UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, and JEFFERY GULICK,

Plaintiffs,

v

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, and ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services,

Defendants.

No. 1:20-cv-0414

HON. PAUL L. MALONEY

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DEFENDANTS WHITMER AND GORDON'S MOTION TO DISMISS

Defendants Gretchen Whitmer and Robert Gordon, through counsel, move this Court to dismiss Plaintiffs' complaint under Fed. R. Civ. P. 12(b)(1) and (6), and based upon the following:

1. Governor Whitmer and Director Gordon are entitled to Eleventh Amendment immunity for any official capacity and damages claims.

2. Plaintiffs' claims are moot because Governor Whitmer has issued executive orders that permit the very activities Plaintiffs alleged were prohibited.

3. Plaintiffs lack standing to bring this lawsuit for lack of a particularized concrete injury to remedy.

4. Plaintiffs' claims are not ripe in the absence of actual enforcement or credible threat of enforcement.

5. The Court should abstain and otherwise decline supplemental jurisdiction over Counts I and II, which raise novel issues of Michigan law better left for decision in State courts.

6. *Jacobson* gives the State broad authority to implement emergency measures when faced with a society-threatening epidemic – including the measures that Plaintiffs challenge as burdening their constitutional rights.

7. Even absent *Jacobson*'s deferential standard, Plaintiffs' constitutional challenges to the Governor's prior Orders fail.

8. Plaintiffs otherwise fail to state a claim for relief for any of the alleged federal constitutional violations.

In further support of this motion, Governor Whitmer and Director Gordon rely on the facts, law and argument more fully developed in the attached brief in support.

The undersigned certifies that on May 27, 2020, concurrence in the relief requested was sought from Plaintiffs' Counsel, and concurrence was denied.

Respectfully submitted,

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Attorney General

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Dated: June 2, 2020

CERTIFICATE OF SERVICE

I certify that on June 2, 2020, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system, which will provide electronic copies to counsel of record.

/s/ John G. Fedynsky
John G. Fedynsky (P65232)
Assistant Attorney General

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BRIEF IN SUPPORT OF DEFENDANTS WHITMER AND GORDON'S MOTION TO DISMISS

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Are Plaintiffs' claims justiciable given that the restrictions they challenge no longer exist?

2. Should this federal court abstain or otherwise decline supplemental jurisdiction over Plaintiffs' novel state law claims?

3. Do Plaintiffs fail to state a claim concerning their federal constitutional challenges?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Chafin v. Chafin, 568 U.S. 165 (2013).

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905).

Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941).

Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014).

U.S. Const., Am. XI.

28 U.S.C. § 1367(c).

INTRODUCTION

Plaintiffs' own briefing and the Court's order disposing of their motion for preliminary injunction prove that this case presents no exigency. This motion proves the case largely is brought at the wrong time in an incorrect forum and it otherwise lacks merit on its face. The necessary and appropriate legal outcome is dismissal of all of Plaintiffs' claims.

The requirement that a case or controversy exist is one of the threshold conditions of every legal dispute for a court to have jurisdiction to resolve a legal matter. On May 21, 2020, the Governor issued Executive Order 2020-96, which among other things rescinded Executive Order 2020-17 effective May 29, 2020, removing any requirement that health care facilities continue to implement a plan to postpone nonessential medical procedures. As of May 29, nothing inhibits Plaintiffs from performing or undergoing a medical procedure.[1] As a result, the case is moot. This Court should dismiss the case for that reason alone.

Mootness is far from the only impediment to Plaintiffs' requested relief. Plaintiffs' claims also fail for lack of standing, for lack of ripeness, and by virtue of the immunity afforded by the Eleventh Amendment. Furthermore, the heart of Plaintiffs' challenge rests upon a legal theory rooted in interpretation of Michigan statutes and constitutional provisions. Under the circumstances, a federal district

[1] The one-week delay in the effective date of the rescission was designed to ensure adequate time for facilities to implement the workplace safeguards required under E.O. 2020-96's companion order on that topic, E.O. 2020-97.

court should abstain from deciding such issues and otherwise decline supplemental jurisdiction over such state law claims, particularly given that these claims and issues are currently and actively being litigated in the state-court system.

The remaining federal claims fare no better on their merits. Claims similar to those raised by the Plaintiffs have already been evaluated and rejected as unlikely to be successful on the merits in the Michigan Court of Claims. That Court's reasoned analysis applies just as well in this case, recognizing judicial deference to the reasonable and temporary measures challenged here. [2] It is well recognized that, "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11, 27 (1905). To that end, "[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community." *Id.* at 26. And when acting on questions fraught with medical and scientific uncertainties, the broad authority given to and duly exercised by state officials should not be "subject to second-guessing by an 'unelected federal

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[2] *Martinko, et. al. v. Governor Whitmer, et. al.,* Michigan Court of Claims Case No. 20-62-MM, April 29, 2020 Opinion and Order Denying Plaintiffs' Motion for a Preliminary Injunction, p. 14 (Attached as Exhibit A); *see also Michigan United for Liberty v. Governor Whitmer*, Michigan Court of Claims Case No. 20-61-MZ, May 19, 2020 Opinion and Order Denying Plaintiff's Motion for a Preliminary Injunction (Attached as Exhibit M), leave granted by the Michigan Court of Appeals on May 29, 2020 (COA No. 353643).

judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *South Bay United Pentecostal Church, et al. v. Gavin Newsom, Governor of California*, 509 U.S. ___, ___ (2020) slip op., p. 2 (summary order released May 29, 2020) (Roberts, C.J., concurring) (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985)).

This well-settled rule of law from *Jacobson* permits a state, in times of public health crises, to reasonably restrict the rights of individuals in order to secure the safety of the community. The scourge of COVID-19—a novel virus that quickly spread across the entire planet, infecting millions, and killing over three hundred and fifty thousand—presents such a crisis. Jurisdictions across the globe have had to impose aggressive measures to stem the viral tide that has overwhelmed healthcare systems worldwide. Schools have been shuttered, gatherings have been postponed, and business operations have been curtailed.

Michigan is one of the states hardest hit by the pandemic. As of June 1, 2020, there have been 57,532 persons confirmed infected and 5,516 have died, all in less than three months. There is no dispute that in the absence of any vaccine, social distancing has been the most effective way to combat the virus and keep these numbers from escalating. Recognizing this, Defendant Governor Gretchen Whitmer and Director Robert Gordon have taken bold, yet reasonable and necessary, steps to prioritize social distancing in Michigan.

In a series of executive orders, Governor Whitmer exercised her authority under Michigan law to put measures in place to suppress the spread of the virus

and protect the public health. The requirements that Plaintiffs challenge here, regarding the temporary postponement of non-essential medical procedures, are part of this broader network of response efforts to suppress the spread of COVID-19, protect the State's health care resources from rapid depletion, and avoid scores of needless deaths.

These temporary response measures are designed to strike a reasonable balance between the need for unnecessary in-person contact to be regulated and the need for essential services to continue. Most importantly, they have worked for the benefit of the public health of everyone who lives in Michigan. As a result of them, countless lives have been saved, the curve of the virus's spread has been flattening, and the Governor has been able to gradually and correspondingly lift a number of the previously imposed restrictions—including the very ones challenged here.

Providing Plaintiffs with their requested relief would unduly disregard the deference that is owed the executive branch's management of this public health crisis and would undermine its effectiveness in a time of most dire need. The judicial creation of exceptions to these public health measures on a case-by-case, piecemeal basis infringes on the state's authority to act in a public health crisis and threatens its overarching plan to cope with the dangers and protect the lives and welfare of all Michiganders. Even if they were justiciable, the claims Plaintiffs raise lack merit and they should be dismissed.

STATEMENT OF FACTS

Plaintiffs offer an inadequate discussion of the public health crisis that has consumed not just Michigan, but the entire planet. Those facts are important to demonstrate the undisputed conditions warranting the promulgation of the executive orders in question.

SARS-CoV-2 is similar to other coronaviruses (a large family of viruses that cause respiratory illnesses), but the strain is novel. There is no general or natural immunity built up in the population (meaning everyone is susceptible), no vaccine, and no known treatment to combat the virus itself (as opposed to treatment to mitigate its symptoms).

It is widely known and accepted that COVID-19, the disease that results from the virus, is highly contagious, spreading easily from person to person via "respiratory droplets."[3] Experts agree that being anywhere within six feet of an infected person puts you at a high risk of contracting the disease.[4] But even following that advice is not a sure-fire way to prevent infection. The respiratory droplets from an infected person can land on surfaces, and be transferred many hours later to the eyes, mouth, or nose of others who touch the surface. Moreover,

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[3] World Health Organization, *Modes of transmission of virus causing COVID-19*, available at https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations. (Attached as Exhibit B).

[4] Centers for Disease Control, *Social Distancing, Quarantine, and Isolation*, available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html. (Attached as Exhibit C).

since many of those infected experience only mild symptoms, a person could spread the disease before he even realizes he is sick. Most alarmingly, a person with COVID-19 could be asymptomatic, yet still spread the disease.[5] Everyone is vulnerable either as a potential victim of this scourge or a carrier of it to a potential victim.

Because there is no way to immunize or treat for COVID-19, the Centers for Disease Control and Prevention have indicated the best way to prevent illness is to "avoid being exposed."[6] And as experience from prior pandemics such as smallpox and the 1918 Spanish Influenza indicates, early intervention to slow COVID-19's transmission is critical.

In keeping with this advice, governmental entities have stressed the critical import of "social distancing," the practice of avoiding public spaces and limiting movement.[7] The objective of social distancing is what has been termed "flattening the curve," that is, reducing the speed at which COVID-19 spreads. If the disease spreads too quickly, the limited resources of our healthcare system could easily become overwhelmed.[8]

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[5] (*Id.*)

[6] (*Id.*)

[7] (*Id.*)

[8] *See New York Times, Flattening the Coronavirus Curve* (March 27, 2020), available at https://www.nytimes.com/article/flatten-curve-coronavirus.html. (Attached as Exhibit D). Take Italy, for example, where the healthcare system was so overloaded in just three weeks of dealing with the virus that it could not treat all patients infected, essentially leaving some to die.

On March 10, 2020, in response to the growing pandemic in Michigan, Governor Whitmer declared a state of emergency and invoked the emergency powers available to the Governor under Michigan law.[9] On March 13, 2020, Governor Whitmer issued Executive Order 2020-5, prohibiting assemblages of 250 or more people in a single shared space with limited exceptions, and ordering the closure of all K-12 school buildings.[10] Yet, even in the face of the social distancing recommendations and the six-foot rule, on Saturday, March 14, the public was out in droves.

On March 16, 2020, the Governor ordered various places of public accommodation, like restaurants, bars, and exercise facilities, to close their premises to the public.[11] And on March 17, 2020, the Governor issued an order rescinding Executive Order 2020-5, changing the cap on assemblages to fifty persons in a single shared indoor space, and expanding the scope of exceptions from that cap.[12]

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[9] E.O. No. 2020-4, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521576--,00.html. (Attached as Exhibit E).
[10] E.O. No. 2020-5, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521595--,00.html. (Attached as Exhibit F).
[11] E.O. No. 2020-9, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521789--,00.html. (Attached as Exhibit G) (Replaced by E.O. 2020-20).
[12] E.O. No. 2020-11, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521890--,00.html. (Attached as Exhibit H).

In response to impending healthcare shortages, the Governor orders certain medical care facilities to implement plans postponing non-essential medical procedures.

On March 20, 2020, the Governor issued Executive Order 2020-17, entitled "Temporary restrictions on non-essential medical and dental procedures." E.O. 2020-17 required "all hospitals, freestanding surgical outpatient facilities, and dental facilities, and all state-operated outpatient facilities . . . must implement a plan to temporarily postpone . . . all non-essential procedures." (E.O. 2020-17, ¶ 1, Exhibit I.) As the order signaled in its preamble, this postponement-plan requirement was imposed "[t]o mitigate the spread of COVID-19, protect the public health, provide essential protections to Michiganders, and ensure the availability of health care resources," such as personal protective equipment, hospital beds, and other health care resources – which were in high and immediate demand as a result of this aggressively spreading pandemic, but in troublingly short supply.

The scope of the postponement plan required by the order was flexible and deferential to the judgment of the medical providers responsible for the care and treatment of the patient. Indeed, the order defined "non-essential procedure" as "a medical or dental procedure that is not necessary to address a medical emergency or to preserve the health and safety of a patient, *as determined by a licensed medical provider*." (E.O. 2020-17, ¶ 1.) (emphasis added). The order was thus was designed to ensure that patients would continue to receive the treatment and care that, in the best clinical judgment of their medical providers, was necessary to preserve their health and safety during this pandemic.

Correspondingly, the order offered a few basic guideposts for its requisite postponement plan, which tracked this general principle. For instance, the order provided that "[a] plan . . . must exclude from postponement emergency or trauma-related procedures where postponement would significantly impact the health, safety, and welfare of the patient." (*Id.* ¶ 2.) Similarly, a plan "must postpone, at a minimum, joint replacement, bariatric surgery, and cosmetic surgery, except for emergency or trauma-related surgery where postponement would significantly impact the health, safety, and welfare of the patient." (*Id.*) And a plan should exclude from postponement:

> surgeries related to advanced cardiovascular disease (including coronary artery disease, heart failure, and arrhythmias) that would prolong life; oncological testing, treatment, and related procedures; pregnancy-related visits and procedures; labor and delivery; organ transplantation; and procedures related to dialysis. [E.O. 2020-17, ¶ 2.]

On May 21, 2020, the Governor issued Executive Order 2020-96, which rescinded Executive Order 2020-17 effective May 28, 2020 at 11:59 p.m. (E.O. 2020-96, ¶ 19, Exhibit J.) As that order's preamble explained, the rescission was "reasonable" at that time because the urgent concerns that had required the order's issuance had shown sufficiently reliable signs of abatement: "our health-care capacity has improved with respect to personal protective equipment, available beds, personnel, ventilators, and necessary supplies." (E.O. 2020-96.)

The Governor issues and continually revises Stay Home orders to stem the tide of COVID-19 infections.

These concerns abated, and E.O. 2020-17 was able to be rescinded, as a result of a series of swift and targeted responsive measures the Governor took to mitigate

the spread of COVID-19 across this State. Namely, three days after the issuance of E.O. 2020-17, on March 23, 2020, Governor Whitmer issued Executive Order No. 2020-21, which essentially ordered all persons not performing essential or critical infrastructure job functions to stay in their place of residence, other than to obtain groceries, care for loved ones, engage in outdoor activity consistent with social distancing, and other limited exceptions.[13] The order also prohibited, with limited exceptions, all public and private gatherings of any number of people that are not part of a single household.[14]

Over the weeks that followed, the Governor reissued that Stay Home order periodically, adjusting its scope to as needed and appropriate to match the ever-changing circumstances presented by this pandemic.[15] As is particularly relevant here, on May 21, 2020, the Governor issued Executive Order 2020-96, a version of the Stay Home order that, among other things, allowed health care facilities to

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[13] E.O. No. 2020-21, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html. (Attached as Exhibit K).

[14] (*Id.*)

[15] *See* E.O. Nos. 2020-42, 2020-59, 2020-70, 2020-77, and 2020-92. Alongside these Stay Home executive orders, Director Gordon, acting pursuant to his authority under MCL 333.2253, issued emergency orders concluding that COVID-19 had reached epidemic status in Michigan and that the measures imposed in the Stay Home orders and certain related executive orders were necessary to control the epidemic and protect the public health. The first of these emergency orders was issued on April 2, 2018, with subsequent versions rescinding and replacing the prior versions of the order issued May 18, 2020 and May 21, 2020. As presented, Plaintiffs challenges appear directed primarily at the Governor's executive orders and only nominally against Director Gordon's April 2 Order.

resume providing, and individuals to resume undergoing, non-essential medical procedures that had been temporarily postponed pursuant to E.O. 2020-17.[16]

STANDARD OF REVIEW

In a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(1) and (6), this Court must accept as true the allegations of the complaint and then determine whether the statements are sufficient to make out a right of relief. *United States v. Gaubert*, 499 U.S. 315, 327 (1991). However, although it must accept well-pled facts as true, the Court is not required to accept a plaintiff's legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). In evaluating the sufficiency of a plaintiff's pleadings, this Court may make reasonable inferences in the non-moving party's favor, "but [this Court is] not required to draw [p]laintiffs' inference." *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005). Similarly, conclusory allegations are "not entitled to be assumed true." *Iqbal*, 556 U.S. at 681.

A complaint may be dismissed if the facts as pled do not state a claim for relief that is plausible on its face. *See Iqbal*, 556 U.S. at 679 (explaining "only a complaint that states a plausible claim for relief survives a motion to dismiss").

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[16] Yesterday, June 1, 2020, the Governor issued another executive order, E.O. 2020-110, which continued the incremental and data-driven reopening of the State by rescinding E.O. 2020-96 and replacing its Stay Home restrictions with narrower and more permissive limitations on certain gatherings, events, and businesses. Plaintiffs remain free under this order to engage in the conduct they allege was unduly restricted under E.O.s 2020-17 and 2020-92.

Though this is a motion for judgment on the pleadings, the court may consider an attached document without converting the motion into one for summary judgment if the attached document is: (1) central to the plaintiff's claim; and (2) undisputed as to authenticity. *See Harris v. Ivax Corp.,* 182 F.3d 799, 802 n. 2 (11th Cir. 1999); *Beddall v. State Street Bank and Trust Co.,* 137 F.3d 12, 16–17 (1st Cir. 1998); *see also Commercial Money Ctr, Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007).

ARGUMENT

As an initial matter, there are threshold jurisdictional and prudential legal reasons to dismiss this case. In particular, the Plaintiffs' claims are moot, and this Court should abstain or otherwise decline supplemental jurisdiction over their state-law claims.

I. The Court lacks subject matter jurisdiction over the Plaintiffs' claims.

A. Plaintiffs' claims for money damages are barred by the Eleventh Amendment.

Plaintiffs have sued Governor Whitmer and Director Gordon in their official capacities, and among the relief they seek is "[d]amages for the violation of the Plaintiffs' constitutional rights, in an amount to be proven at trial." (Complaint, p. 36.) It is well established, however, that this relief is foreclosed by the immunity provided under the Eleventh Amendment: while "a federal court may enjoin a 'state official' from violating federal law, . . . retroactive relief, such as money damages, is

not permitted . . . ." *Lawson v. Shelby Cnty., Tenn.*, 211 F.3d 331, 334 (6th Cir. 2000). Accordingly, Plaintiffs' claims for money damages must be dismissed.

B. Plaintiffs' claims are moot because Governor Whitmer has issued a series of executive orders that permit the very activities Plaintiffs alleged were prohibited.

This Court also lacks subject matter jurisdiction over Plaintiffs' claims for declaratory and injunctive relief. Since the filing of the complaint, the Governor has issued an executive order rescinding the challenged restrictions on non-essential medical procedures, effective May 29, 2020. Similarly, Plaintiffs' claims regarding Director Gordon's April 2, 2020 epidemic order are also moot. That order was expressly rescinded by Director Gordon through an order issued on May 18, 2020.[17] And, following the Governor's issuance of Executive Order 2020-96 on May 21, a new epidemic order rescinding the one from days earlier was issued.

In their Complaint, Plaintiffs alleged the April 2 epidemic order was unlawful because it incorporated future Executive Orders and frequently asked questions that were being published to facilitate implementation. Neither of the successor orders issued by Director Gordon include text like that challenged by Plaintiffs. Thus, the legal analysis showing the mootness of Plaintiffs' challenge to the Executive Orders applies with equal force to its claims against Director Gordon.

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[17] https://www.michigan.gov/documents/coronavirus/MDHHS_epidemic_order_-_reinforcing_governors_orders_5-18_SIGNED_691125_7.pdf

Considering this change in circumstances, the Plaintiffs have no legally cognizable interest in the outcome of this litigation and their claims are moot. This Court should dismiss on this basis alone.

A case is moot and is outside of this Court's Article III authority "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (cleaned up). An "advisory opinion[] on abstract propositions of law" must be avoided. *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam).

In fact, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation" within Article III "of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (internal quotes omitted). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). The limits of Article III jurisdiction are "built on separation-of-powers principles," which "serve[] to prevent the judicial process from being used to usurp the powers of the political branches." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 407 (2013)).

Generally, and pertinent here, the legislative repeal of a statute renders a case challenging that statute moot. *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 644 (6th Cir 1997); *see also Massachusetts v. Oakes*, 491 U.S. 576, 582-84 (1989) (refusing to reach First Amendment overbreadth challenge because

legislative amendment of the challenged statute while the case was pending rendered the issue moot). A circumstance similar to legislative repeal has occurred here, where the Governor rescinded Executive Order 2020-17. *See* Executive Order 2020-96. Accordingly, there is nothing left to preliminarily enjoin. Plaintiffs' claims are mooted.

In an attempt to avoid mootness, Plaintiffs may argue that the Governor's action amounts to a "voluntary cessation." While mere "voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000), where "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation," a case is moot. *Ammex, Inc. v. Cox*, 351 F.3d 697, 705 (6th Cir. 2003) (quoting *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979)). And, where the government is the actor sought to be enjoined, a course change "has been treated with more solicitude by the courts than similar action by private parties." *Id.* (cleaned up). Official government action "provides a secure foundation for dismissal based on mootness so long as it appears genuine." *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990) (quoting *Ragsdale v. Turnock,* 841 F.2d 1358, 1365 (7th Cir. 1988), in turn citing 13A Wright, Miller & Cooper *Federal Practice and Procedure* § 3533.7, at 353 (2d ed. 1984)).

The Governor's new executive order is not mere "voluntary cessation." In fact, the challenged executive order no longer has any legal force. It is extinct. *See* E.O. 2020-96. The lifting of the temporary restrictions, like the various other

modifications made in these executive orders, is "genuine" and driven by the Governor's ongoing assessment of the pandemic and the changing needs of the state to combat it. *Mosely*, 920 F.2d at 415. This is not a circumstance in which the Governor was or is dead-set on enjoining specific activities, and the new orders are simply a shadow to avoid litigation. As a general matter, the now-rescinded executive order imposed temporary regulations, *see* 2020-17's Title ("Temporary restrictions on non-essential medical and dental procedures"), responding to the needs of the evolving public health crisis and the scarcity of medical resources. The novelty of the virus and the rapidity of its spread requires nimble action. And as data evolved (and continues to evolve) and circumstances changed (and continue to change), with additional executive orders, the Governor has modified the scope of the temporarily enjoined activities to appropriately balance the stringent measures necessary to protect to the public health with carveouts to sustain the basic needs of society.

Viewed as a continuum, the Governor's Executive Orders show an evolution of responses framed by an increasing body of knowledge being brought to bear on ever-changing conditions. For Plaintiffs to survive the mootness test, they must convince the Court that the Governor will be in a position to invoke the same responses in the future to identical conditions. The notion the Governor will again put into place the same restrictions is speculative, and the notion that identical conditions will exist in this dynamic situation is an impossibility.

The mootness here is confirmed by comparison to cases in which the concept of "voluntary cessation" has been illustrated. The Governor's new executive orders are not merely a governor's "announcement" to apply a law differently after the Supreme Court granted certiorari, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 fn.1 (2017), or akin to a private party's temporary compliance with a pollution permit, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000). *See also Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (after the Supreme Court granted certiorari on the issue whether a public-sector union could require all members to pay a fee supporting the union's political activities, the union's sending of a notice offering a refund to all class members was an insufficient voluntary cessation). These types of "cessations" lack the force of law and are easily reversed.

But here, "there is no reasonable expectation that the [alleged] wrong will be repeated." *Mosley*, 920 F.2d at 415 (cleaned up). The Governor has not simply voluntarily halted the enforcement of the challenged executive orders. Instead, the Governor has taken an official executive action that rescinds and replaces them, to match the changed needs and conditions presented by this pandemic. Those needs and conditions will surely continue to change, but whether, as a result, Plaintiffs might at some point find themselves again subject to and aggrieved by the same restrictions challenged in this case is a matter of pure speculation, not "reasonable expectation." And, as mentioned, the above legal analysis showing the mootness of Plaintiffs' challenge to the Executive Orders applies with equal force to its claims

regarding the order issued by Director Gordon. Accordingly, Plaintiffs' claims are moot and should be dismissed.

C. Plaintiffs' claims fail for lack of standing.

Even if Plaintiffs' claims were somehow not moot, they would nonetheless be nonjusticiable for lack of standing. To have Article III standing, a plaintiff must have a personal stake in the outcome of a controversy, and that stake must be in the form of an injury that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Driehaus*, 573 U.S. at 158. An allegation of future injury may suffice if the threatened injury is "certainly impending," or there is a "'substantial risk' that the harm will occur." *Id.* And as the Supreme Court has made clear, when—as here—the merits of a constitutional question pit the judiciary to pass on the constitutionality of the other branches of government, the standing inquiry is "especially rigorous." *Clapper*, 568 U.S. at 408.

Plaintiffs bring their claims in a pre-enforcement posture. As such, to satisfy the "injury-in-fact" requirement of Article III standing, they must allege (1) an intention to engage in the conduct he claims is unconstitutionally proscribed and (2) a credible threat of prosecution. *McKay v. Federspiel*, 823 F.3d 862, 867 (6th Cir. 2016). Here, Plaintiffs have satisfied neither of these requirements. They face no credible threat of prosecution for violating the restrictions in E.O. 2020-17 and E.O. 2020-92 because the restrictions they challenge no longer exist. And furthermore, even when the orders were in effect, Plaintiffs commendably acknowledge that they did not violate the orders and they have given no reason to believe that they had

any intent to do so. Plaintiffs' standing cannot survive cursory scrutiny, let alone the "especially rigorous" sort that applies to their claims. *Clapper*, 568 U.S. at 408. As a result, dismissal for lack of Article III standing is warranted.

D. Plaintiffs' claims are not ripe.

Plaintiffs' claims are also unripe. "Ripeness . . . is a question of timing," and "becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997); see *id.* ("A case is ripe for pre-enforcement review under the Declaratory Judgment Act only if the probability of the future event occurring is substantial and of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."(cleaned up)). Where, as here, the claims at issue arise in the pre-enforcement context, the ripeness of the claims depends on: (1) whether "legal analysis [of the claims] would benefit from having [the] concrete factual context" afforded by an enforcement action; (2) "the extent to which the enforcement authority's legal position is subject to change before enforcement"; and (3) "the hardship to the parties of withholding court consideration." *Ammex, Inc. v. Cox*, 351 F.3d 697, 706 (6th Cir. 2003).

Under these standards, Plaintiffs' pre-enforcement challenges are plainly not ripe. With the challenged restrictions in E.O.s 2020-17 and 2020-92 fully rescinded, "the enforcement authority's legal position" has already changed prior to Plaintiffs experiencing any enforcement action under those orders, and Plaintiffs face no limitation in, or threat of enforcement for, engaging in their desired conduct. The

restrictions which Plaintiffs now challenge were never held out to be anything other than temporary, and so they have proven to be. While Plaintiffs claim the restrictions may return, that assertion, as discussed, is entirely speculative and based only on the general possibility that a resurgence of COVID-19 at some point in the future might require the imposition of emergency response measures that are currently not necessary. But there is nothing to indicate that any such resurgence is at all certain or imminent; indeed, the Governor and Director are doing, and will continue to do, everything in their power to avert it. Nor is there anything to indicate that, should a resurgence occur at some undetermined point in the future, it will be necessary to reimpose the same particular restrictions that were required to combat the virus's initial surge. The necessary response will instead depend on a number of factors, including the nature and extent of the resurgence and the state's preparation for it—all of which may differ substantially from the circumstances the State has confronted over these past few months.

None of these factors, or how they might impact the Plaintiffs at some point in the future, is (or even can be) known at this time: there is no "concrete factual context" by which this Court could measure the constitutionality of any future limitations Plaintiffs might experience, nor any assurance or even indication that any such limitations would resemble the ones that Plaintiffs have challenged. And there is no hardship that might befall Plaintiffs from this Court waiting for these circumstances to materialize, if they ever do, before attempting to adjudicate any potential claim of constitutional infringement that Plaintiffs might allege to arise

from them. There is simply nothing in this case that is "substantial" enough "and of sufficient immediate and reality" for this Court to consider at this time. *Magaw*, 132 F.3d at 284. Plaintiffs' claims are thus not ripe, and they warrant dismissal on that basis as well.

II. The Court should abstain and otherwise decline supplemental jurisdiction over the novel claims brought under Michigan law and best decided in the first instance in Michigan courts.[18]

A. Abstention

The precise questions raised in Counts I and II are currently being litigated in the Michigan Courts. Identical questions about the scope of the EMA and EPGA are being litigated in *Michigan House and Senate v. Gov. Whitmer*, which was recently decided by the Court of Claims, Michigan Court of Claims Case No. 20-79-MZ, and is on application to the Michigan Supreme Court with both parties seeking a decision before intermediate appellate court review on an expedited basis.[19] Likewise, the question of whether the EMA and EPGA are impermissible delegations of legislative authority to the Governor is being litigated in *Michigan United for Liberty v Gov. Whitmer*, Michigan Court of Claims Case No. 20-61-MZ and *Martinko, et. al. v. Gov. Whitmer, et. al.*, Michigan Court of Claims Case No. 20-62-MM. Appellate review is pending for each of these cases, too. Given the gravity

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[18] On May 28, 2020, this Court entered a notice of hearing on June 10 and invited briefing by June 5 on whether it should certify certain issues of Michigan law to be decided in the first instance by the Michigan Supreme Court. (R. 23.)

[19] See Exhibit L.

of the state law questions, and because the issues are currently being litigated in State court, this Court should abstain from consideration of the claims under three distinct theories of abstention.

1. *Pullman* abstention

First, this Court should abstain from considering Counts I and II under the *Pullman* abstention doctrine. In *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 499–500 (1941), the Supreme Court held that, when a challenged state statute requires interpretation by the judiciary, the "last word" on the meaning of the statute belongs to the state courts. The Court held:

> In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication. [*Id.* at 500] [internal citations removed].

In sum, "the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them." *Harrison v. Nat'l Ass'n for the Advancement of Colored People*, 360 U.S. 167, 176 (1959). This "well-established procedure" promotes and protects federalism and it "spares the federal courts of unnecessary constitutional adjudication." *Id.* at 176–77 (noting that *Pullman* abstention "is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system")

This Court should refrain from ruling on the cogency of the EMA and the EPGA because, for purposes of this argument, the statutes are "fairly open to interpretation" and "the state courts have [not] been afforded a reasonable opportunity to pass upon them." *Harrison*, 360 U.S. at 176. Further, given the pending state court actions and the expected rapidity of their climb up the appellate ladder, a ruling by this Court on the EMA and EPGA would be "a tentative answer which may be displaced tomorrow by a state adjudication." *Pullman*, 312 U.S. at 499–500.[20] Such an abstention would not "involve the abdication of federal jurisdiction, but only the postponement of its exercise" while "serv[ing] the policy of comity inherent in the doctrine of abstention" and "spar[ing] the federal courts of unnecessary constitutional adjudication." *Harrison*, 360 U.S. at 176–177. Because abstention is proper, Counts I and II should be dismissed.

2. *Thibodaux* abstention

Second, this Court should abstain from considering Counts I and II under the *Thibodaux* abstention doctrine. While similar to *Pullman* abstention, *Thibodaux* abstention is more concerned with the type of state law at issue. See *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 27–28 (1959). The Supreme Court has advised federal district courts to invoke *Thibodaux* abstention "where there have been presented difficult questions of state law bearing on policy

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[20] S*ee also Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 511 (1972) (affirming the Eastern District of Michigan's abstention in a case where a Michigan statute "has not been construed in any Michigan court, and, as appellants themselves suggest in attacking it for vagueness, its terms are far from clear in particulars").

problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976).

In *Thibodaux*, the Supreme Court reviewed a Louisiana district court's decision to abstain from ruling on the constitutionality of a Louisiana state law regarding eminent domain when the State's Attorney General and cities in the State disagreed about the limits of eminent domain power. 360 U.S. at 30. The eminent domain power in question derived from a State statute that had never before been considered by the State courts. *Id.* The district court stayed the case and sought a declaratory ruling from the Louisiana Supreme Court. *Id.* The U.S. Supreme Court affirmed the decision of the district court to abstain, reasoning that "[i]nformed local courts may find meaning not discernible to the outsider" and that rendering a decision on the scope of the State statute may bind the litigants in the lawsuit "whereas the rights of all other litigants would be thereafter governed by a decision of the Supreme Court of Louisiana [which could be] quite different from ours." *Id.*

In this case, this Court should defer to the Michigan state courts on Counts I and II. Importantly, the EMA and EPGA are solely related to police powers, powers inherent to the sovereignty of the State. *Thibodaux*, 360 U.S. at 30. The statutes invoked by the Governor are thus enactments going to the core of Michigan's sovereignty. This once-in-a-generation pandemic is having a disproportionately

deadly impact on the State of Michigan. And the Governor has responded by exercising powers that have been rarely needed or reviewed.

The scope and constitutionality of those powers is a question best left to the Michigan courts. Indeed, the COVID-19 pandemic and the emergency powers utilized by the Governor "present[] difficult questions of state law bearing on policy problems of *substantial* public import whose importance *transcends the result in the case . . . at bar*." *Colorado River*, 424 U.S. at 814 (emphasis added). This Court should abstain from exercising jurisdiction over Counts I and II under *Thibodaux*, and dismiss these claims.

3. *Colorado River* abstention

Finally, this Court should abstain from considering Counts I and II under the *Colorado River* abstention doctrine. *Colorado River* abstention should be invoked when there is concurrent litigation on the same grounds, no matter the type of claim at issue. *Colorado River*, 400 U.S. at 821. The Sixth Circuit has developed abstention factors to be considered where there is similar, concurrent litigation elsewhere:

> (1) whether the state court has assumed jurisdiction over any res or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation; and (4) the order in which jurisdiction was obtained . . . (5) whether the source of governing law is state or federal; (6) the adequacy of the state court action to protect the federal plaintiff's rights; (7) the relative progress of the state and federal proceedings; and (8) the presence or absence of concurrent jurisdiction.

Romine v. Compuserve Corp., 160 F.3d 337, 340-341 (6th Cir. 1998) (internal citations omitted)].

These factors are to be carefully balanced in light of the facts of each case; they are not a "mechanical checklist." *Id.* at 341 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15–16 (1983)).

In applying these factors, this Court should invoke *Colorado River* and abstain from deciding Counts I and II. There has been no action in this case other than the complaint and the filing of initial motion practice. This case involves important matters of State police power and authority that affect *everybody* in Michigan. Moreover, the Governor is a party to all the concurrent litigation related to the Governor's Executive Orders. *Colorado River*, 400 U.S. at 820.

In addition, the Michigan courts have assumed jurisdiction over the concurrent litigation, and the source of governing law is state law. Likewise, the litigation in the state courts will protect Plaintiffs' rights as the relief sought is identical to the relief sought here, and Michigan Courts are the final arbiters of Michigan law. *Romine*, 160 F.3d at 340–41. Therefore, the factors enumerated by the Sixth Circuit favor this Court abstaining from adjudicating Counts I and II in this case. *Id.*

COVID-19 is a once-in-a-lifetime pandemic that threatens the safety and health of every single person in Michigan. To protect Michiganders, the Governor used statutory emergency powers to combat the spread of the virus. Michigan state courts are, right now, considering the scope and constitutionality of those powers. This Court should defer to the Michigan courts to avoid the possibility of inconsistent adjudications regarding matters of the upmost importance and

immediacy, that would only add confusion and sow discord in already uncertain and trying times. This is just the sort of occasion where the friction of federalism should give way to appropriate prudential abstention doctrine. Because this Court should abstain from deciding Counts I and II, those Counts should be dismissed.

B. Supplemental Jurisdiction

In Count I, Plaintiffs maintain (incorrectly) that the Governor's executive orders are not authorized by the Emergency Management Act, MCL 30.401 *et seq*., or the Emergency Powers of the Governor Act, MCL 10.31 *et seq*. In Count II, Plaintiffs assert (again, incorrectly) that the EMA and EPGA are impermissible delegations of legislative authority to the Governor. But these claims have either already been decided by the Michigan Court of Claims, and the issues are quickly percolating in the state appellate courts right now.[21]

Exercising supplemental jurisdiction over these state law claims would be an affront to the comity this Court owes its state court counterparts, especially where several of these issues have been or will be decided in short order. Moreover, deciding such state-law questions would not promote judicial economy or the convenience of the parties.

A federal court may exercise supplemental jurisdiction over each claim in an action that shares a "common nucleus of operative facts" with a claim that invokes

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[21] *See, e.g., Michigan House and Senate v. Gov. Whitmer*, Michigan Court of Claims Case No. 20-79-MZ; *Michigan United for Liberty v Gov. Whitmer*, Michigan Court of Claims Case No. 20-61-MZ and *Martinko, et. al. v. Gov. Whitmer, et. al.*, Michigan Court of Claims Case No. 20-62-MM.

the court's original jurisdiction. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966); 28 U.S.C. § 1367. But the federal court need not exercise its authority to invoke supplemental jurisdiction in every case in which it is possible to do so. *Id.* at 726. Supplemental jurisdiction "is a doctrine of discretion, not of plaintiff's right." *Id.*

"In deciding whether to exercise supplemental jurisdiction . . . a judge must take into account concerns of comity, judicial economy, convenience, fairness, and the like." *Senra v. Smithfield*, 715 F.3d 34, 41 (1st Cir. 2013). If these considerations are not present, "a federal court should hesitate to exercise jurisdiction over state claims." *Gibbs*, 383 U.S. at 726. Additionally, supplemental jurisdiction may be denied "if the federal claims are dismissed before trial," if "it appears that the state issues subsequently predominate," or "if the likelihood of jury confusion" would be strong without separation of the claims. *Id.* at 726–27.

A court has the discretion to decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c) if:

> (1) the claim raises a novel or complex issue of state law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Subsections one, two, and four are relevant to the present action.

1. This Court should decline supplemental jurisdiction over Counts I and II under 28 U.S.C. § 1367(c)(1).

A district court may decline to exercise supplemental jurisdiction pursuant to § 1367(c)(1) if "the [state] claim raises a novel or complex issue of state law." 28 U.S.C. § 1367(c)(1). In deciding whether to exercise supplemental jurisdiction, the "obscurity and the paucity of pertinent state judicial precedent [ ] argue[s] in favor of deferring in favor of the state courts." *Peters v. Cars to Go, Inc.*, 184 F.R.D. 270, 275 (W.D. Mich. Nov. 16, 1998) (quoting *Scott v. Long Island Sav. Bank, FSB,* 937 F.2d 738, 742 (2d Cir.1991)).

Here, there is scant Michigan authority interpreting or applying the statutes considered and challenged by Plaintiffs' Counts I and II. Indeed, it is difficult to find any applicable Michigan precedent regarding the EMA or the EPGA. To be sure, the undersigned has been unable to locate a single appellate Michigan case considering the scope or constitutionality of the EMA or EPGA under the circumstances as here. Nor are there any Michigan appellate cases considering whether the EMA and EPGA are impermissible delegations of legislative authority to the Governor. Similarly, there is no published case from a federal court that has ever attempted to resolve these legal issues.

Importantly, as mentioned, the precise questions raised in Counts I and II are currently being litigated in the Michigan courts. Identical questions about the scope of the EMA and EPGA are being litigated in *Michigan House and Senate v. Gov. Whitmer,* Michigan Court of Claims Case No. 20-79-MZ, and the question of whether the EMA and EPGA are impermissible delegations of legislative authority

to the Governor is being litigated in that case as well as *Michigan United for Liberty v Gov. Whitmer*, Michigan Court of Claims Case No. 20-61-MZ and *Martinko, et al. v. Gov. Whitmer, et al.*, Michigan Court of Claims Case No. 20-62-MM.[22] Comity considerations urge declining supplemental jurisdiction here.

There is no doubt that Counts I and II present novel questions of state law, and federal courts have an "interest in avoiding the unnecessary resolution of state law issues," *Hankins v. The Gap, Inc.,* 84 F.3d 797, 803 (6th Cir. 1996). *See also Doe v. Sundquist,* 106 F.3d 702, 708 (6th Cir. 1997) (declining to exercise supplemental jurisdiction over the plaintiff's state law claim that Tennessee law regarding disclosure of adoption records violated Tennessee constitution). Accordingly, this Court should decline supplemental jurisdiction over Counts I and II.

2. This Court should decline supplemental jurisdiction over Counts I and II under 28 U.S.C. § 1367(c)(2).

A district court may decline to exercise supplemental jurisdiction pursuant to § 1367(c)(2) if "the [state] claim substantially predominates over the claim or claims over which the district court has original jurisdiction." 28 U.S.C. § 1367(c)(2). Where "the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the

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[22] In *Michigan United for Liberty* and *Martinko*, in separate preliminary rulings, the Michigan Court of Claims has determined that neither the EMA nor the EPGA represent an impermissible delegation of legislative authority to the Governor. *See Martinko v Whitmer*, opinion of the Court of Claims, issued April 29, 2020 (Case No. 20-62-MM) (attached as Exhibit A); *Michigan United for Liberty v Gov. Whitmer*, opinion of the Court of Claims, issued May 18, 2019 (Case No. 20-61-MZ) (attached as Exhibit M).

state claims may be dismissed without prejudice and left for resolution to state tribunals." *Gibbs*, 383 U.S. at 726–27. Here, the state law claims present disparate legal theories as to both claims and defenses that are wholly unrelated to the federal claims.

Indeed, Count I presents pure questions of statutory interpretation under state law, and Count II presents a pure question of constitutionality under the Michigan Constitution. These claims are completely independent from to the federal claims. For these reasons, the state claims would predominate over the § 1983 federal claims over which this Court has original jurisdiction. Under 28 U.S.C. § 1367(c)(2), this Court should not exercise supplemental jurisdiction.

3. This Court should decline supplemental jurisdiction over Counts I and II under 28 U.S.C. § 1367(c)(4).

Section 1367(c)(4) allows a district court to "decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c)(4). "Congress's use of the word 'other' to modify 'compelling reasons' indicates that what ought to qualify as 'compelling reasons' for declining jurisdiction under subsection (c)(4) should be of the same nature as the reasons that gave rise to the categories listed in subsections (c)(1)-(3)." *Executive Software N. Am., Inc. v. U.S. Dist. Court,* 24 F.3d 1545, 1557 (9th Cir. 1994) (citing *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350 (1988)). Once the court decides that there are compelling reasons to decline jurisdiction, the factors that inform this decision usually will demonstrate how the circumstances confronted are "exceptional." *Id.* at

1558. Courts generally accept that "compelling reasons for the purposes of [§ 1367](c)(4) . . . should be those that lead a court to conclude that declining jurisdiction best accommodates the values of economy, convenience, fairness and comity." *Id.* at 1557 (internal citations omitted); *see also Palmer v. Hosp. Auth. of Randolph County,* 22 F.3d 1559, 1569 (11th Cir. 1994).

This is not a case where one relatively minor state law claim is brought along with federal causes of action that dominate the matter, nor is it a case where the federal and state causes of action parallel in terms of both elements and expected proofs. Any advantage that may have been gained by considering all the claims together are outweighed by the novel nature of the questions of state law presented, the considerations of comity, and deference to the state courts in allowing these important questions of state law to be resolved by state judicial authority in the first instance.

III. Plaintiffs' claims lack merit.

Even if Plaintiffs' claims were justiciable and this Court were to exercise jurisdiction over them, dismissal would still be warranted because Plaintiffs fail to state any viable claim for relief. The restrictions in the Governor's executive orders are a proper exercise of the statutory authority given to her to combat a public health crisis, and they fall comfortably within the long-settled, deferential standard of review that governs constitutional challenges to such exercises of authority. Third, even under a more standard analysis of the alleged constitutional violations, the restrictions plainly pass muster.

A. The Governor acted pursuant to valid statutory authority under Michigan law.

Plaintiffs fail to present a viable theory under Michigan law for their claims that the EOs were ultra vires and are unenforceable. Defendants rely upon the merits as argued by the Governor in her May 29, 2020 Emergency Bypass Application for Leave to Appeal. *Michigan House of Representatives and Michigan Senate v. Gretchen Whitmer*, Michigan Supreme Court No. 161377 (Exhibit N.) *See also Martinko, et. al. v. Governor Whitmer, et. al.,* Michigan Court of Claims Case No. 20-62-MM, April 29, 2020 Opinion and Order Denying Plaintiffs' Motion for a Preliminary Injunction, p. 14 (Attached as Exhibit A). Defendants adopt and incorporate by reference the merits arguments as articulated by Exhibit N. Fed. R. Civ. P. 10(c). Upon the Court's request and direction, however, Defendants will supplement this briefing.

B. The States have wide latitude in dealing with great dangers to public health.

Plaintiffs' constitutional claims also fail as a matter of law. The worldwide impact of COVID-19 is recognized by all. Such an extraordinary circumstance requires extraordinary governmental measures. The measures taken in the Governor's executive orders were necessary to meet the demands of these extraordinary times and are reasonable and constitutional. Accordingly, judicial invalidation of those orders is not warranted.

1. *Jacobson v. Commonwealth of Massachusetts*

Faced with "great danger[ ]," state actors are permitted great latitude to secure the public health. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 29 (1905). And in this time of crisis, securing the public health requires temporary sacrifices by each of us: "Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others." *Id.* at 26.

In *Jacobson*, the U.S. Supreme Court considered a claim that the state's mandatory vaccination law, which applied to every person in Cambridge, Massachusetts, due to a growing smallpox epidemic, violated the defendant's Fourteenth Amendment right "to care for his own body and health in such way as to him seems best." *Jacobson,* 197 U.S. at 26. The Supreme Court upheld this sweeping, invasive measure as a proper exercise of the States' police power because of the exigencies and dangerousness of the public health crisis. It affirmed that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. As the Court stated,

> in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Jacobson, 197 U.S. at 29.

Jacobson even highlighted the circumstance, without hesitation, in which seemingly healthy people were quarantined against their will aboard a ship on which others had cases of serious diseases. *Id.* at 29. The Court noted that such a drastic measure was reasonable "until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared." *Id.* Recognizing the separation of powers, and the limits on the judiciary to invade the authority of a co-equal branch, the Court refused to "usurp the functions of another branch of government" by second-guessing the executive's exercise of police power in such circumstances. *Id.* at 28.

Of course, constitutional rights do not disappear in the face of a public health crisis, but the analysis of the government's action changes. Review is "only" available if the challenged action "has *no real or substantial relation to those objects* [of securing public health and safety], or is, *beyond all question, a plain, palpable invasion of rights secured by the fundamental law*." *Id.* at 31 (emphasis added).

Jacobson's principle is no outlier. *See*, *e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) ("The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."); *Compagnie Francaise de Navigation a Vapeur v. La State Bd of Health*, 186 U.S. 380, 393 (1902) (upholding Louisiana's right to quarantine even apparently healthy passengers aboard a vessel over a due process challenge).

And *Jacobson* not only remains good law, *see, e.g.*, *Kansas v Hendricks*, 521 U.S. 346, 356 (1997) (block quoting *Jacobson* in support of the proposition that "an

individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context"), but federal circuits have recently had occasion to apply *Jacobson* to COVID-19-related regulations, upholding certain restrictions that burden a fundamental right. *See, e.g., In re Abbott*, No. 20-50264, 2020 WL 1685929, at *8 (5th Cir., April 7, 2020) ("*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency.") (emphasis in original); *In re Rutledge*, 956 F.3d 1018 (8th Cir. April 22, 2020).

Recently, the Sixth Circuit has confirmed that *Jacobson* is the proper starting point for considering restrictions promulgated in response to the COVID-19 crisis that touch upon constitutional rights. *See Adams & Boyle, P.C. v. Slatery*, ___ F.3d ___ (6th Cir., issued April 24, 2020); *Maryville Baptist Church, Inc. v. Beshear*, ___ F.3d ___ (6th Cir., issued May 2, 2020)); *Roberts v. Neace*, ___ F.3d ___ (6th Cir., issued May 9, 2020). In those cases, the Court determined that despite the very deferential standard of *Jacobson*, the Plaintiffs were likely to succeed on the merits of their claims challenging a complete abortion ban in Tennessee and a total ban on group religious services in Kentucky.[23]

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[23] Numerous other federal courts across the country have recognized that *Jacobson* is the proper starting point for considering restrictions promulgated in response to the COVID-19 crisis that touch upon constitutional rights. Most of the Courts considering the question have held that state actions like those challenged here were an appropriate response to the scourge of COVID-19. *See McGhee v. City of Flagstaff*, 2020 WL 2308479 (D. Ariz., May 8, 2020); *Givens v. Newsom*, 2020 WL 2307224 (E.D. Cal., May 8, 2020); *SH3 Health Consulting, LLC v. St. Louis County Exec.*, 2020 WL 2308444 (E.D. Mo., May 8, 2020); *Cross Culture Christian Center v. Newsom*, 2020 WL 2121111 (E.D. Cal., May 5, 2020); *Lighthouse Fellowship Church*

Quite plainly, the restrictions considered by the Sixth Circuit in *Adams & Boyle*, *Maryville Baptist Church, Inc.*, and *Roberts* were different in kind and severity than the limited and temporary (and now rescinded) restrictions challenged by the Plaintiffs in this case. Unlike those cases, Governor Whitmer's executive orders did not impose a complete ban on the exercise of fundamental constitutional rights. Instead, the Plaintiffs challenge temporary and partial restrictions—none of which plainly or palpably invaded a fundamental right beyond all question, and all of which had a real and substantial relation to stopping the spread of the virus, preventing the overwhelming of this state's health care system, and avoiding needless deaths.[24]

And just last week, the U.S. Supreme Court in a 5-to-4 order refused to grant injunctive relief for a party challenging an California executive order that created limitations on public gatherings, including those of public worship, based on considerations of health and safety. *South Bay United Pentecostal Church, et al. v. Gavin Newsom, Governor of California*, 509 U.S. ___ (2020) (summary order released May 29, 2020) (Attached as Exhibit O). In his opinion concurring in the

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v. Northam, 2020 WL 2110416 (E.D. Va., May 1, 2020); *Shows v. Curtis*, 2020 WL 1953621 (W.D. N.C., April 23, 2020); *Gish v. Newsom*, 2020 WL 1979970 (C.D. Cal. April 23, 2020); *Robinson v. Attorney General*, 2020 WL 1952370 (11th Cir. April 23, 2020); *Legacy Church, Inc. v. Kunkel*, 2020 WL 1905586 (D. N.M. April 17, 2020).

[24] It is also worth noting that Governor Whitmer's orders have not sought to place restrictions on the fundamental constitutional rights asserted by the Plaintiffs in *Adams & Boyle* and *Maryville Baptist Church, Inc.* – abortion and free exercise of religion.

denial of relief, Chief Justice Roberts expressly relied on *Jacobson* in explaining that the Constitution "principally entrusts" these questions of safety to "the politically accountable officials of the States." *Id.* at slip op., p. 2 (citing *Jacobson*, 197 U.S. at 38). Notably, as here, when those officials act "in areas fraught with medical and scientific uncertainties," Chief Justice Roberts explained that "their latitude 'must be especially broad.' " *Id.* (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)). And when operating within those broad limits, he explained, these officials "should not be subject to second-guessing" by the federal judiciary, which lacks comparable expertise in public health. *Id.* (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985).)

There is no viable path for Plaintiffs around *Jacobson*'s well-settled rule of law. Plaintiffs cannot dispute the gravity of the pandemic in Michigan. It is a once-in-a-century kind of epidemiological public health crisis. In such times, the State has wide plenary authority to temporarily restrict activity that presents a diffuse but real threat to the public health.

Thus, under *Jacobson* and applicable principles of separation of powers, judicial deference to the Governor's authority responding to the crisis is paramount. Indeed, the Michigan Court of Claims has recognized as much in denying a motion for a preliminary injunction. As so aptly stated by the Court of Claims:

> The role courts play under *Jacobson* and *Lansing Bd of Ed* is not to "second-guess the state's policy choices in crafting emergency public health measures," *In re Abbott*, 954 F3d at 784, but is instead to determine whether the state regulation has a "real or substantial relation to the public health crisis and are not 'beyond all question, a

> plain, palpable invasion of rights secured by the fundamental law.'" *Id.*, quoting in part *Jacobson,* 197 US at 31. Part of this review includes looking to whether any exceptions apply for emergent situations, the duration of any rule, and whether the measures are pretextual. *Id.* at 785.

(Ex A, p. 11.) Plaintiffs' claims cannot survive this settled standard. Therefore, the Court should dismiss the complaint.

2. Application of *Jacobson* to the current health crisis and the restrictions challenged by Plaintiffs.

Plaintiffs allege the impingement of constitutional rights as a result of E.O. 2020-17's (now-rescinded) requirement that certain health care facilities temporarily implement a postponement plan for non-essential procedures, and E.O. 2020-92's corresponding (and correspondingly now-rescinded) requirement that individuals travel only for certain necessary medical treatment (including for medical procedures that, in accordance with a duly adopted postponement plan, have not been postponed). These claims plainly fail under *Jacobson*'s duly deferential review.

Under *Jacobson*, in the face of the current public health crisis, the Governor's executive orders are entitled to great deference, despite any impingement on individual rights, and must be upheld unless there is "no real or substantial relation" to the public health crisis, or the orders were, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."

With this standard in mind, *Jacobson* requires that the Governor's executive orders be upheld in their entirety. While the impact of any restriction on some aspect of normalcy outside of a pandemic is no doubt important, the restrictions

were temporary and in specific response to a widespread public health crisis. The Court should view each restriction through the lens of the general public health justifications and the over-arching and urgent goal of limiting the spread of this novel virus. A myopic, activity-specific framing of any issue is not a proper part of the analysis. Appropriate understanding of the nature of the pandemic and the four corners of the executive orders is adequate to the task before the Court.

In responding to this pandemic, the Governor has had to make countless difficult decisions, in short order and with many lives at stake. Plaintiffs disagree with some of these decisions. While no line-drawing is immune to disagreement, judicial deference is owed to the Governor's assessment of how to most effectively limit the spread of the virus while not restricting life-sustaining activity and services. That assessment included consideration of the temporary nature of any restriction and what as a general matter could be endured while flattening the curve.

The point is not to imagine how each specific activity of daily life might be accomplished safely by using social distancing and other recommended prophylactic measures. In a drought, where the point is to avoid uncontrolled wildfires, there can be no allowance for those who promise to be really careful with their campfire. In a deadly pandemic such as this, the point—the necessity—is to only allow those risks to public health that can and must be taken; the stakes are too high to do otherwise.

To wit, a simple trip to a health care facility for non-emergency care might appear both innocuous and inoculated for purposes of the virus.

But appearances are deceiving. To get to that position, the individual patient likely had to handle multiple objects – vehicles, gas pumps, handles and door knobs, etc. – as did each of the workers at the care site. These individuals then all share space, breathe the same air, and touch common surfaces. Each of these contacts increases the incidence of this highly contagious and asymptomatically transmittable virus spreading. Like innumerable small breezes against a sail, enough will push a sailboat over a waterfall if the course is not changed and the sail not brought under control. Use of personal protective equipment (PPE), sanitizers, and the like will only do so much to avoid these harms and presents the downside of depleting resources critically needed to provide emergency care to those afflicted by COVID-19 and other conditions immediately threatening their health and safety.

This last point merits emphasis. Until recently, Michigan, like other states, had been in the throes of an impending and dangerous shortage of health care resources available to handle the steep and immediate demands created by this pandemic, from PPE for medical professionals (and other critical infrastructure workers), to ventilators and other necessary medical supplies, to hospital beds. As the virus began to ravage the State, health systems were quickly reaching or exceeding their capacity. Medical supplies were dwindling, and beds in intensive care units were in short supply. There was a very real and imminent danger that hospitals could be completely overrun. Indeed, the TCF Center (formerly Cobo

Center) – typically the home of auto shows and black-tie galas – was retrofitted as a makeshift field hospital in anticipation of local bed shortages.[25] That it has not seen thousands of patients is a blessing, and a result of the carefully calibrated measures put in place—like E.O.s 2020-17 and 2020-92—to stem the tide.

Accordingly, there was ample good reason to temporarily regulate health care interactions and related travel, as the E.O.s challenged in this case did. Those restrictions served to protect the public health of the State and its residents, and to prevent its health care system from collapsing under the strain of easily transmittable, potentially fatal, and still untreatable virus. They—like the broader set of measures regarding travel and in-person work and activities that were put in place by the Governor's emergency orders—were temporary, tailored, and aimed at guiding the state as swiftly and safely as possible through the severe dangers posed by this pandemic.

Plaintiffs complain that the restrictions they challenge lasted too long. But adequate time must be given for the public health goals to be served and a transition to economic normalcy to return—and due deference must be given under *Jacobson* to the Governor's assessment and actions in that regard. And indeed, this careful and gradual transition is exactly what has been happening with the

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[25] Detroit Free Press, *TCF Center transformation ahead of schedule, ready for patients April 8* (April 4, 2020), available at https://www.freep.com/story/news/local/michigan/2020/04/04/coronavirus-covid-19-tcf-center-field-hospital/2948726001/

rescission of various executive orders—including E.O.s 2020-17 and 2020-92—and the promulgation of new ones. While circumstances rapidly escalated and the virus began to ravage the State, more restrictive measures were necessary to combat the spread and save lives. As circumstances have improved and the number of infections and deaths have trended downward, the restrictive measures have eased. This is the very essence of the emergency management authority afforded the Governor under the principles announced in *Jacobson*.

Judicial deference is appropriate not just on the substance of this challenge but the timing as well. Temporary suspension of certain activity must be permitted as a matter of public health. As a matter of separation of powers, distinctions between essential and non-essential and safe and unsafe are best left to the branch designed for and equipped to make those calls. The Governor's executive orders should not be undercut by disparate preliminary judicial carveouts in the wake of a particular litigant's race to the courthouse.

In sum, the limited and temporary restrictions in the Governor's orders have been necessary and appropriate, with a "real [and] substantial relation" to stopping the spread of the virus, and they most certainly do not constitute, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 US at 31. As stated by the Michigan Court of Claims:

> What the Court must do—and can only do—is determine whether the Governor's orders are consistent with the law. Under the applicable standards, they are.

(*Martinko* Opinion, Ex A, p. 14, citation omitted). Just as in *South Bay United Pentecostal Church*, it is "quite improbable" that the Plaintiffs have made it " 'indisputably clear' that the Government's limitations are unconstitutional." (Roberts, C.J., concurring, slip op., p. 3.) Accordingly, Plaintiffs cannot overcome *Jacobson* and their claims fail as a matter of law.

C. Even absent *Jacobson's* deferential standard, Plaintiffs' constitutional challenges fail.

1. Plaintiffs fail to state a viable void for vagueness challenge.

Courts apply a two-part test to determine whether a law is unconstitutionally vague: first, the law must give a person of "ordinary intelligence a reasonable opportunity to know what is prohibited, so that [they] may act accordingly[;]" and second, the standards of enforcement must be precise enough to avoid "involving so many factors of varying effect that neither the person to decide in advance nor the jury after the fact can safely and certainly judge the result." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (internal citation omitted); *Columbia Natural Resources v. Tatum,* 58 F.3d 1101, 1105 (6th Cir. 1995).

Plaintiffs quibble with general (not vague) terms such as "health," "non-essential procedures," and "significantly impact." (Pls' Prel. Inj. Br. at 27–29.) There is, however, no claim here that any of the Plaintiffs have been subject to selective enforcement or otherwise unsure about what is or is not permitted in their particular situations. Indeed, the stated purpose of their lawsuit is to fully reopen their health care businesses and to schedule a non-emergency joint replacement

surgery. Even absent the mootness of this purpose in light of E.O. 2020-96, nothing signals any vagueness in the restrictions that Plaintiffs claim to have improperly impeded it.

By claiming the language of the challenged orders is vague, the Plaintiffs have flipped on their head the *flexibility* and *discretion* that the orders permit them. Under the executive orders, the Plaintiffs were required to "implement a plan to temporarily postpone . . . all non-essential procedures." Notably, other than a handful of specific measures that are included within the definition of "non-essential procedures" per Executive Order 2020-17—like non-emergency joint replacement or cosmetic surgery—the definition of "non-essential procedure" is "a medical or dental procedure that is not necessary to address a medical emergency or to preserve the health and safety of a patient, *as determined by a licensed medical provider*." (E.O. 2020-17, ¶ 1) (emphasis added). Thus, beyond requiring a plan and identifying certain essential and non-essential procedures as guideposts, the scope and breadth of the plan was expressly *left to the discretion of the covered facilities and the professional judgment of their medical providers*.

The terms of Executive Order 2020-17 were flexible and clear. The executive order required creation and implementation of a plan, ¶¶ 1–2, and compliance with that plan, ¶ 4. It provided some general guidance and outer boundaries for the content of a plan, and it largely granted licensed medical providers the latitude to "determine" what constitutes a non-essential procedure that can be postponed under their plan. E.O. 2020-92, like prior iterations of the Stay Home order, was

correspondingly clear, permitting individuals to travel to (among other things) receive treatment deemed essential by their medical providers under E.O. 2020-17.

At bottom, Plaintiffs are attempting to use the doctrine of vagueness to secure exemptions from executive orders they had no problem understanding, but simply would have rather not followed. While the orders' restrictions have no doubt impacted the lives of many, Plaintiffs included, that impact has been necessary and tailored to meet an overarching, critical public health need. There is nothing unconstitutionally vague about the content of these restrictions, and Plaintiffs have failed to state a viable void for vagueness challenge.

2. Plaintiffs fail to state a viable procedural due process claim.

It is difficult to discern what process Plaintiffs claim is lacking here for purposes of their procedural due process claim. Of course, the general touchstone for such claims is notice and an opportunity to be heard on a pre- or post-deprivation basis. *See Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976). But under the holding of *Mathews*, none of the instant Plaintiffs have suffered a final deprivation of any protected interest. The challenged executive orders contain temporary restrictions, not final ones. Additionally, *Mathews* concerned termination of disability benefits and not a generally applicable emergency order in a pandemic that need only be disseminated to the public through the usual media channels. Indeed, due process is "flexible and calls for such procedural protections as the particular situation demands." *Morissey v. Brewer*, 408 U.S. 471, 481 (1972).

Here, Plaintiffs seem to be seeking some sort of process by which they can challenge a determination that a procedure is "non-essential," while wholly overlooking the fact that, under the executive orders, they themselves had broad flexibility and discretion to make that very determination on a case-by-case, patient-by-patient basis. Plaintiffs can point to nothing to indicate that, given this "particular situation," due process would somehow "demand[]" further "procedural protections" regarding their own determinations of what procedures are or are not necessary to preserve the health and safety of their patients during this pandemic. *Id.* And while Plaintiffs may very well prefer not to have had to make these determinations over the preceding weeks, it is inevitable that any effective response to a rapidly unfolding and deadly pandemic will involve some measure of disruption to the normal operations of healthcare businesses. Plaintiffs have offered nothing in the federal constitution or cases construing it that would have required any more here than general promulgation of the executive orders issued under emergency authority.

3. Plaintiffs fail to state a viable substantive due process claim.

The Sixth Circuit has recognized that a substantive due process violation occurs when arbitrary and capricious government action deprives an individual of a constitutionally protected property interest. *See Pearson v. City of Grand Blanc,* 961 F.2d 1211, 1216, 1217 (6th Cir. 1992); *see also Nectow v. City of Cambridge,* 277 U.S. 183, 187–88 (1928) (holding that a court should not interfere unless the locality's action "has no foundation in reason and is a mere arbitrary or irrational

exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense") (internal quotation marks and citation omitted).

While challenges to arbitrary and capricious government action appear most frequently in cases involving zoning and other ordinances, *see, e.g., Vill. of Belle Terre v. Boraas,* 416 U.S. 1, 8 (1974), they are not necessarily limited to such cases, *see, e.g., Duke Power Co. v. Carolina Envtl. Study Group,* 438 U.S. 59, 82–83 (1978) (noting that federal economic regulations will be upheld "absent proof of arbitrariness or irrationality on the part of Congress") (citation omitted).

Here, however, there was nothing illogical, arbitrary, or capricious about the Governor's promulgation of the executive orders. Given the characteristics of COVID-19, the restrictions ordered in the executive orders were necessary to protect the public from the rapid spread of an aggressive, untreatable, and potentially fatal disease, and to ensure this State's health care system had the capacity and resources to manage that spread. The same is true of any of the challenged pandemic orders signed by Director Gordon. "The fundamental nature of an individual's interest in liberty . . . may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society." *Salerno*, 481 U.S. at 750–51. Such was the case here. In addition, there is nothing conscience-shocking about prioritizing types of medical care during a pandemic for purposes of not depleting or misdirecting scarce health-care resources (PPE, drugs, emergency room capacity, ICE capacity, etc.), nor about placing

temporary limitations on certain types of traffic within the State in order to strike a necessary and carefully calibrated balance between reducing travel—and therefore human interactions and community spread of this deadly virus throughout the State—and allowing citizens to engage in essential functions. Indeed, given the temporary and tailored nature of the challenged restrictions, and the compelling state interest they served—mitigating the spread of this deadly pandemic, preventing the rapid depletion of critical healthcare resources, and averting countless needless deaths—the restrictions would pass muster under even the strictest level of constitutional scrutiny. There is no substantive due process issue with these measures, and Plaintiffs' claims on that basis should be dismissed for failure to state a recognized claim for relief.

4. Plaintiffs fail to state a viable dormant commerce clause claim.

By empowering Congress to regulate interstate commerce, the Commerce Clause is interpreted to, correspondingly, prohibit states from interfering with the same. U.S. Const., Art. I, s. 8, cl. 3. This negative implication, commonly known as the "dormant commerce clause" "prohibit[s] outright economic protectionism or regulatory measures designed to benefit in-state economic actors by burdening out-of-state actors." *E. Ky. Res. v. Fiscal Court*, 127 F.3d 532, 540 (6th Cir. 1997). A two-tiered analysis applies to such claims. "The first prong targets the core concern of the dormant commerce clause, protectionism – that is 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Tenn. Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 449 (6th Cir.

2009) (quoting *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)). The second applies where, as here, the order invokes no inkling of in-state protectionism but, instead, applies to all businesses operating with this state. In this situation, the order is presumed valid unless its burden on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Plaintiffs bear the burden of demonstrating this second prong weighs in their favor. It is a burden they cannot meet here.

Any burden of the executive orders on interstate commerce or out-of-state actors is minuscule compared to the benefit to the state and local communities as a whole. The challenges presented by the spread of COVID-19 required swift action throughout Michigan to stop the spread of a highly contagious and deadly disease. This includes the complained of restrictions on business and health care activity raised in Plaintiffs' motion. Many businesses and individuals throughout the State have faced these necessary and temporary restrictions.

But nothing in the executive orders regulates interstate commerce as interstate commerce. Impacts on such commerce may be inevitable, but that is not the focus of any of the challenged restrictions. This factor alone distinguishes this case from recognized dormant commerce clause challenges. Additionally, none of the challenged orders seek to regulate any conduct outside of the State of Michigan. While Plaintiffs were impacted by the restrictions and presumably engaged in interstate commerce, those factors alone fall far short of a viable commerce clause challenge.

Further, in *Pike*, the Supreme Court specifically recognized that its holding was influenced by the fact that it was not dealing with "state legislation in the field of safety where the propriety of local regulation has long been recognized." *Pike*, 397 U.S. at 143. This is not the case here. Dealing with public health in general and a pandemic in particular fall squarely within deeply rooted local and state police powers, and Plaintiffs offer nothing to show that the restrictions they challenge were somehow "clearly excessive" in comparison to the critical protections those restrictions provided to the residents, communities and health care system of this State during this pandemic. Therefore, Plaintiffs fail to state a valid claim for relief under dormant commerce clause doctrine.

CONCLUSION AND RELIEF REQUESTED

Judicial invalidation that precludes enforcement of any part of the Governor's or the Director's orders would mean dire, cascading outcomes and untold unintended consequences. The challenged restrictions were put in place, and then lifted, after careful consideration of the unique nature of the threat facing Michigan and the advice of numerous individuals and entities with unique expertise. That process was statutorily and constitutionally sound, and Plaintiffs have no justiciable or viable basis to challenge it. Their claims fail as a matter of law, and they merit nothing more from this Court than dismissal. Indeed, what Plaintiffs want—a piecemeal lifting of restrictions by this Court, without the ability to globally coordinate the State's carefully considered, deliberate, ongoing plan to combat the crisis and transition back to normalcy—is not only legally unwarranted

but also increases the risk and potential harm to everyone. For the reasons already briefed, a particular party's race to the courthouse should not control who is and is not excepted, particularly in a time of great public need when all in Michigan must grab hold of an oar and row in the same direction.

Defendants Whitmer and Gordon respectfully request that the grant this motion, dismissal all claims, and grant any other appropriate relief to Defendants.

Respectfully submitted,

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Dated: June 2, 2020

CERTIFICATE OF SERVICE

I certify that on June 2, 2020, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system, which will provide electronic copies to counsel of record, and I certify that my secretary has mailed by U.S. Postal Service the papers to any non-ECF participant.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, AND JEFFERY GULICK,

Plaintiffs,

v

GRETCHEN WHITMER in her official capacity as Governor of the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, and ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services,

Defendants.

No. 1:20-cv-00414

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Index of Exhibits

Exhibit	Description
A	Opinion and Order Denying Plaintiffs' Motion for a Preliminary Injunction, *Martinko, et. al. v. Governor Whitmer, et. al.,* Michigan Court of Claims Case No. 20-62-MM
B	*Modes of transmission of virus causing COVID-19*, World Health Organization
C	*Social Distancing, Quarantine, and Isolation*, Centers for Disease Control
D	*Flattening the Coronavirus Curve* (March 27, 2020), New York Times
E	E.O. No.2020-4
F	E.O. No. 2020-5
G	E.O. No. 2020-9
H	E.O. No. 2020-11
I	E.O. No. 2020-17
J	E.O. No. 2020-96
K	E.O. No. 2020-21
L	Opinion and Order of the Court issued May 21, 2020, *Michigan House and Senate v. Gov. Whitmer*, Michigan Court of Claims Case No. 20-79-MZ

M	Opinion and Order of the Court issued May 18, 2019, *Michigan United for Liberty v. Gov. Whitmer*, Michigan Court of Claims Case No. 20-61-MZ
N	Governor Gretchen Whitmer's Emergency Bypass Application for Leave to Appeal and Brief in Response to Plaintiffs' Emergency Bypass Application for Leave to Appeal, *Michigan House of Representatives and Michigan Senate v. Gretchen Whitmer*, Michigan Supreme Court Case No. 161377
O	Summary Order released May 29, 2020, *South Bay United Pentecostal Church, et al. v. Gavin Newsom, Governor of California*, 509 U.S. ___ (2020)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, AND JEFFERY GULICK,

Plaintiffs,

v

GRETCHEN WHITMER in her official capacity as Governor of the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, and ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services,

Defendants.

No. 1:20-cv-00414

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Exhibit A

STATE OF MICHIGAN

COURT OF CLAIMS

STEVE MARTINKO, et al,

Plaintiffs,

OPINION AND ORDER REGARDING PLAINTIFFS' APRIL 23, 2020 MOTION FOR A PRELIMINARY INJUNCTION

v

Case No. 20-00062-MM

Hon. Christopher M. Murray

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, DANIEL EICHINGER, in his official capacity as Director of the Michigan Department of Natural Resources, and DANA NESSEL, in her official capacity as the Attorney General for the State of Michigan,

Defendants.
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I. INTRODUCTION

This matter was filed by five Michigan residents who claim that three of Governor Whitmer's executive orders, Executive Orders 2020-21 and 2020-42,[1] and now Executive Order 2020-59, infringe on their constitutional rights to procedural due process and substantive due

[1] Plaintiffs recognize that EO 2020-21 was rescinded by EO 2020-42, and they claim that EO 2020-42 "extended the timeline originally set by [EO] 2020-21 and grossly expands its restrictions on businesses' and individuals' fundamental rights." After the verified complaint was filed, EO 2020-42 was rescinded by EO 2020-59, which (among other things) eliminated the prohibitions on traveling intrastate to another residence, from not using motorized boats on the waterways, and to an extent allows the re-opening of some businesses and state parks. Although plaintiffs challenge the same restrictions set forth in EO 2020-42, the Court will for clarity sake refer to the restrictions within the current executive order, EO 2020-59, unless the timing period is relevant to any issue.

process. Specifically, plaintiffs' verified complaint alleges that the "mandatory quarantine" imposed by EO 2020-59 violates their right to both procedural due process (Count I) and substantive due process (Count II), and that the intrastate travel restrictions contained in EO 2020-42 also violate their rights to procedural due process (Count III) and substantive due process (Count IV). They also allege in Count V of their verified complaint that the Emergency Management Act, MCL 30.401 *et seq*., is an unconstitutional delegation of legislative power to the Governor. Plaintiffs have requested the Court issue a preliminary injunction—but not a permanent one—restraining these defendants from continuing to implement the provisions of EO 2020-59.[2] Once restrained, plaintiffs seek a declaration that the challenged restrictions and the EMA are invalid.[3]

II. JURISDICTION

Defendants first argue that this Court lacks subject matter jurisdiction because plaintiffs seek only injunctive relief based upon federal constitutional claims, which deprives the Court of jurisdiction to decide the matter. Defendants rely upon MCL 600.6440, which provides:

> No claimant may be permitted to file claim in said court against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts, but it is not necessary in the complaint filed to allege that claimant has no such adequate remedy, but that fact may be put in issue by the answer or motion filed by the state or the department, commission, board, institution, arm or agency thereof.

[2] On April 23, 2020, the Court denied plaintiffs' motion for an *ex parte* temporary restraining order on the ground that plaintiffs had not shown the threat of immediate and irreparable harm of physical injury or loss of property.

[3] The Court appreciates the speed at which counsel submitted briefs, and for the high caliber of the briefs submitted.

Because a federal court can exercise jurisdiction against state officers in their official capacity when seeking only prospective injunctive relief, defendants argue, MCL 600.6440 applies and the Court lacks jurisdiction to decide the matter.

The legal principles put forward by defendants are sound, but they do not apply to plaintiffs' case. First, the statute refers to claims filed in the Court of Claims against the state, its departments, agencies, etc., and does not pertain to claims brought in this Court against individuals, as plaintiffs have done here. Thus, it is irrelevant whether claims against state officers in their official capacity brought in federal court might essentially be considered claims against the state. Second, with respect to defendants' argument, plaintiffs seek declaratory rulings on each of their three challenges, and one of those challenges—the claim that the EMA violates the separation of powers doctrine—is based upon state law. So too is their challenge to the intrastate ban on travel to vacation rentals. Additionally, in their complaint plaintiffs seek "other and further relief as the Court deems appropriate," which whatever that could end up being, it would go beyond the declaratory and limited injunctive relief requested in the complaint, and could include damages, even if only nominal. Because plaintiffs' claims and forms of relief do not meet all the requirements of MCL 600.6440, this Court does not lack subject matter jurisdiction.

III. MOOTNESS

Defendants also argue that plaintiffs' case is moot because they only challenge EO 2020-21 and EO 2020-42, which have been rescinded, and EO 2020-59 is the only existing executive order containing these restrictions. True enough, but as defendants seem to recognize, it was *after* plaintiffs' filing last week that the Governor issued EO 2020-59, and plaintiffs have not had time to seek to amend their complaint, and several of plaintiffs' challenges to the prior EOs—the stay-at-home provision and the ban on intrastate travel to vacation rentals—remain within EO 2020-

59. Those two challenges are therefore not moot, as the Court can still render complete relief against those provisions. See *CD Barnes Assoc, Inc v Star Haven, LLC*, 300 Mich App 389, 406; 834 NW2d 878 (2013). The remainder of the challenges to EOs 2020-21 and 2020-42, as well as to the Department of Natural Resources rule[4], have been removed by EO 2020-59, and are now moot.

The Court therefore concludes that the only remaining ripe challenges to the executive orders are (1) the stay-at-home provision, (2) the prohibition of traveling to a third-party vacation rental, and (3) the limited public access to certain public land. And, of course, plaintiffs' challenge to the constitutionality of the EMA remains a live controversy.

IV. STANDARDS FOR A PRELIMINARY INJUNCTION

"The objective of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights." *Alliance for the Mentally Ill of Mich v Dep't of Community Health*, 231 Mich App 647, 655–656; 588 NW2d 133 (1998). The status quo has been defined as " 'the last actual, peaceable, noncontested status which preceded the pending controversy.' " *Buck v Thomas Cooley Law School*, 272 Mich App 93, 98 n 4; 725 NW2d 485 (2006), quoting *Psychological Services of Bloomfield, Inc v Blue Cross & Blue Shield of Michigan*, 144 Mich App 182, 185; 375 NW2d 382 (1985). In *Mich AFSCME Council 25 v Woodhaven–Brownstown Sch*

[4] Specifically, plaintiffs challenge a Department of Natural Resources rule, implemented in furtherance of EO 2020-42, that "restricts the use of powerboats on public waterways yet allows sailboats and kayaks." Plaintiffs likewise question a DNR rule, also implemented in furtherance of EO 2020-42, that "further restricted access to public lands, parks and trails to residents of 'local communities.' " Much to the pleasure of outdoor enthusiasts, EO 2020-59 seems to have eliminated the restrictions on use of powerboats and use of state parks during certain hours of the day.

Dist, 293 Mich App 143, 146; 809 NW2d 444 (2011), the Court of Appeals instructed that, "[w]hen deciding whether to grant an injunction under traditional equitable principles,

> a court must consider (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.[5]

Not surprisingly, the Court will first turn to the initial consideration, i.e., whether plaintiffs have shown a likelihood of prevailing on the merits. Though plaintiffs do not have to prove they *will* succeed on the merits, they do have to prove that they have a *substantial likelihood* of success on the merits. *Int'l Union v Michigan*, 211 Mich App 20, 25; 535 NW2d 210 (1995).

V. THE MERITS

A. BACKGROUND AND FACTS

Michigan residents, like all other Americans, cherish their liberty. We always have, though the liberties and freedoms we seek to protect have changed over time. At and before our founding, our forefathers fought for the inalienable right to own property, freely engage in commerce, represent ourselves through our own elected representatives, worship where and how we wanted, etc. The Declaration of Independence's list of grievances against the King of England prove as much, as do several of the amendments to the United States Constitution, and in particular, the Fifth and Fourteenth Amendments.

[5]Quoting in part *Alliance for the Mentally Ill*, 231 Mich App at 655–656.

Today we have all the freedoms and liberties that the founders fought for, and our branches of government exist in large part to ensure that those rights remain intact. See Declaration, ¶ 2.[6] The liberty and freedoms at stake in this matter do not in large part involve those rights and liberties the founders fought so hard for; instead, plaintiffs focus on the right to freely move about one's community and state, to do commerce when one pleases, and to travel about the state for vacation purposes. It is the restrictions to those activities within EO 2020-59 that plaintiffs challenge here.

As any reader of this opinion knows, the challenged executive orders were issued to address the public health crisis occasioned by the world-wide spread of the novel coronavirus, which hit our great state in early March. Specifically, on March 10, 2020, was when the first two cases of the virus were diagnosed in our state[7], while the first death resulting from the virus occurred on March 18, 2020.[8] As a result of the quick spread of the virus within our state borders, and to meet the myriad challenges that immediately arose Governor Whitmer issued numerous executive orders, including EO 2020-21, EO 2020-42 and EO 2020-59. The main element of the executive

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[6] The Court realizes that the Declaration is a political document, not a legal one, but it is good evidence of the founding political theories and objectives. See *Troxel v Granville*, 530 US 57, 91; 120 S Ct 2054; 147 L Ed 2d 49 (2000)(SCALIA, J., dissenting)("The Declaration of Independence ... is not a legal prescription conferring powers upon the courts[.]"); *Derden v McNeel*, 978 F2d 1453, 1456 n4 (CA 5, 1992)("[G]eneral statements about inalienable rights ... tell us little about the prerogatives of an individual in concrete factual situations."); *Coffey v United States*, 939 F Supp 185, 191 (EDNY, 1996)("While the Declaration of Independence states that all men are endowed certain unalienable rights including 'Life, Liberty and the pursuit of Happiness,' it does not grant rights that may be pursued through the judicial system." (citation omitted)).

[7] Executive Order No, 2020-21; Detroit Free Press, *Coronavirus Timeline* https://www.freep.com/story/news/local/michigan/2020/03/18/coronavirus-timeline-first-case-michigan-first-death/5069676002/ (accessed April 28, 2020). This article contains a compilation of information from the state Department of Health and Human Services.

[8] Detroit Free Press, *First Michigan Death Due to Coronavirus is Southgate Man in his 50s* https://www.freep.com/story/news/local/michigan/wayne/2020/03/18/coronavirus-deaths-michigan/5054788002/ (accessed April 28, 2020).

orders is the requirement that most residents remain in their home unless engaging in certain essential activities, or certain limited outdoor activities. The result of the order, from an economic standpoint, was thousands of Michigan residents being unable to work unless they could do so remotely, the closing of all restaurants, bars, and other small and large businesses.[9]

At the time the first stay-at-home order was issued on March 23, 2020—only 13 days since the first confirmed case in this state—there were already 1,328 confirmed cases and 15 deaths.[10] Today, just over one month later, Michigan has over 36,000 confirmed cases of the virus and over 3,000 related deaths.

B. THE MERITS

In their complaint, plaintiffs do not challenge the Governor's authority to issue the executive orders on this subject-matter. Instead, plaintiffs challenge the scope of the order through separate claims based on procedural due process and substantive due process. Although these claims entail different considerations and standards, see *In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App 562, 573-574; 892 NW2d 388 (2016), the Court will address the claims together since, under these circumstances, each protected right is subject to the same overriding principle. In other words, the constitutional right asserted does not make a difference when considering this issue, because both are subject to a balancing with the state's interest to protect the public health. This holds true because, and perhaps contrary to common knowledge, most, if not all, individual constitutional rights are not absolute and are subject to a balancing with the

[9] Michigan was not alone in this regard. The Court takes notice that the worldwide economy has come to a virtual standstill as a result of state and national actions taken to control the virus.

[10] Detroit Free Press, *Michigan Coronavirus Cases, Tracking the Pandemic*, https://www.freep.com/in-depth/news/nation/coronavirus/2020/04/11/michigan-coronavirus-cases-tracking-covid-19-pandemic/5121186002/ (accessed April 28, 2020).

countervailing state interest. See *New Rider v Board of Ed of Independent School Dist No 1*, 480 F2d 693, 696 (CA 10, 1973) ("Constitutional rights, including First Amendment rights, are not absolutes.") and *In re Abbott*, 954 F3d 772, 784 (CA 5, 2020) (Recognizing, when addressing Texas emergency rules during the coronavirus pandemic, that individual rights secured by the Constitution could be reasonably restricted during a health crisis).

As can be seen, then, there are two competing constitutional principles at play. First, as plaintiffs note in their verified complaint, in *Ex Parte Milligan*, 71 US 2, 120-121; 18 L Ed 281 (1866), the United States Supreme Court recognized—in a case that arose during the height of the Civil War—that our rights enshrined in the Constitution do not become less important or enforceable because of exigent circumstances:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Though our individual constitutional rights cannot be suspended or eliminated, they are, as noted, subject to reasonable regulation by the state. And, when it comes to the power of the state to act in the best interests of the public health when faced with a serious contagious disease, which is the state interest acted upon by the Governor,

> "[w]e are plowing no virgin field in considering the questions here involved. Numerous decisions, both federal and state, have considered the questions now before us. They are not all in accord and in some instances are not reconcilable. There is, however, a very marked trend in them in one direction, that which upholds the right of the state, in the exercise of its police power and in the interest of the public health, to enact such laws, such rules and regulations, as will prevent the spread of this dread disease." [*People ex rel Hill v Lansing Bd of Ed*, 224 Mich

> 388, 390; 195 NW 95 (1923). See, also, *Jacobsen v Commonwealth of Mass*, 197 US 11, 25-26; 25 S Ct 358; 49 L Ed 643 (1905) (upholding state's power to require vaccination over plaintiff's Fourteenth Amendment liberty interest to not be told what to do), and *In re Abbott*, 954 F3d at 784-785.]

As noted earlier, plaintiffs' due process claims set out in Counts I and III are challenges to the quarantine[11] requirement and (as amended by the changes contained in EO 2020-59), the prohibition on intrastate travel to a vacation rental. Plaintiffs' specific assertion is that, although the state may have the ability to quarantine those who are infected with the virus, the state cannot quarantine everyone without some showing that the individual(s) are infected. Because EO 2020-59 does so, the executive order violates their right to procedural due process. The same holds true, they argue, for the prohibition of intrastate travel to a third parties' vacation home.[12]

In addressing this argument, it is imperative to recognize the limited question the Court is empowered to decide. Except in limited circumstances mentioned later, it is not for the courts to pass on the wisdom of state action that is granted to it by the general police power or by statute. Certainly the state cannot simply ignore the individual rights enshrined in our federal (or state) constitution in the name of a public health threat. Judicial review of state actions is therefore (and quite obviously) appropriate and necessary. But the *depth* of that review is limited, and does not include delving deep into the pros and cons of what is the better plan of action between two reasonable alternatives. This point was well-made by three concurring Justices in *Rock v Carney*,

[11] Plaintiffs characterize the "stay-at-home" provision as a quarantine, which defendants quarrel with, but quarantine is defined as "a restraint upon the activities or communications of persons … designed to prevent the spread of disease or pests." Merriam-Webster's Collegiate Dictionary (11th Ed).

[12] Plaintiffs have not asserted that they own a second home in Michigan or that they had rented a third parties' vacation home for use during a time in which any executive order remained in place.

216 Mich 280, 283; 185 NW 798 (1921), a case involving the state's response to the spread of venereal diseases during World War I:

> The questions involved in this litigation are of supreme importance, not only to the individuals composing this commonwealth, but also to the numerous boards of health and to the state itself. We approach their consideration with a due regard of their importance. Neither a desire to sustain the state, nor a supersensitiveness prompted by the delicacy of the examination here involved, should in any way enter into or control our decision. Policies adopted by the legislative and executive branches of the state government are not submitted to this branch for approval as to their wisdom. They stand or fall in this court because valid or invalid under the law, and their wisdom or want of wisdom in no way rests with us. If valid, they must be upheld by this court; if invalid, they must be so declared by this court. If these defendants have transcended their power, they must be held liable, and they may not be excused from liability by the fact that their motives were of the highest. If they had not transcended their power, they are not liable, and supersensitiveness or preconceived notions of proprieties, no matter of how long standing, do not render them liable. The case must be determined by the application of cold rules of law.

Thus, whether and to what extent this Court agrees with policy implemented in the executive orders is of no moment or consideration. Instead, the Court must dutifully apply the "cold rules of law" to determine the validity of the challenged provisions of the executive order.

Binding authority from the United States Supreme Court and the Michigan Supreme Court compels this Court to conclude that plaintiffs do not have a substantial likelihood of success on the merits. This is not because the rights asserted by plaintiffs are not fundamental—being forced (with some important exceptions) by the state to remain in one's home, in turn causing many residents to be unable to work, visit elderly relatives, and to generally move about the state. But those liberty interests are, and always have been, subject to society's interests—society being our fellow residents. They—our fellow residents—have an interest to remain unharmed by a highly communicable and deadly virus, and since the state entered the Union in 1837, it has had the broad

power to act for the public health of the entire state when faced with a public crisis. As the *Jacobsen* Court so aptly held:

> The defendant insists that his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. *But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.* This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.' In *Crowley v Christensen*, 137 US 86, 89; 34 L Ed 620, 621; 11 S Ct 13 (we said: 'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.' [*Jacobson*, 197 US at 26; citations omitted in part; emphasis supplied.]

The role courts play under *Jacobson* and *Lansing Bd of Ed* is not to "second-guess the state's policy choices in crafting emergency public health measures," *In re Abbott*, 954 F3d at 784, but is instead to determine whether the state regulation has a "real or substantial relation to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.' " *Id*., quoting in part *Jacobson*, 197 US at 31. Part of this review includes

looking to whether any exceptions apply for emergent situations, the duration of any rule, and whether the measures are pretextual. *Id*. at 785.[13]

Turning to plaintiffs' specific challenges, the stay-at-home provision, the most restrictive portion of the executive order, was first implemented by the Governor on March 23, 2020, thirteen days after the first case of COVID-19 was diagnosed in the state. Though there were at that point approximately 1,328 cases in the state and 15 reported deaths, Governor Witmer was not acting on a blank slate. Instead, it was common knowledge that the virus had already rapidly spread throughout the state of Washington, was prevalent in several other states, and was devastating parts of Italy, China, and other countries. Indeed, the speed at which the virus spread was well known at the time the stay-at-home provision was implemented. It is true that this measure is a severe one, and greatly restricts each of our liberties to move about as we see fit, as we do in normal times. But the governor determined that severe measures were necessary, and had to be quickly implemented to prevent the uncontrolled spreading of the virus. As noted, Michigan was not alone in this regard:

> To be sure, [the order] is a drastic measure, but that aligns it with the numerous drastic measures Petitioners and other states have been forced to take in response to the coronavirus pandemic. Faced with exponential growth of COVID-19 cases, states have closed schools, sealed off nursing homes, banned social gatherings, quarantined travelers, prohibited churches from holding public worship services, and locked down entire cities. These measures would be constitutionally intolerable in ordinary times, but are recognized as appropriate and even necessary responses to the present crisis. [*In re Abbott*, 954 F3d at 787.]

[13] Plaintiffs' correctly note that *Jacobson* did not involve a state-wide requirement to stay at home, and instead addressed an involuntary vaccination program. But most cases have different facts, and it is the legal principle set forth in the decision that guides future courts. Thus, despite some factual differences, the Court relies (as did the *In re Abbott* court) upon *Jacobson* as it is the most relevant decision on this issue from the Supreme Court.

Plaintiffs suggest that the better—and more constitutionally sound decision—would have been to quarantine only those who have the virus. It may have been a better option to some, as doing so may have had a less severe impact on the movement of the Michigan population, and may have reduced unemployment. Or, as plaintiffs argue, a more narrowly tailored order by region may have been more reasonable for the entire state. But some of that is simply hindsight, and to accept it would be to impermissibly delve too deep into the choices made. Additionally, the Governor's concerns were not limited to what was most convenient or palatable at the time, as she also had to protect, to the extent possible, the health and safety of all Michigan residents and to not overburden the health care system. The introduction to EO 2020-59 outlines some of the other serious considerations that went into issuing the stringent order:

> To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible.

And, contrary to plaintiffs' arguments, the Supreme Court has upheld, against a constitutional challenge, a state's quarantine of individuals even when they are *not* infected with the disease being controlled. See *Compagnie Francaise de Navigation a Vapeur v Louisiana*, 186 US 380, 393; 22 S Ct 811; 46 L Ed 1209 (1902).

As noted, the Court's role is not to pick which alternative may be more reasonable, more preferential, or more narrowly tailored, as the latter is in deciding some constitutional cases. Monday morning quarterbacking is the role of sports fans, not courts reviewing the factual basis supporting executive action to protect the public health. Instead, it is the role of the executive and legislative branches to determine what *steps* are necessary when faced with a public health crisis.

In re Abbott, 954 F3d at 792 ("Such authority [to determine what measures are best to take] properly belongs to the legislative and executive branches of the governing authority"); *Rock,* 216 Mich at 296; *Lansing Bd of Ed*, 224 Mich at 397.[14] Under federalism principles, it is the States that retained the police power, and that power—though not unlimited—is quite broad. See *Nat'l Federation of Independent Business v Sebelius*, 567 US 519, 536; 132 S Ct 2566; 183 L Ed 2d 450 (2012) ("The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the "police power") and *Blue Cross & Blue Shield of Mich v Governor*, 422 Mich 1, 73; 367 NW2d 1 (1985) (discussing the scope of the police power and how that power extends to enacting regulations to promote public health, safety, and welfare, and providing that regulations "passed pursuant to the police power carry with them a strong presumption of constitutionality.").

What the Court must do—and can only do—is determine whether the Governor's orders are consistent with the law. *Rock*, 216 Mich at 283. Under the applicable standards, they are. The undisputed facts known at the time the first stay-at-home order was made, and the undisputed facts known today, compel the conclusion that the order had a real and substantial relation to the public health crisis. The challenged measures relate to limiting human interaction which helps control the spread of a virus considered to be extremely communicable. To make it voluntary, or more limited in scope, were perhaps other avenues to pursue, but even accepting that proposition does

[14] As will be discussed shortly, the Legislature has also spoken on the issue of how to address emergent situations. MCL 10.21; MCL 30.401 *et seq*. Additionally, the Court takes notice that the Legislature recently established an oversight committee to review the measures implemented through the Governor's various executive orders.

not make what the Governor reasonably chose to do invalid. Instead, the Governor's determination as to the speed and ease with which the virus spreads, and the potential impact that spread would have on the health care system, and the threat it had to the lives of thousands of Michigan residents in a short period of time, allows for the conclusion that the two challenged provisions had a real and substantial relation to the public health crisis. *Jacobson*, 197 US at 31. There is nothing presented to the Court to draw any other legal conclusion.[15]

Nor is there any evidence (or even a suggestion) that the stay-at-home provision was a pretext to accomplish some other objective. Additionally, the record is clear that these measures are temporary, and limited in time to address the speed at which the virus spreads, the status of the available health care system, and the need to get Michigan residents back to enjoying their liberties. Indeed, since this lawsuit was filed last week, the Governor issued EO 2020-59, easing some of the very restrictions challenged by plaintiffs, and has indicated more lifting of restrictions are imminent. Plaintiffs have not shown a substantial likelihood of success on the merits in their challenge to the executive order restrictions.

C. CONSTITUTIONALITY OF THE EMA[16]

Turning again to *In re Forfeiture of 2000 GMC Denali and Contents*, the Court set forth the rather difficult standards governing a challenge to the constitutionality of a state statute:

> A party challenging the constitutionality of a statute has the burden of proving the law's invalidity. *Gillette Commercial Operations North America & Subsidiaries v*

[15] Plaintiffs submitted documentary evidence which, if believed, could allow a governor to issue a more narrowly tailored order. But because this Governor made a different conclusion that was likewise based on other supporting evidence related to the virus, her decision had a real and substantial relation to the public health crisis.

[16] Plaintiffs do not challenge the Governor's exercise of authority under either statute, nor whether she needs legislative approval to continue her emergency declaration.

> *Dep't of Treasury*, 312 Mich App 394, 414-415; 878 NW2d 891 (2015). The challenging party must overcome a heavy burden because "[s]tatutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 516; 857 NW2d 529 (2014). When interpreting a statute, our primary goal is to "give effect to the intent of the Legislature." *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621, 628; 765 NW2d 31 (2009). To do so, we examine the plain language of the statute itself, and "[i]f the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). [*In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App at 569.]

As far as the Court can discern, plaintiffs' challenge to the EMA is an as-applied one:

> A constitutional challenge to the validity of a statute can be brought in one of two ways: by either a facial challenge or an as-applied challenge. This is an as-applied challenge, meaning that claimant has alleged " 'a present infringement or denial of a specific right or of a particular injury in process of actual execution' of government action." *Bonner v City of Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014), quoting *Village of Euclid v Ambler Realty Co*, 272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926). "The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative." *Ada v Guam Society of Obstetricians & Gynecologists*, 506 US 1011, 1012; 113 S Ct 633; 121 L Ed 2d 564 (1992) (SCALIA, J., dissenting). See also *United States v Frost*, 125 F3d 346, 370 (CA 6, 1997). [*In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App at 569-570.]

Plaintiffs' challenge to the delegation of power from the Legislature to the executive will likely not succeed. It is certainly true that the Legislature cannot grant some vague, unfettered discretion to the executive to carry out what is a legislative function. But if the challenged legislation contains sufficient guidance to the executive on how to execute the law to further the Legislature's policy, it does not violate the non-delegation doctrine. *City of Ann Arbor v Nat'l Ctr for Mfg Sciences, Inc*, 204 Mich App 303, 308; 514 NW2d 224 (1994) ("[T]he standards must be sufficiently broad to permit efficient administration so that the policy of the Legislature may be complied with, but not so broad as to give uncontrolled and arbitrary power to the administrators.").

As defendants point out, plaintiffs allege in their complaint that the powers granted to the Governor are "limited," and none of the provisions in the act are such that the executive would have "uncontrolled, arbitrary power." *Dep't of Natural Resources v Seaman*, 396 Mich 299, 308; 240 NW2d 206 (1976). The provisions of the EMA are not vague, and contain specific procedures and criteria for the Governor to declare a state of disaster or emergency, and what conditions qualify as a disaster or emergency. See MCL 30.402(e) and (h); MCL 30.403(3) and (4). The EMA also grants the Governor additional, specific duties and powers when addressing any declared disaster or emergency, MCL 30.405, and sets for a comprehensive state and local jurisdictional system to address declared state-wide disasters or emergencies. MCL 30.407-MCL 30.411. As a result, plaintiffs are unable to establish a likelihood of success on the merits on this claim.

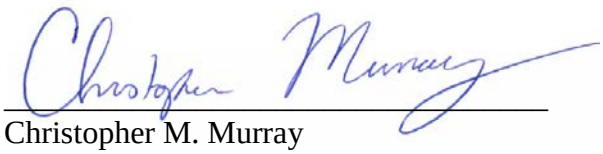
D. HARM TO THE PUBLIC INTEREST

Finally, and for many of the same reasons, the Court concludes that entry of a preliminary injunction would be more detrimental to the public than it would to plaintiffs. Although the Court is painfully aware of the difficulties of living under the restrictions of these executive orders, those difficulties are temporary, while to those who contract the virus and cannot recover (and to their family members and friends), it is all too permanent. That is not to say that every new virus will require the action taken here, but given the authority of the Governor to do so in the face of these circumstances, the Court must conclude issuing injunctive relief would not serve the public interest, despite the temporary harm to plaintiffs' constitutional rights.

VI. CONCLUSION

For these reasons, plaintiffs' motion for a preliminary injunction is DENIED.

Date: April 29, 2020



Christopher M. Murray
Judge, Court of Claims

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, AND JEFFERY GULICK,

Plaintiffs,

v

GRETCHEN WHITMER in her official capacity as Governor of the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, and ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services,

Defendants.

No. 1:20-cv-00414

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Exhibit B

Modes of transmission of virus causing COVID-19: implications for IPC precaution recommendations

Scientific brief

29 March 2020

العربية 中文 Español

This version updates the 27 March publication by providing definitions of droplets by particle size and adding three relevant publications.

Modes of transmission of the COVID-19 virus

Respiratory infections can be transmitted through droplets of different sizes: when the droplet particles are >5-10 μm in diameter they are referred to as respiratory droplets, and when then are <5μm in diameter, they are referred to as droplet nuclei.[1] According to current evidence, COVID-19 virus is primarily transmitted between people through respiratory droplets and contact routes.[2-7] In an analysis of 75,465 COVID-19 cases in China, airborne transmission was not reported.[8]

Droplet transmission occurs when a person is in in close contact (within 1 m) with someone who has respiratory symptoms (e.g., coughing or sneezing) and is therefore at risk of having his/her mucosae (mouth and nose) or conjunctiva (eyes) exposed to potentially infective respiratory droplets. Transmission may also occur through fomites in the immediate environment around the infected person.[8] Therefore,

transmission of the COVID-19 virus can occur by direct contact with infected people and indirect contact with surfaces in the immediate environment or with objects used on the infected person (e.g., stethoscope or thermometer).

Airborne transmission is different from droplet transmission as it refers to the presence of microbes within droplet nuclei, which are generally considered to be particles <5μm in diameter, can remain in the air for long periods of time and be transmitted to others over distances greater than 1 m.

In the context of COVID-19, airborne transmission may be possible in specific circumstances and settings in which procedures or support treatments that generate aerosols are performed; i.e., endotracheal intubation, bronchoscopy, open suctioning, administration of nebulized treatment, manual ventilation before intubation, turning the patient to the prone position, disconnecting the patient from the ventilator, non-invasive positive-pressure ventilation, tracheostomy, and cardiopulmonary resuscitation.

There is some evidence that COVID-19 infection may lead to intestinal infection and be present in faeces. However, to date only one study has cultured the COVID-19 virus from a single stool specimen.[9] There have been no reports of faecal−oral transmission of the COVID-19 virus to date.

Implications of recent findings of detection of COVID-19 virus from air sampling

To date, some scientific publications provide initial evidence on whether the COVID-19 virus can be detected in the air and thus, some news outlets have suggested that there has been airborne transmission. These initial findings need to be interpreted carefully.

A recent publication in the New England Journal of Medicine has evaluated virus persistence of the COVID-19 virus.10 In this experimental study, aerosols were generated using a three-jet Collison nebulizer and fed into a Goldberg drum under controlled laboratory conditions. This is a high-powered machine that does not reflect normal human cough conditions. Further, the finding of COVID-19 virus in aerosol particles up to 3 hours does not reflect a clinical setting in which aerosol-generating procedures are performed—that is, this was an experimentally induced aerosol-generating procedure.

There are reports from settings where symptomatic COVID-19 patients have been admitted and in which

no COVID-19 RNA was detected in air samples.[11-12] WHO is aware of other studies which have evaluated the presence of COVID-19 RNA in air samples, but which are not yet published in peer-reviewed journals. It is important to note that the detection of RNA in environmental samples based on PCR-based assays is not indicative of viable virus that could be transmissible. Further studies are needed to determine whether it is possible to detect COVID-19 virus in air samples from patient rooms where no procedures or support treatments that generate aerosols are ongoing. As evidence emerges, it is important to know whether viable virus is found and what role it may play in transmission.

Conclusions

Based on the available evidence, including the recent publications mentioned above, WHO continues to recommend droplet and contact precautions for those people caring for COVID-19 patients. WHO continues to recommend airborne precautions for circumstances and settings in which aerosol generating procedures and support treatment are performed, according to risk assessment.[13] These recommendations are consistent with other national and international guidelines, including those developed by the European Society of Intensive Care Medicine and Society of Critical Care Medicine[14] and those currently used in Australia, Canada, and United Kingdom.[15-17]

At the same time, other countries and organizations, including the US Centers for Diseases Control and Prevention and the European Centre for Disease Prevention and Control, recommend airborne precautions for any situation involving the care of COVID-19 patients, and consider the use of medical masks as an acceptable option in case of shortages of respirators (N95, FFP2 or FFP3).[18-19]

Current WHO recommendations emphasize the importance of rational and appropriate use of all PPE,[20] not only masks, which requires correct and rigorous behavior from health care workers, particularly in doffing procedures and hand hygiene practices.[21] WHO also recommends staff training on these recommendations,[22] as well as the adequate procurement and availability of the necessary PPE and other supplies and facilities. Finally, WHO continues to emphasize the utmost importance of frequent hand hygiene, respiratory etiquette, and environmental cleaning and disinfection, as well as the importance of maintaining physical distances and avoidance of close, unprotected contact with people with fever or respiratory symptoms.

WHO carefully monitors emerging evidence about this critical topic and will update this scientific brief as more information becomes available.

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WHO continues to monitor the situation closely for any changes that may affect this interim guidance. Should any factors change, WHO will issue a further update. Otherwise, this scientific brief will expire 2 years after the date of publication.

WHO reference number: WHO/2019-nCoV/Sci_Brief/Transmission_modes/2020.2

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Modes of transmission of virus causing COVID-19

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Exhibit C

Coronavirus Disease 2019 (COVID-19)

Keep Your Distance to Slow the Spread

Other Languages Print Page

Limiting face-to-face contact with others is the best way to reduce the spread of coronavirus disease 2019 (COVID-19).

What is social distancing?

Social distancing, also called “physical distancing,” means keeping space between yourself and other people outside of your home. To practice social or physical distancing:

- Stay at least 6 feet (2 meters) from other people
- Do not gather in groups
- Stay out of crowded places and avoid mass gatherings

In addition to everyday steps to prevent COVID-19, keeping space between you and others is one of the best tools we have to avoid being exposed to this virus and slowing its spread locally and across the country and world.

When COVID-19 is spreading in your area, everyone should limit close contact with individuals outside your household in indoor and outdoor spaces. Since people can spread the virus before they know they are sick, it is important to stay away from others when possible, even if you have no symptoms. Social distancing is especially important for people who are at higher risk of getting very sick.

prolonged period. Spread happens when an infected person coughs, sneezes, or talks, and droplets from their mouth or nose are launched into the air and land in the mouths or noses of people nearby. The droplets can also be inhaled into the lungs. Recent studies indicate that people who are infected but do not have symptoms likely also play a role in the spread of COVID-19.

It may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or eyes. However, this is not thought to be the main way the virus spreads. COVID-19 can live for hours or days on a surface, depending on factors such as sun light and humidity. Social distancing helps limit contact with infected people and contaminated surfaces.

Although the risk of severe illness may be different for everyone, anyone can get and spread COVID-19. Everyone has a role to play in slowing the spread and protecting themselves, their family, and their community.

Tips for social distancing

- Follow guidance from authorities where you live.
- If you need to shop for food or medicine at the grocery store or pharmacy, stay at least 6 feet away from others.
    - Use mail-order for medications, if possible.
    - Consider a grocery delivery service.
    - Cover your mouth and nose with a cloth face cover when around others, including when you have to go out in public, for example to the grocery store.
        - Stay at least 6 feet between yourself and others, even when you wear a face covering.
- Avoid large and small gatherings in private places and public spaces, such a friend's house, parks, restaurants, shops, or any other place. This advice applies to people of any age, including teens and younger adults. Children should not have in-person playdates while school is out. To help maintain social connections while social distancing, learn tips to keep children healthy while school's out.
- Work from home when possible.
- If possible, avoid using any kind of public transportation, ridesharing, or taxis.
- If you are a student or parent, talk to your school about options for digital/distance learning.

Stay connected while staying away. It is very important to stay in touch with friends and family that don't live in your home. Call, video chat, or stay connected using social media. Everyone reacts differently to stressful situations and having to socially distance yourself from someone you love can be difficult. Read tips for stress and coping.

What is the difference between quarantine and isolation?

Quarantine

Quarantine is used to keep someone who might have been exposed to COVID-19 away from others. Someone in self-quarantine stays separated from others, and they limit movement outside of their home or current place. A person may have been exposed to the virus without knowing it (for example, when traveling or out in the community), or they could have the virus without feeling symptoms. Quarantine helps limit further spread of COVID-19.

Isolation

Isolation is used to separate sick people from healthy people. People who are in isolation should stay home. In the home, anyone sick should separate themselves from others by staying in a specific "sick" bedroom or space and using a different bathroom (if possible).

What should I do if I might have been exposed? If I feel sick? Or have confirmed COVID-19?

If you think you have been exposed to COVID-19, read about symptoms.

If you or someone in your home might have been exposed

Self-Monitor

Be alert for symptoms. Watch for fever,* cough, or shortness of breath.

- Take your temperature if symptoms develop.

- Practice social distancing. Maintain 6 feet of distance from others, and stay out of crowded places.
- Follow CDC guidance if symptoms develop.

If you feel healthy but:

- Recently had close contact with a person with COVID-19, or
- Recently traveled from somewhere outside the U.S. or on a cruise ship or river boat

Self-Quarantine

- Check your temperature twice a day and watch for symptoms.
- Stay home for 14 days and self-monitor.
- If possible, stay away from people who are high-risk for getting very sick from COVID-19.

If you:

- Have been diagnosed with COVID-19, or
- Are waiting for test results, or
- Have symptoms such as cough, fever, or shortness of breath

Self-Isolate

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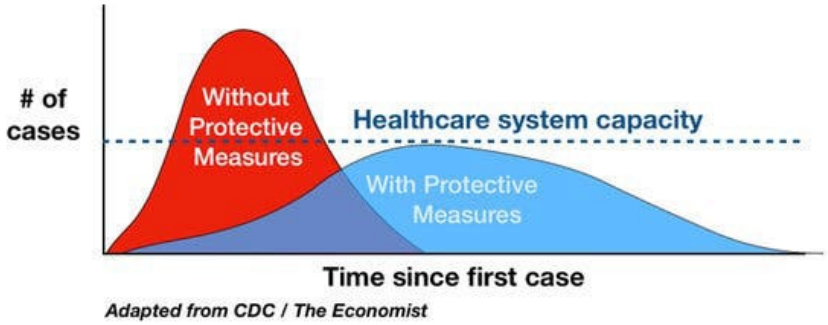
Exhibit D

Flattening the Coronavirus Curve

One chart explains why slowing the spread of the infection is nearly as important as stopping it.



The longer it takes for coronavirus to spread the population, the more time hospitals have to prepare. Drew Harris

By Siobhan Roberts

March 27, 2020

At the end of February, Drew Harris, a population health analyst at Thomas Jefferson University in Philadelphia, had just flown across the country to visit his daughter in Eugene, Ore., when he saw an article on his Google news feed. It was from The Economist, and was about limiting the damage of the coronavirus.

The accompanying art, by the visual-data journalist Rosamund Pearce, based on a graphic that had appeared in a C.D.C. paper titled "Community Mitigation Guidelines to Prevent Pandemic Influenza," showed what Dr. Harris called two epi curves. One had a steep peak indicating a surge of coronavirus outbreak in the near term; the other had a flatter slope, indicating a more gradual rate of infection over a longer period of time.

The gentler curve results in fewer people infected at this critical moment in time — preventing a surge that would inundate the healthcare system and ultimately, one hopes, resulting in fewer deaths. "What we need to do is flatten that down," said Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, during the coronavirus task force briefing at the White House on a Tuesday evening in early March. "You do that with trying to interfere with the natural flow of the outbreak."

The infographic reminded Dr. Harris of something similar that he had designed years earlier for a pandemic preparedness training program. "Folks in the preparedness and public health community have been

thinking about all of these issues for many years," Dr. Harris said in an email. "Understanding and managing surge is an important part of preparedness." But during the training course, Dr. Harris's students had struggled with the concept of reducing the epidemic curve, so he added a dotted line indicating hospital capacity — "to make clear what was at stake," he said.

After his visit with his daughter, Dr. Harris was waiting for his return flight in Portland when the first Oregon coronavirus case was announced; he had dinner at a busy airport bar and thought about how quiet the place would be in a week or two when the reality of the outbreak set in. Once home, he recreated his graphic and posted it on Twitter and LinkedIn, and was pleased to see the enthusiastic interest in flattening the curve.

"Now I know what going viral means," Dr. Harris said. (For a more detailed analysis, see a recent paper in The Lancet, "How will country-based mitigation measures influence the course of the COVID-19 epidemic?")

The following is an edited version of our email conversation.

What does it mean to “flatten the curve”?

The ideal goal in fighting an epidemic or pandemic is to completely halt the spread. But merely slowing it — mitigation — is critical. This reduces the number of cases that are active at any given time, which in turn gives doctors, hospitals, police, schools and vaccine-manufacturers time to prepare and respond, without becoming overwhelmed. Most hospitals can function with 10 percent reduction in staff, but not with half their people out at once.

Some commentators have argued for getting the outbreak over with quickly. That is a recipe for panic, unnecessary suffering and death. Slowing and spreading out the tidal wave of cases will save lives. Flattening the curve keeps society going.

What exactly do those two curves show?

Both curves add up the number of new cases over time. The more people reporting with the virus on a given day, the higher the curve; a high curve means the virus is spreading fast. A low curve shows that the virus is spreading slower — fewer people are diagnosed with the disease on any given day. Keeping the curve down — diminishing the rate at which new cases occur — prevents overtaxing the finite resources (represented by the dotted line) available to treat it.

Think of the health care system capacity as a subway car that can only hold so many people at once. During rush hour, that capacity is not enough to handle the demand, so people must wait on the platform for their turn to ride. Staggering work hours diminishes the rush hour and increases the likelihood that you will get on the train and maybe even get a seat. Avoiding a surge of coronavirus cases can ensure that anyone who needs care will find it at the hospital.

What sorts of mitigation measures help transform the red curve into the blue curve?

Diseases spread when one person gives it to one or more others, who go on to give it to more people, and so on. How fast this occurs depends on many factors, including how contagious the disease is, how many people are vulnerable and how quickly they get sick.

The difference between seasonal flu and coronavirus is that many people have full or partial immunity to the flu virus because they have had it before or were vaccinated against it. Far more people are vulnerable to coronavirus, so it has many more targets of opportunity to spread. Keeping people apart in time and space with social distancing measures, self-isolation and actual quarantine decreases opportunities for transmission.

To take the subway example again, a packed car — or a packed subway platform — is a great place to spread the virus. But reducing the number of people on the train or platform, by asking people to work from home or to stagger their working hours, enables individuals to stay farther apart, limiting the spread of the virus. That is social distancing in action.

Mitigation efforts keep people farther apart, making every transmission opportunity marginally less likely. This slows the spread. We should, and will, take the most vulnerable people out of the population altogether by keeping them totally separate. This is what Washington State is trying to do by limiting visitors to nursing homes. Think of this as a reverse quarantine.

What are you doing day-to-day in response to these unusual times?

Like most everyone else, I'm more aware of my surroundings and behaviors. I try to use a sleeve or elbow to open doors, and I wash my hands or use hand sanitizers after I touch a surface that might be contaminated. And I made sure to have a good supply of my prescription and nonprescription medications, just in case any shortages occur after the shutdown of Chinese pharmaceutical suppliers. I'm following the lead of my public health officials here in Philadelphia, where there is only one case as of Tuesday, and travel isn't restricted. I'm avoiding crowds and sick people. I am going out, and will continue to do so unless a quarantine is ordered or public places are closed.

I know there is a good chance that I will catch the virus before a vaccine becomes available, but I also believe I'm very likely to do fine. I'm not in any high-risk group. But I worry about the more vulnerable folks and want

to do what I can to prevent the spread. I also worry about people who lack the resources I have. What happens to the self-employed, hourly workers and people in the gig economy when business stops? What about the homeless who depend upon charity and services for support? It's these second-order effects that could be just as devastating if this epidemic really takes off.

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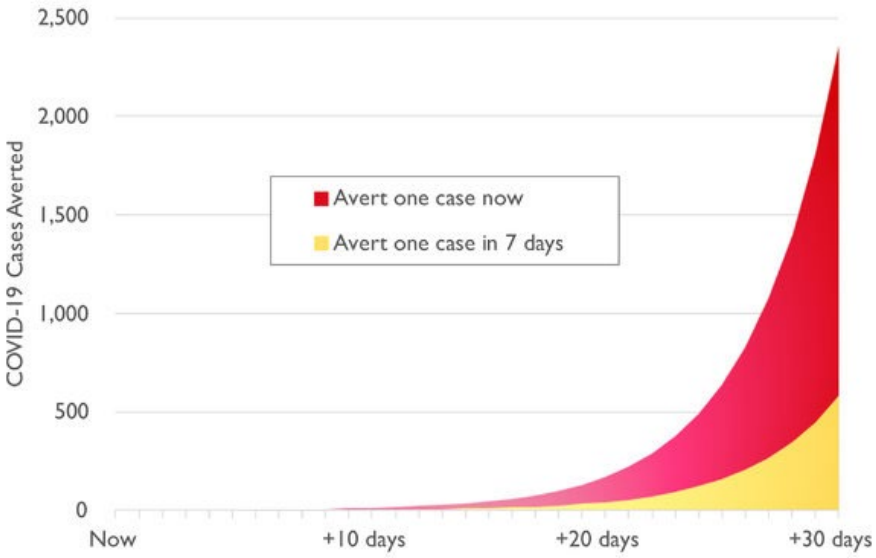
Coronavirus and statistics
The Exponential Power of Now
March 13, 2020



The Coronavirus, by the Numbers
March 5, 2020

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GRETCHEN WHITMER in her official capacity as Governor of the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, and ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services,

Defendants.

No. 1:20-cv-00414

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

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Exhibit E

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-4

Declaration of State of Emergency

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus that had not been previously identified in humans and can easily spread from person to person.

COVID-19 has been identified as the cause of an outbreak of respiratory illness first detected in Wuhan City in the Hubei Province of China. Person-to-person spread of the virus has occurred in the United States, with some of those occurring in people with no travel history and no known source of exposure. On January 31, 2020, the United States Department of Health and Human Services Secretary Alex Azar declared a public health emergency for COVID-19, and affected state and local governments have also declared states of emergency.

The State of Michigan has been taking proactive steps to prevent and prepare for the spread of this disease. On February 3, 2020, the Michigan Department of Health and Human Services (MDHHS) activated the Community Health Emergency Coordination Center, and has been working diligently with local health departments, health systems, and medical providers throughout Michigan to make sure appropriate screening and preparations for COVID-19 are being made. On February 28, 2020, I activated the State Emergency Operations Center to maximize coordination with state, local and federal agencies, as well as private partners, and to help prevent the spread of the disease. On March 3, 2020, I created four task forces comprising key state government agencies to coordinate the state's response and work closely with the appropriate community and non-governmental stakeholders to combat the spread of COVID-19 and assess the impact it may have on Michiganders' day-to-day lives. And throughout this time, the State has been working with schools, businesses, medical providers, local health departments, and residents to make sure they have the information they need to prepare for potential cases.

On March 10, 2020, MDHHS identified the first two presumptive-positive cases of COVID-19 in Michigan.

Section 1 of article 5 of the Michigan Constitution of 1963 vests the executive power of the State of Michigan in the governor.

The Emergency Management Act, 1976 PA 390, as amended, MCL 30.403(4), provides that "[t]he governor shall, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists."

The Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31(1), provides that "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, . . . the governor may proclaim a state of emergency and designate the area involved."

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. A state of emergency is declared across the State of Michigan.

2. The Emergency Management and Homeland Security Division of the Department of State Police must coordinate and maximize all state efforts that may be activated to state service to assist local governments and officials and may call upon all state departments to utilize available resources to assist.

3. The state of emergency is terminated when emergency conditions no longer exist and appropriate programs have been implemented to recover from any effects of the emergency conditions, consistent with the legal authorities upon which this declaration is based and any limits on duration imposed by those authorities.

Given under my hand and the Great Seal of the State of Michigan.

Date: March 10, 2020

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

FILED WITH SECRETARY OF STATE
ON 3/10/2020 AT 11:30pm

SECRETARY OF SENATE
2020 MAR 11 AM 9:02

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, AND JEFFERY GULICK,

Plaintiffs,

v

GRETCHEN WHITMER in her official capacity as Governor of the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, and ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services,

Defendants.

No. 1:20-cv-00414

HON. PAUL L. MALONEY

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Exhibit F

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-5

Temporary prohibition on large assemblages and events, temporary school closures

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945, provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To mitigate the spread of COVID-19 and to provide essential protections to vulnerable Michiganders and this state's health care system and other critical infrastructure, it is reasonable and necessary to impose limited and temporary restrictions on large events and assemblages of people.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. Beginning on March 13, 2020 at 5:00 pm, and continuing through April 5, 2020 at 5:00 pm, all assemblages of more than 250 people in a single shared space and all events of more than 250 people are prohibited in this state, except for assemblages for the purpose of: industrial or manufacturing work; mass transit; or the purchase

of groceries or consumer goods. A single shared space includes but is not limited to a room, hall, cafeteria, auditorium, theater, or gallery. This prohibition does not abridge protections guaranteed by the state or federal constitution under these emergency circumstances.

2. Beginning on March 16, 2020, all elementary school buildings and secondary school buildings in this state must close to students for educational purposes through April 5, 2020. This requirement includes all public, nonpublic, and boarding schools in the state. This requirement does not apply to residential facilities at schools and childcare providers at schools.

3. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order shall constitute a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

Date: March 13, 2020

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

SECRETARY OF SENATE
2020 MAR 13 AM 11:43

FILED WITH SECRETARY OF STATE
ON 3/13/20 AT 11:14 A.M.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, AND JEFFERY GULICK,

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No. 1:20-cv-00414

HON. PAUL L. MALONEY

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Exhibit G

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-9

Temporary restrictions on the use of places of public accommodation

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945, provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To mitigate the spread of COVID-19, protect the public health, and provide essential protections to vulnerable Michiganders, it is reasonable and necessary to impose limited and temporary restrictions on the use of places of public accommodation.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. Beginning as soon as possible but no later than March 16, 2020 at 3:00 pm, and continuing until March 30, 2020 at 11:59 pm, the following places of public accommodation are closed to ingress, egress, use, and occupancy by members of the public:

   (a) Restaurants, food courts, cafes, coffeehouses, and other places of public accommodation offering food or beverage for on-premises consumption;

(b) Bars, taverns, brew pubs, breweries, microbreweries, distilleries, wineries, tasting rooms, special licensees, clubs, and other places of public accommodation offering alcoholic beverages for on-premises consumption;

(c) Hookah bars, cigar bars, and vaping lounges offering their products for on-premises consumption;

(d) Theaters, cinemas, and indoor and outdoor performance venues;

(e) Libraries and museums;

(f) Gymnasiums, fitness centers, recreation centers, indoor sports facilities, indoor exercise facilities, exercise studios, and spas;

(g) Casinos licensed by the Michigan Gaming Control Board, racetracks licensed by the Michigan Gaming Control Board, and Millionaire Parties licensed by the Michigan Gaming Control Board; and

(h) Places of public amusement not otherwise listed above.

Places of public accommodation subject to this section are encouraged to offer food and beverage using delivery service, window service, walk-up service, drive-through service, or drive-up service, and to use precautions in doing so to mitigate the potential transmission of COVID-19, including social distancing. In offering food or beverage, a place of public accommodation subject to this section may permit up to five members of the public at one time in the place of public accommodation for the purpose of picking up their food or beverage orders, so long as those individuals are at least six feet apart from one another while on premises.

This section does not prohibit an employee, contractor, vendor, or supplier of a place of public accommodation from entering, exiting, using, or occupying that place of public accommodation in their professional capacity.

2. The restrictions imposed by this order do not apply to any of the following:

(a) Places of public accommodation that offer food and beverage not for on-premises consumption, including grocery stores, markets, convenience stores, pharmacies, drug stores, and food pantries, other than those portions of the place of public accommodation subject to the requirements of section 1;

(b) Health care facilities, residential care facilities, congregate care facilities, and juvenile justice facilities;

(c) Crisis shelters or similar institutions; and

(d) Food courts inside the secured zones of airports.

3. For purposes of this order:

(a) "Place of public accommodation" means a business, or an educational, refreshment, entertainment, or recreation facility, or an institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public. Place of public accommodation also includes the facilities of private clubs, including country clubs, golf clubs, boating or yachting clubs, sports or athletic clubs, and dining clubs.

(b) "Place of public amusement" means a place of public accommodation that offers indoor services or facilities, or outdoor services or facilities involving close contact of persons, for amusement or other recreational or entertainment purposes. A place of public amusement includes an amusement park, arcade, bingo hall, bowling alley, indoor climbing facility, skating rink, trampoline park, and other similar recreational or entertainment facilities.

4. The director of the Department of Health and Human Services, the Michigan Liquor Control Commission, and the executive director of the Michigan Gaming Control Board must issue orders and directives and take other actions pursuant to law as necessary to implement this order.

5. This order does not alter any of the obligations under law of an employer affected by this order to its employees or to the employees of another employer.

6. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

Gretchen Whitmer

Date: March 16, 2020

GRETCHEN WHITMER
GOVERNOR

By the Governor:

Jocelyn Benson

SECRETARY OF STATE

SECRETARY OF SE
2020 MAR 16 PM1:38

SECRETARY OF SENATE
2020 MAR 16 PM1:38

FILED WITH SECRETARY OF STATE
ON 3/16/20 AT 1:10 P.M.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, AND JEFFERY GULICK,

Plaintiffs,

v

GRETCHEN WHITMER in her official capacity as Governor of the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, and ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services,

Defendants.

No. 1:20-cv-00414

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Exhibit H

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-11

Temporary prohibition on large assemblages and events, temporary school closures

Rescission of Executive Order 2020-5

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945, provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To mitigate the spread of COVID-19 and to provide essential protections to vulnerable Michiganders and this state's health care system and other critical infrastructure, it is reasonable and necessary to impose limited and temporary restrictions on large events and assemblages of people.

Executive Order 2020-5 imposed such restrictions. This order changes the temporary restrictions imposed on events and assemblages by Executive Order 2020-5, in light of the most recent guidance from the Centers for Disease Control and Prevention. This order does not change the scope of temporary restrictions imposed by Executive Order 2020-5 as to the closure of elementary school buildings and secondary school buildings. When the new restrictions set forth in this order take effect, Executive Order 2020-5 is rescinded.

While this order continues to permit certain assemblages and events, these assemblages and events should only occur as necessary and in adherence with the measures needed to mitigate the potential transmission of COVID-19, including social distancing, proper hand hygiene and respiratory etiquette, and using electronic communication platforms in lieu of in-person interaction as feasible.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. Beginning on March 17, 2020 at 9:00 am, and continuing through April 5, 2020 at 5:00 pm, all assemblages of more than 50 people in a single indoor shared space and all events of more than 50 people are prohibited in this state. A single indoor shared space includes but is not limited to a room, hall, cafeteria, auditorium, theater, or gallery. The prohibition on assemblages set forth in this section does not apply to:

   (a) health care facilities;

   (b) workplaces or portions thereof not open to the public;

   (c) the state legislature; and

   (d) assemblages for the purpose of mass transit, the purchase of groceries or consumer goods, or the performance of agricultural or construction work.

   The prohibition set forth in this section does not abridge protections guaranteed by the state or federal constitution under these emergency circumstances.

2. Beginning on March 16, 2020, all elementary school buildings and secondary school buildings in this state must close to students for educational purposes through April 5, 2020. This requirement includes all public, nonpublic, and boarding schools in the state. This requirement does not apply to residential facilities at schools and childcare providers at schools.

3. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order shall constitute a misdemeanor.

4. On March 17, 2020 at 9:00 am, Executive Order 2020-5 is rescinded.

Given under my hand and the Great Seal of the State of Michigan.

Date: March 16, 2020

Time: 6:07 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

SECRETARY OF SENATE
2020 MAR 17 AM10:47

FILED WITH SECRETARY OF STATE
ON 3/17/20 AT 10:22 A.M.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, AND JEFFERY GULICK,

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Defendants.

No. 1:20-cv-00414

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Exhibit I

Executive Order 2020-17 (COVID-19)

EXECUTIVE ORDER

No. 2020-17

Temporary restrictions on non-essential medical and dental procedures

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.

The Emergency Management Act vests the governor with broad powers and duties to "cope with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945 provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To mitigate the spread of COVID-19, protect the public health, provide essential protections to vulnerable Michiganders, and ensure the availability of health care resources, it is reasonable and necessary to impose temporary restrictions on non-essential medical and dental procedures.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. Beginning as soon as possible but no later than March 21, 2020 at 5:00 pm, and continuing while the state of emergency declared in Executive 2020-4 is in effect, all hospitals, freestanding surgical outpatient facilities, and dental facilities, and all state-operated outpatient facilities (collectively, "covered facilities"), must implement a plan to temporarily postpone, until the termination of the state of emergency under section 3 of Executive Order 2020-4, all non-essential procedures ("non-essential procedure postponement plan" or "plan"). For purposes of this order, "non-essential procedure" means a medical or dental procedure that is not necessary to address a medical emergency or to preserve the health and safety of a patient, as determined by a licensed medical provider.

2. A plan for a covered facility that performs medical procedures, including any medical center or office that performs elective surgery or cosmetic plastic surgery, must postpone, at a minimum, joint replacement, bariatric surgery, and cosmetic surgery, except for emergency or trauma-related surgery where postponement would significantly impact the health, safety, and welfare of the patient. A plan for a covered facility that performs medical procedures should exclude from postponement: surgeries related to advanced cardiovascular disease (including coronary artery disease, heart failure, and arrhythmias) that would prolong life; oncological testing, treatment, and related procedures; pregnancy-related visits and procedures; labor and delivery; organ transplantation; and procedures related to dialysis. A plan for a covered facility that performs medical procedures must exclude from postponement emergency or trauma-related procedures where postponement would significantly impact the health, safety, and welfare of the patient.

3. A plan for a covered facility that performs dental procedures must postpone, at a minimum: any cosmetic or aesthetic procedures (such as veneers, teeth bleaching, or cosmetic bonding); any routine hygiene appointments; any orthodontic procedures that do not relieve pain or infection, do not restore oral function, or are not trauma-related; initiation of any crowns, bridges, or dentures that do not relieve pain or infection, do not restore oral function, or are not trauma-related; any periodontal plastic surgery; any extractions of asymptomatic non-carious teeth; and any recall visits for periodontally healthy patients. If a covered facility that performs dental procedures chooses to remain

open, its plan must exclude from postponement emergency or trauma-related procedures where postponement would significantly impact the health, safety, and welfare of the patient.

4. A covered facility must comply with the restrictions contained in its non-essential procedure postponement plan.

5. **This order does not alter any of the obligations under law of an affected health care facility to its employees or to the employees of another employer.**

6. The director of the Department of Licensing and Regulatory Affairs shall issue orders or directives pursuant to law as necessary to enforce this order.

7. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, AND JEFFERY GULICK,

Plaintiffs,

v

GRETCHEN WHITMER in her official capacity as Governor of the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, and ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services,

Defendants.

No. 1:20-cv-00414

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_____/

Exhibit J

Executive Order 2020-96 (COVID-19)

EXECUTIVE ORDER

No. 2020-96

Temporary requirement to suspend certain activities that are not necessary to sustain or protect life

Rescission of Executive Orders 2020-17, 2020-34, and 2020-92

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the State of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And on April 30, 2020, finding that COVID-19 had created emergency and disaster conditions across the State of Michigan, I issued Executive Order 2020-67 to continue the emergency declaration under the Emergency Powers of the Governor Act, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the Emergency Management Act.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the

Governor Act of 1945 provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. In Executive Orders 2020-42, 2020-59, 2020-70, 2020-77, and 2020-92, I extended that initial order, modifying its scope as needed and appropriate to match the ever-changing circumstances presented by this pandemic.

The measures put in place by these executive orders have been effective: the number of new confirmed cases each day has started to drop. Although the virus remains aggressive and persistent—on May 20, 2020, Michigan reported 53,009 confirmed cases and 5,060 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We can now start the process of gradually resuming in-person work and activities that were temporarily suspended under my prior orders. In so doing, however, we must move with care, patience, and vigilance, recognizing the grave harm that this virus continues to inflict on our state and how quickly our progress in suppressing it can be undone.

With this order, I find it reasonable and necessary to reaffirm the measures set forth in Executive Order 2020-92, while also allowing gatherings of no more than ten people statewide, effective immediately, and permitting retailers and motor vehicle dealerships to see customers by appointment, beginning on May 26, 2020. In addition, because our health-care capacity has improved with respect to personal protective equipment, available beds, personnel, ventilators, and necessary supplies, I find it reasonable to rescind Executive Orders 2020-17 and 2020-34, which required health-care and veterinary facilities to implement plans to postpone some medical and dental procedures. Those rescissions will take effect on May 29.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

I. This order must be construed broadly to prohibit in-person work that is not necessary to sustain or protect life.
II. For purposes of this order, Michigan comprises eight separate regions:
    a. Region 1 includes the following counties: Monroe, Washtenaw, Livingston, Genesee, Lapeer, Saint Clair, Oakland, Macomb, and Wayne.
    b. Region 2 includes the following counties: Mason, Lake, Osceola, Clare, Oceana, Newaygo, Mecosta, Isabella, Muskegon, Montcalm, Ottawa, Kent, and Ionia.
    c. Region 3 includes the following counties: Allegan, Barry, Van Buren, Kalamazoo, Calhoun, Berrien, Cass, Saint Joseph, and Branch.

d. Region 4 includes the following counties: Oscoda, Alcona, Ogemaw, Iosco, Gladwin, Arenac, Midland, Bay, Saginaw, Tuscola, Sanilac, and Huron.
e. Region 5 includes the following counties: Gratiot, Clinton, Shiawassee, Eaton, and Ingham.
f. Region 6 includes the following counties: Manistee, Wexford, Missaukee, Roscommon, Benzie, Grand Traverse, Kalkaska, Crawford, Leelanau, Antrim, Otsego, Montmorency, Alpena, Charlevoix, Cheboygan, Presque Isle, and Emmet.
g. Region 7 includes the following counties: Hillsdale, Lenawee, and Jackson.
h. Region 8 includes the following counties: Gogebic, Ontonagon, Houghton, Keweenaw, Iron, Baraga, Dickinson, Marquette, Menominee, Delta, Alger, Schoolcraft, Luce, Mackinac, and Chippewa.

III. Subject to the exceptions in section 8 of this order, all individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence. Subject to the same exceptions, all public and private gatherings of any number of people occurring among persons not part of a single household are prohibited.

IV. All individuals who leave their home or place of residence must adhere to social distancing measures recommended by the Centers for Disease Control and Prevention ("CDC"), including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.

V. No person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life, to conduct minimum basic operations, or to perform a resumed activity within the meaning of this order.

a. For purposes of this order, workers who are necessary to sustain or protect life are defined as "critical infrastructure workers," as described in sections 9 and 10 of this order.
b. For purposes of this order, workers who are necessary to conduct minimum basic operations are those whose in-person presence is strictly necessary to allow the business or operation to maintain the value of inventory and equipment, care for animals, ensure security, process transactions (including payroll and employee benefits), or facilitate the ability of other workers to work remotely.
Businesses and operations must determine which of their workers are necessary to conduct minimum basic operations and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Workers need not carry copies of their designations when they leave the home or place of residence for work.
Any in-person work necessary to conduct minimum basic operations must be performed consistently with the social distancing practices and other mitigation measures described in Executive Order 2020-97 and any orders that may follow from it.
c. Workers who perform resumed activities are defined in section 11 of this order.

VI. Businesses and operations that employ critical infrastructure workers or workers who perform resumed activities may continue in-person operations, subject to the following

conditions:

a. Consistent with sections 9, 10, and 11 of this order, businesses and operations must determine which of their workers are critical infrastructure workers or workers who perform resumed activities and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Workers need not carry copies of their designations when they leave the home or place of residence for work. Businesses and operations need not designate:
    1. Workers in health care and public health.
    2. Workers who perform necessary government activities, as described in section 7 of this order.
    3. Workers and volunteers described in section 10(d) of this order.
b. In-person activities that are not necessary to sustain or protect life or to perform a resumed activity must be suspended.
c. Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons, as described in Executive Order 2020-97 and any orders that may follow from it.
d. Any business or operation that employs workers who perform resumed activities under section 11(a) of this order, but that does not sell necessary supplies, may sell any goods through remote sales via delivery or at the curbside. Such a business or operation, however, must otherwise remain closed to the public.

VII. All in-person government activities at whatever level (state, county, or local) are suspended unless:

a. They are performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders, as defined in sections 9 and 10 of this order.
b. They are performed by workers who are permitted to resume work under section 11 of this order.
c. They are necessary to support the activities of workers described in sections 9, 10, and 11 of this order, or to enable transactions that support businesses or operations that employ such workers.
d. They involve public transit, trash pick-up and disposal (including recycling and composting), the management and oversight of elections, and the maintenance of safe and sanitary public parks so as to allow for outdoor activity permitted under this order.
e. For purposes of this order, necessary government activities include minimum basic operations, as described in 5(b) of this order. Workers performing such activities need not be designated.
f. Any in-person government activities must be performed consistently with the social distancing practices and other mitigation measures to protect workers and patrons described in Executive Order 2020-97 and any orders that may follow from it.

VIII. Exceptions.

a. Individuals may leave their home or place of residence, and travel as necessary:

1. To engage in outdoor recreational activity, consistent with remaining at least six feet from people from outside the individual's household. Outdoor recreational activity includes walking, hiking, running, cycling, boating, golfing, or other similar activity, as well as any comparable activity for those with limited mobility.
2. To perform their jobs as critical infrastructure workers after being so designated by their employers. (Critical infrastructure workers who need not be designated under section 6(a) of this order may leave their home for work without being designated.)
3. To conduct minimum basic operations, as described in section 5(b) of this order, after being designated to perform such work by their employers.
4. To perform resumed activities, as described in section 11 of this order, after being designated to perform such work by their employers.
5. To perform necessary government activities, as described in section 7 of this order.
6. To perform tasks that are necessary to their health and safety, or to the health and safety of their family or household members (including pets). Individuals may, for example, leave the home or place of residence to secure medication or to seek medical or dental care for themselves or a household or family member.
7. To obtain necessary services or supplies for themselves, their family or household members, their pets, and their motor vehicles.
    A. Individuals must secure such services or supplies via delivery to the maximum extent possible. As needed, however, individuals may leave the home or place of residence to purchase groceries, take-out food, gasoline, needed medical supplies, and any other products necessary to maintain the safety, sanitation, and basic operation of their residences or motor vehicles.
    B. Individuals may also leave the home to pick up or return a motor vehicle as permitted under section 10(i) of this order, or to go to a motor vehicle dealership showroom by appointment, as permitted under section 11(p) of this order.
    C. Individuals may leave the home to have a bicycle repaired or maintained.
    D. Individuals should limit, to the maximum extent that is safe and feasible, the number of household members who leave the home for any errands.
8. To pick up non-necessary supplies at the curbside from a store that must otherwise remain closed to the public.
9. To care for a family member or a family member's pet in another household.
10. To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons.
11. To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted.
12. To visit a child in out-of-home care, or to facilitate a visit between a parent and a child in out-of-home care, when there is agreement between the child placing

agency, the parent, and the caregiver about a safe visitation plan, or when, failing such agreement, the individual secures an exception from the executive director of the Children's Services Agency.

13. To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court.
14. To work or volunteer for businesses or operations (including both religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.
15. To attend a funeral, provided that no more than 10 people are in attendance.
16. To attend a meeting of an addiction recovery mutual aid society, provided that no more than 10 people are in attendance.
17. To view a real-estate listing by appointment, as permitted under section 11(g) of this order.
18. To participate in training, credentialing, or licensing activities permitted under section 11(i) of this order.
19. For individuals in Regions 6 or 8, to go to a restaurant or a retail store.
20. To go to a retail store by appointment, as permitted under section 11(q) of this order.
21. To attend a social gathering of no more than 10 people.

b. Individuals may also travel:
    1. To return to a home or place of residence from outside this state.
    2. To leave this state for a home or residence elsewhere.
    3. Between two residences in this state, including moving to a new residence.
    4. As required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.
c. All other travel is prohibited, including all travel to vacation rentals.

IX. For purposes of this order, critical infrastructure workers are those workers described by the Director of the U.S. Cybersecurity and Infrastructure Security Agency in his guidance of March 19, 2020 on the COVID-19 response (available **here**). This order does *not* adopt any subsequent guidance document released by this same agency.

Consistent with the March 19, 2020 guidance document, critical infrastructure workers include some workers in each of the following sectors:

a. Health care and public health.
b. Law enforcement, public safety, and first responders.
c. Food and agriculture.
d. Energy.
e. Water and wastewater.
f. Transportation and logistics.
g. Public works.
h. Communications and information technology, including news media.
i. Other community-based government operations and essential functions.
j. Critical manufacturing.

k. Hazardous materials.
l. Financial services.
m. Chemical supply chains and safety.
n. Defense industrial base.

X. For purposes of this order, critical infrastructure workers also include:

a. Child care workers (including workers at disaster relief child care centers), but only to the extent necessary to serve the children or dependents of critical infrastructure workers, workers who conduct minimum basic operations, workers who perform necessary government activities, or workers who perform resumed activities. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of such workers.
b. Workers at suppliers, distribution centers, or service providers, as described below.
    1. Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate another business's or operation's critical infrastructure work may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
    2. Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the necessary work of suppliers, distribution centers, or service providers described in sub-provision (1) of this subsection may designate their workers as critical infrastructure workers provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
    3. Consistent with the scope of work permitted under sub-provision (2) of this subsection, any suppliers, distribution centers, or service providers further down the supply chain whose continued operation is necessary to enable, support, or facilitate the necessary work of other suppliers, distribution centers, or service providers may likewise designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
    4. Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection shall be subject to sanctions to the fullest extent of the law.
c. Workers in the insurance industry, but only to the extent that their work cannot be done by telephone or remotely.
d. Workers and volunteers for businesses or operations (including both religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.
e. Workers who perform critical labor union functions, including those who administer health and welfare funds and those who monitor the well-being and safety of union

members who are critical infrastructure workers, provided that any administration or monitoring should be done by telephone or remotely where possible.

f. Workers at retail stores who sell groceries, medical supplies, and products necessary to maintain the safety, sanitation, and basic operation of residences or motor vehicles, including convenience stores, pet supply stores, auto supplies and repair stores, hardware and home maintenance stores, and home appliance retailers.
g. Workers at laundromats, coin laundries, and dry cleaners.
h. Workers at hotels and motels, provided that the hotels or motels do not offer additional in-house amenities such as gyms, pools, spas, dining, entertainment facilities, meeting rooms, or like facilities.
i. Workers at motor vehicle dealerships who are necessary to facilitate remote and electronic sales or leases, or to deliver motor vehicles to customers, provided that showrooms remain closed to in-person traffic until May 26, 2020 at 12:01 am.

XI. For purposes of this order, workers who perform resumed activities are defined as follows:

a. Workers who process or fulfill remote orders for goods for delivery or curbside pick-up.
b. Workers who perform bicycle maintenance or repair.
c. Workers for garden stores, nurseries, and lawn care, pest control, and landscaping operations.
d. Workers for moving or storage operations.
e. Workers who perform work that is traditionally and primarily performed outdoors, including but not limited to forestry workers, outdoor power equipment technicians, parking enforcement workers, and outdoor workers at places of outdoor recreation not otherwise closed under Executive Order 2020-69 or any order that may follow from it.
f. Workers in the construction industry, including workers in the building trades (plumbers, electricians, HVAC technicians, and similar workers).
g. Workers in the real-estate industry, including agents, appraisers, brokers, inspectors, surveyors, and registers of deeds, provided that:
    1. Any showings, inspections, appraisals, photography or videography, or final walk-throughs must be performed by appointment and must be limited to no more than four people on the premises at any one time. No in-person open houses are permitted.
    2. Private showings may only be arranged for owner-occupied homes, vacant homes, vacant land, commercial property, and industrial property.
h. Workers necessary to the manufacture of goods that support workplace modification to forestall the spread of COVID-19 infections.
i. Workers necessary to train, credential, and license first responders (e.g., police officers, fire fighters, paramedics) and health-care workers, including certified nursing assistants, provided that as much instruction as possible is provided remotely.
j. Workers necessary to perform manufacturing activities. Manufacturing work may not commence under this subsection until the facility at which the work will be

performed has been prepared to follow the workplace safeguards described in section 4 of Executive Order 2020-97 and any orders that may follow from it.

k. Workers necessary to conduct research activities in a laboratory setting.

l. For Regions 6 and 8, beginning at 12:01 am on May 22, 2020, workers necessary to perform retail activities. For purposes of this order, retail activities are defined:
    1. As the selling of goods and the rendering of services incidental to the sale of the goods (e.g., any packaging and processing to allow for or facilitate the sale and delivery of the goods).
    2. To exclude those places of public accommodation that are closed under Executive Order 2020-69 and any orders that may follow from it.

m. For Regions 6 and 8, beginning at 12:01 am on May 22, 2020, workers who work in an office setting, but only to the extent that such work is not capable of being performed remotely.

n. For Regions 6 and 8, beginning at 12:01 am on May 22, 2020, workers in restaurants or bars, subject to the capacity constraints and workplace standards described in Executive Order 2020-97. Nothing in this subsection should be taken to abridge or otherwise modify the existing power of a local government to impose further restrictions on restaurants or bars. For restaurants and bars subject to this subsection, this subsection supersedes the limitations placed on those restaurants and bars by Executive Order 2020-69 and any order that may follow from it.

o. Workers necessary to prepare a workplace to follow the workplace standards described in Executive Order 2020-97 and to otherwise ready the workplace for reopening.

p. Beginning at 12:01 am on May 26, 2020, workers at motor vehicle dealerships, provided that showrooms are open only by appointment.

q. Beginning at 12:01 am on May 26, 2020, workers necessary to perform retail activities by appointment, provided that the store is limited to 10 customers at any one time. For purposes of this order, retail activities are defined:
    1. As the selling of goods and the rendering of services incidental to the sale of the goods (e.g., any packaging and processing to allow for or facilitate the sale and delivery of the goods).
    2. To exclude those places of public accommodation that are closed under Executive Order 2020-69 and any orders that may follow from it.

r. Consistent with section 10(b) of this order, workers at suppliers, distribution centers, or service providers whose in-person presence is necessary to enable, support, or facilitate another business's or operation's resumed activities, including workers at suppliers, distribution centers, or service providers along the supply chain whose in-person presence is necessary to enable, support, or facilitate the necessary work of another supplier, distribution center, or service provider in enabling, supporting, or facilitating another business's or operation's resumed activities. Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection shall be subject to sanctions to the fullest extent of the law.

XII. Any store that is open for in-store sales under section 10(f), section 11(c), or section 11(q) of this executive order:

a. May continue to sell goods other than necessary supplies if the sale of such goods is in the ordinary course of business.
b. Must consider establishing curbside pick-up to reduce in-store traffic and mitigate outdoor lines.

XIII. No one shall rent a short-term vacation property except as necessary to assist in housing a health care professional aiding in the response to the COVID-19 pandemic or a volunteer who is aiding the same.

XIV. Michigan state parks remain open for day use, subject to any reductions in services and specific closures that, in the judgment of the director of the Department of Natural Resources, are necessary to minimize large gatherings and to prevent the spread of COVID-19.

XV. Rules governing face coverings.
a. Except as provided in subsection (b) of this section, any individual able to medically tolerate a face covering must wear a covering over his or her nose and mouth—such as a homemade mask, scarf, bandana, or handkerchief—when in any enclosed public space.
b. An individual may be required to temporarily remove a face covering upon entering an enclosed public space for identification purposes. An individual may also remove a face covering while seated at a restaurant or bar.
c. All businesses and operations whose workers perform in-person work must, at a minimum, provide non-medical grade face coverings to their workers.
d. Supplies of N95 masks and surgical masks should generally be reserved, for now, for health care professionals, first responders (e.g., police officers, fire fighters, paramedics), and other critical workers who interact with the public.
e. The protections against discrimination in the Elliott-Larsen Civil Rights Act, 1976 PA 453, as amended, MCL 37.2101 et seq., and any other protections against discrimination in Michigan law, apply in full force to individuals who wear a face covering under this order.

XVI. Except as otherwise expressly stated in this order, nothing in this order should be taken to supersede another executive order or directive that is in effect, except to the extent this order imposes more stringent limitations on in-person work, activities, and interactions. Consistent with prior guidance, neither a place of religious worship nor its owner is subject to penalty under section 22 of this order for allowing religious worship at such place. No individual is subject to penalty under section 22 of this order for engaging in or traveling to engage in religious worship at a place of religious worship, or for violating section 15(a) of this order.

XVII. Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority. Similarly, nothing in this order shall be taken to abridge protections guaranteed by the state or federal constitution under these emergency circumstances.

XVIII. This order takes effect immediately, unless otherwise specified in this order, and continues through May 28, 2020 at 11:59 pm.

XIX. Executive Order 2020-17, which imposed temporary requirements regarding the postponement of non-essential medical and dental procedures, is rescinded as of May 28,

2020 at 11:59 pm. Executive Order 2020-34, which imposed temporary requirements regarding the postponement of veterinary services, is rescinded as of May 28, 2020 at 11:59 pm. Outpatient health-care facilities, including veterinary offices, are subject to the workplace safety rules described in Executive Order 2020-97.

XX. Executive Orders 2020-92 is rescinded. All references to that order in other executive orders, agency rules, letters of understanding, or other legal authorities shall be taken to refer to this order.

XXI. I will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, I will consider, among other things, (1) data on COVID-19 infections and the disease's rate of spread; (2) whether sufficient medical personnel, hospital beds, and ventilators exist to meet anticipated medical need; (3) the availability of personal protective equipment for the health care workforce; (4) the state's capacity to test for COVID-19 cases and isolate infected people; and (5) economic conditions in the state.

XXII. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

GRETCHEN WHITMER
GOVERNOR

Date: May 21 2020

Time: 9:49 am

RELATED CONTENT

Executive Order 2020-95 (COVID-19) (May 21, 2020)

Executive Order 2020-97 (COVID-19) (May 21, 2020)

Executive Order 2020-93 (COVID-19) (May 20, 2020)

Executive Order 2020-94 (May 19, 2020) - Declaration of State of Emergency

Executive Order 2020-85 (COVID-19)

Executive Order 2020-88 (COVID-19)

Executive Order 2020-92 (COVID-19) (May 18, 2020) - Rescinded

Executive Order 2020-91 (COVID-19) (May 18, 2020) - Rescinded

Executive Order 2020-86 (COVID-19)

Executive Order 2020-87 (COVID-19)

Executive Order 2020-89 (COVID-19)

Executive Order 2020-90 (COVID-19)

Executive Order 2020-84 (COVID-19) - Rescinded

Executive Order 2020-81 (COVID-19)

Executive Order 2020-83 (COVID-19)

Executive Order 2020-82 (COVID-19)

Executive Order 2020-79 (COVID-19)

Executive Order 2020-80 (COVID-19)

Executive Order 2020-78 (COVID-19)

Executive Order 2020-75 (COVID-19)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, AND JEFFERY GULICK,

Plaintiffs,

v

GRETCHEN WHITMER in her official capacity as Governor of the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, and ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services,

Defendants.

No. 1:20-cv-00414

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_____/

Exhibit K

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-21

Temporary requirement to suspend activities that are not necessary to sustain or protect life

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. Older adults and those with chronic health conditions are at particular risk, and there is an increased risk of rapid spread of COVID-19 among persons in close proximity to one another. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945, provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible.

This order takes effect on March 24, 2020 at 12:01 am, and continues through April 13, 2020 at 11:59 pm.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. This order must be construed broadly to prohibit in-person work that is not necessary to sustain or protect life.

2. Subject to the exceptions in section 7, all individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence. Subject to the same exceptions, all public and private gatherings of any number of people occurring among persons not part of a single household are prohibited.

3. All individuals who leave their home or place of residence must adhere to social distancing measures recommended by the Centers for Disease Control and Prevention, including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.

4. No person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life or to conduct minimum basic operations.

   (a) For purposes of this order, workers who are necessary to sustain or protect life are defined as "critical infrastructure workers," as described in sections 8 and 9.

   (b) For purposes of this order, workers who are necessary to conduct minimum basic operations are those whose in-person presence is strictly necessary to allow the business or operation to maintain the value of inventory and equipment, care for animals, ensure security, process transactions (including payroll and employee benefits), or facilitate the ability of other workers to work remotely.

   Businesses and operations must determine which of their workers are necessary to conduct minimum basic operations and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Such designations, however, may be made orally until March 31, 2020 at 11:59 pm.

5. Businesses and operations that employ critical infrastructure workers may continue in-person operations, subject to the following conditions:

   (a) Consistent with sections 8 and 9, businesses and operations must determine which of their workers are critical infrastructure workers and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Such designations, however, may be made orally until March 31, 2020 at 11:59 pm. Businesses and operations need not designate:

(1) Workers in health care and public health.

(2) Workers who perform necessary government activities, as described in section 6.

(3) Workers and volunteers described in section 9(d).

(b) In-person activities that are not necessary to sustain or protect life must be suspended until normal operations resume.

(c) Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons. Those practices and measures include, but are not limited to:

(1) Restricting the number of workers present on premises to no more than is strictly necessary to perform the business's or operation's critical infrastructure functions.

(2) Promoting remote work to the fullest extent possible.

(3) Keeping workers and patrons who are on premises at least six feet from one another to the maximum extent possible, including for customers who are standing in line.

(4) Increasing standards of facility cleaning and disinfection to limit worker and patron exposure to COVID-19, as well as adopting protocols to clean and disinfect in the event of a positive COVID-19 case in the workplace.

(5) Adopting policies to prevent workers from entering the premises if they display respiratory symptoms or have had contact with a person who is known or suspected to have COVID-19.

(6) Any other social distancing practices and mitigation measures recommended by the Centers for Disease Control.

6. All in-person government activities at whatever level (state, county, or local) that are not necessary to sustain or protect life, or to supporting those businesses and operations that are necessary to sustain or protect life, are suspended.

(a) For purposes of this order, necessary government activities include activities performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders.

(b) Such activities also include, but are not limited to, public transit, trash pick-up and disposal, activities necessary to manage and oversee elections, operations necessary to enable transactions that support the work of a business's or operation's critical infrastructure workers, and the maintenance of safe and sanitary public parks so as to allow for outdoor recreation.

(c) For purposes of this order, necessary government activities include minimum basic operations, as described in section 4(b). Workers performing such activities need not be designated.

(d) Any in-person government activities must be performed consistently with the social distancing practices and other mitigation measures to protect workers and patrons described in section 5(c).

7. Exceptions.

(a) Individuals may leave their home or place of residence, and travel as necessary:

(1) To engage in outdoor activity, including walking, hiking, running, cycling, or any other recreational activity consistent with remaining at least six feet from people from outside the individual's household.

(2) To perform their jobs as critical infrastructure workers after being so designated by their employers. (Critical infrastructure workers who need not be designated under section 5(a) may leave their home for work without a designation.)

(3) To conduct minimum basic operations, as described in section 4(b), after being designated to perform such work by their employers.

(4) To perform necessary government activities, as described in section 6.

(5) To perform tasks that are necessary to their health and safety, or to the health and safety of their family or household members (including pets). Individuals may, for example, leave the home or place of residence to secure medication or to seek medical or dental care that is necessary to address a medical emergency or to preserve the health and safety of a household or family member (including procedures that, in accordance with a duly implemented nonessential procedures postponement plan, have not been postponed).

(6) To obtain necessary services or supplies for themselves, their family or household members, and their vehicles. *Individuals must secure such services or supplies via delivery to the maximum extent possible.* As needed, however, individuals may leave the home or place of residence to purchase groceries, take-out food, gasoline, needed medical supplies, and any other products necessary to maintain the safety, sanitation, and basic operation of their residences.

(7) To care for a family member or a family member's pet in another household.

(8) To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons.

(9) To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted.

(10) To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court.

(11) To work or volunteer for businesses or operations (including both and religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.

(b) Individuals may also travel:

(1) To return to a home or place of residence from outside this state.

(2) To leave this state for a home or residence elsewhere.

(3) To travel between two residences in this state.

(4) As required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.

8. For purposes of this order, critical infrastructure workers are those workers described by the Director of the U.S. Cybersecurity and Infrastructure Security Agency in his guidance of March 19, 2020 on the COVID-19 response (available here). Such workers include some workers in each of the following sectors:

(a) Health care and public health.

(b) Law enforcement, public safety, and first responders.

(c) Food and agriculture.

(d) Energy.

(e) Water and wastewater.

(f) Transportation and logistics.

(g) Public works.

(h) Communications and information technology, including news media.

(i) Other community-based government operations and essential functions.

(j) Critical manufacturing.

(k) Hazardous materials.

(l) Financial services.

(m) Chemical supply chains and safety.

(n) Defense industrial base.

9. For purposes of this order, critical infrastructure workers also include:

(a) Child care workers (including workers at disaster relief child care centers), but only to the extent necessary to serve the children or dependents of critical infrastructure workers as defined in this order. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of critical infrastructure workers.

(b) Workers at designated suppliers and distribution centers, as described below.

(1) A business or operation that employs critical infrastructure workers may designate suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the work of its critical infrastructure workers.

(2) Such suppliers, distribution centers, or service providers may designate workers as critical infrastructure workers *only* to the extent those workers are necessary to enable, support, or facilitate the work of the original operation's or business's critical infrastructure workers.

(3) Designated suppliers, distribution centers, and service providers may in turn designate additional suppliers, distribution centers, and service providers whose continued operation is necessary to enable, support, or facilitate the work of their critical infrastructure workers.

(4) Such additional suppliers, distribution centers, and service providers may designate workers as critical infrastructure workers *only* to the extent that those workers are necessary to enable, support, or facilitate the work of the critical infrastructure workers at the supplier, distribution center, or service provider that has designated them.

(5) Businesses, operations, suppliers, distribution centers, and service providers must make all designations in writing to the entities they are designating, whether by electronic message, public website, or other appropriate means. Such designations may be made orally until March 31, 2020 at 11:59 pm.

(6) Businesses, operations, suppliers, distribution centers, and service providers that abuse their designation authority shall be subject to sanctions to the fullest extent of the law.

(c) Workers in the insurance industry, but only to the extent that their work cannot be done by telephone or remotely.

(d) Workers and volunteers for businesses or operations (including both and religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.

(e) Workers who perform critical labor union functions, including those who administer health and welfare funds and those who monitor the well-being and safety of union members who are critical infrastructure workers, provided that any administration or monitoring should be done by telephone or remotely where possible.

10. Nothing in this order should be taken to supersede another executive order or directive that is in effect, except to the extent this order imposes more stringent limitations on in-person work, activities, and interactions. Consistent with prior guidance, a place of religious worship, when used for religious worship, is not subject to penalty under section 14.

11. Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority.

12. This order takes effect on March 24, 2020 at 12:01 am, and continues through April 13, 2020 at 11:59 pm.

13. The governor will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, she will consider, among other things, (1) data on COVID-19 infections and the disease's rate of spread; (2) whether sufficient medical personnel, hospital beds, and ventilators exist to meet anticipated medical need; (3) the availability of personal protective equipment for the health-care workforce; (4) the state's capacity to test for COVID-19 cases and isolate infected people; and (5) economic conditions in the state.

14. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

Date: March 23, 2020

Time: 10:39 am

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

FILED WITH SECRETARY OF STATE
ON 3/23/2020 AT 11:51 AM

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, AND JEFFERY GULICK,

Plaintiffs,

v

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_____/

Exhibit L

STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN HOUSE OF REPRESENTATIVES, and MICHIGAN SENATE,

Plaintiffs,

v

GOVERNOR GRETCHEN WHITMER,

Defendant.
_____/

OPINION AND ORDER

Case No. 20-000079-MZ

Hon. Cynthia Diane Stephens

This matter arises out of Executive Orders issued by Governor Gretchen Whitmer in response to the COVID-19 pandemic. Neither the parties to this case nor any of the amici deny the emergent and widespread impact of Covid-19 on the citizenry of this state. Neither do they ask this court at this time to address the policy questions surrounding the scope and extent of contents of the approximately 90 orders issued by the Governor since the initial declaration of emergency on March 10, 2020 in Executive Order No. 2020-4. The Michigan House of Representatives and the Michigan Senate (Legislature) in their institutional capacities challenge the validity of Executive Orders 2020-67 and 2020-68, which were issued on April 30, 2020. They have asked this court to declare those Orders and all that rest upon them to be invalid and without authority as written. The orders cited two statutes, 1976 PA 390, otherwise known as the Emergency Management Act (EMA); and 1945 PA 302, otherwise known as the Emergency Powers of Governor Act (EPGA). In addition, the orders cite Const 1963, art 1, § 5, which generally vests the executive power of the state in the Governor. This court finds that:

1. The issue of compliance with the verification language of MCL 600.6431 is abandoned.
2. The Michigan House of Representative and Michigan Senate have standing to pursue this case.
3. Executive Order 2020-67 is a valid exercise of authority under the EPGA and plaintiffs have not established any reason to invalidate any executive orders resting on EO 2020-67.
4. The EPGA is constitutionally valid.
5. Executive Order No. 2020-68 exceeded the authority of the Governor under the EMA.

I. BACKGROUND

The Court will dispense with a lengthy recitation of the pertinent facts and history and will instead jump to the Governor's declaration of a state of emergency[1] as well as a state of disaster[2] under the EMA and the EPGA on April 1, 2020, in response to the COVID-19 pandemic. Executive Order No. 2020-33. Both chambers of the Legislature adopted Senate Joint Resolution No. 24 which approved "an extension of the state of emergency and state of disaster declared by Governor Whitmer in Executive Order 2020-4 and Executive Order 2020-33 through April 30, 2020. . . ." The Senate Concurrent Resolution cited the 28-day legislative extension referenced in MCL 30.403 of the EMA.

[1] The EPGA does not define the term "state of emergency." However, the EMA defines the term as follows: "an executive order or proclamation that activates the emergency response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected." MCL 30.402(q).

[2] While the EPGA does not use, let alone define, the term "state of disaster," the EMA defines the term as "an executive order or proclamation that activates the disaster response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected." MCL 30.402(p).

The public record affirms that the governor asked the legislative leadership to extend the state of disaster and emergency on April 27, 2020. The Legislature demurred and instead passed SB 858, a bill without immediate effect, which addressed some the subject matter of several of the COVID-19-related Executive Orders, but did not extend the state of emergency or disaster or the stay-at-home order. The Governor vetoed SB 858.

On April 30, 2020, the Governor issued Executive Order 2020-66 which terminated the state of emergency and disaster that had previously been declared under Executive Order 2020-33. The order opined that "the threat and danger posed to Michigan by the COVID-19 pandemic has by no means passed, *and the disaster and emergency conditions it has created still very much exist*." Executive Order No. 2020-66 (emphasis added). However, EO 2020-66 acknowledged that 28 days "have lapsed since [the Governor] declared states of emergency and disaster under the Emergency Management Act in Executive Order 2020-33." *Id.* The order declared there was a "clear and *ongoing* danger to the state . . . ." (Emphasis added).

On the same day, and only one minute later, the Governor issued two additional executive orders. First, she issued Executive Order No. 2020-67, which cited the EPGA. [In addition, the order contained a cursory citation to art 5, § 1.] EO 2020-67 noted the Governor's authority under the EPGA to declare a state of emergency during "'times of great public crisis . . . or similar public emergency within the state. . . .'" *Id*. quoting MCL 10.31(1). The order noted that such declaration does not have a fixed expiration date. *Id.* Then, and as a result of the ongoing COVID-19 pandemic, EO 2020-67 declared that a "state of emergency remains declared across the State of Michigan" under the EPGA. The order stated that "[a]ll previous orders that rested on Executive Order 2020-33 now rest on this order." *Id*. The order was to take immediate effect. *Id*.

In addition to declaring that a state of emergency "remained" under the EPGA, the Governor simultaneously issued Executive Order No. 2020-68; this order declared a state of emergency and a state of disaster under the EMA. [In addition, like all previous orders, the order contained a vague citation to art 5, § 1 as well.] Hence, EO 2020-68 essentially reiterated the very same states of emergency and disaster that the Governor had, approximately one minute earlier, declared terminated. The order declared that the states of emergency and disaster extended through May 28, 2020 at 11:59 p.m., and that all orders that had previously relied on the prior states of emergency and disaster declaration in EO 2020-33 now rest on this order, i.e., EO 2020-68.

The House of Representative and the Senate subsequently filed this case asking for an expedited hearing and a declaration that EO 2020-67 and EO 2020-68, and any other Executive Orders deriving their authority from the same, were null and void.

COMPLIANCE WITH MCL 600.6431

The Governor noted in her reply brief that the complaint, as originally filed in this court did not meet the verification requirement of MCL 600.6431(2)(d). At oral argument the Governor acknowledged that the verification requirements were not met when the complaint was originally filed; however, a subsequent filing was notarized in accordance with the statute. The Governor also acknowledged that the failure to sign the verified pleading before a person authorized to administer oaths was not necessary for invoking this Court's jurisdiction. Finally, the Governor agreed that she was not seeking dismissal of the action based on plaintiffs' initial lack of compliance. For those reasons this Court will consider the issue moot and decline any analysis of the arguments predicated on MCL 600.6431.

STANDING

The issue of standing is central to this case as it is with all litigation. Courts exist to manage actual controversies between parties to whom those controversies matter. The Legislature has cited MCR 2.605 in support of its standing to pursue this declaratory action. The Legislature asserts that it has a need for guidance from this Court in order to determine how it will proceed to protect what it articulates as its special institutional rights and responsibilities. The Governor challenges whether the Legislature has standing to bring this suit. The Governor argues that the institution of the Legislature has no more interest in the outcome of this suit than any member of the public. She further claims that the Legislature does not need the guidance of the Court to determine how to carry out its constitutional duties. It is the opinion of this Court that the Legislature has standing to pursue its claims before this Court.

Both parties cite the seminal case on the issue of standing, *Lansing Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). In that case, the Supreme Court refined the concept of standing under the Michigan Constitution. In doing so, the Court rejected the federal standing analysis and articulated an analytical framework rooted the Michigan Constitution. The *Lansing Schs Ed Ass'n* Court looked to whether a cause of action was authorized by the Legislature. Where the Legislature did not confer a right to a specific cause of action, a plaintiff must have "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different than the citizenry at large . . . ." *Id*. at 372.

The Governor relies heavily on the recent case of *League of Women Voters of Mich v Secretary of State*, __ Mich App __; __ NW2d __ (2020) (Docket Nos. 350938; 351073), which is itself now on appeal to the Michigan Supreme Court. That case, similar to the instant case, was brought under the aegis of MCR 2.605 and asked the court to declare that an Attorney General Opinion's interpretation of a statute was invalid. The Court of Appeals majority in *League of*

Women Voters examined the issue through the lens of MCR 2.605 and found that in that case the institution of the Legislature had no standing: "Given the definition of 'actual controversy' for the purposes of MCR 2.605, we are not convinced that the Legislature has demonstrated standing to pursue a declaratory action here. No declaratory judgement is necessary to guide the Legislature's future conduct in order to preserve its legal rights." *Id*., slip op at p. 7.

League of Women Voters was the first examination of the issue of institutional standing in Michigan. For that reason, the court focused on the logic of the Supreme Court's decision in *Dodak v State Admin Bd*, 441 Mich 547; 495 NW2d 539 (1993), which analyzed a standing issue in relation to individual legislators. *Dodak*, like this case, presented a conflict between the executive and legislative branches of state government. That Court, like this one, is mindful that in such instances the issue of legislative standing requires a litigant to overcome "a heavy burden because, courts are reluctant to hear disputes that may interfere with the separation of powers between the branches of government." *League of Women Voters*, __ Mich App at __, slip op at p. 8 (citation and quotation marks omitted; cleaned up). There must be a "personal and legally cognizable interest peculiar" to the legislative body, rather than a "generalized grievance that the law is not being followed." *Id*. (citations and quotation marks omitted). In *Dodak* four legislators pressed a case concerning what they asserted was an abrogation of their individual rights as members of the appropriations committees when the State Administrative Board was allowed to redistribute funds allocated by the Legislature between departments of state government. Ultimately the Supreme Court found that the chair of the appropriation committee did in fact have a peculiar and special right and a potential for a personal injury sufficient to acquire standing. In *Dodak*, 441 Mich at 557, the Supreme Court cited with approval federal authorities holding that an individual legislator "'only has standing if he alleges a diminution of congressional influence

which amounts to a complete nullification of his vote, with no recourse in the legislative process.' Dodak, 441 Mich at 557, quoting *Chiles v Thornburgh*, 865 F3d 1197, 1207 (CA 11, 1989). In *League of Women Voters* the institution claimed its right was to have a constitutionally correct interpretation of certain legislation. The *League of Women Voters* Court found that indeed every citizen had such a right and the Legislature once it enacted a statute had no special relationship to it. *League of Women Voters*, __ Mich App at __, slip op at p. 8. The case did not, remarked the Court, concern the validity of any particular legislative member's vote. *Id*.

While it is a close question, this Court finds that the issue presented in this case is whether the Governor's issuance of EO 2020-67 and/or EO 2020-68 had the effect of nullifying the Legislature's decision to decline to extend the states of emergency/disaster. The United States Court of Appeals for the Sixth Circuit recently found that a legislative body under certain circumstances does have standing. See *Tennessee General Assembly v United States Dep't of State*, 931 F3d 499 (CA 6, 2019). The logic of their analysis is persuasive and compatible with both *Dodak* and *League of Women Voters*. In *Tennessee General Assembly*, the Sixth Circuit surveyed two cases from the Supreme Court of the United States to illustrate when a legislative body, or portion thereof, may have standing. *Id*. at 508, citing *Coleman v Miller*, 307 US 433; 59 S Ct 972; 83 L 3d 1385 (1939); and *Ariz State Legislature v Ariz Independent Redistricting Comm*, __ US __; 135 S Ct 2652; 192 L Ed 704 (2015). Surveying *Coleman* and its progeny, the Sixth Circuit explained that, "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Tennessee General Assembly*, 931 F3d at 509 (citation and quotation marks omitted). The Sixth Circuit further noted that *Arizona State Legislature* Court also conferred standing under article III to a legislature. In

that case, the legislature claimed that the power to redistrict accrued to them under the Arizona constitution. The challenged action in that case was "more similar to the 'nullification' injury in *Coleman*." *Tennessee General Assembly*, 931 F3d at 510, citing *Arizona State Legislature*, __ US at __; 135 S Ct at 2665. To that end, the proposal at issue would have completely nullified any legislative vote, and there was "a sufficiently concrete injury to the Legislature's interest in redistricting . . . that the Legislature had Article III standing." *Id*., citing *Arizona State Legislature*, __ US at __; 135 S Ct 2665-2666.

The injury claimed in this case is that EO 2020-67 and EO 2020-68 nullified the decision of the Legislature to not extend the state of emergency or disaster. The Legislature claims this right is exclusively theirs as an institution under the EMA and this state's Constitution. Understanding that *Lansing Schs Ed Ass'n* specifically departed from the Article III analysis of its predecessor cases, the nullification argument is nevertheless not incompatible with the *Lansing Schs Ed Ass'n* focus on "special injury." This type of injury sounds similar in the nature of the right that was taken from the one plaintiff who had standing in *Dodak*, 441 Mich at 559-560, i.e., the member of the House Appropriations Committee who lost his right to approve or disapprove transfers following the Governor's actions.

In this respect the instant matter is distinguishable from *League of Women's Voters*, __ Mich App at __, slip op at 9, where the Court of Appeals remarked that "the validity of any particular legislative member's vote is not at issue[.]" Plaintiffs have at least a credible argument that they are not merely seeking to have this Court resolve a lost political battle, nor are plaintiffs only generally alleging that the law is not being followed. Cf. *id.* at 8. Rather, they are alleging that the Governor eschewed the Legislature's role under the EMA and nullified an act of the legislative body as a whole. This is an injury that is unique to the Legislature and it shows a

substantial interest that was (allegedly) detrimentally affected in a manner different than the citizenry at large. Cf. *id*. at 7 (discussing standing, generally).

As a final argument on standing, the Governor contends that the Legislature does not need declaratory relief to guide its future actions. She and at least one amicus brief note that the Legislature has in fact moved toward amending the EPGA. At oral argument the Legislature was almost invited to amend either the EMA or EPGA. However, while the legislative body is well aware of its power to enact, amend, and repeal statutes, this Court believes that guidance as to the issues presented in this case will avoid a multiplicity of litigation. The parties here have pled facts of an adverse interest which necessitate the sharpening of the issues raised.

ANALYSIS OF AUTHORITIES CITED IN THE CHALLENGED EXECUTIVE ORDERS

The Executive Orders at issue cite three sources of authority: the EMA, the EPGA, and Const 1963, art 5, § 1. The Court will examine each to determine whether the Governor possessed authority to issue the challenged orders.

ARTICLE 5 OF THE MICHIGAN CONSTITUTION

The challenged orders in this case all contain a brief citation to art 5, § 1. This section of the Michigan Constitution vests "executive power" in the Governor. See Const 1963, art 5, § 1. The Governor invokes this power in claiming authority to issue the challenged Executive Orders. The Legislature has argued that Governor errs in relying on her art 5, § 1 "executive power" to issue orders in response to the pandemic. This court agrees that "Executive power" is merely the "authority exercised by that department of government which is charged with the administration or execution of the laws." *People v Salsbury*, 134 Mich 537, 545; 96 NW 936 (1903). In fact, the

Governor has not claimed in her briefing or at oral argument that she had the authority to enact EO 2020-67 or EO 2020-68 absent an enabling statute. Through two distinct acts, stated in plain and certain terms, the Legislature has granted the Governor broad but focused authority to respond to emergencies that affect the State and its people. The Governor's challenged actions—declaring states of disaster and emergency during a worldwide public health crisis—are required by the very statutes the Legislature drafted. Thus, the focus of this opinion, is on those two distinct acts, the EMA and EPGA.

THE EPGA AUTHORIZED EO 2020-67 AND SUBSEQUENT ORDERS RELIANT THEREON

The Court will first turn its attention to the EPGA and to plaintiffs' arguments that the EPGA did not permit the Governor to issue a statewide emergency declaration in EO 2020-67 or any subsequent orders reliant on EO 2020-67. Plaintiffs advance two arguments in support of their position: (1) first, they contend that the EPGA, unlike the EMA, does not grant authority for a *statewide* declaration of emergency, but instead only confers upon the Governor the authority to issue a local or regional state of emergency; (2) second, plaintiffs argue that if the EPGA does grant authority for a statewide state of emergency, the delegation of legislative authority accomplished by the act is unconstitutional. The Court rejects both of plaintiffs' contentions regarding the EPGA and concludes that EO 2020-67, and any orders relying thereon, remain valid.

Turning first to the scope of the EPGA, the Court notes that the statute bestows broad authority on the Governor to declare a state of emergency and to take necessary action in connection with that declaration. See MCL 10.31(1). Under the EPGA, the Governor "may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." *Id.*

The Legislature stated that its intent in enacting MCL 10.32 was to "to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster." Section 2 of the EPGA continues, declaring that the provisions of the EPGA "shall be broadly construed to effectuate this purpose." *Id.*

Reading the EPGA as a whole, as this Court must do, see *McCahan v Brennan*, 492 Mich 730, 738-739; 822 NW2d 747 (2012), the Court rejects plaintiffs' attempt to limit the scope of the EPGA to local or regional emergencies only. Informing this decision is the statement of legislative intent in MCL 10.32, which declares that the EPGA was intended to confer "sufficiently broad power" on the Governor in order to enable her to respond to public disaster or crisis. It would be inconsistent with this intent to find that "sufficiently broad power" to respond to matters of great public crisis is constrained by contrived geographic limitations, as plaintiffs suggest. The Court also notes that this "sufficiently broad" power granted by the Legislature references "the police power of the state[.]" MCL 10.32. In general, the police power of the state refers to the state's inherent power to "enact regulations to promote the public health, safety, and welfare" of the citizenry at large. See *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 73; 367 NW2d 1 (1985). It cannot be overlooked that the police power of the state, which undeniably pertains to the state as a whole, see, e.g., *Western Mich Univ Bd of Control v State*, 455 Mich 531, 536; 565 NW2d 828 (1997), was given to a state official, the Governor, who possesses the executive power of the entire state. See Const 1963, art 5, § 1. Plaintiffs' attempts to read localized restrictions on broad, statewide authority given to this state's highest executive official are unconvincing.

The Act has a much broader application than plaintiffs suggest. The Act repeatedly uses terms such as "great public crisis," "public emergency," "public crisis," "public disaster," and

"public safety" when referring to the types of events that can give rise to an emergency declaration. See MCL 10.31(1); MCL 10.32. These are not terms that suggest local or regional-only authority. See *Black's Law Dictionary* (11th ed) (defining public safety). See also *Merriam-Webster Online Dictionary*, <https://www.merriam-webster.com/dictionary/public> (accessed May 11, 2020) (defining "public" to mean "of, relating to, or affecting *all the people of the whole area of a nation or state*") (emphasis added). Taking these broad terms and imposing limits on them as plaintiffs suggest would run contrary to MCL 10.32's directive to broadly construe the authority granted to the Governor under the EPGA. See *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) (explaining that it is "well established that to discern the Legislature's intent, statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole."). And in this context, it is apparent the EPGA employs broad terminology that empowers the Governor to act for the best interests of all the citizens of this state, not just the citizens of a particular county or region. It would take a particularly strained reading of the plain text of the EPGA to conclude that a grant of authority to deal with a public crisis that affects all the people of this state would somehow be constrained to a certain locality. Moreover, adopting plaintiffs' view would require the insertion into the EPGA of artificial barriers on the Governor's authority to act which are not apparent from the text's plain language. To that end, even plaintiffs would surely not quibble that the broad authority bestowed on the Governor under the act would permit her to respond to an emergency situation that affected one county, or perhaps even multiple counties. Under plaintiffs' view, if that emergency became too large and it affected the entire state, the Governor would have to pick and choose which citizens could be assisted by the powers granted by the EPGA because, according to plaintiffs, rendering emergency assistance to the state's entire citizenry is not an option under the EPGA. While plaintiffs generally contend there

are localized or regionalized limitations on the Governor's authority under the EPGA, they do not explain how to demarcate the precise geographic limitations on the Governor's authority under the EPGA—and this is for good reason: there are no such limitations.

In arguing for a contrary interpretation of the scope of the Governor's authority under the EPGA, plaintiffs selectively rely on parts of the statute and ignore the contextual whole. For instance, they focus on the notion that a city or county official may apply for an emergency declaration in order to support their assertion that the EPGA only applies to local or regional emergency declarations. In doing so, plaintiffs ignore that the same sentence permitting local officials to apply for an emergency declaration also authorizes two state officials—one of whom is the Governor herself—to apply for or make an emergency declaration. See MCL 10.31(1). Equally unpersuasive is plaintiffs' fixation on the word "within" as it appears in MCL 10.31(1). Plaintiffs note that MCL 10.31(1) permits the Governor to declare a state of emergency in response to "great public crisis, disaster, rioting, catastrophe, or similar public emergency *within the state*" (emphasis added). According to plaintiffs, the use of the word "within" means that an emergency can only be declared at a particular location *within* the state, and precludes the state of emergency from being declared for the entire state. However, a common understanding of the word "within," including the same definition plaintiffs cite, demonstrates the flaw in plaintiffs' position. The word "within" is generally used "as a function word to indicate enclosure or containment." *Merriam-Webster's Online Dictionary*, <https://www.merriam-webster.com/dictionary/within> (accessed May 20, 2020). For instance, it can refer to "the scope or sphere of" something, such as referring to that which is "within the jurisdiction of the state." *Id*. In other words, the term "within" refers to the jurisdictional bounds of the state. The authority to declare an emergency "within" the state is, quite simply, the authority to declare an emergency across the entire state.

Plaintiffs next argue that, when the EPGA is read together with the EMA, it is apparent that the EPGA is not meant to address matters of statewide concern. In general, both the EPGA and the EMA grant the Governor power to act during times of emergency. "Statutory provisions that relate to the same subject are *in pari materia* and should be construed harmoniously to avoid conflict." *Kazor v Dep't of Licensing & Regulatory Affairs*, 327 Mich App 420, 427; 934 NW2d 54 (2019). "The object of the *in pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes. If statutes lend themselves to a construction that avoids conflict, that construction should control." *In re AGD*, 327 Mich App 332, 344; 933 NW2d 751 (2019) (citation and quotation marks omitted).

Here, when the EMA and the EPGA are read together, it is apparent that there is no conflict between the two acts even though they address similar subjects. While plaintiffs are correct in their assertion that the EMA contains more sophisticated management tools, that does not mean that the EPGA is limited to local and regional emergencies only. Nor does the fact that both statues apply to statewide emergencies mean that one act renders the other nugatory. Instead, the Court can harmonize the two statutes, see *In re AGD*, 327 Mich App at 344, by recognizing that while both statutes permit the Governor to declare an emergency, the EMA equips the Governor with more sophisticated tools and options at her disposal. The use of these enhanced features comes at some cost, however, because the EMA is subject to the 28-day time limit contained in MCL 30.405(3)-(4), whereas an emergency declaration under the less sophisticated EPGA has no end date. Finally, plaintiffs' contentions regarding a conflict between the EMA and the EPGA are belied by MCL 30.417. That section of the EMA expressly states that nothing in the EMA was intended to "Limit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of

the Michigan Compiled Laws . . . ." MCL 30.417(d). In other words, the EMA explicitly recognizes the EPGA and it recognizes that the Governor possesses similar, but different, authority under the EPGA than she does under the EMA.

Plaintiffs' final attempt to assert that the EPGA was intended as a local or regional act is to point to what they describe as the history of the EPGA. In general, the legislative history of an act and the historical context of a statute can be considered by a court in ascertaining legislative intent; however, these sources are generally considered to have little persuasive value. See, e.g., *In re AGD*, 327 Mich App 342 (generally rejecting legislative history as "a feeble indicator of legislative intent and . . . therefore a generally unpersuasive tool of statutory construction") (citation and quotation marks omitted). Here, the history cited by plaintiffs is particularly unpersuasive because, having reviewed the same, the Court concludes that it does not even address or suggest the local limit plaintiffs attempt to impose on the EPGA. Nor have plaintiffs directed the Court's attention to a particular piece of history that expressly supports their claim; they instead rely on mere generalities and anecdotal commentary. Finally, the EPGA presents no ambiguity requiring explanation through extrinsic historical commentary.

In an alternative argument, plaintiffs argue that, assuming the Governor's ability to act under the EPGA gives her statewide authority, the executive orders issued pursuant to the EPGA are nevertheless invalid. According to plaintiffs, the Governor's exercise of lawmaking authority under the orders runs afoul of separation of powers principles.

Plaintiffs' constitutional challenge to the EPGA fares no better than their attempt to limit the Act's scope. This Court must, when weighing this constitutional challenge to the EPGA, remain mindful that a statute must be presumed constitutional, "unless its constitutionality is

readily apparent." *Mayor of Detroit v Arms Tech, Inc*, 258 Mich App 48, 59; 669 NW2d 845 (2003) (citation and quotation marks omitted). Indeed, "[t]he power to declare a law unconstitutional should be exercised with extreme caution and never where serious doubt exists with regard to the conflict." *Council of Orgs & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 570; 566 NW2d 208 (1997).

Const 1963, art 3, § 2 declares that "[t]he powers of government are divided into three branches: legislative, executive and judicial." The Constitution dictates that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." *Id*. The issue in this case concerns what plaintiffs have alleged is an unconstitutional delegation of legislative power to the Governor. While the Legislature cannot delegate its legislative power to the executive branch of government, the prohibition against delegation does not prevent the Legislature "from obtaining the assistance of the coordinate branches." *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8; 658 NW2d 127 (2003) (citation and quotation marks omitted). As explained by our Supreme Court, "[c]hallenges of unconstitutional delegation of legislative power are generally framed in terms of the adequacy of the standards fashioned by the Legislature to channel the agency's or individual's exercise of the delegated power." *Blue Cross & Blue Shield v Milliken*, 422 Mich 1, 51; 367 NW2d 1 (1985).

In general, the Supreme Court has recognized three "guiding principles" to be applied in non-delegation cases:

> First, the act in question must be read as a whole; the provision in question should not be isolated but must be construed with reference to the entire act. Second, the standard should be as reasonably precise as the subject matter requires or permits. The preciseness of the standard will vary with the complexity and/or the degree to which subject regulated will require constantly changing regulation. The various and varying detail associated with managing the natural resources has led to

> recognition by the courts that it is impractical for the Legislature to provide specific regulations and that this function must be performed by the designated administrative officials. Third, if possible the statute must be construed in such a way as to render it valid, not invalid, as conferring administrative, not legislative power and as vesting discretionary, not arbitrary, authority. [*State Conservation Dep't v Seaman*, 396 Mich 299, 309; 240 NW2d 206 (1976) (internal citations and quotation marks omitted).]

Any discussion of plaintiffs' non-delegation issue must acknowledge that the policy goals and the complexity of issues presented under the EPGA do not concern ordinary, everyday issues. Rather, as the title of the act and its various provisions reflect, the EPGA is only invoked in times of emergency and of "great public crisis," and when "public safety is imperiled[.]" MCL 10.31(1). Hence, while the Governor's powers are not expanded by crisis, the standard by which this Court must view the standards ascribed to the delegation at issue must be informed by the complexities inherent in an emergency situation. *Blue Cross & Blue Shield*, 422 Mich at 51; *State Conservation Dep't*, 396 Mich at 309.

With that backdrop, and when viewing the EPGA in its entirety, the Court concludes that the Act contains sufficient standards and that it is not an unconstitutional delegation of legislative authority. At the outset, MCL 10.31(1) provides parameters for when an emergency declaration can be made in the first instance. The power to declare an emergency only arises during "times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled . . . ." *Id*. In addition, the statute provides a process for other officials, aside from the Governor, to request or aid in assessing whether an emergency should be declared. See *id*. (allowing input from "the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police"). Therefore, the EPGA places parameters and limitations on the Governor's power to declare a state of emergency in the first instance, which weighs against plaintiffs'

position. Cf. *Blue Cross & Blue Shield*, 422 Mich at 52-53 (finding an unconstitutional delegation of legislative authority where there were no guidelines provided to direct the pertinent official's response and where the power of the official was "completely open-ended.").

Furthermore, the EPGA provides standards on what a Governor can, and cannot, do after making an emergency declaration. As for what she can do, the Governor may "promulgate *reasonable* orders, rules, and regulations as he or she considers *necessary to protect life and property or to bring the emergency situation within the affected area under control*." MCL 10.31(1) (emphasis added). The Legislature's use of the terms "reasonable" and "necessary" are not trivial expressions that can be cast aside as easily as plaintiffs would have the Court do. Rather than being mere abstract concepts that fail to provide a meaningful standard, the terms "reasonable" and "necessary" have historically proven to provide standards that are more than amenable to judicial review. See, e.g., MCL 500.3107(1)(a) (describing, in the context of personal injury protection insurance, "allowable expenses" that consist of "reasonable" charges incurred for "reasonably necessary products, services and accommodations . . . ."). Thus, the Court rejects any contention that these terms are too ambiguous to provide meaningful standards. See *Klammer v Dep't of Transp*, 141 Mich App 253, 262; 367 NW2d 78 (1985) (concluding that a delegation of authority which permitted an administrative body to continue to employ an individual for such a period of time as was "necessary" provided a sufficient standard, under the circumstances). See also *Blank v Dept' of Corrections*, 462 Mich 103, 126; 611 NW2d 530 (2000) (opinion by Kelly, J.) (finding a constitutionally permissible delegation of authority, in part, based on the enabling legislation constrained rulemaking authority to only those matters that were "necessary for the proper administration of this act."). Finally, in addition to the above standards, the EPGA goes on to expressly list examples of that which a Governor can and cannot do under the EPGA. See MCL

10.31(1) (providing a non-exhaustive, affirmative list of subjects on which an order may be issued); MCL 10.31(3) (containing an express prohibition on orders affecting lawfully possessed firearms). Accordingly, the EPGA contains some restrictions on the Governor's authority and it provides standards for the exercise of authority under the Act.[3]

In sum, the Court concludes that plaintiffs' challenges to the Governor's authority to declare a state of emergency under the EPGA and to issue Executive Orders in response to a statewide emergency situation under the EPGA are meritless. Thus, and for the avoidance of doubt, while the Court concludes that the Governor's actions under the EMA were unwarranted—see discussion below—the Court concludes that plaintiffs have failed to establish a reason to invalidate Executive Orders that rely on the EPGA.

EXECUTIVE ORDER 2020-68 WAS NOT AUTHORIZED BY THE EMA

Turning next to the Governor's orders issued pursuant to the EMA, the Court again notes that the legitimacy of the initial declaration of emergency and disaster, Executive Order No. 2020-04, is unchallenged in this case. The extension of that declaration under EO 2020-33 is likewise agreed to be a legitimate exercise of gubernatorial power. This court is not asked to review the scope of myriad emergency measures authorized under either declaration. The laser focus of this case is the legitimacy of EO 2020-68, which re-declared a state of emergency and state of disaster under the EMA only one minute after EO 2020-66 cancelled the same. The Legislature contends that the issuance of EO 2020-68 was ultra vires, and this Court agrees.

[3] The Court notes that Judge Kelly reached a similar conclusion, albeit in the context of denying a motion for preliminary injunction, in the case of *Mich United for Liberty v Whitmer*, Docket No. 20-000061-MZ.

The EMA allows circumvention of the traditional legislative process only under extraordinary circumstances and for a finite period of time. Enacted in 1976, the EMA grants the Governor sweeping powers to cope with "dangers to this state or the people of this state presented by a disaster or emergency." MCL 30.403(1). These powers include the authority to issue executive orders and directives that have the force and effect of law. MCL 30.403(2). The Governor may also, by executive order, "Suspend a regulatory statute, order, or rule prescribing the procedures for conduct of state business, when strict compliance with the statute, order, or rule would prevent, hinder, or delay necessary action in coping with the disaster or emergency." MCL 30.405(1)(a). Additionally, the Governor may issue orders regarding the utilization of resources; may transfer functions of state government; may seize private property—with the payment of "appropriate compensation"—evacuate certain areas; control ingress and egress; and take "all other actions which are which are necessary and appropriate under the circumstances." See, e.g., MCL 30.405(1)(b)-(j). This power is indeed awesome.

The question presented is whether the Governor could legally, by way of Executive Order 2020-68, declare the exact states of emergency and disaster that she had, only one minute before, terminated. The Legislature answer with an emphatic, "No," and the Governor offers an equally emphatic, "Yes."

As with most contracts, the Legislature asserts that time is of the essence in the limits of the extraordinary power afforded the executive under the EMA. The Act is replete with references to timing. MCL 30.403 provides as follows:

> The state of disaster shall continue until the governor finds that the threat or danger has passed, the disaster has been dealt with to the extent that disaster conditions no longer exist, or until the declared state of disaster has been in effect for 28 days. *After 28 days, the governor shall issue an executive order or proclamation*

> *declaring the state of disaster terminated, unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature*. An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the disaster, the area or areas threatened, the conditions causing the disaster, and the conditions permitting the termination of the state of disaster. [MCL 30.403(3) (emphasis added).]

Later the act addresses the duration of a "state of emergency," and its extension under MCL 30.403(4):

> The state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency has been in effect for 28 days. *After 28 days, the governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature.* An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the emergency, the area or areas threatened, the conditions causing the emergency, and the conditions permitting the termination of the state of emergency. [Emphasis added.]

The limitation of 28 days is repeated multiple times. A state of emergency or disaster, once declared, terminates no later than 28 days after being initially declared. The Governor can determine that the emergent conditions have been resolved earlier than 28 days. Alternatively, the Governor may ask the Legislature to extend the emergency powers for a period of up to 28 days from the issuance of the extension. Nothing in Act precludes legislative extension for multiple additional 28-day periods. In this case the Governor stated in EO 2020-66 that she expressly terminated the previously issued states of emergency and disaster—not because the disaster or emergency condition ceased to exist—but because a period of 28 days had expired. In fact, EO 2020-66, the order that terminated the states of disaster and emergency under the EMA, expressly acknowledged that the emergency and/or disaster had not subsided and still remained In this respect, EO 2020-66 complied with MCL 30.403(3) and (4)'s directives that the Governor "shall,"

after 28 days, "issue an executive order or proclamation declaring" that the state of emergency and/or disaster terminated.

However, the Governor argues that she may continue to exercise emergency powers under the EMA without legislative authorization in this case. She argues that she has a duty and the authority to do so because the Legislature failed to grant her the requested extension despite the fact that the emergent conditions continued to exist.

Neither party to this case denies that the COVID-19 emergency was abated as of April 30. No serious argument has been offered that had the Governor not issued EO 2020-68 that all of the emergency measures authorized by EO-33 would have terminated with the signing of EO 2020-66 on April 30 even if had the governor not vetoed SB 858, which purported to embody several of the expiring Executive Orders and which would not have been effective until 90 days later because the Legislature did not give that bill immediate effect. The Governor asserts she had a duty to act to address the void. She argues that MCL 30.403(3) and (4) compelled her, upon the termination of the states of emergency and disaster accomplished by way of time, to declare anew both states of emergency and disaster within minutes. The Governor makes this argument by emphasizing language in MCL 30.403(3) and (4) stating that, if the Governor finds that a disaster or emergency occurs, then she "shall" issue orders declaring states of emergency or disaster. Thus, argues the Governor, when the 28-day emergency and disaster declarations ended, but the disaster and emergency conditions remained, the Governor was compelled, irrespective of legislative approval, to re-declare states of emergency and disaster.

The EMA does not prohibit a governor from declaring multiple emergencies or disasters during a term of office or even more than on disaster at the same time. Indeed, the collapse of the

dam at the Tittabawassee River sparked the issuance of a separate state of emergency and disaster during of this lawsuit. Clearly the collapse of the dam and the subsequent flooding was a new and different circumstance from the COVID-19 pandemic. Returning to the instant case, it could also be argued that the very fact that the Legislature had neither authorized the extension of the emergency powers of the Governor under the EMA nor put in place measures to address the emergent situation was itself a new emergency justifying gubernatorial action. However, the "new" circumstance was occasioned not by a mutation of the disease into something such as "COVID-20," a precipitous spike in infection, or any other factor, except the Legislature's failure to grant an extension.

Thus, while the Governor emphasizes the directive that she "shall" declares states of emergency and disaster, the Court concludes that the Governor takes these directives out of context and renders meaningless the legislative extension set forth in MCL 30.403(3) and (4). The Governor's position ignores the other crucial "shall" in the statute. "After 28 days, the governor *shall* issue an executive order or proclamation declaring the state of" disaster or emergency terminated, "*unless a request by the governor for an extension of the state of*" *disaster or emergency* "*for a specific number of days is approved by resolution of both houses of the legislature*." See MCL 30.403(3) (as to disasters); MCL 30.403(4) (as to emergencies). The language employed here is mandatory: The Governor "*shall*" terminate the state of emergency or disaster *unless* the Legislature grants a request to extend it. See *Smitter v Thornapple Twp.*, 494 Mich 121, 136; 833 NW2d 785 (2013) (explaining that the term "shall" denotes a mandatory directive). Stated otherwise, at the end of 28 days, the EMA contemplates only two outcomes: (1) the state of emergency and/or disaster is terminated by order of the Governor; or (2) the state of emergency/disaster continues *with legislative approval*. The only qualifier on the "shall terminate"

language is an affirmative grant of an extension from the Legislature. There is no third option for the Governor to continue the state of emergency and/or disaster on her own, absent legislative approval. Nor does the statute permit the Governor to simply extend the same state of disaster and/or emergency that was otherwise due to expire. To adopt the Governor's interpretation of the statute would render nugatory the express 28-day limit and it would require the Court to ignore the plain statutory language. Whatever the merits of that might be as a matter of policy, that position conflicts with the plain statutory language. The Governor's attempt to read MCL 30.403(2) as providing an additional, independent source of authority to issue sweeping orders would essentially render meaningless MCL 30.405(1)'s directive that such orders only issue upon an emergency declaration. It would also read into MCL 30.403(2) broad authority not expressed in the subsection's plain language. See *Robinson*, 486 Mich at 21 (explaining that, when it interprets a statute, a reviewing court must "avoid a construction that would render part of the statute surplusage or nugatory") (citation and quotation marks omitted). See also *United States Fidelity & Guarantee Co v Mich Catastrophic Claims Ass'n*, 484 Mich 1, 13; 795 NW2d 101 (2009) ("As far as possible, effect should be given to every phrase, clause, and word in the statute."). The Court is not free to "pick and choose what parts of a statute to enforce," see *Sau-Tuk Indus, Inc v Allegan Co*, 316 Mich App 122, 143; 892 NW2d 33 (2016), yet that is precisely what the Governor's position has asked the Court to do. The language of MCL 30.403(3) and (4) requiring legislative approval of an emergency or disaster declaration should not so easily be cast aside.

Finally, and contrary to the Governor's argument, the 28-day limit in the EMA does not amount to an impermissible legislative veto. See *Blank v Dept' of Corrections*, 462 Mich 103, 113-114; 611 NW2d 530 (2000) (opinion by KELLY, J.) (declaring that, once the Legislature delegates authority, it does not have the right to retain veto authority over the actions of the

executive). The Governor's characterization of the 28-day limit as a legislative veto is not accurate. The 28-day limit is not legislative oversight or a "veto" of the Governor's emergency declaration; rather, it is a standard imposed on the authority so delegated. That is, the Governor is afforded with broad authority under the EMA to make rules and to issue orders; however, that authority is subject to a time limit imposed by the Legislature. The Legislature has not "vetoed" or negated any action by the executive branch by imposing a temporal limit on the Governor's authority; instead, it limited the amount of time the Governor can act independently of the Legislature in response to a particular emergent matter.

CONCLUSION

IT IS HEREBY ORDERED that the relief requested in plaintiffs' motion for immediate declaratory judgment is DENIED. While the Governor's action of re-declaring the same emergency violated the provisions of the EMA, plaintiffs' challenges to the EPGA and the Governor's authority to issue Executive Orders thereunder are meritless.

This order resolves the last pending claim and closes the case.

Dated: May 21, 2020

Cynthia Diane Stephens, Judge
Court of Claims

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, AND JEFFERY GULICK,

Plaintiffs,

v

GRETCHEN WHITMER in her official capacity as Governor of the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, and ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services,

Defendants.

No. 1:20-cv-00414

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_____/

Exhibit M

STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN UNITED FOR LIBERTY,

Plaintiff,

OPINION AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

v

Case No. 20-000061-MZ

GOVERNOR GRETCHEN WHITMER,

Hon. Michael J. Kelly

Defendant.
_____/

Pending before the Court is plaintiff's motion for preliminary injunction.[1] For the reasons that follow, the motion is DENIED.

I. BACKGROUND

Plaintiff's complaint and motion for preliminary injunction challenge the authority of defendant Governor Gretchen Whitmer to issue executive orders in response to the COVID-19 pandemic. Defendant cited two acts, the Emergency Management Act (EMA), MCL 30.401 *et seq.*; and the Emergency Powers of Governor Act (EPGA), MCL 10.31 *et seq.* when issuing the orders at the heart of this case. At this juncture, the facts underlying the complaint are well known to the parties and their recitation in this opinion would serve no meaningful purpose. The Court will instead constrain its time and attention to the legal issues presented in plaintiff's pleadings

[1] The Court notes and appreciates the parties' compliance with the expedited briefing schedule ordered in this case.

and briefing. Distilled to the most basic level, plaintiff is asserting that the EMA and the EPGA are unconstitutional because they represent an impermissible delegation of legislative authority to the Governor. Plaintiff has asked the Court to issue a preliminary injunction enjoining defendant from enforcing and issuing any orders under the EMA or EPGA.

II. ANALYSIS

Injunctive relief "represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Davis v Detroit Fin Review Team*, 296 Mich App 568, 613; 821 NW2d 896 (2012) (citation and quotation marks omitted). The Court utilizes four factors in determining whether to issue this extraordinary remedy:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Id*. (citation and quotation marks omitted).]

A. PLAINTIFF HAS NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS

Turning first to the likelihood of success on the merits, the Court begins by noting that plaintiff asserts facial challenges to the validity of the EMA and the EPGA. This type of challenge presents significant obstacles a litigant must overcome in order to succeed. Initially, statutes are presumed to be constitutional, and a court has a "duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Oakland Co v State*, 325 Mich App 247, 260; 926 NW2d 11 (2018). A court must "exercise the power to declare a law unconstitutional with extreme caution," and the court must not exercise that power if serious doubt exists as to the alleged constitutional invalidity. *Id*. (citation omitted). Instead, "[e]very reasonable presumption or

intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity." *Id*. (citation and quotation marks omitted).

Moreover, plaintiff's facial challenge to the constitutionality of the statutes at issue requires a particularly difficult showing. A facial challenge considers the plain language of the statute at issue and it involves a "claim that the law is invalid in toto—and therefore incapable of any valid application." *League of Women Voters of Mich v Secretary of State*, __ Mich App __, __; __ NW2d __ (Docket Nos. 350938; 351073), slip op at p. 10 (citation and quotation marks omitted). "To make a successful facial challenge to the constitutionality of a statute, the challenger must establish that no set of circumstances exists under which the act would be valid." *Oakland Co*, 325 Mich App at 260 (citation and quotation marks omitted).

Here, in order for plaintiff to demonstrate a likelihood of success on the merits of the claims asserted in its briefing, it must demonstrate that the challenged statutes contain constitutionally infirm delegations of legislative authority to the Governor. In general, the principle of separation of powers, see Const 1963, art 3, § 2, precludes the legislative branch from delegating its law-making authority to the executive or judicial branches of government, *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8; 658 NW2d 127 (2003). However, the separation of powers does not preclude this state's Legislature from "obtaining the assistance of the coordinate [b]ranches." *Id*. at 8-9, quoting *Mistretta v United States*, 488 US 361, 371; 109 S Ct 647; 102 L Ed 2d 714 (1989). Caselaw counsels that "when properly prescribed standards exist, the Legislature has not abdicated its law-making or legislative power because the agency to which the power is delegated is limited in its action by the Legislature's prescribed will; it cannot follow its own

uncircumscribed will." *Westervelt v Nat Resources Comm*, 402 Mich 412, 441; 263 NW2d 564 (1978) (opinion by WILLIAMS, J.) (quotation marks omitted). In *Taylor*, the Supreme Court remarked that, historically, these types of challenges "have been uniformly unsuccessful" across federal and state jurisprudence. *Taylor*, 468 Mich at 9.

In order to determine whether the challenged statutes at issue in this case contain sufficient standards to survive a constitutional challenge, the Court's analysis must be guided by the following criteria:

> 1) the act must be read as a whole; 2) the act carries a presumption of constitutionality; and 3) the standards must be as reasonably precise as the subject matter requires or permits. The preciseness required of the standards will depend on the complexity of the subject. [*Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 51; 367 NW2d 1 (1985).]

The Court will first address plaintiff's challenges to the EMA, which makes the Governor "responsible for coping with dangers to this state or the people of this state presented by a disaster or emergency." MCL 30.403(1). The Act permits the Governor to issue orders to implement the act and it empowers her to issue emergency and disaster declarations. MCL 30.403(3)-(4). That authority is not unchecked, however, as the statute sets forth definitions for "emergency," and "disaster" that provide some measure of guidance for the Governor's use of authority under the Act. See MCL 30.402(e); MCL 30.402(h). Furthermore, the EMA goes on to describe the authority and duties of the Governor under the Act, with MCL 30.405(1)(a)-(j) detailing ten subjects (nine particular subjects and one catch-all provision) on which the Governor can issue orders under the Act. Those orders can only be issued "upon the declaration of a state of disaster or a state of emergency . . . ." MCL 30.405(1).

When viewing the statute as a whole and considering the complexity of the subject sought to be addressed, plaintiff cannot demonstrate a substantial likelihood of success on the assertion that the EMA is an unconstitutional, standard-less delegation of legislative authority to the Governor. See *Blue Cross & Blue Shield*, 422 Mich at 51. At the outset, the Court's analysis on this issue must be informed by the notion that the EMA's very purpose is to permit the Governor to deal with a highly complex emergency or disaster situation. Caselaw cautions that the more difficult a particular subject-matter is to regulate, the more impractical it is for the Legislature to provide specific, exacting standards for the delegation of authority. *State Conservation Dep't*, 396 Mich at 309. Thus, generalized standards can be appropriate. *Id*. And here, the Court concludes that the parameters and standards set forth in the EMA, at least at this stage, are of the type that pass constitutional muster. The EMA is not an unfettered, unchecked grant of power to the Governor. Rather, the statute specifies that the Governor, in emergency or disaster situations, is to be given certain, defined authority. The fact that this authority is limited to statutorily defined "emergencies" or "disasters" provides some measure of standards. Additionally, the Legislature imposed regulations on the subject-matter to be reached by the Governor's orders, as well as with respect to the duration of the orders. See MCL 30.405(1) (prescribing the subject-matter that can be regulated by way of executive order); MCL 30.405(3)-(4) (placing a 28-day limit on certain orders issued by the Governor). The Legislature also implemented a method by which the Governor can work with the Legislature after a certain period of time. See MCL 30.403(3)-(4). In sum, while the Court acknowledges that the authority granted under the EMA is undoubtedly broad in some respects, the grant of authority does not sound in the nature of statutes that have run afoul of the non-delegation doctrine. Cf. *Blue Cross & Blue Shield*, 441 Mich at 55 (finding an impermissible delegation of authority where the statute contained a "lack of standards defining

and directing" the delegated authority). A plain reading of the EMA does not support the notion that the statute contains the kind of "uncontrolled, arbitrary power" that our Supreme Court has cautioned against in non-delegation cases. See *State Conservation Dep't*, 396 Mich at 308-309.[2]

Plaintiff's ability to succeed on its challenge to the delegation of authority contained in the EPGA is no less dubious. While the EPGA is a much less detailed act than its subsequently enacted counterpart, it nonetheless sets some standards for the Governor's exercise of authority. The authority exercised by the Governor under the EPGA can only be invoked if public safety is or will be imperiled. MCL 10.31(1) makes clear that authority under the Act is only bestowed on the Governor. "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled . . . ." The statute continues by describing that any rules or regulations imposed by the Governor must be "reasonable" and "necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1). The Court concludes that the terms "reasonable" and "necessary" carry more significance than plaintiff assigns to them, particularly when they are read in light of the statute's goals of protecting life and property and combating an emergency or disaster scenario. See *Klammer v Dep't of Transp*, 141 Mich App 253, 262; 367 NW2d 78 (1985) (concluding that a delegation of authority that empowered the decisionmaker to take action that was deemed "necessary" in response to a particular situation was a sufficiently precise standard in the context of the statute at issue). Moreover, when scanning the EPGA for additional criteria, the Court notes

[2] The Court notes that Judge Murray reached a similar decision when denying injunctive relief in the case of *Martinko v Whitmer*, Docket No. 20-00062-MM (issued April 29, 2020).

that the statute contains a list of subjects over which the Legislature granted the Governor authority, as well as one area where the Legislature expressly stated that the Governor was not permitted to act. See MCL 10.31(1) & (3) (permitting the Governor to control matters such as traffic, transportation, places of amusement and assembly, and to establish curfews, but expressly declaring that the Governor cannot seize, take, or confiscate lawfully possessed firearms or other weapons). Finally, the Act specifies that the Governor is to exercise the state's police power in order "to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster." MCL 10.32. The Court concludes at this stage of the litigation that the phrase, "adequate control," and the reference to that control lasting only for periods of public crisis or disaster guides the Governor's exercise of authority. Hence, the plain language of the act, contrary to plaintiff's contentions, describes standards and limitations on the Governor's exercise of authority under the EPGA. While the level of authority conferred upon the Governor may be broad—and at times frustrating in practice—it does not appear on plaintiff's motion to be the type that would warrant relief under the non-delegation doctrine.

Furthermore, in evaluating the EPGA, just as it did when evaluating the EMA, the Court must remain cognizant that the situation sought to be controlled by the EPGA is an unpredictable, dangerous emergency or disaster situation. A disaster or emergency is almost assuredly a dynamic, unpredictable situation fraught with complexity. It is unreasonable to expect a demanding or precise set of legislative standards be incorporated into the EPGA in order to deal with such a demanding scenario. See *State Conservation Dep't,* 396 Mich at 309 (explaining that "[t]he preciseness of the standard will vary with the complexity and/or the degree to which subject regulated will require constantly changing regulation.").

B. PLAINTIFF'S ALLEGED IRREPARABLE HARM FALLS SHORT AS WELL

Although the above analysis in and of itself would cause the Court to deny injunctive relief, the Court finds plaintiff's assertion of irreparable harm falls short of that which is required to demonstrate entitlement to preliminary injunctive relief. A "particularized showing of irreparable harm . . . is . . . an indispensable requirement to obtain a preliminary injunction." *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008) (citation and quotation marks omitted). The harm must be particularized; a "generalized argument that a constitutional violation would result in harm is insufficient because it is not particularized." *Hammel v Speaker of House of Representatives*, 297 Mich App 641, 652; 825 NW2d 616 (2012). The problem in the instant case is that plaintiff has only generally asserted the harm it allegedly suffered by generically alleging constitutional violations. Plaintiff has not articulated particularized, individual harm. Furthermore, caselaw again cautions that, in the absence of bad faith on the part of a public body—which has not been alleged in this case—"there is no real and imminent danger of irreparable injury requiring issuance of an injunction." *Davis*, 296 Mich App at 621. Plaintiff's failure to assert a particularized irreparable injury in the absence of injunctive relief represents an independent reason to deny the motion for preliminary injunction.

III. CONCLUSION

Both the EMA and the EPGA confer broad authority upon the office of the Governor. History will determine whether the Governor is judiciously exercising this authority in response to the COVID-19 pandemic. But, for the reasons stated herein:

IT IS HEREBY ORDERED that plaintiff's motion for preliminary injunction is DENIED.

This is not a final order and it does not resolve the last pending claim or close the case.

May 19, 2020

Michael J. Kelly
Judge, Court of Claims

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, AND JEFFERY GULICK,

Plaintiffs,

v

GRETCHEN WHITMER in her official capacity as Governor of the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, and ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services,

Defendants.

No. 1:20-cv-00414

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_____/

Exhibit N

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Plaintiffs-Appellants/
Cross-Appellees,

v

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan,

Defendant-Appellee/
Cross-Appellant.
_____/

Supreme Court No. 161377

Court of Appeals No. 353655

Court of Claims No. 20-79-MZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

GOVERNOR GRETCHEN WHITMER'S EMERGENCY BYPASS APPLICATION FOR LEAVE TO APPEAL AND BRIEF IN RESPONSE TO PLAINTIFFS' EMERGENCY BYPASS APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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Dated: May 29, 2020

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STATEMENT OF JURISDICTION

The Michigan House of Representatives and Michigan Senate (Legislative Plaintiffs) sought an immediate declaratory judgment that Governor Whitmer exceeded her authority under the Emergency Powers of the Governor Act (EPGA) and the Emergency Management Act (EMA) during the COVID-19 pandemic. MCL 10.31 et seq; MCL 30.401 et seq.

The Court of Claims issued an opinion denying Plaintiffs' request for declaratory relief and entered a final order. (5/21/20 Ct of Claims Op and Order, p 25.) In its opinion, the Court of Claims found that the Governor's declaration pf emergency and accompanying executive orders constituted a valid exercise of her authority under the EPGA. (*Id.* at 2.)

The Court of Claims also determined that the Legislative Plaintiffs have standing in this case (*id.* at 4–9), and that the Governor acted outside of her authority when issuing Executive Order 2020-68 pursuant to the EMA, (*id.* at 2, 19–25.) The Governor seeks leave to appeal these adverse rulings.

The Plaintiffs filed a claim of appeal in the Court of Appeals on May 22, 2020, and later that day, in this Court, filed an emergency application for leave to appeal the Court of Claims decision "before a decision of the Court of Appeals" (bypass application). MCR 7.305(B)(2). The Governor similarly filed a cross-claim of appeal on May 29, and here files an omnibus response to the Legislative Plaintiffs' bypass application and bypass application regarding the two adverse rulings against her.

The Governor asks this Court to grant her bypass application and the Legislative Plaintiffs' bypass application, and to hear them on an expedited basis.

STATEMENT OF QUESTIONS PRESENTED[1]

1. Legislative standing is available only where the body suffers an injury specific to it or to protect its legal rights. The House and Senate allege only injuries shared with the general citizenry, and any decision by this Court will not affect their constitutional authority to legislate. Do the Legislative Plaintiffs have standing?

   Governor's answer: No.

   Legislative Plaintiffs' answer: Yes.

   Court of Claims answer: Yes.

   Court of Appeals' answer: Did not answer.

2. The Emergency Powers of the Governor Act grants broad authority to the Governor to declare a state of emergency during great public crises where public safety is imperiled within the State. The Governor declared a state of emergency in response to a worldwide public health pandemic that has killed thousands of Michiganders. Did the Governor act within her statutory grant of authority?

   Governor's answer: Yes.

   Legislative Plaintiffs' answer: No.

   Court of Claims answer: Yes.

   Court of Appeals' answer: Did not answer.

[1] Issues 2 and 3 are the subject of the Legislative Plaintiffs' bypass application, and Issues 1 and 4 are the subject of the Governor's bypass application as well as alternative bases to affirm the lower court's decision in response to the Plaintiffs' bypass application.

3. The Emergency Powers of the Governor Act permits the Governor during public crises to issue "reasonable" orders "necessary to protect life and property" or bring the emergency under control. The Legislature may constitutionally grant broad authority to the executive branch provided there is sufficient guidance in light of the purpose of the delegation. Have the Legislative Plaintiffs proven their own law is an unconstitutional delegation?

Governor's answer:	No.
Legislative Plaintiffs' answer:	Yes.
Court of Claims answer:	No.
Court of Appeals' answer:	Did not answer.

4. The Emergency Management Act requires a Governor to declare a state of emergency or disaster if the conditions in the State warrant it, and to terminate those specific declarations if the Legislature does not extend them beyond 28 days by concurrent resolution. The Governor terminated unextended declarations, but issued new ones pursuant to her ongoing statutory duty. Did the Governor act within her authority under the EMA?

Governor's answer:	Yes.
Legislative Plaintiffs' answer:	No.
Court of Claims answer:	No.
Court of Appeals' answer:	Did not answer.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

Const 1963, art 5, § 1 provides:

> Except to the extent limited or abrogated by article V, section 2, or article IV, section 6, the executive power is vested in the governor.

Const 1963, art 4, § 26 provides, in pertinent part:

> No bill shall be passed or become a law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days. Every bill shall be read three times in each house before the final passage thereof. No bill shall become a law without the concurrence of a majority of the members elected to and serving in each house.

Const 1963, art 4, § 33 provides, in pertinent part:

> Every bill passed by the legislature shall be presented to the governor before it becomes law, and the governor shall have 14 days measured in hours and minutes from the time of presentation in which to consider it. If he approves, he shall within that time sign and file it with the secretary of state and it shall become law. If he does not approve, and the legislature has within that time finally adjourned the session at which the bill was passed, it shall not become law. If he disapproves, and the legislature continues the session at which the bill was passed, he shall return it within such 14-day period with his objections, to the house in which it originated. That house shall enter such objections in full in its journal and reconsider the bill. If two-thirds of the members elected to and serving in that house pass the bill notwithstanding the objections of the governor, it shall be sent with the objections to the other house for reconsideration. The bill shall become law if passed by two-thirds of the members elected to and serving in that house.

Pertinent Provisions of the Emergency Powers of the Governor Act

MCL 10.31 provides:

> (1) During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled, either upon application of the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police or upon his or her own volition, the governor may proclaim a state of emergency and designate the area involved. After making the proclamation or declaration, the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control. Those orders, rules, and regulations may include, but are not limited to, providing for the control of traffic, including public and private transportation, within the area or any section of the area; designation of specific zones within the area in which occupancy and use of buildings and ingress and egress of persons and vehicles may be prohibited or regulated; control of places of amusement and assembly and of persons on public streets and thoroughfares; establishment of a curfew; control of the sale, transportation, and use of alcoholic beverages and liquors; and control of the storage, use, and transportation of explosives or inflammable materials or liquids deemed to be dangerous to public safety.
>
> (2) The orders, rules, and regulations promulgated under subsection (1) are effective from the date and in the manner prescribed in the orders, rules, and regulations and shall be made public as provided in the orders, rules, and regulations. The orders, rules, and regulations may be amended, modified, or rescinded, in the manner in which they were promulgated, from time to time by the governor during the pendency of the emergency, but shall cease to be in effect upon declaration by the governor that the emergency no longer exists.

MCL 10.32 provides:

> It is hereby declared to be the legislative intent to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. The provisions of this act shall be broadly construed to effectuate this purpose.

Pertinent Provisions of the Emergency Management Act

MCL 30.402(e) provides:

> "Disaster" means an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to, fire, flood, snowstorm, ice storm, tornado, windstorm, wave action, oil spill, water contamination, utility failure, hazardous peacetime radiological incident, major transportation accident, hazardous materials incident, epidemic, air contamination, blight, drought, infestation, explosion, or hostile military action or paramilitary action, or similar occurrences resulting from terrorist activities, riots, or civil disorders.

MCL 30.402(h) provides:

> (h) "Emergency" means any occasion or instance in which the governor determines state assistance is needed to supplement local efforts and capabilities to save lives, protect property and the public health and safety, or to lessen or avert the threat of a catastrophe in any part of the state.

MCL 30.402(p) provides:

> (p) "State of disaster" means an executive order or proclamation that activates the disaster response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected.

MCL 30.402(q) provides:

> (q) "State of emergency" means an executive order or proclamation that activates the emergency response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected.

MCL 30.403 provides:

> (1) The governor is responsible for coping with dangers to this state or the people of this state presented by a disaster or emergency.
>
> (2) The governor may issue executive orders, proclamations, and directives having the force and effect of law to implement this act. Except as provided in section 7(2), an executive order, proclamation, or directive may be amended or rescinded by the governor.

(3) The governor shall, by executive order or proclamation, declare a state of disaster if he or she finds a disaster has occurred or the threat of a disaster exists. The state of disaster shall continue until the governor finds that the threat or danger has passed, the disaster has been dealt with to the extent that disaster conditions no longer exist, or until the declared state of disaster has been in effect for 28 days. After 28 days, the governor shall issue an executive order or proclamation declaring the state of disaster terminated, unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature. An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the disaster, the area or areas threatened, the conditions causing the disaster, and the conditions permitting the termination of the state of disaster. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and shall be promptly filed with the emergency management division of the department and the secretary of state, unless circumstances attendant upon the disaster prevent or impede its prompt filing.

(4) The governor shall, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists. The state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency has been in effect for 28 days. After 28 days, the governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature. An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the emergency, the area or areas threatened, the conditions causing the emergency, and the conditions permitting the termination of the state of emergency. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and shall be promptly filed with the emergency management division of the department and the secretary of state, unless circumstances attendant upon the emergency prevent or impede its prompt filing.

MCL 30.417 provides, in pertinent part:

> This act shall not be construed to do any of the following:
>
> * * *
>
> (d) Limit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of the Michigan Compiled Laws, or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of this state independent of, or in conjunction with, this act.

INTRODUCTION

The Legislative Plaintiffs come to the judiciary seeking only to build a constitutional crisis atop a public health crisis in Michigan. The law requires putting that effort to rest.

Unfortunately, the scourge of COVID-19 will not lie down. The novel coronavirus that causes COVID-19 has rapidly spread across the planet, infecting millions, and killing hundreds of thousands in just a few months. In response, jurisdictions the world over have imposed bold measures to stem the viral tide that has overwhelmed healthcare systems.

At home, Michigan is one of the states hardest hit by the pandemic. Since March 18, COVID-19 has claimed at least 5,372 lives, and countless others have suffered the excruciating health effects of the virus. Through wicked happenstance of this novel virus, many who are infected escape symptoms but unwittingly spread the virus to others, who may end up on ventilators, or worse. Such disparities still perplex medical experts, which only highlights the uncertainty ahead.

In response to the threat of the pandemic, Governor Gretchen Whitmer declared states of emergency and disaster. Consistent with her duties to protect the health and welfare of the State and its citizens and respond to emergencies within its borders, the Governor put measures in place to suppress the spread of the virus, incrementally loosening restrictions as the public health permits. Because of these efforts, the disease's spread has been slowed and countless lives have been saved. But the crisis is not over, and the virus remains highly contagious, still untreatable, and potentially poised for resurgence.

The Legislative Plaintiffs deny none of this, but ask this Court to invalidate the Governor's emergency response authority and declare their own delegation of this authority unconstitutional. Past Legislatures have thought better of putting a slow and fractious multi-member body in charge of responding to emergencies that demand a rapid, coordinated, and nimble response. Through two laws—the Emergency Powers of the Governor Act (EPGA) and the Emergency Management Act (EMA)—the Legislature vested such responsibility in the executive branch.

The Legislative Plaintiffs, of course, remain free to amend these laws, even over the Governor's objection, if they are dissatisfied with the authority generations have vested in the Governor or the Governor's due exercise of that authority. But they have not done so. The courts are not the proper branch for lawmaking, and the Legislative Plaintiffs lack standing to bring this suit. The Legislative Plaintiffs have failed to show a sufficient injury to an institutional interest, and their action against the Governor raises separation of powers concerns. Moreover, nothing in the declaratory relief they seek is necessary to guide their future conduct and preserve their legal rights—they only seek to affect the *Governor's* rights.

They fare no better on the merits of their challenges to the Governor's exercise of her emergency authority. Under the EPGA, the Legislature plainly granted the Governor authority to proclaim an emergency and reasonably guided her discretion in doing so. And while the Legislative Plaintiffs attempt to engraft limitations on this authority and cast doubt on its constitutionality, settled caselaw and the EPGA's plainly stated text make short work of those arguments, just as the

Court of Claims did. The Governor's declaration and reaffirmation of an emergency under the EPGA are valid, as are the executive orders issued under that authority.

Independently, the EMA contains authority that is activated upon the Governor's declaration of a state of emergency or disaster. Importantly, the EMA *requires* the Governor to issue those declarations if the conditions warrant it. If the declarations of states of emergency or disaster—which are defined by the act as "executive order[s]"—are not extended by the Legislature after 28 days, the Governor must terminate those executive orders. While the Court of Claims agreed with the Legislative Plaintiffs' contention that the Governor ignored this limitation, she in fact adhered closely to it and the EMA's other mandates—she timely terminated the earlier declarations and then issued new ones, consistent with her legal duty to do so when disaster or emergency conditions afflict our State.

The Legislative Plaintiffs frame the Governor's actions—particularly her new declarations—as unprecedented. But that flips the conversation on its head. The pandemic that Michigan is facing is unprecedented, as is the Legislative Plaintiffs' refusal to ratify the declarations the Governor issued—declarations whose factual basis they do not and cannot dispute. That refusal may be their right under the EMA, but the Governor's responsibility to act in response to the ongoing emergency and disaster remains her duty.

Even if this Court were to find that the Governor exceeded her authority under the EMA, that leaves her declaration under the EPGA undisturbed, as the

Court of Claims concluded. Because the Governor's declarations here work as a belt and suspenders, even if the belt is removed, the suspenders remain.

The Legislative Plaintiffs' overarching claim is that the Governor has acted beyond her constitutional role (despite the Legislature granting her the very authority she has invoked and exercised). Yet rather than act with their own most fundamental power—to amend the laws they now challenge—they filed suit. But there is no legal basis for this Court to upend the status quo in the midst of this public health crisis. The Constitution grants the Legislature the tools to do just that if it so chooses—to amend its own laws, by veto override if it must. This Court should not short circuit that route still available to the Legislature, one that runs through their own chambers.

This case warrant answers from this State's highest court because the issues involve the constitutional validity of the EPGA, MCR 7.305(B)(1), have "significant public interest," MCR 7.305(B)(2), and touch on the Governor's emergency authority and the propriety of the Legislative Plaintiffs' standing, MCR 7.305(B)(3). Although the status quo will not cause substantial harm to the public because the Governor's measures to protect the public health remain valid under the decision below, MCR 7.305(B)(4)(a), the Governor's full authority to respond to a public crisis is currently undercut by part of the Court of Claims ruling, MCR 7.305(B)(4)(b).

The Governor asks this Court to grant her bypass application, and agrees that the Court should grant Legislative Plaintiffs' own bypass application, to decide these important and consequential questions.

STATEMENT OF FACTS AND PROCEEDINGS

COVID-19 infects the globe.

SARS-CoV-2 is similar to other coronaviruses (a large family of viruses that cause respiratory illnesses), but the strain is "novel," *i.e.*, never-before-seen. This means that there is no general or natural immunity built up in the population, no vaccine, and no known treatment to combat the virus itself.

It is widely known and accepted that the virus is highly contagious, spreading easily from person to person via "respiratory droplets."[2] Experts agree that being anywhere within six feet of an infected person puts you at a high risk of contracting the disease, called COVID-19.[3] But even following that advice is not a sure-fire way to prevent infection. The respiratory droplets from an infected person can land on surfaces, and be transferred many hours later to the eyes, mouth, or nose of others who touch the surface. Moreover, since many of those infected experience no symptoms or only mild ones, a person could spread the disease before he even realizes he is sick.[4] Everyone is vulnerable either as a potential victim of this scourge or a carrier of it to a potential victim.

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[2] World Health Organization, *Modes of transmission of virus causing COVID-19*, available at https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations.

[3] Centers for Disease Control, *Social Distancing, Quarantine, and Isolation*, available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html.

[4] (*Id.*)

Because there is no way to immunize or treat for COVID-19, the Centers for Disease Control and Prevention have indicated the best way to prevent illness is to "avoid being exposed."[5] And as experience from prior pandemics such as smallpox and the 1918 Spanish Influenza have indicated, early intervention to slow transmission is critical.

In keeping with this advice, governmental entities have stressed the critical import of "social distancing," the practice of avoiding public spaces and limiting movement.[6] The objective of social distancing is what has been termed "flattening the curve," that is, reducing the speed at which COVID-19 spreads. If the disease spreads too quickly, the limited resources of our healthcare system could easily become overwhelmed.[7]

Michigan is hit hard by the expanding epidemic and the Governor declares states of disaster and emergency.

On March 10, 2020, in response to the growing pandemic in Michigan, Governor Whitmer declared a state of emergency and invoked the emergency powers available to the Governor under Michigan law—pursuant to her authority under the Emergency Powers of the Governor Act (EPGA), the Emergency Management Act (EMA), and Article 5, § 1.[8]

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[5] (*Id.*)

[6] (*Id.*)

[7] See *New York Times, Flattening the Coronavirus Curve* (March 27, 2020), available at https://www.nytimes.com/article/flatten-curve-coronavirus.html.

[8] Executive Order 2020-4, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521576--,00.html.

On March 13, 2020, Governor Whitmer issued an executive order prohibiting assemblages of 250 or more people in a single shared space with limited exceptions, and ordering the closure of all K-12 school buildings.[9] Yet, even in the face of the social distancing recommendations and the six-foot rule of thumb, on Saturday, March 14, the public was out in droves. On March 16, 2020, the Governor ordered various places of public accommodation, like restaurants, bars, and exercise facilities, to close their premises to the public.[10]

Subsequently, on March 23, 2020, again in response to the spreading pandemic in Michigan, Governor Whitmer issued an executive order which essentially ordered all persons not performing essential or critical infrastructure job functions to stay in their place of residence, other than to obtain groceries, care for loved ones, engage in outdoor activity consistent with social distancing, and other limited exceptions (the Stay Home Order).[11] Several other orders intended to address the pandemic in Michigan were issued pursuant to her authority under the EPGA and the EMA.[12]

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[9] Executive Order 2020-5, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521595--,00.html.

[10] Executive Order 2020-9, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521789--,00.html. (Replaced by Executive Order 2020-20).

[11] Executive Order 2020-21, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html. That order was to continue through April 13, 2020; however, on April 9, 2020, the Governor issued Executive Order 2020-42, extending the Stay Home Order through April 30, 2020, at midnight. Executive Order 2020-42, available at https://content.govdelivery.com/attachments/MIEOG/2020/04/09/file_attachments/1423850/EO%202020-42.pdf.

[12] See generally "Executive Orders" http://www.legislature.mi.gov/(S(wskfimad5qtw1lrxuwq3z3jb))/mileg.aspx?page=executiveorders

On April 1, the Governor issued Executive Order 2020-33, which expanded upon the prior declaration of a state of emergency and, consistent with the virus's aggressive and destructive spread, declared states of emergency and disaster across the State of Michigan. Under the EMA (though not the EPGA), the declarations must be terminated after 28 days absent resolution by both houses of the Legislature. MCL 30.403(3), (4). On April 7, the Michigan House and Senate approved an extension of the Governor's declaration until April 30, 2020.[13]

As required by the EMA, the Governor terminates the states of emergency and disaster under the EMA after the Legislature refuses to extend them.

Prior to April 30, the Governor again asked the Legislature to extend the states of disaster and emergency under the EMA pursuant to MCL 30.403(3) and (4), but the Legislature did not do so. Notably, neither in public statements nor in its pleading to this Court have the Legislative Plaintiffs expressed disagreement that the conditions persist that warrant declarations of emergency and disaster.[14]

On April 30, 2020, then, the Governor issued three executive orders. First, in Executive Order 2020-66 (App'x A), the Governor terminated the executive orders of states of emergency and disaster declared under the EMA as required by MCL 30.403(3) and (4) because the Legislature refused to extend those executive orders.

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[13] 2020 SCR 24.

[14] To the contrary, the Senate Majority Leader, the very morning after refusing to extend the prior declarations, responded with indignation when asked if the emergency was over: "No, not at all. Hell—heck no. I'd like to know where you would even come up with that question." See https://jtv.tv/senate-majority-leader-shirkey-on-legislative-showdown/ (thirty seconds into the interview).

Although noting that "the threat and danger posed to Michigan by the COVID-19 pandemic has by no means passed, and the disaster and emergency conditions it has created very much exist," the Governor recognized that the Legislature—"despite the clear and ongoing emergency and disaster conditions afflicting our state—has refused to extend [the states of emergency and disaster] beyond today." *Id*. Accordingly, she was required by the EMA's plain language to issue an order "terminat[ing]" the states of emergency and disaster. *Id.*

Because the COVID-19 crisis persists, the EMA requires her to declare a state of disaster and emergency, which she promptly does.

After terminating the prior declarations, the Governor again declared a state of emergency and a state of disaster under the EMA. Executive Order 2020-68 (App'x B). She also explained the basis for this new declaration. Although the measures issued pursuant to her emergency authority had been working, "the need for them—like the unprecedented crisis posed by this global pandemic—is far from over." *Id.* COVID-19, she said,

> remains present and pervasive in Michigan, and it stands ready to quickly undo our recent progress in slowing its spread. Indeed, while COVID-19 initially hit Southeast Michigan hardest, the disease is now increasing more quickly in other parts of the state. For instance, cases in some counties in Western and Northern Michigan are now doubling every 6 days or faster. [*Id.*]

The Governor further found, "[t]he health, economic, and social harms of the COVID-19 pandemic thus remain widespread and severe, and they continue to constitute a statewide emergency and disaster." *Id.* Accordingly, the Governor stated: "I now declare a state of emergency and a state of disaster across the State

of Michigan under the Emergency Management Act." *Id.* Finally, the Governor ordered that "[a]ll previous orders that rested on Executive Order 2020-33 now rest on this order." *Id.*

The Governor reaffirms her declaration of the state of emergency under the EPGA.

In the third Executive Order issued that day, the Governor reaffirmed the state of emergency under the EPGA, ordering that "[a] state of emergency remains declared across the State of Michigan under the Emergency Powers of the Governor Act of 1945." Executive Order 2020-67 (App'x C). And like in Executive Order 2020-68, she ordered "Executive Order 2020-33 is rescinded and replaced. All previous orders that rested on Executive Order 2020-33 now rest on this order." *Id.*

The Court of Claims denies declaratory relief and affirms the Governor's authority under the EPGA.

The Legislative Plaintiffs brought suit, seeking an expedited declaratory judgment that the Governor's authority to act under the EMA ended April 30, 2020; the EPGA does not provide authority for the Governor's COVID-19 executive orders; the Governor has no lawmaking power under Const 1963, art 5, § 1; and the Governor's ongoing COVID-19 executive orders violate the separation of powers. (Compl Request for Relief.)

On May 21, 2020, the Court of Claims issued an opinion and order denying the Plaintiffs' requested relief. (5/21/20 Op and Order, p 25) (App'x D). First, the Court of Claims determined that the Legislative Plaintiffs have standing, but

deemed it a "close question." (*Id.* at 7.) The court construed the Legislative Plaintiffs' claimed injury as being "that EO 2020-67 and EO 2020-68 nullified the decision of the Legislature to not extend the state of emergency or disaster." (*Id.* at 8.) More specifically, the court found the Legislative Plaintiffs' allegation to be "the Governor eschewed the Legislature's role under the EMA and nullified an act of the legislative body as a whole," an injury "unique to the Legislature." (*Id.* at 8–9.)

The court also held that that Executive Order 2020-67 (the EPGA declaration) was a valid exercise of the "broad authority" by the Governor. (*Id.* at 10.) The court rejected the Legislative Plaintiffs' "attempt to limit the scope of the EPGA to local or regional emergencies only," relying heavily on the Legislature's plain statutory purpose in MCL 10.32 to confer " 'sufficiently broad power' on the Governor in order to enable her to respond to public disaster or crisis." (*Id.* at 11, quoting MCL 10.32.) The court rejected the attempt to impose "artificial barriers on the Governor's authority to act," noting that a "particularly strained reading of the plain text of the EPGA" was required to reach the Legislative Plaintiffs' result. (*Id.* at 12.) Recognizing the Legislative Plaintiffs' "selectively rely on parts of the statute and ignore the contextual whole," the court affirmed the Governor's authority to issue state-wide declarations under the EPGA. (*Id.* at 13–14.)

The court had no difficulty squaring this reading with the existence of the EMA, explaining that "while both statutes permit the Governor to declare an emergency, the EMA equips the Governor with more sophisticated tools and options at her disposal." (*Id.* at 14.) And, citing MCL 30.417(d)—which makes clear that

the EMA does not "[l]imit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to [the EPGA]"—the court relied on the Legislature's own textual "explicit recognition" in refusing to narrow the EPGA or the EMA as the Legislative Plaintiffs desire. (*Id.* at 15.)

The court also denied the Legislative Plaintiffs' request to declare the EPGA unconstitutional as violative of the separation of powers. The court properly balanced the complexity of the underlying subject matter—response to an unknown future emergency situation—with the sufficient guidance the Legislature provided. (*Id.* at 16–18.) As the court summed up, citing several Michigan decisions:

> The Legislature's use of the terms "reasonable" and "necessary" are not trivial expressions that can be cast aside as easily as plaintiffs would have the Court do. Rather than being mere abstract concepts that fail to provide a meaningful standard, the terms "reasonable" and "necessary" have historically proven to provide standards that are more than amenable to judicial review. [*Id.* at 18.]

Given the validity of the EPGA and the validity of the Governor's declaration under it, the Court of Claims "conclude[d] that plaintiffs have failed to establish a reason to invalidate Executive Orders that rely on the EPGA." (*Id.* at 19.) The court, again, denied the relief requested by the Legislative Plaintiffs. (*Id.* at 25.)

Even though the court denied Legislative Plaintiffs' relief, the opinion determined that the Governor acted outside of her authority with respect to her April 30 declarations under the EMA. See Op and Order, pp 2–3 ("This court finds that . . . Executive Order No. 2020-68 exceeded the authority of the Governor under the EMA."); p 19 ("The Legislature contends that the issuance of EO 2020-68 was ultra vires, and this Court agrees" that 2020-68 is ultra vires).

After describing the broad authorities a Governor has under the EMA, the court accurately noted that, in Executive Order 2020-66, the Governor "expressly terminated the previously issued states of emergency and disaster—not because the disaster or emergency condition ceased to exist—but because a period of 28 days had expired," which is consistent with the statutory language in MCL 30.403(3) and (4). As the court correctly put it, "The Governor *"shall"* terminate the state of emergency or disaster *unless* the Legislature grants a request to extend it." (*Id.* at 23.) But the court found the Governor's new declarations as contrary to that language, stating, "To adopt the Governor's interpretation of the statute would render nugatory the express 28-day limit." (*Id.* at 24.) The court also disagreed that, construed in this way, the 28-day limit is an unconstitutional legislative veto, describing it as "a standard imposed on the authority so delegated." (*Id.* at 25.)

STANDARD OF REVIEW

This Court reviews questions of statutory and constitutional interpretation de novo. *Mich Dept of Transp v Tomkins*, 481 Mich 184, 190 (2008).

ARGUMENT

I. The Legislative Plaintiffs lack standing.

Dissatisfied by the Governor's issuance of Executive Orders 2020-67 and 2020-68, the Legislative Plaintiffs have a clear, unique, and powerful remedy: they can change the law, even over the Governor's objection. Instead, they have chosen to sue the Governor, asking for a judicial solution to a perceived legislative problem.

This, they cannot do. The Legislative Plaintiffs cannot claim an institutional interest in the enforcement of already-enacted legislation, and have not claimed an injury distinct from the citizenry at large. This Court should determine that the Legislative Plaintiffs lack standing.

A. The Legislative Plaintiffs lack standing because they have no special interest in challenging the executive orders of the Governor that differs in any way from the general interest of the citizenry at large.

"Standing is the legal term used to denote the existence of a party's interest in the outcome of the litigation . . . ." *Allstate Ins Co v Hayes*, 442 Mich 56, 68 (1993) (citations omitted). A litigant meeting the requirements of MCR 2.605 "is sufficient to establish standing to seek a declaratory judgment." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372 (2010). Moreover, a litigant may have standing if it "has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large." *Id.* at 372.

As with an individual legislator, to establish standing, a legislative body must allege that it has been deprived of a cognizable interest peculiar to the body. *Tennessee General Assembly v US Dep't of State*, 931 F3d 499, 507 (CA 6, 2019), citing *Ariz State Legislature v Ariz Independent Redistricting Comm*, 135 S Ct 2652, 2664 (2015). Importantly, a "generalized grievance that the law is not being followed," is insufficient to establish standing. *Dodak v State Admin Bd*, 441 Mich 547, 556 (1993) (citation omitted); see also *League of Women Voters of Michigan v Secy of State*, ___ Mich App ___, ____ (Docket No. 350938), slip op at *6, app for lv pending 938 NW2d 244 (Mich 2020).

The Legislative Plaintiffs seek to nullify the Governor's acts of declaring states of emergency and disaster under the EMA and the EPGA. But constraining the Governor's executive authority will not affect the Legislature as an institution entrusted with passing laws. The Legislative Plaintiffs' success in this case would only infringe upon the separation of powers by invalidating the Governor's implementation of the law and her exercise of the powers vested in her by law. Indeed, that is explicitly the relief that the Legislative Plaintiffs seek. Under *League of Women Voters* and *Dodak*, they cannot obtain that relief here.

The Legislative Plaintiffs claim that the Governor's actions violate the EPGA and the EMA. But even if that were true (it is not), such an alleged injury is not personal or unique to them. As the court noted in *League of Women Voters*, "once the votes of legislators have been counted and the statute enacted, their special interest as lawmakers has ceased." ___ Mich App at ___; slip op at *7. So too here, once the Legislature passed its laws, it exercised its legislative power. Execution of the laws is the purview of the executive. Const 1963, art 5, §§ 1, 8.

The Legislative Plaintiffs fare no better by attempting to cast their claims as Michigan constitutional violations. Whether they frame the Governor's action as allegedly unlawful or unconstitutional, they lack standing to challenge the actions for the same reasons. In either instance, the alleged injury or deprivation is no different than that accruing to the ordinary citizen.[15]

[15] Below, Plaintiffs relied heavily on the *Arizona State Legislature* case for the proposition that a legislature has an interest in protecting its lawmaking power from infringement. (5/15/2020 Hr'g Tr, p 10.) But *Arizona State Legislature* merely

The Legislative Plaintiffs' case is that the Governor did not follow the EMA and EPGA when declaring states of emergency and disaster—a claim of statutory interpretation—and that their own law is unconstitutional. The Governor has not asserted an inherent authority to act with legislative authority, only that the Legislature granted her authority by statute, which she has exercised. By acting as she did, the Governor did not work any infringement upon or dilution of the Legislature's constitutional power to pass laws, or any other constitutionally granted authority. See *Tennessee Gen Assembly*, 931 F3d at 512 (noting that legislative standing is proper upon an allegation of "interference with a legislative body's specific powers . . . or a constitutionally assigned power").

To the contrary, the Legislature admittedly introduced dozens of bills during the pandemic (Compl, ¶ 43), and is not hampered from continuing to do so. Any and all legislative tools remain on the table and available for amending or repealing the laws on the books. That the Governor may *also* act (per the Legislature's own delegation), does not squeeze out the Legislature from acting concurrently.

To sum it up, per the Court of Appeals in *League of Women Voters*:

> [T]he Legislature is suing to reverse actions by the [Governor], a member of the Executive Branch. The Legislature is thus plainly challenging the actions of members of the Executive Branch. *Dodak* stands for the proposition that courts should not confer standing in

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stands for the proposition that, where a legislative body alleges that it is effectively *barred* from exercising its constitutional authority, it has standing. *Id.* at 2663–2664; see also *Tennessee Gen Assembly*, 931 F3d at 511 (explaining that state legislatures had been found to have standing when they "alleged that an action at the state legislative level had interfered with their federal constitutional prerogatives"). That is miles from this case.

> matters that have the real possibility of infringing upon the separation of powers. [*League of Women Voters*, slip op at *7.]

And *League of Women Voters* is all the more persuasive on this point because, in that case, the Legislature sought to *protect* the constitutionality of its laws. ___ Mich App at ___; slip op at *9 ("To accept the Legislature's argument that it has standing here would open the door for the Legislature to seek a declaratory judgment whenever the constitutionality of a statute was challenged."). Here, the Legislative Plaintiffs ask this Court to *invalidate one of its own laws*, seeking a declaration that the EPGA is unconstitutional. If the Legislature lacks standing to attempt to enforce its own laws, it must lack standing to nullify them.

Finally, there is no room for concern in this case that, without standing for these plaintiffs, the executive's actions might evade judicial review.[16] A private party would have standing to challenge the Governor's declarations if the litigant could point to an alleged harm stemming from one of the Governor's substantive executive orders premised on her declarations under the EMA and/or the EPGA.

B. The Legislative Plaintiffs cannot meet their obligation to show that an actual controversy exists under MCR 2.605.

Nor can the Legislative Plaintiffs generate standing by framing their claims as requests for declaratory relief. MCR 2.605 states that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory

[16] See e.g., *League of Women Voters of Michigan v Secretary of State* (Docket No 160907-8), March 11, 2020 Oral Argument, Viviano, J., questioning at 52:26. Available at https://www.youtube.com/watch?v=9_AxvQNoa_4

judgment." Where no such actual controversy exists, a plaintiff does not have standing to bring a declaratory action. *City of South Haven v Van Buren Cty Bd of Comm'rs*, 478 Mich 518, 533–534 (2007).

"In general, 'actual controversy' exists where a declaratory judgment or decree is *necessary to guide a plaintiff's future conduct in order to preserve his legal rights*." *Shavers v Attorney General*, 402 Mich 554, 588 (1978) (emphasis added). See also *Assoc Builders & Contractors v Dep't of Consumer & Indus Servs Director*, 472 Mich 117, 126 (2005), overruled in part on other grds, 487 Mich at 371 n 18.

Here, the gravamen of the Legislative Plaintiffs' complaint is that they passed laws that are not being followed by the Governor, or that their own law (the EPGA) violates the Michigan Constitution. But if that were enough to create an actual controversy, the Legislature would have standing to bring a lawsuit against any government entity that has allegedly violated the Constitution or failed to enforce or comply with a statute. That outcome would be both an abuse of the court system and an improper curtailing of the legislative and political processes.

Nor do the Legislative Plaintiffs adequately explain how declaratory relief is needed here to guide their future conduct in order to preserve their *legal* rights. *Lansing Sch Ed Ass'n,* 293 Mich App at 515. To be sure, the future conduct that the Legislative Plaintiffs seek to "guide"—that is, curtail—is the that of the Governor, not the Legislature. The law does not provide standing for the Legislature to seek declaratory relief. As the Court of Appeals concluded in *League of Women Voters*:

> No declaratory judgment is necessary to guide the Legislature's future conduct in order to preserve its legal rights. The Legislature's

> authority to enact laws is separate and distinct from this Court's role in determining whether any law passes constitutional muster. These "rights" and obligations of the two separate branches of government will remain the same, no matter what the outcome in this matter, such that the preservation of the Legislature's legal rights is not at issue. [*League of Women Voters*, ___ Mich App at ___, slip op at *7.]

The Legislative Plaintiffs contend that they have a special right that is affected in a manner different from the citizenry at large in their right to enact legislation—but this is more spin than reality. There is nothing in the Governor's actions that interferes with the Legislature's ability to legislate. In fact, the complaint specifically alleges that the "Legislature has introduced almost 100 bills on COVID-19 related issues." (Compl, ¶ 43.) The Legislative Plaintiffs' claim for declaratory relief fails because there is no threat to their power to enact legislation, including their power to amend or repeal the very laws they challenge. [17]

In sum, the Legislative Plaintiffs' concern here is the Governor's actions, not infringement of its own institutional rights or responsibilities. They have no special interest in challenging the Governor's executive orders or advancing a strained interpretation of their own laws. Therefore, and in light of the separation-of-powers concerns pervading this suit, the Legislative Plaintiffs lack standing.

[17] The Michigan Constitution provides that "[n]o bill shall become law without the concurrence of a majority of the members elected to and serving in each house." Const 1963, art 4, § 26. "Every bill passed by the legislature shall be presented to the governor before it becomes law[.]" Const 1963, art 4, § 33. If the Governor vetoes a bill, the Legislature may override it by a two-thirds vote in each house. *Id.*

II. The Governor has the authority under the EPGA to declare a state of emergency and to issue orders to protect the health and safety of the State and its people.

Even if the Legislative Plaintiffs could seek their requested relief from this Court, they have not shown entitlement to it. The EPGA grants the Governor broad police powers in times of public emergency to protect life and property and bring the emergency to its end.

A. The State is generally granted broad latitude to respond to public health crises.

Faced with "great danger[ ]," state actors are permitted great latitude to secure the public health. *Jacobson v Commonwealth of Massachusetts,* 197 US 11, 29 (1905). In *Jacobson*, the Supreme Court considered a claim that the Massachusetts' mandatory vaccination law, which applied to every person in Cambridge due to a growing smallpox epidemic, violated the defendant's Fourteenth Amendment right "to care for his own body and health in such way as to him seems best." 197 US at 26. The Supreme Court upheld this sweeping, invasive measure as a proper exercise of the States' police power because of the exigencies and dangerousness of the public health crisis. It affirmed that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. As the Court stated,

> in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. [*Id.* at 29.]

In upholding the law, the Court refused to "usurp the functions of another branch of government" by second-guessing the executive's exercise of police power in such circumstances. *Id.* at 28. As *Jacobson* illustrates, the police power has long been recognized as a fundamental and central means by which States can respond in an effective fashion to an imminent threat to its citizens' health and safety.

B. Consistent with the proper exercise of police power, the Legislature enacted the EPGA.

Through the EPGA, the Legislature has ensured that the Governor, who holds the executive power, has the necessary tools to deal with emergencies and disasters in this State, such as the crisis presented by COVID-19. Const 1963, art 5, § 1. The EPGA does not deprive the Legislature of any of its lawmaking tools or powers, and throughout this crisis, the Legislature has retained and been free to use them. But rather than exercise that lawmaking authority to amend the EPGA or EMA, the Legislative Plaintiffs asks this Court to misconstrue them.

1. The EPGA's broad, but not unlimited, grant of authority supports the Governor's declared state of emergency.

The EPGA, enacted in 1945, provides the Governor with broad powers "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state." MCL 10.31(1). The Governor "may proclaim a state of emergency" during these times, or upon "reasonable apprehension of immediate danger" of such an emergency, "when public safety is imperiled." *Id.*

Upon the proclamation of a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the

affected area under control." *Id.* Any "orders, rules, and regulations promulgated . . . are effective from the date and in the manner prescribed in the orders, rules, and regulations." MCL 10.31(2). And they "may be amended, modified, or rescinded . . . by the governor" and "shall cease to be in effect upon declaration by the governor that the emergency no longer exists." *Id.* As a whole, the EPGA must "be broadly construed to effectuate [its] purpose," which is to "invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster." MCL 10.32.

Our State is undoubtedly facing a "time[ ] of great public crisis," "disaster," or "similar public emergency," wherein "public safety is imperiled." MCL 10.31(1). The world over has been ravaged by the COVID-19 crisis, with serious, often fatal, consequences for many due to the virus's easy and rapid transmission. States of emergency exist across our country too, with orders effectuating social distancing. Since the virus's origin in China, it has traveled to nearly every country on Earth, killing over 350,000 people. Indeed, in April, it killed more Michiganders than heart disease and cancer combined.[18] As of filing, over 5,000 have died here, and over 100,000 have died in the United States.[19]

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[18] Michigan Department of Community Health, Number of Deaths by Select Causes of Death by Month, available at https://www.mdch.state.mi.us/osr/Provisional/MontlyDxCounts.asp

[19] *New York Times*, *An Incalculable Loss* (May 27, 2020), available at https://www.nytimes.com/interactive/2020/05/24/us/us-coronavirus-deaths-100000.html

These undisputed (and undisputable) facts form the basis of the Governor's finding that a state of emergency exists under the EPGA, and well justify the "reasonable" and "necessary" measures she has taken "to protect life" throughout the State and bring this pandemic "under control." MCL 10.31(1).

2. The Legislative Plaintiffs' narrow construction of the EPGA is not borne out by the statute's plain language, and their heavy reliance on the alleged history of the act is misplaced.

In an attempt to avoid the unfavorable result that flows from the EPGA's plain and straightforward text, the Legislative Plaintiffs strain to narrowly read their own statute, suggesting that the EPGA is limited to quelling riots and other uprisings of local concern. (Pls Bypass App, pp 20–24.) But this narrow construction is unwarranted for as many as six reasons.

First, such a limited reading is directly contrary to the Legislature's own (duly enacted) direction, which mandates that the act be "broadly construed to effectuate [its] purpose," which was plainly stated:

> It is hereby declared to be the legislative intent to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. [MCL 10.32.]

Second, the Legislative Plaintiffs proffer *a geographical limitation*—an interpretation of the statute that limits a declaration's reach to only local subsets of the State. (Pls Bypass App, pp 20–22) ("These words—'area,' 'zone,' and 'section'—all establish that the Governor's power is intended to reach some subpart of the state as a whole."). This is an attempt to recast the intended, and plainly stated,

flexibility of the EPGA as a limitation. The EPGA provides that, when declaring an emergency, the Governor must "designate the area involved." MCL 10.31(1). The EPGA then provides an illustrative, and expressly non-exhaustive, list of "orders, rules, and regulations" that the Legislature suggested may be appropriate in response to an emergency—which occasionally includes reference to "zones" or "section[s]," but just as often does not. *Id.*

All of this wisely recognizes that public emergencies, and necessary responses to them, may come in many different shapes and sizes, depending on the nature of the threat to public safety. And none of it suggests that the Governor, when faced with a statewide threat to public safety, cannot declare a state of emergency commensurate with that threat. Here, the "area" designated by the Governor is the entire State—and rightfully so, given the nature of the threat posed to this State (indeed the world) by this highly contagious, often fatal, and still untreatable virus. See MCL 10.31(1) (permitting a declaration during a "public emergency" or "reasonable apprehension of immediate danger of a public emergency").

Simply put, given the nature of this virus and the current limitations on our ability to test for, trace, and contain it, there is unquestionably a "reasonable apprehension of immediate danger of a public emergency" currently present in every portion of this State. MCL 10.31(1). The State is the "area involved," and

under the plainly stated language and intent of the EPGA, the Governor is fully authorized to designate that area and respond accordingly.[20]

Also, any claim that the EPGA is only designed to address local emergencies, and the EMA only statewide ones, is further belied by the language of the EMA. (Pls Bypass App, pp 15–20.) Just as the EPGA plainly accommodates emergencies statewide in scope, so too is the EMA filled with references to the authority for addressing local states of emergencies. It defines a "local state of emergency," MCL 30.402(j), grants local officials with the authority to declare such a state of emergency, MCL 30.410(1)(b), and provides guidance where a local emergency extends "beyond the control of the county," MCL 30.414(1). It also leads to the unfounded conclusion that, prior to the passage of the EMA in 1976, the law contemplated no means for the State to respond to a statewide emergency. The idea that the Governor would have had to issue 83 local emergency orders is not well taken, and is wholly unsupported by the text or express purpose of the EPGA. (See 5/22/20 Ct of Claims Op, p 12 ("Under plaintiffs' view, if that emergency became too large and it affected the entire state, the Governor would have to pick and choose which citizens could be assisted by the powers granted by the EPGA[.]").)

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[20] Similarly misguided is the suggestion that a statewide declaration is contrary to the EPGA because it contemplates that the Governor may act during times of public emergency "within" the State. But even adopting the Legislative Plaintiffs' definition of "within"—" 'Within' means 'on the inside or on the inner-side' or 'inside the bounds of a place or region' " (Pls Bypass App, pp 20, ultimately quoting *Webster's Third New International Dictionary* 758 (1993))—the designated area meets that definition. The entirety of the state is "inside the bounds" of the State.

Third, like squeezing water from a stone, the Legislative Plaintiffs wish to engraft yet another limitation on the EPGA—let us call it the "rioting" limitation—in order to shrink the EPGA's authority to reach only local emergencies of a very specific sort. (Pls Bypass App, pp 17–18, 25.) This, too, fails. While the Legislative Plaintiffs' chosen specific term—rioting—is certainly covered by the EPGA, it sits adjacent "great public crisis," which is quite general (and perfectly applicable), as are "disaster" and "catastrophe." MCL 10.31. And the trusty canon of construction *ejusdem generis* is a handy reference, which applies "where a general term follows a series of specific terms," requiring "the general term [to be] interpreted to include only things of the same kind, class, character, or nature as those specifically enumerated." *Neal v Wilkes*, 470 Mich 661, 669 (2004) (cleaned up). With "public emergency" as the general term, the "similar" specific terms must inform the general term's scope. The ample breadth of "public emergency" is confirmed by the distinct specific terms. The broad terms used by the Legislature, in conjunction with the liberal-construction requirement in MCL 10.32, confirm that the Governor's declaration under the EPGA is appropriate.

Fourth, the Legislative Plaintiffs stitch together their own narrative of the history and motivations behind the enactment of the EPGA. (Pls Bypass App, pp 24–26.) Plaintiffs, of course, have told the story that helps their case, leaning heavily on a circumscribed review of prior *Governors*' understanding of the law which definitionally bears little on the *Legislature's* intent—the proper focus of statutory construction. As the Court of Claims found, the proffered history is

"particularly unpersuasive" because it "does not even address or suggest the local limit plaintiffs attempt to impose on the EPGA" and "rel[ies] on mere generalities and anecdotal commentary." (5/21/20 Ct of Claims Op and Order, p 15.)

But the accuracy or completeness of that history is fundamentally beside the point. The Legislature made its intentions in enacting the EPGA perfectly clear in the language of the statute itself, and Plaintiffs cannot rewrite those intentions to meet their own considerations. "Because the statute is clear, there is no ambiguity that would permit or justify looking outside the plain words of the statute." *In re Certified Question from US Court of Appeals for Sixth Circuit*, 468 Mich 109, 116 (2003) (cleaned up). In particular, courts "do not resort to legislative history to cloud a statutory text that is clear." *Id.* Lacking any ambiguity, the text of the EPGA, including its express directive to construe its terms broadly, controls.

Fifth, contrary to the Legislative Plaintiffs' argument, the doctrine of *in pari materia*, which assists in reading laws on the same subject harmoniously, is generally inapplicable to statutes that are unambiguous and do not present a "patent conflict." *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 74 n 26 (2017). And the doctrine is most profitably applied to address statutes that do not refer to each other, so this canon is employed to make sense of their interaction. See, e.g., *People v Anderson,* ___ Mich App ___ (2019) (No. 343272), slip op at *3 (the doctrine applies "even if the statutes do not reference one another").

But there is no mystery here, the second-in-time statute—the EMA—expressly explains that it does not "[l]imit, modify, or abridge the authority of the

governor to proclaim a state of emergency pursuant [the EPGA]" or any other law in place. MCL 30.417(d). Thus, the statutes themselves unambiguously tell us that they each are—and must be read as—independent, supplementary, and non-conflicting grants of authority to the Governor. This understanding of the EMA and EPGA as overlapping authorities makes practical sense too, as the unforeseen discovery of statutory gaps in the midst of an emergency or disaster could be devastating. Better to, as the 1976 Legislature made clear with MCL 30.417(d), complement one authority with another.

The EMA provides for a more extensive structure of governmental action in response to an emergency, and a more detailed set of powers for the Governor to implement in that response. The EMA, however, expressly ensures that, underlying the mechanisms it provides for activating implementing state and local emergency response resources, there remains the EPGA and its foundational assurance that, in times of public emergency, the executive branch is empowered to exercise the police power of the State to do what is reasonable and necessary to protect life and bring the emergency under control. The law provides more than one tool in the Governor's toolbox, without any limitation against using them in tandem.

Sixth and finally, and for these same reasons, the Legislative Plaintiffs' attempt to engraft the EMA's 28-day limitation period onto the EPGA must fail. There is simply nothing in the text of either statute that supports or even suggests it. The Governor's proclamation only ceases "upon declaration *by the governor* that the emergency no longer exists." MCL 10.31(2) (emphasis added). And the

Legislature, in enacting the EMA thirty years later, wisely chose to leave that characteristic of the EPGA intact. The wisdom of this legal landscape is apparent in the case of a pandemic that respects no boundaries while impacting individuals, regional health systems, and all aspects of life in severe and unpredictable ways.

III. The EPGA contains standards that guide the Governor's exercise of authority concomitant with the nature of broad, developing emergencies and therefore survives a non-delegation challenge.

The Legislative Plaintiffs claim that the EPGA violates the separation of powers because it lacks sufficient standards to guide the Governor's decision-making, in violation of the non-delegation doctrine. Ample caselaw disagrees.

A. The branches of government are not barred from working together, and sharing their authority is permitted so long as adequate guidance is given.

The Michigan Constitution provides for the separation of powers among the three branches of state government. In particular, the Constitution provides:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch. [Const 1963, art 3, § 1.]

But Michigan courts have never interpreted the separation of powers doctrine as meaning there can never be any overlapping of functions between branches. *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 752 (1982). Rather, an overlap or sharing of power is constitutionally permissible provided that "the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other." *Judicial Attorneys Ass'n v Mich*, 459 Mich 291, 297 (1998); see also *id.* ("It is simply

impossible for a judge to do nothing but judge; a legislator to do nothing but legislate; a governor to do nothing but execute the laws.").

The separation of powers doctrine "ha[s] led to the constitutional discipline that is described as the nondelegation doctrine," *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8 (2003), which the Legislative Plaintiffs claim the EPGA violates. While the legislative power—the power "to make, alter, and amend laws"—sits with the Legislature, *Harsha v City of Detroit*, 261 Mich 586, 590 (1933), both the U.S. Supreme Court and the Michigan Supreme Court "ha[ve] recognized that the separation of powers principle, and the nondelegation doctrine in particular, do not prevent Congress [or our Legislature] from obtaining the assistance of the coordinate Branches." *Taylor*, 468 Mich at 8 (internal quotes omitted).

The Michigan doctrine of non-delegation has been expressed in terms of a "standards test." *Westervelt v Natural Resources Comm*, 402 Mich 412, 437 (1978). Under this test, "legislation which contains a delegation of power to . . . [another branch] must contain either explicitly or by reference . . . standards prescribed for guidance . . . ." *Id*. at 437–438. Significantly, such standards must only be "as reasonably precise as the subject matter requires or permits." *Id*. at 438.

And the statute carries a presumption of constitutionality; it "must be construed in such a way as to 'render it valid, not invalid.' " *Id*., citing *Argo Oil Corp v Atwood*, 274 Mich 47, 53 (1935). In Michigan, like the federal system, successful nondelegation claims are exceedingly rare. See *Taylor*, 468 Mich at 9

("In the federal courts these improper delegation challenges to the power of federal regulatory agencies have been uniformly unsuccessful.")

This case presents no exception to the rule; the standards set forth in the EPGA are as "reasonably as precise as the subject matter requires or permits." *Westervelt*, 402 Mich at 439. The Legislature did not grant the Governor a blank check. The EPGA provides the Governor the authority, after declaring a state of emergency, to "promulgate *reasonable* orders, rules, and regulations as he or she considers *necessary* to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1). Accordingly, there are several limits on the Governor's authority. Her orders may come only upon a "public emergency" and the orders must not only be reasonable *and* necessary, they must be directed at protection of "life and property" or "bring[ing] the emergency situation . . . under control" in the "affected area." *Id.*

Michigan courts have consistently upheld similar language as sufficiently precise to avoid any nondelegation problem. In *G.F. Redmond & Co v Michigan Sec Comm'n*, 222 Mich 1, 7 (1923), this Court held that "the term 'good cause' for revocation of the license, relating, as it does, to the conduct of the business regulated by the policy declared in the statute, is sufficiently definite." See also *Smith v Behrendt*, 278 Mich 91, 97–98 (1936) (holding that allowing the executive to grant oversize loads for freeway travel in "special cases" was a limited and proper delegation of legislative authority). These examples suffice to reveal that the courts are hesitant to invalidate laws on the basis of an allegedly improper delegation

where the Legislature provides even a modicum of direction to the executive branch. This level of trust—in the Legislature, to delegate as it sees fit, and in the executive, to follow those guidelines—justifies a strong deference from this Court to its coordinate branches.

The Legislative Plaintiffs rely on *Blue Cross & Blue Shield of Michigan v Milliken*, which determined that "the power delegated to the Insurance Commissioner" regarding approval of actuarial risk factors "is completely open ended." 422 Mich 1, 53 (1985). And for good reason—the commissioner's authority was not guided at all. Instead, the commissioner was granted complete authority to " 'approve' or 'disapprove' the proposed risk factors; the basis of the evaluation is not addressed." *Id.* *Blue Cross* is a poor comparison.

And of course, the standards imposed on the Governor's authority under the EPGA are not read in a vacuum—the "subject matter" of the delegation guides how strictly or narrowly drawn the standards must be. *Westervelt*, 402 Mich at 439. The context of a developing "crisis, disaster, rioting, catastrophe, or similar public emergency," MCL 10.31(1), counsels granting substantial leeway to the decisionmaker. Public emergencies are not static events, nor do they unfold patiently or predictably. Response to such crises warrant—indeed require—nimbleness coupled with judgment to meet the needs of the moment. There is no specific one-size-fits-all response to a complex and ongoing emergency. This subject matter requires the broadest level of leeway permissible under the nondelegation doctrine. If "the management of natural resources is a difficult and complex task,"

DNR v Seaman, 396 Mich 299, 311 (1976), surely the response to a rapidly developing and ever-changing public health crisis is even more so.

The EPGA provides the Governor substantial discretion, but limits her ability to act upon a finding of an emergency, and even then only to exercise her discretion to issue "reasonable" orders "necessary" to protect "life and property" and to bring the emergency "under control." MCL 10.31(1). These guideposts are more than sufficient, and do not contemplate legislative or judicial second-guessing.

B. The Legislature is not best equipped to address the exigencies of an emergency.

The Legislative Plaintiffs highlight the Legislature's "nature and design" as best situated to handle the ongoing public health crisis. (Pls Ct of Claims Br, p 44.) They offer the virtues of "consensus through rigorous parliamentary debate," and considerable "distillation and refinement," to make public policy choices. (*Id.*) As explained in painstaking detail by an amicus filing in the Court of Claims (Senate Democrats Caucus Br, pp 6–12), the road from an idea to a bill to an enactment is a long one, filled with procedural requirements—most notably, the constitutional requirement that each bill must sit, at a minimum, for *five days in each chamber* before it can be passed, Const 1963, art 4, § 26. Though valuable in the normal course of legislative deliberation, the response necessary to combat a fast-moving, contagious disease is agile and flexible (as well as temporary and reasonable)

action, not Robert's Rules of Order.[21] The Legislature knows that to meet the moment, proper delegation to the executive is the wisest course, which is why it granted the authorities it did to the Governor.

This Court should honor that choice. Having extolled its virtues in making public policy choices, it is incumbent on the Legislature, not this Court, to make the changes it seeks. Bicameralism and presentment are the procedures that the Legislature designed to effectuate such choices, and if it thinks it is wise to take the reins in the middle of this crisis, it should exercise its legislative authority to do so.

IV. In the EMA, the Legislature *requires* the Governor declare a state of emergency and disaster if she finds certain conditions exist.

In addition to her authority under the EPGA, the Governor has an independent source of emergency-response authority in the EMA. In determining that the Governor acted outside of that statutory authority under the EMA when issuing Executive Order 2020-68, the Court of Claims made its only error on the merits. That error stems from an interpretation of the EMA's provision concerning the effect of the Legislature's decision not to extend the Governor's declarations of emergency and disaster. (5/22/20 Ct of Claims Op, pp 19–25.) Before review of that provision, however, an understanding of the scope of the EMA sets the background.

[21] In some emergency circumstances, even the constitutionally mandated quorum necessary to do business in the Legislature could pose logistical barriers. Const 1963, art 4, § 14.

A. The EMA sets out a statutory game-plan for state and local emergency response, and it grants the Governor broad powers and duties to "cop[e] with dangers to the state or its people."

First enacted in 1976, the EMA sets forth several independent (though related) obligations regarding state and local responses to emergencies and disasters in the State. The Governor is not the only subject of the EMA—that act tasks county boards of commissioners, MCL 30.409, and directors in state government, MCL 30.408, among others, with emergency planning, including the designation of emergency management coordinators. See MCL 30.410. It grants those local coordinators the authority to declare a local state of emergency and permits them to, among other things, appropriate funds, provide emergency assistance to victims of a disaster, and enter into regional compacts with public and private entities to respond to the emergencies. MCL 30.410(1)(b).

Particular to the Governor, the EMA grants her the important responsibility to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency." MCL 30.403(1). This broad charge places the Governor at the forefront of emergency and disaster responsiveness and serves as a baseline for the latitude given to her by the Legislature in times of crisis. To that end, she possesses the authority to "issues executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(2). The act grants the Governor, and only the Governor, the authority to amend or rescind those orders. *Id.*

This broad statement of authority is confirmed throughout the EMA. For example, MCL 30.414(3), makes clear that the EMA "shall not be construed to restrain the governor from exercising on his own initiative any of the powers set

forth in this act." The act also emphasizes the breadth and strength it is intended to add to the Governor's preexisting emergency response authority, stating that it does not "[l]imit, modify, or abridge" the authority of the Governor to proclaim a state of emergency under the EPGA "or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of the state independent of, or in conjunction with, this act." MCL 30.417(d). As discussed above, the EPGA confers emergency authority on the Governor without mention of legislative involvement—a characteristic the EMA expressly preserved.

B. If the conditions warrant it, the Governor has a duty under the EMA to declare states of emergency and disaster which actuates certain emergency response mechanisms.

Consistent with this broad authority, the Governor has the obligation to declare states of disaster and emergency if the pertinent conditions exist. She "*shall*, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists." MCL 30.403(4) (emphasis added). Similarly, she "*shall*, by executive order or proclamation, declare a state of disaster if he or she finds a disaster has occurred or the threat of a disaster exists." MCL 30.403(3) (emphasis added).

Upon that order or proclamation, the law grants the Governor authority to marshal both state and federal resources to adequately deal with the danger facing the State.[22] The executive order or proclamation also authorizes the Governor to

[22] See, e.g., MCL 30.404(1) (authorizing deployment of forces and distribution of supplies); MCL 30.404(2) (the Governor may seek and accept federal assistance); MCL 30.408(1) (demanding cooperation among the state agencies).

exercise additional broad powers, including "[s]uspending a regulatory statute, order, or rule prescribing the procedures for conduct of state business" in certain circumstances, "commandeer[ing] . . . private property necessary to cope with the disaster or emergency," and "[c]ontrol[ling] ingress and egress to and from a stricken or threatened area," and "[d]irect[ing] all other actions which are necessary and appropriate under the circumstances." MCL 30.405(1)(a), (d), (g), (j).

And the EMA expressly defines "state of disaster" and "state of emergency" independently from "disaster" and "emergency." "[D]isaster" and "emergency" refer to conditions that the Governor may find to exist in the State.[23]

Distinctly, "state of emergency" and "state of disaster"—both of which were declared in Executive Order 2020-68—are defined as types of executive orders or proclamations that the Governor must issue upon finding emergency or disaster conditions exist. Per MCL 30.402(p), " 'state of disaster' means *an executive order or proclamation* that activates the disaster response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected." (Emphasis added.) Similarly, " 'state of emergency' means *an executive order or proclamation* that activates the emergency response and recovery aspects of the state, local, and interjurisdictional emergency

[23] The EMA defines both "disaster" and "emergency." Under MCL 30.402(e), " '[d]isaster' means an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause. . . ." "Emergency" is defined as "any occasion or instance in which the governor determines state assistance is needed to supplement local efforts and capabilities to save lives, protect property and the public health and safety, or to lessen or avert the threat of a catastrophe in any part of the state." MCL 30.402(h).

operations plans applicable to the counties or municipalities affected." MCL 30.402(p) (emphasis added).

In short, "state of emergency" and "state of disaster" are *species of executive orders* that activate certain response efforts and resources and may—indeed, must—be issued only when "emergency" or "disaster" conditions are found to exist. These statutory definitions are important to understand the interplay between the Governor's termination of her prior declarations and subsequent new declarations.

Importantly, "if [the Governor] finds that an emergency [or disaster] has occurred or that the threat of an emergency [or disaster] exists," the Governor "*shall*" declare as such in an executive order or proclamation. MCL 30.403(3), (4). Under longstanding Michigan precedent, "the word 'shall' is ordinarily construed in its imperative sense, excluding the idea of discretion." *State Bd of Ed v Houghton Lake Cmty Sch*, 430 Mich 658, 670 (1988).[24] The Governor thus has a *duty* to declare a state of emergency or a state of disaster if she determines a disaster or emergency has occurred or will occur.

And just as she is required to *declare* a state of emergency if the real-world conditions merit it, she also has the duty to "terminate" a state of disaster or emergency, i.e., such executive orders, if the conditions cease or the Legislature refuses to extend those executive orders. MCL 30.403(3), (4).

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[24] See also *Sauder v Dist Bd of Sch Dist No 10, Royal Oak Tp, Oakland Co*, 271 Mich 413, 418 (1935) (when a statute uses "shall" and "the public are interested" that charge "is imperative"); *Southfield Tp v Main*, 357 Mich 59, 76 (1959) ("The use of the word 'shall' is mandatory and imperative and when used in a command to a public official.").

C. Pursuant to the EMA's mandates, the Governor terminated her earlier declarations and issued new ones because there was an undisputed "disaster" and "emergency" in Michigan.

As April 30 approached and with it the expiration of the declared states of emergency and disaster under the EMA, see Executive Order 2020-33, the Legislature declined to extend those executive orders, despite the lack of dispute that that the conditions in our State remained dire. On April 30, then, in accordance the mandate that the Governor "terminate" the state of emergency and disaster declarations under the EMA absent legislative extension, MCL 30.403(3), (4), the Governor so terminated. Executive Order 2020-66.

Then, since the conditions on the ground undisputedly remained dire—*just that day*, over 100 Michiganders died from the virus and over 1,100 were confirmed infected[25]—the Governor found "that an emergency [or disaster] has occurred or that the threat of an emergency [or disaster] exists," triggering her *duty* under the EMA to declare as such in an executive order or proclamation. MCL 30.403(3), (4); Executive Order 2020-68, Preamble.

In carrying out her statutory duty, the Governor acknowledged that the measures implemented pursuant to her authority under the EMA and the EPGA (like the Stay at Home order, among others) "have been effective, but the need for them—like the unprecedented crisis posed by this global pandemic—is far from over." *Id.* She emphasized the continued lack of treatment for the virus, the ease of

[25] *MLive, Thursday, April 30: Latest developments on coronavirus in Michigan*, available at https://www.mlive.com/public-interest/2020/04/thursday-april-30-latest-developments-on-coronavirus-in-michigan.html

transmission, and the "lack [of] adequate means to fully test for it and trace its spread." *Id.* Ultimately, the Governor found that "the threat and danger posed to Michigan by the COVID-19 pandemic has by no means passed, and the disaster and emergency conditions it has created still very much exist." *Id.* Given her findings and the facts on the ground, the Governor was obligated to issue the declaration.

D. The construction of the Court of Claims and the Legislative Plaintiffs adds limitations on the Governor's authority that the Legislature did not impose.

The Court of Claims erroneously ruled that the Governor was barred from issuing Executive Order 2020-68. Because the Legislature did not extend the emergency and disaster declarations set to expire on April 30, the Governor terminated them, just as she was required to do. *Id.* But her duty to issue states of emergency and disaster plainly remained, and was not the subject of those terminated declarations. So, because of the duty to issue such declarations whenever the conditions warrant it—the law states that she "shall" do so—she immediately issued new orders declaring states of emergency and disaster. *Id.*

The Legislative Plaintiffs' position—that their refusal to extend requires not only termination of the executive orders, but bars the Governor from issuing distinct and subsequent executive orders—finds no mention in the text. (5/21/20 Ct of Claims Op at 23.) Rather, the Legislature seeks to engraft a *second* effect of their refusal to extend the Governor's executive orders: the negation of her duty to respond to emergencies under the EMA.

To illuminate the legal error (and the real-world stakes) in an all-too-possible factual context, barring the Governor from declaring a state of emergency or disaster on the same subject matter of a prior, un-extended declaration would prohibit her from activating the EMA's emergency response resources to combat COVID-19, no matter how badly or urgently those resources are needed. *How long* would the Governor have to wait from the earlier termination before enough time had passed, if the Plaintiffs and the Court of Claims are correct that a minute is simply not long enough? How about a day? A week? Six months? No time period exists in the statute, and this Court should not add some extra-textual time-lapse before the Governor may fulfill her statutory duty to the State and its residents.

Nor is there any requirement in the statute, express or implied, that the Governor's duty to declare an emergency or disaster may spring back up, but only if the *conditions change*. (5/21/20 Ct of Claims Op at 23.) And in the absence of any statutory guidance, how is the Governor to know, or a court to review, whether the conditions have sufficiently changed? The EMA does not contemplate this, nor would it make any sense as a matter of emergency response; the decision to declare states of emergency and disaster is entrusted to the sound discretion of the Governor and is based, as it should be, on what the existing conditions require, not on whether they have changed in some undefined and uncertain way. Imposing such extra-textual rules about how and when a Governor can reactivate needed emergency response resources is both unwarranted and dangerous.

Public health experts warn of a possible second wave of this pandemic. The existence of such unknowns and uncertainties about the future impact of the coronavirus (as with many emergencies or disasters) further supports reading the law as it is, not as the Legislative Plaintiffs would like it to be. The Legislature wrote the law; the Governor followed it. Only the Legislature may amend it.

The Governor is not granted her emergency authority without limit, as the Legislative Plaintiffs' seemingly warned below. Indeed, although the Governor "shall" declare an emergency or disaster "if he or she finds" that an emergency or disaster has occurred or threat of either exists, she is not empowered to declare either in the absence of the conditions precedent. MCL 30.403(3) and (4). These clear textual limitations should mute the siren-decibel lamentations of the Governor's purported "tyranny." (Pls Ct of Claims Br, p 41.)[26]

And while a Governor's factual finding of an emergency is entitled to great deference, it is not beyond judicial review. *Straus v Governor*, 459 Mich 526, 533 (1999), quoting *People ex rel Johnson v Coffey*, 237 Mich 591, 602 (1927) ("The Governor holds an exalted office. To him, and to him alone, a sovereign people has committed the power and the right to determine the facts in the proceeding before us. His decision of disputed question of fact is final. His finding of fact, *if it has*

[26] The Legislative Plaintiffs bludgeon the Governor's supposed creation of "new crimes" and for criminalizing violation of her executive orders. (Pls Ct of Claims Reply Br, pp 4, 23–24.) Yet, it is *the Legislature* that criminalized violation of a Governor's executive orders. MCL 30.405 (willfully disobeying or interfering with an order of the Governor is a misdemeanor); MCL 10.33 (violation of Governor's orders "shall be punishable as a misdemeanor" where so stated).

evidence to support it, is conclusive on this court.") (emphasis added). If a party disputes the factual support for the Governor's findings supporting a declaration, it may attempt redress in the courts. But, again, the Legislative Plaintiffs have agreed that emergency and disaster conditions exist.

E. The Legislative Plaintiffs' responsive arguments do not fully account for the language of the act.

The Legislative Plaintiffs made several arguments below why the Governor's April 30, 2020 declaration of a state of emergency and state of disaster under the EMA are void. None have merit.

1. No piece of the EMA is invalidated or rendered nugatory.

The Court of Claims agreed with the Legislative Plaintiffs' contention that, under the Governor's reading, the concurrent-resolution procedure for extending states of emergency and disaster beyond 28 days in MCL 30.403(3) and (4) is rendered meaningless. (5/21/20 Ct of Claims Op and Order, p 24.) Not so.

First, the lack of legislative extension after 28 days *forces* the Governor to terminate those executive orders. That is no mere technicality. This mechanism is a tool to hold the Governor accountable if the conditions supporting a declaration are questionable, or completely lacking. Recall that the declaration "shall" include an explanation of the conditions causing the disaster or emergency and the area affected. MCL 30.403(3) and (4). Therefore, by refusing to extend a declared state of emergency or disaster, the Legislature can force the Governor to prove her

insistence that an emergency or disaster has not abated, creating an interbranch dialogue on a matter of utmost public importance.[27]

But that is not the circumstance before the Court—the Legislative Plaintiffs have not denied that Michigan faces a dire public health threat, nor could it in good faith do so. Nonetheless, the Legislature withheld. The statute it drafted, though, does not allow that withholding to override the Governor's duty to declare states of disaster and emergency, and to cope with the dangers facing the State, when the conditions on the ground warrant it. And wisely so. In a wildfire, the firefighters holding the hose do not pack up if someone shuts off a ringing alarm. Instead, they fight the spread and respond to the conditions as they are.

The lack of legislative extension after 28 days also serves another purpose. It forces the Governor not only to show her work to the Legislature, but to explain to the People the grounds for any renewal of the declarations. This is because all emergency or disaster proclamations must be "disseminated promptly" to "bring its contents to the attention of the general public." *Id.* Thus, at least every 28 days, her justifications must be manifest to the whole State, to whom she answers.

Of course, this Court has recognized that it "is not to second-guess those policy decisions or to change the words of a statute in order to reach a different result." *People v Harris*, 499 Mich 332, 345 (2016). If the Legislative Plaintiffs now complain that the language they wrote grants them an insufficient measure of

[27] Ultimately, as discussed above, this is a determination that, while subject to great deference, is within the courts' authority to review. See *Straus*, 459 Mich at 533; *Coffey*, 237 Mich at 602.

control over the Governor's handling of an emergency or disaster, it is up to the Legislature, not this Court, to modify its statutes.

The Legislature had several options for writing its law differently. It could have set an expiration period on her *legal duty* to declare an emergency, rather than on the just the declaration. Or it could have *prohibited* the Governor from issuing a substantively similar declaration if the Legislature did not extend the earlier one. It could have constructed the definitions of "state of disaster" and "state of emergency" differently. But the 1976 Legislature wisely did not draft so inflexible and short-sighted a statute. Myriad unforeseen disasters and emergencies awaited future generations, so the Legislature's words *requiring* the Governor to issue a declaration where the real-world implications persist was a humble acknowledgement of our predictive limitations, and a trust in the one statewide office equipped to lead a coordinated response.

2. The Governor's construction does not yield absurd results.

Below, the Legislative Plaintiffs leaned on the concept of absurd results (Pls Ct of Claims Br, pp 21–23), arguing that the Governor issued contradictory orders by simultaneously terminating and declaring states of emergency and disaster. But this, again, shows a misunderstanding both of the Governor's declarations and of the language of the EMA. Even if the absurd results doctrine exists in Michigan, *Johnson v Recca*, 492 Mich 169, 193 (2012) (questioning that premise), it involves a high standard: "[a] result is only absurd if it is quite impossible that the Legislature could have intended the result," *id.* (cleaned up).

Again, "state of emergency" and "state of disaster" are, by statutory definition, types of "executive orders." MCL 30.402(p) and (q). And as the Governor made abundantly clear in Executive Order 2020-66, the termination of her previously declared states of emergency and disaster was not driven by any belief that the emergency and disaster conditions requiring them had ceased to exist. Rather, per the EMA, she terminated those executive orders only because the Legislature refused to extend them. MCL 30.403(3) and (4). Accordingly, Executive Order 2020-66 complies stringently with the law. The Legislature wrote the rules; the Governor followed them.

3. If the Legislative Plaintiffs are right about the authority to effectively veto the Governor's declarations under the EMA, the Legislature retained an unconstitutional legislative veto under *Chadha* and *Blank*.

The Legislative Plaintiffs read the EMA's concurrent-resolution extension mechanism as a means for the Legislature to force the termination not only of certain orders, but of the Governor's substantive emergency response authority under the EMA. This reading not only goes beyond contradicting the EMA's plain text—it is unconstitutional. As discussed above, the Legislature may share its constitutional authority with the Governor provided it prescribes standards for guidance that are reasonably precise in light of the subject matter of the delegation. But once the Legislature does so, it may not retain what amounts to a legislative veto. *Blank v Department of Corrections*, 462 Mich 103, 113 (2000). If the Legislative Plaintiffs are correct about their interpretation of the concurrent-resolution provision, then that body has not just kept a modicum of oversight, but a

"right to approve or disapprove" the Governor's exercise of delegated authority—and to do so without itself abiding by constitutional requirements of bicameralism and presentment. *Id.* Such invasive oversight would violate our Constitution.

In *INS v Chadha*, 462 US 919 (1983), the U.S. Supreme Court evaluated whether the Constitution permitted Congress to delegate authority to the executive but permit one house of Congress to retain veto authority over the actions of the executive. The Court held that such a maneuver violated the principle of bicameralism and presentment. *Id.* at 959. Just as in *Chadha*, where there was "[d]isagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha," here, the Legislative Plaintiffs disagree with the Governor's decision to declare states of disaster and emergency in Michigan and to activate the response resources that accompany those declarations. *Id.* at 954. Such "determinations of policy" by legislative branches may be implemented "in only one way": bicameral passage and presentment to the President (or Governor). *Id.* at 954–955. "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." *Id.* at 955.

In *Blank*, this Court applied the framework in *Chadha* in considering the constitutionality of a 1977 amendment to the Administrative Procedures Act, which required an administrative agency to "obtain the approval of a joint committee of the Legislature or the Legislature itself before enacting new administrative rules." 462 Mich at 108 (Kelly, J.). The Court framed the issue as follows: "[W]hether the Legislature, upon delegating [rulemaking authority to an executive-branch agency],

may retain the right to approve or disapprove rules proposed by [the agency]." *Id.* at 113. The plurality opinion ultimately answered that question in the negative, finding that the Legislature's approval or disapproval of an executive-agency rule is "inherently legislative" and therefore "subject to the enactment and presentment requirements of the Michigan Constitution." *Id.* at 115–116.

The same conclusion holds for any determination by the Legislature that the Governor can no longer exercise the emergency powers the Legislature has vested in her through the EMA. Effectuating such an inherently legislative determination requires legislative action, and "[w]hen the Legislature engages in 'legislative action' it must do so by enacting legislation." *Id.* at 119. "[T]he Legislature cannot circumvent the enactment and presentment requirements [that must accompany legislative action] simply by labeling or characterizing its action as something other than 'legislation.' " *Id.* The Legislative Plaintiffs thus cannot complain that the EMA's concurrent-resolution procedure has not been given the effect they would like it to have, because that effect—a legislative veto of the Governor's delegated authority—would be unconstitutional.

The Court of Claims erred in concluding that "[t]he 28-day limit is not legislative oversight or a 'veto' of the Governor's emergency declaration; rather, it is a standard imposed on the authority so delegated." (5/21/20 Ct of Claims Op and Order, p 25.) But that conclusion is a consequence of the erroneous determination that the legislative extension provision does more work than the text provides. The Legislature's withholding only results in the termination of certain executive

orders; it does not operate as a "stop" button on the duty the Legislature delegated to the Governor to respond to emergencies and disaster. The Legislature "must abide by its delegation of authority until that delegation is legislatively altered or revoked," *Chadha*, 462 US at 955, through the means set forth in the Constitution.

* * *

The Legislative Plaintiffs ask this Court to nullify the Governor's declarations and all of the executive orders derived from them, like the incrementally loosening Stay Home Order, among others. The emergency and disaster declarations issued by the Governor were executed after careful consideration of the unique nature of the threat facing Michigan and the advice of numerous individuals and entities with unique expertise. To judicially strip the Governor of her authority, contrary to her clear legal obligations, would not just upset the separation of powers, it would work grievous harm on the State and its citizens. If asking this Court to strike down its own statute as unconstitutional is not ironic enough, the Legislative Plaintiffs come to the judiciary seeking a shortcut to do something it already has the power to do—amend the challenged laws.

Because both emergency acts grant the Governor the authority she has exercised, and because she has stringently abided by the very terms the Legislature used in granting that power, this Court should hold that the Governor's executive orders were proper.

CONCLUSION AND RELIEF REQUESTED

The Governor asks this Court to grant the bypass applications, determine that the Michigan House of Representatives and Michigan Senate do not have standing, and hold in the alternative on the merits—that the Governor's Executive Orders 2020-66, 2020-67, and 2020-68 are validly issued orders under the EPGA and EMA.

Respectfully submitted,

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Dated: May 29, 2020

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, AND JEFFERY GULICK,

Plaintiffs,

v

GRETCHEN WHITMER in her official capacity as Governor of the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, and ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services,

Defendants.

No. 1:20-cv-00414

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Exhibit O

SUPREME COURT OF THE UNITED STATES

No. 19A1044

SOUTH BAY UNITED PENTECOSTAL CHURCH, ET AL.
v. GAVIN NEWSOM, GOVERNOR OF
CALIFORNIA, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[May 29, 2020]

The application for injunctive relief presented to JUSTICE KAGAN and by her referred to the Court is denied.

JUSTICE THOMAS, JUSTICE ALITO, JUSTICE GORSUCH, and JUSTICE KAVANAUGH would grant the application.

CHIEF JUSTICE ROBERTS, concurring in denial of application for injunctive relief.

The Governor of California's Executive Order aims to limit the spread of COVID–19, a novel severe acute respiratory illness that has killed thousands of people in California and more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others. The Order places temporary numerical restrictions on public gatherings to address this extraordinary health emergency. State guidelines currently limit attendance at places of worship to 25% of building capacity or a maximum of 100 attendees.

Applicants seek to enjoin enforcement of the Order. "Such a request demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Respect Maine PAC* v. *McKee*, 562 U. S. 996 (2010) (internal quotation marks omitted). This

power is used where "the legal rights at issue are indisputably clear" and, even then, "sparingly and only in the most critical and exigent circumstances." S. Shapiro, K. Geller, T. Bishop, E. Hartnett & D. Himmelfarb, Supreme Court Practice §17.4, p. 17-9 (11th ed. 2019) (internal quotation marks omitted) (collecting cases).

Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson* v. *Massachusetts*, 197 U. S. 11, 38 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall* v. *United States*, 414 U. S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. See *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 545 (1985).

That is especially true where, as here, a party seeks

emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground. The notion that it is "indisputably clear" that the Government's limitations are unconstitutional seems quite improbable.

SUPREME COURT OF THE UNITED STATES

No. 19A1044

SOUTH BAY UNITED PENTECOSTAL CHURCH, ET AL.
v. GAVIN NEWSOM, GOVERNOR OF
CALIFORNIA, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[May 29, 2020]

JUSTICE KAVANAUGH, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, dissenting from denial of application for injunctive relief.

I would grant the Church's requested temporary injunction because California's latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses. Such discrimination violates the First Amendment.

In response to the COVID–19 health crisis, California has now limited attendance at religious worship services to 25% of building capacity or 100 attendees, whichever is lower. The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries.

South Bay United Pentecostal Church has applied for temporary injunctive relief from California's 25% occupancy cap on religious worship services. Importantly, the Church is willing to abide by the State's rules that apply to comparable secular businesses, including the rules regarding social distancing and hygiene. But the Church objects to a 25% occupancy cap that is imposed on religious worship services but not imposed on those comparable secular businesses.

In my view, California's discrimination against religious worship services contravenes the Constitution. As a general matter, the "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *McDaniel* v. *Paty*, 435 U. S. 618, 639 (1978) (Brennan, J., concurring in judgment). This Court has stated that discrimination against religion is "odious to our Constitution." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S.__,__ (2017) (slip op., at 15); see also, *e.g., Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993); *McDaniel*, 435 U. S. 618.

To justify its discriminatory treatment of religious worship services, California must show that its rules are "justified by a compelling governmental interest" and "narrowly tailored to advance that interest." *Lukumi*, 508 U. S., at 531–532. California undoubtedly has a compelling interest in combating the spread of COVID–19 and protecting the health of its citizens. But "restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom." *Roberts* v. *Neace*, 958 F. 3d 409, 414 (CA6 2020) (*per curiam*). What California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap.

California has not shown such a justification. The Church has agreed to abide by the State's rules that apply to comparable secular businesses. That raises important questions: "Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?" *Ibid.*

The Church and its congregants simply want to be treated equally to comparable secular businesses. California already trusts its residents and any number of businesses to adhere to proper social distancing and hygiene practices. The State cannot "assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings." *Ibid.*

California has ample options that would allow it to combat the spread of COVID–19 without discriminating against religion. The State could "insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities." *Id.,* at 415. Or alternatively, the State could impose reasonable occupancy caps across the board. But absent a compelling justification (which the State has not offered), the State may not take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship.

The State also has substantial room to draw lines, especially in an emergency. But as relevant here, the Constitution imposes one key restriction on that line-drawing: The State may not discriminate against religion.

In sum, California's 25% occupancy cap on religious worship services indisputably discriminates against religion, and such discrimination violates the First Amendment. See *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U. S. 1312 (1986) (Scalia, J., in chambers). The Church would suffer irreparable harm from not being able to hold services on Pentecost Sunday in a way that comparable secular businesses and persons can conduct their activities. I would therefore grant the Church's request for a temporary injunction. I respectfully dissent.