RECEIVED by MSC 7/21/2020 1:55:55 PM

STATE OF MICHIGAN

IN THE SUPREME COURT

IN RE CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION,
___________________________________/

Supreme Court No. 161492

USDC-WD: 1:20-cv-414

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

Plaintiffs,

v

GOVERNOR OF MICHIGAN, MICHIGAN ATTORNEY GENERAL, and MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES DIRECTOR,

Defendants.

**PLAINTIFFS' OPENING BRIEF**

****ORAL ARGUMENT REQUESTED****

---

James R. Peterson (P43102)
Stephen J. van Stempvoort (P79828)
Amy E. Murphy (P82369)
MILLER JOHNSON
Co-counsel for Plaintiffs
45 Ottawa Avenue SW, Suite 1100
Grand Rapids, Michigan 49503
(616) 831-1700
petersonj@millerjohnson.com
vanstempvoorts@millerjohnson.com
murphya@millerjohnson.com

Patrick J. Wright (P54052)
Mackinac Center Legal Foundation
140 W Main St.
Midland, Michigan 48640-5156
Co-counsel for Plaintiffs
(989) 631-0900
wright@mackinac.org

Ann M. Sherman (P67762)
Rebecca Berels (P81977)
Assistant Attorney General
Attorneys for Defendant Nessel
Michigan Dep't of Attorney General
P.O. Box 30212
Lansing, MI 48909
(517) 335-7628
shermana@michigan.gov
berelsr1@michigan.gov

Christopher M. Allen
Joshua O. Booth
John G. Fedynsky
Joseph T. Froehlich
Assistant Attorneys General for
Defendants Whitmer and Gordon
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
Allenc28@michigan.gov
Buthj2@michigan.gov
fedynsky@michigan.gov
Froehlichj1@michigan.gov

RECEIVED by MSC 7/21/2020 1:55:55 PM

Table of Contents

Page

INDEX OF AUTHORITIES ........ iv

JURISDICTIONAL STATEMENT ........ xi

QUESTIONS PRESENTED ........ xii

INTRODUCTION ........ 1

STATEMENT OF FACTS ........ 3

A. Governor Whitmer Issues an Executive Order Declaring a State of Emergency on March 10, 2020, and Takes Other Action by Executive Orders. ........ 3

B. Governor Whitmer Declares a State of Emergency and State of Disaster on April 1, 2020 and Issues Drastic Executive Orders. ........ 4

C. The Legislature Declines to Extend the Governor's Emergency Declaration, and the Governor Unilaterally Extends It Anyway. ........ 6

D. Governor Whitmer Issues Numerous, Sweeping Executive Orders After April 30, 2020. ........ 7

E. Governor Whitmer Admits the Ban on "Non-Essential" Medical Procedures Is No Longer Necessary on May 1, 2020, Yet Does Not Lift It Until May 29. ........ 8

F. Governor Whitmer Announces a Long-Term Plan to Address the Challenges Posed by the Pandemic. ........ 9

G. Governor Whitmer Issues More Than 140 Executive Orders Based on COVID-19 and Has Extended the State of Emergency Through August 11. ........ 10

H. The Plaintiffs Are Medical Providers and a Patient, Each of Whom Was Restricted from Providing (or Receiving) "Non-Essential" Medical Care Due to EO 2020-17. ........ 11

ARGUMENT ........ 12

I. After April 30, 2020, the Governor no longer has authority under the Emergency Management Act to issue executive orders related to the COVID-19 pandemic. ........ 12

RECEIVED by MSC 7/21/2020 1:55:55 PM

Table of Contents
(continued)

Page

A. The EMA prohibits the Governor from continuing an emergency beyond 28 days. ....12

B. The Legislature's inaction cannot amount to a legislative veto. ....14

II. As a matter of statutory interpretation, the EPGA does not support Governor Whitmer's executive orders. ....17

A. The EPGA authorizes only limited orders for time-limited emergencies, and a years-long pandemic is not an "emergency." ....17

1. An "emergency" for purposes of the EPGA is a set of exigent circumstances that calls for immediate action, not a years-long public health problem. ....18

2. The Governor's declarations of "emergency" contemplate that the state of emergency will last until the end of the epidemic, even if that takes years. ....20

3. MCL § 10.32 does not permit the Governor to extend an emergency declaration indefinitely. ....22

B. Governor Whitmer has already terminated the only "emergency" that supported her declaration of emergency under the EPGA. ....24

III. To the extent that the EPGA gives Governor Whitmer discretion to declare an emergency across the entire State for an indefinite period of time, it violates the Separation of Powers and Non-Delegation Clauses. ....29

A. A delegation of power to the executive is unconstitutional if it does not confine the executive's conduct within specific parameters in order to avoid executive law-making. ....29

B. To the extent that the EPGA does not contain a durational limit, then it violates separation of powers and non-delegation principles. ....33

C. The EPGA's requirement that the Governor's orders be "reasonable" and "necessary" does not impose any true parameters to guide the executive's conduct. ....36

D. Separation of powers concerns are accorded particularly important weight because they implicate the very structure of our government. ....39

Table of Contents
(continued)

Page

IV. The Governor cannot collaterally attack the federal district court's decisions....45

CONCLUSION....46



RECEIVED by MSC 7/21/2020 1:55:55 PM

RECEIVED by MSC 7/21/2020 1:55:55 PM

Index of Authorities

Page

**Cases**

*ALA Schechter Poultry Corp v United States*,
295 US 495 (1935) ..... 33

*Blank v Dep't of Corr*,
462 Mich 103; 611 NW2d 530 (2000) ..... 14

*Blue Cross and Blue Shield of Mich. v. Milliken*,
367 N.W.2d 1 (Mich. 1985) ..... 30, 31, 32, 33

*Brown v Argosy Gaming Co, LP*,
360 F3d 703 (CA 7, 2004) ..... 46

*California v Trump*,
___ F3d ___, No. 19-16299, 2020 WL 3480841 (CA 9, June 26, 2020) ..... 42

*Civil Serv Comm'n v Auditor Gen*,
302 Mich 673; 5 NW2d 536 (1942) ..... 30

*Clinton v City of NY*,
524 US 417 (1998) ..... 43, 44

*Cty of Hudson v State of New Jersey Dep't of Corr*,
No. A-2552-07T1, 2009 WL 1361546 (NJ Super Ct App Div, May 18, 2009) ..... 22

*Dillon v Mr Unknown*,
61 Mich App 588; 233 NW2d 96 (1975) ..... 23

*District of Columbia v Wash Home Ownership Council, Inc*,
415 A2d 1349 (DC, 1980) ..... 13

*Elkhorn Baptist Church v Brown*,
366 Or 506 (Or, 2020) ..... 41

*Free Enter Fund v Pub Co Accounting Oversight Bd*,
561 US 477 (2010) ..... 43

*Hoitt v Vitek*,
497 F2d 598 (CA 1, 1974) ..... 22

*Home Bldg & Loan Ass'n v Blaisdell*,
290 US 398 (1934) ..... 43

*House of Representatives v. Whitmer*,
unpublished opinion of the Court of Claims, issued May 21, 2020
(Docket No. 20-000079-MZ) ..... 12, 14, 17

Index of Authorities
(continued)

Page

*INS v Chadha*,
462 US 919 (1983) ........ 15

*Jacobson v Massachusetts*,
197 US 11 (1905) ........ 38

*Jefferson v Southworth*,
447 F Supp 179 (DRI, 1978) ........ 29

*League of Indep Fitness Facilities & Trainers, Inc v Whitmer*,
No. 20-1581, 2020 WL 3468281 (CA 6, June 24, 2020) ........ 38

*Lewis Consol Sch Dist of Cass Co v Johnston*,
256 Iowa 236; 127 NW2d 118 (1964) ........ 37

*Maple BPA, Inc v Bloomfield Charter Twp*,
302 Mich App 505; 838 NW2d 915 (2013) ........ 37

*Mich. Deferred Presentment Servs. Ass'n v. Comm'r of Office of Fin. & Ins. Regulation*,
788 N.W.2d 842 (Mich. Ct. App. 2010) ........ 26, 27

*Mistretta v United States*,
488 US 361 (1989) ........ 32, 44

*Nemours Found v Manganaro Corp*,
878 F2d 98 (CA 3, 1989) ........ 46

*Oshtemo Charter Twp v Kalamazoo Cty Rd Comm'n*,
302 Mich App 574; 841 NW2d 135 (2013) ........ 32

*Osius v. City of St. Clair Shores*,
75 N.W.2d 25 (Mich. 1956) ........ 30, 32, 35

*Palmigiano v Garrahy*,
616 F2d 598 (CA 1, 1980) ........ 29

*Panama Refining Co v Ryan*,
293 U.S. 388 (1935) ........ 33, 42

*People v Jacques*,
456 Mich 352; 572 NW2d 195 (1998) ........ 18, 19

*People v McKinley*,
496 Mich 410; 852 NW2d 770 (2014) ........ 17, 26



RECEIVED by MSC 7/21/2020 1:55:55 PM

RECEIVED by MSC 7/21/2020 1:55:55 PM

Index of Authorities
(continued)

Page

*People v Stephan*,
241 Mich App 482; 616 NW2d 188 (2000) ... 26

*People v Turmon*,
417 Mich 638; 340 NW2d 620 (1983) ... 30, 33

*People v. Rea*,
902 NW2d 362 (Mich. 2017) ... 28

*Plaut v Spendthrift Farm, Inc*,
514 US 211 (1995) ... 44

*SBC Health Midwest, Inc v City of Kentwood*,
500 Mich 65; 894 NW2d 535 (2017) ... 27

*State Highway Comm'n v Vanderkloot*,
392 Mich 159; 220 NW2d 416 (1974) ... 31

*Stern v Marshall*,
564 US 462 (2011) ... 44

*Taxpayers of Mich Against Casinos v State*,
471 Mich 306; 685 NW2d 221 (2004) ... 15, 35

*Taylor v Smithkline Beecham Corp*,
468 Mich 1; 658 NW2d 127 (2003) ... 32

*United States Fid & Guar Co v Mich Catastrophic Claims Ass'n*,
484 Mich 1; 795 NW2d 101 (2009) ... 14

*United States v Amirnazmi*,
645 F3d 564 (CA 3, 2011) ... 33, 34, 36, 37, 38

*United States v Bishop*,
555 F2d 771 (CA 10, 1977) ... 40

*Valiant Steel & Equip, Inc v Goldschmidt*,
499 F Supp 410 (DDC, 1980) ... 22

*Westervelt v Nat Res Comm'n*,
402 Mich 412; 263 NW2d 564 (1978) ... 31, 34, 37

*Whitman v Am Trucking Associations*,
531 US 457 (2001) ... 32, 38

RECEIVED by MSC 7/21/2020 1:55:55 PM

Index of Authorities
(continued)

Page

*Wisconsin Legislature v Palm*,
942 NW2d 900 (Wis, 2020) ........ 24, 36

*Wolf v Scarnati*,
No. 104 MM 2020, 2020 WL 3567269 (Pa. July 1, 2020) ........ 16

*Worthington v. Fauver*,
440 A.2d 1128 (N.J. 1982) ........ 13

*Youngstown Sheet & Tube Co v Sawyer*,
343 US 579 (1952) ........ 36

**Statutes**

20 Ill. Comp. Stat. Ann. 3305/7 ........ 40

20 V.S.A. § 13 ........ 41

30 R.I. Gen. Laws Ann. § 30-15-9(b) ........ 41

35 Pa. Stat. and Cons. Stat. Ann. § 7301(c) ........ 41

50 U.S.C. § 1622 ........ 40

50 U.S.C. § 1706(b) ........ 40

Alaska Stat. Ann. § 26.23.020(c) ........ 40

Ariz. Rev. Stat. Ann. § 26-303(F) ........ 40

Ark. Code Ann. § 12-75-107(c)(1) ........ 40

Cal. Gov't Code § 8629 ........ 40

Colo. Rev. Stat. Ann. § 24-33.5-704(4) ........ 40

Fla. Stat. Ann. § 252.36(2) ........ 40

Ga. Code Ann. § 38-3-51(a) ........ 40

Idaho Code Ann. § 46-1008(2) ........ 40

Ind. Code Ann. § 10-14-3-12 ........ 40

Iowa Code Ann. § 29C.3(3) ........ 40

Index of Authorities
(continued)

Page

Kan. Stat. Ann. § 48-924(3) .......... 40

La. Stat. Ann. § 29:724(B)(2) .......... 40

MD Public Safety §14-107(4)(i) .......... 40

Me. Rev. Stat. tit. 37-B, § 743(2) .......... 40

Mich. Comp. Laws § 10.31 .......... 3, 18, 19, 24, 25, 26, 27, 33, 34, 36

Mich. Comp. Laws § 10.32 .......... 22, 23, 35

Mich. Comp. Laws § 30.403 .......... 3, 13, 14, 15, 16, 28

Mich. Comp. Laws § 30.417(d) .......... 28

Mich. Comp. Laws § 333.5201, *et seq.* .......... 44

Minn. Stat. Ann. § 12.31 (2)(b) .......... 40

Mo. Ann. Stat. § 44.100(2) .......... 40

Mont. Code Ann. § 10-3-302 (3) .......... 40

N.D. Cent. Code Ann. § 37-17.1-05(3) .......... 41

N.H. Rev. Stat. Ann. § 4:45(II)(c) .......... 40

N.Y. Exec. Law § 28(3) .......... 41

Neb. Rev. Stat. Ann. § 81-829.40(3) .......... 40

Nev. Rev. Stat. Ann. § 414.070 (West) .......... 40

Okla. Stat. Ann. tit. 63, § 6405(C) .......... 41

Or. Rev. Stat. Ann. § 401.204(2) .......... 41

S.C. Code Ann. § 25-1-440) .......... 41

Tex. Gov't Code Ann. § 418.014(c) .......... 41

Utah Code Ann. § 53-2a-206(3) .......... 41

W. Va. Code Ann. § 15-5-6(b) .......... 41



RECEIVED by MSC 7/21/2020 1:55:55 PM

Page

Wis. Stat. Ann. § 323.10 .......... 41

**Other Authorities**

1 Official Record, Constitutional Convention 1961 .......... 29

39 Mich. Senate J. 655 (May 7, 2020) .......... 22

Cooley, Constitutional Limitations (6th ed.) .......... 31

Georgia Executive Order 07.15.20.01 .......... 41

John Locke, *Two Treatises on Government* § 141 .......... 31

Mich. Const. (1963) art. III, Section 2 .......... 29

Mich. House Fiscal Agency Bill Analysis, H.B. 5496, 1/24/2002 .......... 13

Mich. Senate Bill 0858 (passed April 30, 2020) .......... 22

Michigan Governor Gretchen Whitmer Coronavirus Briefing Transcript March 23, *available at* https://www.rev.com/blog/transcripts/michigan-governor-gretchen-whitmer-coronavirus-briefing-transcript-march-23 .......... 4

Michigan Governor Gretchen Whitmer Press Conference Transcript April 27, *available at* https://www.rev.com/blog/transcripts/michigan-governor-gretchen-whitmer-press-conference-transcript-april-27 .......... 6

*Michigan Governor Gretchen Whitmer Press Conference Transcript May 1*, available at https://www.rev.com/blog/transcripts/michigan-governor-gretchen-whitmer-press-conference-transcript-may-1 .......... 8

*Michigan Governor Gretchen Whitmer Press Conference Transcript May 7*, available at https://www.rev.com/blog/transcripts/michigan-governor-gretchen-whitmer-press-conference-transcript-may-7 .......... 9

Texas Executive Order GA-28 .......... 41

Texas Executive Order GA-29 (July 2, 2020) .......... 41

Virginia Gordan, *Local police to handle reports of violations of Gov. Whitmer's stay-at-home order*, Michigan Radio, Mar. 25, 2020, available at https://www.michiganradio.org/post/local-police-handle-reports-violations-gov-whitmers-stay-home-order .......... 4



RECEIVED by MSC 7/21/2020 1:55:55 PM

Page

Webster's New International Dictionary 837 (2d ed. 1942) .......... 18, 19, 20

**Rules**

MCR 7.308(A)(3) .......... xi

RECEIVED by MSC 7/21/2020 1:55:55 PM

## JURISDICTIONAL STATEMENT

This Court has jurisdiction to answer the certified questions under MCR 7.308(A)(3).

RECEIVED by MSC 7/21/2020 1:55:55 PM

RECEIVED by MSC 7/21/2020 1:55:55 PM

# QUESTIONS PRESENTED

I. Whether, under the Emergency Powers of the Governor Act, MCL § 10.31, *et seq*., or the Emergency Management Act, MCL § 30.401, *et seq*., Governor Whitmer has the authority after April 30, 2020 to issue or renew any executive orders related to the COVID-19 pandemic.

Plaintiffs say: No.

Defendants say: Yes.

II. Whether the Emergency Powers of the Governor Act and/or the Emergency Management Act violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution.

Plaintiffs say: Yes.

Defendants say: No.

RECEIVED by MSC 7/21/2020 1:55:55 PM

# INTRODUCTION

In moments of imminent public danger where a rapid legislative response is impossible, swift executive action may be needed in order to triage the situation until the Legislature can assemble to determine the State's appropriate response. But short-term emergencies pose unique, long-term temptations. When an executive is able to wield sweeping, unilateral power to rapidly respond to an emergency situation, it can be tempting for the executive to retain unilateral power, unhindered by the compromise of competing interests that are inherent in the legislative process. If the executive chooses to continue the emergency indefinitely and sidelines the Legislature in the interim, governance of the State becomes unrecognizable, because the same branch of government that enforces the rules also has the power to make them.

That is why the Legislature, when enacting the Emergency Management Act, carefully imposed a strict, 28-day limit on the Governor's emergency powers. The durational limit gives the Legislature the ability to approve or disapprove the continuation of the executive's unilateral governance. Only by including an appropriate durational limit on the Governor's emergency powers can an emergency-powers statute pass constitutional muster. Without a durational limit, the executive can continue to exercise broad emergency powers—including broad rule-making powers that affect every aspect of Michigan's economy and civic life—for as long as the executive determines that an "emergency" continues to exist, even if the "emergency" consists of a long-term policy problem rather than a short-term crisis in which legislative action would be impossible.

That danger is precisely what is posed here. The Michigan Legislature permitted Governor Whitmer to take extraordinary and immediate executive action during the first month of Michigan's response to the COVID-19 pandemic. It even granted a 23-day extension of the Governor's initial emergency declaration. Nevertheless, the Michigan Legislature declined to

extend Governor Whitmer's declaration of a state of emergency beyond April 30, 2020. The Legislature's decision not to extend the state of emergency constituted its determination that, now that Michigan had found its bearings about the nature of the pandemic, the Legislature could resume its constitutionally mandated role of legislating based upon policy for what is no longer an emergency but a long-term public health challenge.

Instead of accepting the Legislature's decision to resume its ordinary policy-setting and law-making role or compromising with the Legislature in order to obtain an additional extension of the extraordinary powers given to her under the enabling statutes, Governor Whitmer simply re-declared exactly the same state of emergency that Michigan law required—and the Legislature directed—to be terminated. Governor Whitmer has continued to unilaterally re-extend the state of emergency for months. By the time that this appeal will be argued, Governor Whitmer will have been governing Michigan unilaterally for almost half of a year. Under Governor Whitmer's interpretation of the enabling statutes, the executive branch may re-declare a state of emergency serially, for as long as the Governor believes that there is an "emergency."

The certified questions that are presented to this Court do not require any determination about whether Governor Whitmer's policy decisions in combating the COVID-19 epidemic are wise or effective. This case is instead about the nature of Michigan's government—about whether the executive branch may displace Michigan's Legislature and continue to indefinitely extend and exercise its immensely broad emergency powers throughout the entirety of a pandemic that has no clear end in sight.

The relevant statutes—the Emergency Powers of the Governor Act and the Emergency Management Act—do not permit the Governor to do so. Nor does Michigan's Constitution. The long-term policy decisions regarding Michigan's response to the COVID-19



RECEIVED by MSC 7/21/2020 1:55:55 PM

pandemic lie with the legislative branch, not the executive branch. Having declined to involve the Legislature and having been denied by the Legislature the opportunity to continue emergency rule, Governor Whitmer lacks the authority to issue emergency orders related to the COVID-19 pandemic after April 30, 2020.

## STATEMENT OF FACTS

### A. Governor Whitmer Issues an Executive Order Declaring a State of Emergency on March 10, 2020, and Takes Other Action by Executive Orders.

On March 10, 2020, after the first two presumed-positive cases of COVID-19 were identified in Michigan, Governor Whitmer issued Executive Order ("EO") 2020-4, which proclaimed a state of emergency under both the Emergency Management Act ("EMA"), MCL § 30.403, and the Emergency Powers of the Governor Act of 1945 ("EPGA"), MCL § 10.31. The order identified the COVID-19 pandemic as the basis for the Governor's declaration of a state of emergency under both statutory regimes. (App. 83a).

In the ensuing weeks, Governor Whitmer issued numerous additional executive orders, invoking emergency powers that the Governor claims flow from the state of emergency declared under EO 2020-4. Among other far-reaching actions, the Governor closed elementary and secondary school buildings (EO 2020-5); restricted the public from accessing bars, restaurants, theaters, libraries, museums, and gyms (EO 2020-9); and prohibited gatherings of more than 50 people (EO 2020-11).

On March 21, 2020, the Governor issued EO 2020-17, which prohibited medical providers from providing any "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." A willful violation of EO 2020-17 was a criminal misdemeanor. These



RECEIVED by MSC 7/21/2020 1:55:55 PM

restrictions, the order explained, were necessary to "ensure the availability of health care resources." (App. 85a).

On March 23, 2020, the Governor issued EO 2020-21, which ordered all residents "to stay at home" (with limited exceptions), prohibited any public or private gathering of any size, and restricted in-person business operations except those "necessary to sustain or protect life or to conduct minimum basic operations." A willful violation of EO 2020-21 was a criminal misdemeanor. In a press conference announcing the first "Stay at Home" order, Governor Whitmer explained that this drastic action was needed to prevent an overwhelmed healthcare system: "COVID-19 is a global pandemic. It's a novel virus. There is no cure. There is no vaccine. The only tool that we have to fight it at the moment and to support our healthcare system to respond is to give them the opportunity by buying some time."[1] Despite widespread confusion about the scope of the Governor's orders, the Attorney General's office advised that violating the order could result in criminal penalties and the forced closure of businesses by law enforcement.[2]

### B. Governor Whitmer Declares a State of Emergency and State of Disaster on April 1, 2020 and Issues Drastic Executive Orders.

On April 1, 2020, Governor Whitmer issued EO 2020-33, which replaced EO 2020-4, declared a state of emergency pursuant to the EPGA, and proclaimed a state of disaster and a state of emergency under the EMA. These declarations were based on the same circumstances—that is, the dangers posed by the virus that causes COVID-19—that formed the basis of EO 2020-4. (App. 88a).

---

[1] *Michigan Governor Gretchen Whitmer Coronavirus Briefing Transcript March 23*, available at https://www.rev.com/blog/transcripts/michigan-governor-gretchen-whitmer-coronavirus-briefing-transcript-march-23 (last visited July 21, 2020).

[2] Virginia Gordan, *Local police to handle reports of violations of Gov. Whitmer's stay-at-home order*, Michigan Radio, Mar. 25, 2020, available at https://www.michiganradio.org/post/local-police-handle-reports-violations-gov-whitmers-stay-home-order (last visited July 21, 2020).



RECEIVED by MSC 7/21/2020 1:55:55 PM

On April 1, 2020, Governor Whitmer also requested that the Michigan Legislature extend the state of emergency by an additional 70 days (through June 3, 2020), as contemplated by the EMA. On April 7, 2020, the Michigan Legislature voted to pass a resolution extending the state of emergency through April 30, 2020, but not beyond. Mich. Senate Concurrent Resolution No. 24 (passed April 7, 2020).

Throughout April, the Governor issued numerous executive orders that created and changed substantive state law and regulations and affected wide swaths of the economy. On April 9, 2020, the Governor issued EO 2020-42, the second in the series of "Stay at Home" orders. Among other things, the order criminalized the sale of paint, furniture, and flooring, and prohibited large retail stores from engaging in almost all advertising. (App. 99a). After widespread concern over the breadth of EO 2020-42, the Governor issued a third Stay at Home order, EO 2020-59, on April 24, 2020.

The Governor also issued orders requiring employees to stay home from work if they experience symptoms of, have tested positive for, or have been exposed to COVID-19, and governing employers' obligations in those circumstances (EO 2020-36); and suspending K-12 instruction for the remainder of the 2019-2020 school year (EO 2020-35), among other actions. As of April 30, 2020, Governor Whitmer had issued 65 executive orders related to the COVID-19 pandemic.

Governor Whitmer justified those 65 executive orders, including her initial declarations of a state of emergency, on the important goal to "flatten the curve" and avoid overwhelming Michigan's healthcare system and hospitals. Thankfully, the dire predictions of



RECEIVED by MSC 7/21/2020 1:55:55 PM

RECEIVED by MSC 7/21/2020 1:55:55 PM

overwhelmed hospitals did not come to pass. And during a press conference on Monday, April 27, 2020, Governor Whitmer acknowledged that the curve had flattened in Michigan.[3]

### C. The Legislature Declines to Extend the Governor's Emergency Declaration, and the Governor Unilaterally Extends It Anyway.

Under the statutes that grant emergency powers to the executive, the Governor has the power to declare an emergency, but the Legislature determines how long that emergency—and the Governor's attendant powers to make laws on an emergency basis—lasts. The EMA requires the Governor to issue an order declaring that a state of emergency is terminated after 28 days if the Legislature does not extend the emergency. In turn, the EPGA states that any emergency declared under that statute terminates when the Governor declares that the emergency is terminated.

As stated above, the Michigan Legislature agreed to extend the state of emergency declaration through April 30, 2020. On April 30, 2020, the Michigan Legislature declined to extend Governor Whitmer's declarations of a state of emergency and a state of disaster. Immediately afterward, Governor Whitmer issued three additional Executive Orders: 2020-66, 2020-67, and 2020-68.

EO 2020-66 terminated the Governor's declarations of a state of emergency and a state of disaster based upon the COVID-19 pandemic, as required under the EMA. (App. 104a).

EO 2020-67, issued only one minute after EO 2020-66, stated that a "state of emergency remains declared across Michigan" under the EPGA and that the state of emergency remains in effect until May 28, 2020. The state of emergency that EO 2020-67 referenced is exactly

[3] *Michigan Governor Gretchen Whitmer Press Conference Transcript April 27*, available at https://www.rev.com/blog/transcripts/michigan-governor-gretchen-whitmer-press-conference-transcript-april-27 (last visited July 21, 2020).

the same state of emergency that the Governor declared to be terminated in EO 2020-66. (App. 107a).

EO 2020-68, issued simultaneously with EO 2020-67, purported to re-declare under the EMA exactly the same states of disaster and emergency that the Legislature refused to extend and which had just been terminated under EO 2020-66. These renewed states of disaster and emergency purported to remain effective through May 28, 2020. (App. 112a).

### D. Governor Whitmer Issues Numerous, Sweeping Executive Orders After April 30, 2020.

After renewing the emergency declarations based on COVID-19, Governor Whitmer took additional sweeping action by executive orders. In May alone, the Governor issued four more Stay at Home orders: EO 2020-70 (issued on May 1), EO 2020-77 (issued on May 7), EO 2020-92 (issued on May 18), and EO 2020-96 (issued on May 21). (The Governor also issued the first and second in a series of executive orders establishing numerous workplace safeguards for all businesses as well as many industry-specific requirements: EO 2020-91 (issued on May 18) and EO 2020-97 (issued on May 21). The rules and protocols in these orders are far-reaching. Among other things, all businesses must conduct daily health screenings of employees, require employees to wear face coverings when they cannot sufficiently maintain distance from one other, and restrict non-essential business travel.

The Governor's decision to re-declare an emergency and issue multiple additional emergency orders after the Legislature declined to extend the Governor's declaration of emergency past April 30 caused great confusion and doubt. On May 4, 2020, Attorney General Nessel issued a letter to law enforcement officials asserting that, "regardless of what you may have heard," the



RECEIVED by MSC 7/21/2020 1:55:55 PM

Governor's post-April 30 executive orders continued to be valid under the EPGA and directing that law enforcement officials continue to enforce the Governor's orders. (App. 43a).

### E. Governor Whitmer Admits the Ban on "Non-Essential" Medical Procedures Is No Longer Necessary on May 1, 2020, Yet Does Not Lift It Until May 29.

At a press conference on May 1, 2020, Governor Whitmer admitted that the restrictions on medical procedures were no longer necessary and explained that the need to protect the supply of personal protective equipment for an influx of COVID-19 patients in hospitals no longer existed. The Governor stated:

> We are encouraging anyone who has been holding off on surgery that really needs to be done, to get that scheduled and to proceed. Early on, it was really necessary because we had so few N95 masks, and gloves, and all of the important things that we needed to keep people safe as we were dealing with this influx of COVID-19 patients, so that we could use all of that PPE. Now, we've been able to build up enough that we can proceed with these other procedures, and we are encouraging hospital systems to move forward with that.
>
> * * *
>
> [A]s for oncology surgeries, as for knee surgeries, those are things that should be scheduled and we're encouraging people to get that done.[4]

Despite the Governor's admission that there was no longer a need to prohibit knee surgeries and other non-essential medical procedures as of May 1, 2020, EO 2020-17 remained in effect until EO 2020-96 lifted the ban almost a month later, on May 29, 2020. (App. 125a). And with the reopening of medical facilities came additional restrictions. Under EO 2020-97, outpatient healthcare facilities were subject to numerous obligations concerning signs, waiting area occupancy, contactless sign-in, special hours for vulnerable populations, temperature checks of

[4] *Michigan Governor Gretchen Whitmer Press Conference Transcript May 1*, available at https://www.rev.com/blog/transcripts/michigan-governor-gretchen-whitmer-press-conference-transcript-may-1 (last visited July 21, 2020).



RECEIVED by MSC 7/21/2020 1:55:55 PM

patients, provision of hand sanitizer and face coverings, personal protective equipment for employees, physical barriers at sign-in, telehealth and telemedicine options, limitations on the number of appointments, and cleaning and disinfection protocols. (App. 136a-137a).

### F. Governor Whitmer Announces a Long-Term Plan to Address the Challenges Posed by the Pandemic.

On May 7, 2020, Governor Whitmer announced a six-phase plan to reopen Michigan's economy titled "MI Safe Start." (App. 68a). Governor Whitmer stated that Michigan was in the third phase, called the "Flattening" phase,[5] in which "[c]ase growth is gradually declining." In the Flattening phase, the reopening of the economy is strictly limited to only "[s]pecified lower-risk businesses with strict workplace safety measures." (App. 69a).

MI Safe Start is not the sort of document that one would expect could be drawn up during an emergency. Instead, it is a detailed blueprint addressing every aspect of daily life through every phase of the pandemic, including the sixth "Post-pandemic" phase. And Michigan will not reach the sixth "Post-pandemic" phase anytime soon. From the Governor's perspective, Michigan enters that phase only once the state has achieved "sufficient community immunity" and there is "high uptake of an effective therapy or vaccine." (App. 69a). Phase 6 could be years down the road.

Governor Whitmer's MI Safe Start plan warns that at any time, "it is also possible to move backwards"—and reenter earlier phases of the MI Safe Start plan—"if risk increases and if we stop adhering to safe practices." (App. 69a). There is a real possibility that the Governor will continue for many months, if not years, to make law by executive order, enacting measures that significantly impact the rights and liberties of Michigan citizens without legislative input.

---

[5] *Michigan Governor Gretchen Whitmer Press Conference Transcript May 7*, available at https://www.rev.com/blog/transcripts/michigan-governor-gretchen-whitmer-press-conference-transcript-may-7 (last visited July 21, 2020).



RECEIVED by MSC 7/21/2020 1:55:55 PM

RECEIVED by MSC 7/21/2020 1:55:55 PM

### G. Governor Whitmer Issues More Than 140 Executive Orders Based on COVID-19 and Has Extended the State of Emergency Through August 11.

Governor Whitmer has continued to issue coronavirus-related executive orders at an extraordinary pace. On May 22, 2020, the Governor issued EO 2020-99, which purported to extend the state of emergency declaration through June 19, 2020. (App. 142a).

In June, the Governor issued two more orders governing the reopening of businesses across the state as well as the steps that must be taken by individuals who leave their homes: EO 2020-110 (issued on June 1) and EO 2020-115 (issued on June 5). Under EO 2020-110 and EO 2020-115, which remain in effect, Regions 6 and 8 (as defined by the orders, covering counties in the Upper Peninsula and northern lower Michigan) are in Phase 5 of the MI Safe Start Plan, while the rest of Michigan remains in Phase 4. The Governor also updated the required workplace safeguards in EO 2020-114 (issued on June 5). And in EO 2020-127, the Governor purported to extend the state of emergency through July 16, 2020. (App. 146a).

In July, the Governor issued yet another updated set of workplace safeguards in EO 2020-145 (issued on July 9). In EO 2020-147, the Governor ordered all individuals to wear face coverings in indoor public spaces and crowded outdoor events. And in EO 2020-151, the Governor purported to extend the state of emergency again—this time through August 11, 2020. (App. 150a).

From March 10 through July 21, 2020, the Governor has issued more than 140 emergency executive orders based on COVID-19. The Governor has also made it clear that the state of emergency will not end any time soon. According to EO 2020-151, "[l]ife will not be back to normal for some time to come." (App. 149a). In fact, the "statewide disaster and emergency conditions will exist" until "the economic and fiscal harms from this pandemic have been contained, and the threats posed by COVID-19 to life and the public health, safety, and welfare of this state have been neutralized." (App. 149a).

RECEIVED by MSC 7/21/2020 1:55:55 PM

### H. The Plaintiffs Are Medical Providers and a Patient, Each of Whom Was Restricted from Providing (or Receiving) "Non-Essential" Medical Care Due to EO 2020-17.

The plaintiffs in the underlying lawsuit, which was filed in the federal District Court for the Western District of Michigan, are medical providers and a patient. They challenge Governor Whitmer's authority to criminalize the provision of all "non-essential" medical treatments, as well as her prohibition against patients' ability to travel to obtain such medical treatment. They filed the underlying lawsuit on May 12, 2020, after the Legislature declined to extend the Governor's declaration of emergency and after Governor Whitmer admitted that a ban on non-essential medical procedures was no longer necessary yet continued to prohibit them. (App. 1a). The Governor rescinded EO 2020-17 (which had banned non-essential medical treatments) effective May 29, 2020—the day after a preliminary injunction hearing was scheduled to occur in the plaintiffs' lawsuit. (App. 125a).

The medical provider plaintiffs in the underlying litigation—Grand Health, Wellston Medical Center, and Primary Health Services—provide medical procedures that were deemed non-essential under EO 2020-17 and were restricted from providing "non-essential" medical care for over two months, from March 21 through May 29, 2020. After the lifting of the restrictions in EO 2020-17 on May 29, 2020, these plaintiffs reopened safely and resumed their provision of care. They remain subject to numerous workplace restrictions under EO 2020-145.

The Governor's earlier ban risked the financial ruin of these medical providers. It also forced the postponement or cancellation of important medical procedures that the Governor, solely focused on COVID-19, deemed "non-essential." The delay and cancellation of these procedures had grievous effects on some of the plaintiffs' patients. (App. 9a-11a). The Governor's ban, and her decision to continue it until the end of May, illustrate the shortcomings with having the executive branch, rather than the representative legislature, make the laws: Focusing on one

public-health concern (the COVID-19 pandemic), the Governor failed to fully accommodate other public-health concerns, embodied in the needs of the plaintiffs' patients.

On June 16, 2020, the federal district court certified two questions to this Court:

> (1) Whether, under the Emergency Powers of the Governor Act, MCL § 10.31, *et seq*., or the Emergency Management Act, MCL § 30.401, et seq., Governor Whitmer has the authority after April 30, 2020 to issue or renew any executive orders related to the COVID-19 pandemic; and
>
> (2) Whether the Emergency Powers of the Governor Act and/or the Emergency Management Act violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution.

On June 30, 2020, this Court ordered expedited briefing on the certified questions and scheduled oral argument for September 2, 2020.

## ARGUMENT

### I. After April 30, 2020, the Governor no longer has authority under the Emergency Management Act to issue executive orders related to the COVID-19 pandemic.

The analysis under the EMA is relatively uncomplicated. As the Court of Claims properly held, Governor Whitmer cannot re-declare an emergency under the EMA that the Legislature specifically refused to renew. "The EMA allows circumvention of the traditional legislative process only under extraordinary circumstances and for a finite period of time." *House of Representatives v. Whitmer*, unpublished opinion of the Court of Claims, issued May 21, 2020 (Docket No. 20-000079-MZ), slip op. at 20 (App. 211a). The Governor may not circumvent the statute's unambiguous textual prohibition against emergency declarations in excess of 28 days by indefinitely re-declaring the same emergency in serial 28-day increments.

#### A. The EMA prohibits the Governor from continuing an emergency beyond 28 days.

The EMA unambiguously states that, unless both houses of the Michigan Legislature approve the Governor's request for an extension of a declared state of disaster or state



RECEIVED by MSC 7/21/2020 1:55:55 PM

of emergency with 28 days, then "the governor shall issue an executive order or proclamation declaring the state of disaster [or emergency] terminated." MCL § 30.403(3) & (4). The term "terminated" connotes finality. The clear purpose for imposing a 28-day limit on the Governor's exercise of her emergency powers was to ensure that the Legislature retained the ability to override the Governor's authority to rule unilaterally. The legislative history, for example, suggests that, when the Legislature adopted the 28-day limit in 2002, it did so only because "sometimes the legislature may not be in session during the time when a state of emergency or disaster needs extending." Mich. House Fiscal Agency Bill Analysis, H.B. 5496, 1/24/2002. (App. 48a). The Legislature recognized that more lengthy extensions of emergency power could give rise to "abuses of executive power." (App. 49a). Thus, the language requiring that the Legislature have the ability to terminate the state of emergency operates as a safety valve to ensure that legislative democracy does not devolve into an indeterminate unilateral rule by the executive.

On April 30, 2020, Governor Whitmer terminated the states of disaster and emergency in EO 2020-66, as the Legislature directed. Then, one minute later, the Governor re-declared in EO 2020-68 exactly the same emergency and disaster declarations that she had just declared terminated—and which the Legislature had specifically refused to renew. Such a maneuver is an end run around the EMA and is incompatible with the statute's clear language. The statute requires that the Governor "terminate" the declaration of emergency, not that she simply sign two pieces of paper and continue the same emergency that the Legislature refused to extend. Courts routinely reject the attempt to prolong emergencies indefinitely by reissuing emergency declarations seriatim. *See, e.g.*, *Worthington v Fauver*, 440 A2d 1128, 1138–39 (NJ, 1982) (noting that an executive order would be invalid if it invoked the same emergency each year indefinitely); *District of Columbia v Wash Home Ownership Council, Inc*, 415 A2d 1349, 1365 (DC, 1980)



RECEIVED by MSC 7/21/2020 1:55:55 PM

RECEIVED by MSC 7/21/2020 1:55:55 PM

(Gallagher, J., concurring) (rejecting the ability of the D.C. Council to engage in "repeated enactments of numerous 'emergency' measures," which had the practical effect of "permanent legislation").

Further, as the Court of Claims observed, the Governor's position that she can re-declare the same emergency indefinitely despite the Legislature's express disapproval "renders meaningless the legislative extension [provisions] set forth in MCL 30.403(3) and (4)." *House of Representatives*, slip op. at 23 (App. 214a). No Governor would ever seek the Legislature's approval if she could simply re-declare the same emergency for repeated 28-day periods under MCL § 30.403(2) without bothering with MCL §§ 30.403(3) and (4).

This Court is careful under even ordinary circumstances not to interpret statutes in a manner that reads portions of them as nugatory. *See United States Fid & Guar Co v Mich Catastrophic Claims Ass'n*, 484 Mich 1, 13; 795 NW2d 101 (2009). In this case, the Governor's interpretation of the EMA would render nugatory the portion of the statute in which the Legislature sought to preserve its own ability to regain the authority to govern. The Legislature would never have intended this provision to become an ineffective, dead letter. The plain language of the statute unmistakably demonstrates the Legislature's careful attempt to yield to the executive law-making authority for a maximum of only 28 days—not more—without the Legislature's consent. The Governor's re-declaration of the identical emergency declaration after the Legislature refused to extend it is a transparent attempt to evade the clear barriers imposed by the statutory text.

### B. The Legislature's inaction cannot amount to a legislative veto.

To the extent that the Governor contends that the Legislature's refusal to approve the Governor's request for an extension of the emergency under the EMA constitutes an improper "legislative veto," the Governor is wrong. *See Blank v Dep't of Corr*, 462 Mich 103, 113-15; 611 NW2d 530 (2000) (opinion of Kelly, J.). A legislative veto occurs only where the legislature

RECEIVED by MSC 7/21/2020 1:55:55 PM

delegates authority to the executive branch by statute but then passes a resolution taking back a portion of that previously delegated power. In such a circumstance, the resolution is invalid because it effectively amounts to a new statute that has not been presented to the executive for signature. *Id*. at 113-15 (discussing *INS v Chadha*, 462 US 919, 956 (1983)). Thus, in order for the Legislature to be able to take back power that it has previously given to the executive, the Legislature must pass a new statute taking that power back from the executive, rather than simply trying to regain it via resolution. *See Taxpayers of Mich Against Casinos v State*, 471 Mich 306, 330; 685 NW2d 221 (2004).

That is not what happened here. Under the EMA, the Legislature never gave the Governor the power to declare indefinite emergencies. Instead, the EMA parcels out the legislative power to the Governor in 28-day increments. The statute is very clear about this, placing a full stop on any emergency or disaster declaration after 28 days have elapsed: "After 28 days, the governor shall issue an executive order or proclamation declaring the state of [disaster or emergency] terminated . . ." MCL §§ 30.403(3) & (4). The default, in other words, is that the Governor's power lapses after 28 days. Only if the Legislature affirmatively approves an extension may the Governor have another 28-day at the reins. If the Legislature does nothing, then the Governor's power expires after 28 days, under the plain terms of the statute.

The legislative veto analysis is therefore entirely inapposite. It is not a legislative veto for the Legislature to decline to approve the Governor's request for an additional 28-day increment, because the Legislature is not taking away any power that the EMA granted to the Governor. The Legislature is not even passing a resolution. Instead, the Legislature is simply declining to extend the Governor's power, and the Governor's power under the EMA comes to an end under the plain terms and ordinary operation of the statute.

RECEIVED by MSC 7/21/2020 1:55:55 PM

The recent decision in *Wolf v Scarnati*, No. 104 MM 2020, 2020 WL 3567269, at *1 (Pa. July 1, 2020) (attached at App. 221a), provides a useful contrast. There, the Pennsylvania statute authorizing an emergency declaration gave the Governor the power to declare an emergency, and further provided that "no state of disaster emergency may continue for longer than 90 days unless renewed by the Governor. The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time." *Id.* at *1 (quoting the applicable statute). In other words, the Pennsylvania legislature gave the Governor the power unilaterally to renew the state of emergency as long as he chose; if the Legislature did nothing, then the Governor would be able to continue the emergency indefinitely. The Pennsylvania Supreme Court ruled that the legislature could not terminate the emergency and regain its legislative authority by simply passing a resolution, because the resolution would amount to a legislative veto. *Id.* at *8. Here, by contrast, the Legislature does not need to pass a resolution at all: it simply needs to do nothing, at which point the Governor's emergency powers expire automatically.[6]

The Governor cannot explain how a legislative veto could arise on the basis of inaction by the Legislature—that is, as a result of the Legislature's decision to do nothing and allow the Governor's power to expire under the plain terms of the statute. The Legislature has not engaged in any sort of veto, legislative or otherwise. Instead, the Legislature has simply allowed

[6] To be clear, the Pennsylvania Supreme Court's reasoning in *Wolf* is troubling for other reasons. The *Wolf* court ruled that the Pennsylvania legislature gave the Governor emergency power to re-extend the emergency declaration indefinitely, but that the legislature's inclusion in the statute of a provision to turn off the executive's emergency power (*i.e.*, a joint resolution) was an unconstitutional legislative veto. The net effect of this ruling is a conclusion that the legislature gave all of its governing power to the executive indefinitely and now has no way to get it back, because the method that the legislature included in the statute in order to permit it to take back its powers is fatally defective. Such a ruling fundamentally re-orders the political branches' relative power. Michigan's Constitution does not tolerate such an upheaval. And in any event, the joint-resolution provisions of MCL §§ 30.403(3) & (4) are not severable from the remainder of the statute, because the grant to the Governor of a 28-day period of emergency powers is conditioned on the ability of the legislature to decline approval of an extension of emergency powers. Thus, if these provisions were deemed to be unconstitutional legislative vetoes, then the entirety of MCL § 30.403 would need to be invalidated.

the Governor's power under the EMA to be exhausted after 28 days, precisely as the statutory language requires.

Nothing prevents the Governor from issuing emergency declarations under the EMA with respect to "a new and different circumstance from the COVID-19 pandemic." *House of Representatives*, slip op. at 23 (App. 214a). And nothing prevents the Legislature from determining—should the need arise—to provide the Governor with further periods of emergency authority under the EMA in order to facilitate a response to the pandemic. But the EMA does not permit the Governor to continue exercising extraordinary unilateral powers on her own, without the involvement of the Legislature. Under the EMA, the Governor's executive orders related to the COVID-19 pandemic are invalid beyond April 30, 2020, unless the Legislature chooses to extend them.

## II. As a matter of statutory interpretation, the EPGA does not support Governor Whitmer's executive orders.

Governor Whitmer also lacks authority under the EPGA to continue to issue executive orders related to the COVID-19 pandemic. Statutes like the EPGA that pose significant constitutional concerns must be interpreted—if at all possible—in a manner that avoids constitutional infirmity. *People v McKinley*, 496 Mich 410, 415; 852 NW2d 770 (2014) (noting "the widely accepted and venerable rule of constitutional avoidance"). Such an interpretation is called for here.

### A. The EPGA authorizes only limited orders for time-limited emergencies, and a years-long pandemic is not an "emergency."

The EPGA does not authorize orders that mandate long-lasting, sweeping changes to generally applicable legislation. Instead, it authorizes extraordinary executive action only during "emergencies" and under circumstances that pose "immediate danger"—that is, during temporary,



RECEIVED by MSC 7/21/2020 1:55:55 PM

time-limited crises. A years-long pandemic—no matter how serious of a policy matter it is—is not an "emergency" within the meaning of the EPGA.

#### 1. An "emergency" for purposes of the EPGA is a set of exigent circumstances that calls for immediate action, not a years-long public health problem.

Unlike the EMA, the EPGA provides that the Governor may proclaim only a state of "emergency"; it does not permit the Governor to proclaim a state of "disaster." MCL § 10.31(1). The term "emergency" as used when the EPGA was enacted in 1945 referred only to exigencies that exist for a relatively limited period of time. The 1942 edition of Webster's New International Dictionary, for example, defines "emergency" as "[a]n unforeseen combination of circumstances which calls for immediate action; also, less properly, exigency." Webster's New International Dictionary 837 (2d ed. 1942). The fact that the EPGA applies only in "emergency" circumstances means that the Governor's powers under the EPGA are limited to circumstances that are time-sensitive, rather than to long-term public health challenges.

Further, the EPGA permits the Governor to proclaim a state of emergency only under certain circumstances: namely, "[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." MCL § 10.31(1). The inclusion of this illustrative list within the text of the statute is no mistake. When interpreting statutes, Michigan courts employ the doctrine of *ejusdem generis*, which directs that, where a statute defines a category by reference to a list of illustrative terms, the general category "will ordinarily be presumed to be and construed as restricted by the particular designation and as including only things of the same kind, class, character or nature as those specifically enumerated." *People v Jacques*, 456 Mich 352, 355; 572 NW2d 195 (1998).



RECEIVED by MSC 7/21/2020 1:55:55 PM

Unlike the EMA, the EPGA does not refer to "epidemics" as an example of circumstances over which the EPGA gives the Governor emergency powers. Instead, the EPGA defines an "emergency" by reference to a list of scenarios in which an urgent, time-sensitive response is required: "crisis," "disaster," "rioting," "catastrophe," and circumstances causing "immediate danger" of a similar public emergency. MCL § 10.31(1). A years-long public health challenge like an epidemic does not fit within that list and is therefore outside the scope of the statute. *Jacques*, 456 Mich at 355. Defining the term "emergency" by reference to this illustrative list confirms that the term is intended to carry its ordinary meaning. The term "emergency" typically refers only to exigencies that exist for a relatively limited period of time, and those are the types of scenarios that populate the illustrative list. Webster's New International Dictionary 837 (2d ed. 1942).

This interpretation of the statutory language is further supported by the second list of exemplars contained in the EPGA; namely, the EPGA's illustrative list of the types of orders that the Governor may issue during the emergency. *See* MCL § 10.31(1). The EPGA contemplates that the Governor's orders will be of primarily brief duration and circumscribed scope, affecting matters such as traffic control, controls of alcohol sales and explosives storage, and limitations on public assembly and imposition of curfews (which would necessarily be time-limited, due to the strictures of the First Amendment). *See* MCL § 10.31(1). This illustrative list clearly contemplates that the Governor would take action in relatively time-limited circumstances, not for months or years on end.

Other clues confirm this interpretation. First, the EPGA empowers certain local officials to request an emergency declaration, suggesting that the concerns that the statute was intended to cover are primarily local in nature, rather than state-wide. *See* MCL § 10.31(1). Second,



RECEIVED by MSC 7/21/2020 1:55:55 PM

the historical context suggests that the EPGA was enacted in 1945 in response to localized riots in Detroit in 1943. (App. 51a). Thus, both internal and external clues strongly suggest that the EPGA does not authorize the Governor to continue to rule unilaterally in the context of an ongoing, lengthy pandemic.

In other words, the EPGA (1) allows the Governor to issue only a declaration of "emergency," (2) lists only time-limited crises as the types of "public emergencies" in which such a declaration is permissible, and (3) provides exemplar orders and scenarios that would necessarily be brief in duration and limited in scope. Under the plain language of the EPGA, a long-term public health challenge does not constitute an "emergency" that empowers the Governor to rule by executive order for months or years on end.

2. **The Governor's declarations of "emergency" contemplate that the state of emergency will last until the end of the epidemic, even if that takes years.**

There is no need for this Court to engage in exquisite line-drawing when determining whether the COVID-19 pandemic is an "emergency" within the meaning of this language. It clearly is not. Under the plain statutory language, an "emergency" is "[a]n unforeseen combination of circumstances which calls for immediate action." Webster's New International Dictionary 837 (2d ed. 1942). There is widespread agreement that the COVID-19 pandemic likely will last for years, requiring significant policy decisions to be made for years to come. The need for significant policy decisions is no longer "unforeseen." And—as of the date of this brief—Governor Whitmer's emergency declarations have continued for almost half of a year. The pandemic is assuredly an important and concerning challenge. But "vitally important" is not the same as "emergent." The pandemic is now an ongoing situation, not an "emergency" one.

Governor Whitmer's initial emergency declaration occurred on March 10, 2020. (App. 84a). The basis for the Governor's emergency declaration and subsequent executive orders



RECEIVED by MSC 7/21/2020 1:55:55 PM

RECEIVED by MSC 7/21/2020 1:55:55 PM

was articulated as the concern that Michigan's hospitals would be extended beyond capacity if extraordinary measures were not imposed in order to slow the pace of COVID-19 infections. (App. 83a, 85a). But, as the Governor admitted on May 1, 2020, that is no longer a concern.[7] The focus has now shifted to a discussion of the measures that are appropriate to contain the pandemic over the long term.

For example, the Governor has outlined her own set of policies, set forth in the six-phase MI Safe Start plan, which was implemented on May 7, 2020. (App. 68a). Whether the Governor's six-phase plan is or is not good policy is not at issue in this Court. Instead, the salient point is that the Governor's plan contemplates long-term and even permanent alterations to policy in order to contain the pandemic. Phase Six, for example, refers to the "post-pandemic" phase. Phase Six is not triggered until after there has been "[h]igh uptake of an effective therapy or a vaccine." (App. 69a). And even then, the Governor contemplates permanent changes. Her plan for Phase Six provides that all events and gatherings are permitted but that they will be subject to "new safety guidance and procedures." (App. 69a). In other words, the "emergency" may continue even after the epidemic is over. *See also* EO 2020-154, § IV(1) (providing that the executive order will remain in effect even after the conclusion of the declaration of emergency).

As a matter of policy, the Governor's phased approach may or may not be an appropriate response. But there is no question that the Governor may not implement such a policy on her own. The Governor's plan unambiguously extends her unilateral policy decisions beyond the expiration of the pandemic, long after the "emergency" is over. Once the pressing exigency has concluded, a pandemic constitutes a lengthy public-health crisis, not the sort of relatively time-limited "emergency" in which the EPGA authorizes the Governor to take unilateral action.

---

[7] *See supra* note 4.

RECEIVED by MSC 7/21/2020 1:55:55 PM

Moreover, the justification for giving the Governor emergency law-making power—namely, that the Michigan Legislature may be unable to immediately respond to exigent circumstances—is not present here, either. The Legislature was able to assemble, debate a policy response to the COVID-19 epidemic, and pass legislation to address the pandemic. *See* Mich. Senate Bill 0858 (passed April 30, 2020). The reason that the Legislature's policy decisions are not currently controlling the State's response to the pandemic is not because the Legislature lacked adequate time to debate and enact them, but because the Governor vetoed them. *See* 39 Mich. Senate J. 655 (May 7, 2020).

"Emergencies . . . cease to be emergencies when they continue indefinitely." *Hoitt v Vitek*, 497 F2d 598, 600 (CA 1, 1974) (citation omitted). The EPGA simply does not permit the Governor to make the sorts of long-term policy decisions that she is invoking the EPGA in order to impose. *See Valiant Steel & Equip, Inc v Goldschmidt*, 499 F Supp 410, 413 (DDC, 1980) ("[D]efendants cannot be allowed to continue to rely indefinitely on an emergency which at this date is almost two years old."); *Cty of Hudson v State of New Jersey Dep't of Corr*, No. A-2552-07T1, 2009 WL 1361546, at *7 (NJ Super Ct App Div, May 18, 2009) (declared emergency under state Disaster Control Act was no longer an "emergency" after nine years had passed since initial declaration of emergency).

3. **MCL § 10.32 does not permit the Governor to extend an emergency declaration indefinitely.**

None of these arguments is undercut by MCL § 10.32. Section 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.

*Id.*

The Governor has argued that § 10.32 supports her authority to maintain an indefinite state of emergency under the EPGA. But § 10.32 recognizes that the Governor shall have "broad" authority only "during such periods of impending or actual public crisis or disaster"—that is, only during circumstances that qualify as an "emergency" under § 10.31(1). In other words, § 10.32 does not expand the circumstances in which the Governor may issue an emergency declaration such that the Governor may also declare emergencies even in non-emergency scenarios. Instead, it simply permits the Governor to exercise broad authority once an emergency has been declared in the limited set of circumstances in which such a declaration is permissible. Because a years-long pandemic is not an "emergency" within the meaning of the EPGA, § 10.32 does not expand the Governor's authority to exercise extraordinary powers in order to implement long-term policy responses to it.

For similar reasons, § 10.32's direction that "[t]he provisions of this act shall be broadly construed to effectuate this purpose" does not help the Governor, either. First, even a direction that the statutory language be broadly construed does not mean that the Governor can avoid the ordinary meaning of the statutory text. A broad construction of a statutory term is one thing; interpreting the term to mean something other than what it says is another. *See Dillon v Mr Unknown*, 61 Mich App 588, 591; 233 NW2d 96 (1975) (even if statutory text must be construed broadly, "where the language of the statute is plain, we are left no room for judicial construction"). Second, the "purpose" that broad construction is intended to "effectuate" is the authority of the Governor to take action within circumstances that already qualify as "emergencies." It does not further the statutory purpose to interpret the EPGA as allowing the Governor to continue to take action in circumstances that do not qualify as "emergencies" under the plain meaning of the term.



RECEIVED by MSC 7/21/2020 1:55:55 PM

At bottom, the analysis here is the same as the analysis that carried the day in Wisconsin:

> [T]he Governor's emergency powers are premised on the inability to secure legislative approval given the nature of the emergency. For example, if a forest fire breaks out, there is no time for debate. Action is needed. The Governor could declare an emergency and respond accordingly. But in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely.

*Wisconsin Legislature v Palm*, 942 NW2d 900, 914 (Wis, 2020). Because a years-long pandemic is not the type of "emergency" to which the EPGA applies, Governor Whitmer's continuing declarations of emergency related to the COVID-19 pandemic under the EPGA are invalid.

### B. Governor Whitmer has already terminated the only "emergency" that supported her declaration of emergency under the EPGA.

The EPGA also provides that any orders issued by the Governor during the emergency "shall cease to be in effect upon declaration by the governor that the emergency no longer exists." MCL § 10.31(2). Governor Whitmer has terminated the only emergency upon which her declaration under the EPGA rested.

The Governor rested her emergency declaration under the EPGA on precisely the same set of facts upon which her declaration of a state of disaster and a state of emergency under the EMA were based. The initial declaration of emergency, contained in EO 2020-4, declared a single "emergency" due to the COVID-19 pandemic and did not describe separate emergencies or separate facts or circumstances giving rise to independent emergencies under the EMA and the EPGA. The renewed declaration of emergency, found in EO 2020-33, declared a "state of emergency and a state of disaster." The basis for these declarations was, again, the COVID-19 pandemic. The Governor did not identify any new or different emergency; there was only one "emergency" identified in all of her executive orders.



RECEIVED by MSC 7/21/2020 1:55:55 PM

This sole "emergency" was terminated in EO 2020-66. There, the Governor stated that "[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." (EO 2020-66). The Governor added, "[T]he 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.*). Nevertheless, the Governor acknowledged that 28 days had elapsed since the declarations of disaster and emergency in EO 2020-33, and that while the Governor "sought the legislature's agreement" to further extend those declarations, the Legislature "refused to extend them beyond today." (*Id.*). Accordingly, the Governor acknowledged and complied with the statutory obligation to declare that the states of emergency and disaster were terminated. (*Id.*).

Although EO 2020-66 purported to limit this termination to the state of emergency that had been declared under the EMA, that is word play. Only one emergency was ever identified in Governor Whitmer's executive orders: the COVID-19 pandemic. In fact, the first 11 paragraphs of EO 2020-66, EO 2020-67, and EO 2020-68—reciting the factual basis for the renewed declarations of emergency—are exactly identical in all three orders. Each of the executive orders specifically recognizes that the basis for the ongoing disaster declarations is exactly the same as the basis for the emergency declarations in EO 2020-4 and EO 2020-33. Because this emergency was terminated in EO 2020-66, all executive orders purporting to be based on the same emergency no longer have any effect under the EPGA. MCL § 10.31(2).

EO 2020-67 does not salvage the Governor's attempt to exercise authority under the EPGA, for at least two reasons. First, instead of declaring a new emergency based on a different set of facts, EO 2020-67 simply asserts that a state of emergency "remains declared" across Michigan due to the COVID-19 pandemic. EO 2020-67 recites exactly the same facts that, only



RECEIVED by MSC 7/21/2020 1:55:55 PM

60 seconds before, EO 2020-66 recited when terminating the very same emergency. But the EPGA allows the Governor to issues an emergency declaration only if there is a "great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state." MCL § 10.31(1). The Governor cannot manufacture a new emergency merely by reiterating exactly the same facts that the Governor had just recited when terminating the emergency literally one minute before. Allowing the Governor to re-declare a new "emergency" based on entirely unchanged facts without identifying any changed circumstances or new urgency would permit the Governor to use the EPGA to support indefinite unilateral rule through serial emergency declarations. The statutory text does not permit the executive to do so.

Second, particularly because the Governor predicated her declaration of emergency under the EPGA on exactly the same facts that formed the basis of her declaration of emergency under the EMA, the 28-day limitation contained in the EMA applies to the Governor's declaration of emergency under the EPGA. Under Michigan law, "[s]tatutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates." *Mich Deferred Presentment Servs Ass'n v Comm'r of Office of Fin & Ins Regulation*, 287 Mich App 326, 334; 788 NW2d 842 (2010). "[S]tatutes in pari materia are to be taken together in ascertaining the intention of the legislature, and ... courts will regard all statutes upon the same general subject matter as part of 1 system." *People v McKinley*, 496 Mich 410, 421 n11; 852 NW2d 770 (2014). "The object of the *in pari materia* rule is to further legislative intent by finding an harmonious construction of related statutes, so that the statutes work together compatibly to realize that legislative purpose." *People v Stephan*, 241 Mich App 482, 497–98; 616 NW2d 188 (2000). Statutes need not be ambiguous for the in pari materia doctrine to apply; all that matters is that the



RECEIVED by MSC 7/21/2020 1:55:55 PM

two statutes speak to the same subject matter. *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 74 n26; 894 NW2d 535 (2017).

The EPGA and EMA are *in pari materia*, because they relate to the same subject and share a common purpose; namely, describing the parameters of the executive's emergency power. This is particularly the case when a single set of facts forms the basis for emergency declarations under both statutes. In such a scenario, the statutes should be read together to control the executive branch's emergency powers with respect to precisely the same set of underlying circumstances.

When the statutes are read together, the EMA provides the outer time limit on the executive's exercise of emergency power under both the EPGA and the EMA. On its face, the EPGA does not impose a time limit on the Governor's exercise of her emergency powers, whereas the EMA does. Unless the two statutes are harmonized, they would cause contradictory results: Under the EPGA, the Governor could exercise emergency power over precisely the same emergency circumstances with respect to which the Legislature had denied her the authority to exercise her emergency powers under the EMA. This would render the time limit in the EMA meaningless. In fact, it would render the entirety of the EMA meaningless, because the Governor could simply ground her emergency declarations on the far broader language of the EPGA and dispense with any need to rely upon the EMA whatsoever.

"To the extent that statutes that are *in pari materia* are unavoidably in conflict and cannot be reconciled, the more specific statute controls." *Mich Deferred Presentment Servs*, 287 Mich App at 334. The EPGA generally provides that any orders issued by the Governor during the emergency "shall cease to be in effect upon declaration by the governor that the emergency no longer exists." MCL § 10.31(2). The EMA, in turn, provides the specific mechanism under which



RECEIVED by MSC 7/21/2020 1:55:55 PM

the Governor must declare an emergency terminated. As a result, particularly where the same emergency forms the basis for declarations under both the EMA and the EPGA, then the more specific EMA controls: The emergency cannot be extended beyond 28 days, absent the Legislature's consent, as provided in the EMA. MCL § 30.403(4).

To read the statutes as separate regimes that do not speak to each other leads to absurd results. If the EPGA allows the Governor carte blanche to declare an emergency and rule unilaterally indefinitely, then the careful balance of power reflected in the considered language of the EMA is entirely pointless, and the EMA is wholly irrelevant. A court "must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *People v Rea*, 500 Mich 422, 428 (2017). Applying the doctrine of *in pari materia* avoids the absurdity of rendering the EMA entirely surplusage.

Reading the EPGA and the EMA together in this manner does not contradict MCL § 30.417(d), which provides that the EMA was not intended to "[l]imit, modify, or abridge the authority of the governor to *proclaim* a state of emergency pursuant to [the EPGA]." *Id.* (emphasis added). The EMA's 28-day time limit does not detract in any way from the Governor's power to "proclaim" a state of emergency under the EPGA. But once the Governor proclaims an emergency, the Governor cannot *extend* it beyond 28 days, unless the Legislature approves that extension. Reading the two statutes together does not abridge the executive's powers to "proclaim" a state of emergency under the EPGA.

Finally, on May 1, 2020, Governor Whitmer admitted that there was no longer an imminent threat that Michigan's hospitals would be overtaxed, meaning that the initial basis for the emergency was ended. "Any deference, properly accorded an administrative determination that an emergency situation justifies a general lockup, is not appropriate when, by the administration's



RECEIVED by MSC 7/21/2020 1:55:55 PM

own admission, the emergency no longer exists." *Jefferson v Southworth*, 447 F Supp 179, 189 (DRI, 1978), *aff'd sub nom Palmigiano v Garrahy*, 616 F2d 598 (CA 1, 1980). An "emergency" no longer exists—both because of the EMA and by virtue of the Governor's admissions—and the Governor may no longer issue executive orders related to it.

## III. To the extent that the EPGA gives Governor Whitmer discretion to declare an emergency across the entire State for an indefinite period of time, it violates the Separation of Powers and Non-Delegation Clauses.

In the event that the EPGA is not interpreted in the manner set forth above, then the EPGA is an impermissible delegation of legislative authority in violation of the Separation of Powers and Non-Delegation Clauses of the Michigan Constitution. Without a time limit or a limitation on the EPGA's applicability to long-term pandemics that pose years-long (and potentially permanent) public health policy implications, the EPGA would contain no check on the Governor's authority to govern unilaterally. As such, the EPGA would be unconstitutional.

### A. A delegation of power to the executive is unconstitutional if it does not confine the executive's conduct within specific parameters in order to avoid executive law-making.

The Separation of Powers Clause in the Michigan Constitution provides that "[t]he 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 except as expressly provided in this constitution." Mich. Const. (1963) art. III, Section 2. This provision reflects the Constitutional Convention's intent to "prevent[ ] the collection of governmental powers into the hands of 1 man, thus protecting the rights of the people." 1 Official Record, Constitutional Convention 1961, p. 601. (App. 67a). This "fundamental" principle "is as



RECEIVED by MSC 7/21/2020 1:55:55 PM

old as our American governmental system" and means, with respect to the executive branch, that "he who enforces a law shall not make or change it . . ." *Id.*

Similarly, Article IV, Section 1 of the Michigan Constitution prohibits the delegation of "legislative power." The essential purpose of this prohibition is to "protect the public from misuses of delegated power." *Blue Cross and Blue Shield of Mich v Milliken*, 422 Mich 1, 51; 367 NW2d 1 (1985). If there is any ambiguity about whether an impermissible delegation has occurred, "the doubt should be resolved in favor of the traditional separation of governmental powers." *Civil Serv Comm'n v Auditor Gen*, 302 Mich 673, 683; 5 NW2d 536 (1942).[8]

Because "[t]here is no doubt that a legislative body may not delegate to another its lawmaking powers," a delegation of power to the executive through legislation is not lawful if it permits executive law making. *Osius v City of St Clair Shores*, 344 Mich 693, 698; 75 NW2d 25 (1956). A delegation of power is improper if it gives the executive wide discretion to make substantive rules, because such a delegation cedes the legislature's core function to the executive branch. The Legislature "must promulgate, not abdicate." *Id.*

Instead, a delegation is valid only if it provides "reasonably precise" parameters to guide the executive's exercise of its authority "to say when the law shall operate, or as to whom, or upon what occasion." *Id.* There must be "sufficient standards and safeguards . . . provided to circumscribe the agencies' use of legislative power, thereby insuring effectuation of legislatively declared policies and a means to 'check' agency action." *People v Turmon*, 417 Mich 638, 649–50; 340 NW2d 620 (1983). Only if the scope of the executive's action is limited may the executive

[8] The Governor's executive orders suggest that the executive has free-standing power under the Constitution to take unilateral control of the reins of state in the midst of an emergency. There is no support for the assertion that, if the executive believes it to be truly necessary, the executive may sideline the other branches absent enabling legislation. *See House of Representatives*, slip op. at 9 (App. 200a) (rejecting the ability of the executive to exert emergency powers in the absence of enabling legislation).



RECEIVED by MSC 7/21/2020 1:55:55 PM

branch be deemed not to be "'legislating' in the essential sense of the word, because the [executive] is acting within specified limitations ('standards') established by the Legislature and is not acting in accordance with its own will." *Westervelt v Nat Res Comm'n*, 402 Mich 412, 441; 263 NW2d 564 (1978). If no such limitations are in place and the executive branch is able to "follow its own uncircumscribed will," then the statute consists of an improper delegation and is unconstitutional. *Id.*[9]

"The preciseness required of the standards will depend on the complexity of the subject." *Blue Cross*, 422 Mich at 51. Nevertheless, "[o]ne of the requirements of substantive due process is the existence of reasonably precise standards to be utilized by [the executive] in the performance of delegated legislative tasks." *State Highway Comm'n v Vanderkloot*, 392 Mich 159, 169–70; 220 NW2d 416 (1974).

*Blue Cross* shows how this principle is applied. The statute at issue in that case established a panel of three actuaries to resolve risk-factor disputes and provided the Insurance Commissioner with the discretion to "approve" or "disapprove" risk factors proposed by health care corporations. 422 Mich at 53. The statute did not provide any parameters that would guide the exercise of this discretion: "The act is completely devoid of any indication why one factor should be preferred over another; no underlying policy has been articulated, nor has the Legislature detailed the criteria to be employed by the panel in making this determination." *Id.* at 55. In other

[9] This Court in *Westervelt* quoted Thomas Cooley's explanation that, "One of the settled maxims in constitutional law is that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. . . . The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." *Westervelt*, 402 Mich at 427–28 (quoting Cooley, Constitutional Limitations (6th ed.), p. 137). *See also* John Locke, *Two Treatises on Government* § 141 ("The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.").



RECEIVED by MSC 7/21/2020 1:55:55 PM

words, the statute allowed the executive to engage in lawmaking by determining the substance of the rules to be applied, rather than by determining simply when or to whom the rules should be applied. *Osius*, 344 Mich at 698. As a result, the court struck this portion of the statute as unconstitutional. *Blue Cross*, 422 Mich at 55. *See also Oshtemo Charter Twp v Kalamazoo Cty Rd Comm'n*, 302 Mich App 574, 592; 841 NW2d 135 (2013) (suggesting that a statute that "contain[ed] neither factors for the [decisionmaker] to consider … nor guiding standards" was likely unconstitutional).

Michigan courts have also looked to federal precedent on questions of non-delegation and separation of powers. *See Taylor v Smithkline Beecham Corp*, 468 Mich 1, 10; 658 NW2d 127 (2003). The federal courts have explained that a statute violates the federal non-delegation principle if "there is an absence of standards for the guidance of the [executive's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed . . ." *Mistretta v United States*, 488 US 361, 379 (1989). Moreover, the more sizable the amount of power that the legislature delegates to the executive, the more precise the standards constraining the executive's exercise of those powers must be. *Whitman v Am Trucking Associations*, 531 US 457, 475 (2001) ("While Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country elevators,' . . . it must provide substantial guidance on setting air standards that affect the entire national economy.").

The federal courts have demonstrated how this analysis works in the context of emergency management statutes that—like the Governor's executive orders—allow the executive to impose criminal penalties. For example, the Third Circuit upheld the delegation to the President of certain economic powers during national-emergency situations under the International Emergency Economic Powers Act—but it did so only because the statute "subjected the



RECEIVED by MSC 7/21/2020 1:55:55 PM

President's authority to a host of procedural limitations designed to ensure Congress would retain its essential legislative superiority in the formulation of sanctions regimes erected under the Act's delegation of emergency power." *United States v Amirnazmi*, 645 F3d 564, 572 (CA 3, 2011). These procedural restrictions embedded in the statute included provisions that provided for "congressional consultation, review, and termination." *Id.* at 577. Due to these procedural limitations on the executive's power, the court concluded that the statutory scheme "struck a careful balance between affording the President a degree of authority to address the exigencies of national emergencies and restraining his ability to perpetuate emergency situations indefinitely . . ." *Id.* at 577. By contrast, federal statutes violate the non-delegation principle if, for example, they provide literally no guidance for the executive's exercise of discretion, *see Panama Refining Co v Ryan*, 293 U.S. 388, 426 (1935), or confer authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition," *see ALA Schechter Poultry Corp v United States*, 295 US 495 (1935).

**B. To the extent that the EPGA does not contain a durational limit, then it violates separation of powers and non-delegation principles.**

The situation here is similar to that in *Blue Cross* and in *Panama Refining*. The EPGA—as interpreted by the Governor—contains no standards guiding the Governor's exercise of her emergency powers, nor is there any manner in which the EPGA insures that the Governor implements "legislatively declared policies," nor is there any ability for the Legislature to "check" the executive's action. *Turmon*, 417 Mich at 649–50. The EPGA allows the Governor to proclaim a state of emergency "upon his or her own volition" and to promulgate "orders, rules, and regulations as he or she considers necessary" during the state of emergency. MCL § 10.31(1). There is no substantive limitation regarding the types of orders or types of conduct that the Governor's orders may affect: in fact, the Governor has asserted that the EPGA permits her to



RECEIVED by MSC 7/21/2020 1:55:55 PM

RECEIVED by MSC 7/21/2020 1:55:55 PM

unilaterally regulate every aspect of Michigan's economy as well as every public interaction by every resident or visitor across the state. And that is exactly what the Governor has done. The Governor has used these powers to criminalize residents who travel to their cottages, attorneys who drive to work, and homeowners who purchase paint. (App. 99a).

Under the EPGA, the Governor is not required to make any particular findings prior to declaring an emergency or issuing an executive order; the Governor is not required to permit the Legislature an opportunity to provide input or review of the Governor's decisions; the Governor is not required to defer to the Legislature's determination to terminate the emergency. On its terms, the EPGA contains no substantive limitations on the Governor's authority, nor does it contain any procedural limitations on the Governor's authority. Instead, the EPGA permits the executive branch to "follow its own uncircumscribed will"—the hallmark of an unconstitutional delegation. *Westervelt*, 402 Mich at 441. There is nothing in the EPGA that prevents the executive from "perpetuat[ing] emergency situations indefinitely." *Amirnazmi*, 645 F3d at 577.

In fact, that is exactly how the Governor is interpreting the EPGA. According to the Governor, the EPGA contains no time limit: it permits the executive to continue the state of emergency for as long as the executive deems necessary—even if the Legislature explicitly disagrees with the executive's continued elimination of the legislative role. MCL § 10.31(2). As interpreted by the Governor, the EPGA permits the Governor to assert one-person rule over the entire State for as long as it takes to respond to an infectious disease that is almost certain to remain a global challenge for years to come. The Governor's six-phase plan, on its face, prescribes detailed, long-term policies that will remain in place even after the pandemic has been resolved. (App. 69a). There is no question that the Governor is engaged in "law-making." These are long-term policy changes that apply to everyone in the State of Michigan, presumably for months and

years to come. The Governor—not the Legislature—has determined the substance of each of the Governor's executive orders. That action is legislative in nature, not executive. *See Taxpayers of Michigan Against Casinos*, 471 Mich at 318 (defining "legislation" as "unilateral regulation"). The Legislature cannot validly give the Governor the power to make long-term laws: that is the Legislature's duty, and it cannot abdicate that duty by giving it to the Governor. *Osius*, 344 Mich at 698.

The absence of any standards to guide the proper subject matter of the executive's emergency orders is troubling enough on its own, but combined with the absence of any time limit on the executive's authority to declare an emergency, it is fatal. "[A] complete lack of standards is constitutionally impermissible." *Oshtemo*, 302 Mich App at 592. If, as the Governor argues, the EPGA reflects an open-ended delegation that leaves the length of the emergency solely within the executive's discretion, it is an impermissible delegation. This is especially true if, as the Governor contends, the EPGA requires that it be "broadly construed" to permit the Governor to take any action that she deems necessary within the context of an emergency that she has seen fit to declare. If, under MCL § 10.32, the EPGA is interpreted as giving the Governor the authority to leverage the entire "police power of the state" indefinitely, then the EPGA constitutes a wholesale delegation to the Governor of the entirety of the legislative power for an indefinite period of time—a result that is incompatible with Michigan's long-standing separation of powers jurisprudence.

The Governor has articulated no limitation on her powers under the EPGA, other than an assertion that her powers end whenever she determines that the "emergency" is over. It has been almost half of a year already, and the Governor's assertion that the emergency will continue until "the threats posed by COVID-19 to life . . . have been neutralized" indicates that the Governor's emergency declaration will continue potentially for years, depending on how long it



RECEIVED by MSC 7/21/2020 1:55:55 PM

RECEIVED by MSC 7/21/2020 1:55:55 PM

takes for an effective vaccine to be tested, approved, manufactured, and then disseminated in sufficient quantities to achieve herd immunity. (App. 149a). In fact, the Governor's MI Safe Start plan provides that Michigan will remain in Phase 5, with citizens subject to substantial "additional safety measures," until there is "a permanent solution to the epidemic"—that is, "[h]igh uptake of an effective therapy or vaccine." (App. 69a). It almost certainly will take years for the epidemic to be permanently resolved.

The Michigan Constitution cannot simply be put on the shelf for several years and then dusted off when the epidemic is over. The Constitution does not permit the executive to rule the State for years to come, through emergency decree. *Cf. Wisconsin Legislature*, 942 NW2d at 914 ("[T]he Governor cannot rely on emergency powers indefinitely."). Nor does it permit the executive to persist in unilateral rule by continually overruling the Legislature's attempts to regain its legislative power. *See Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 652 (1952) (Jackson, J., concurring) ("[E]mergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.").

### C. The EPGA's requirement that the Governor's orders be "reasonable" and "necessary" does not impose any true parameters to guide the executive's conduct.

The Governor likely will contend that the EPGA sufficiently limits the Governor's discretion by requiring that her orders be "reasonable" and "necessary." *See* MCL § 10.31(1). But this argument is incorrect. The plaintiffs have not found any case in which any statute—even an emergency-powers statute—has been saved from a non-delegation challenge by virtue of such amorphous statutory language. To the contrary, cases like *Amirnazmi* demonstrate that much more is required. 645 F3d at 577.

There are several reasons why the requirement that the Governor's conduct be "reasonable" and "necessary" are not the sort of "specified limitations" that are necessary in order

to ensure that the executive is following the legislature's will rather than its own. *Westervelt*, 402 Mich at 441.

First, they are no limit at all. As the Iowa Supreme court observed when invalidating a statute that allowed an executive official to "[p]erform such duties prescribed by law as it may find necessary," the non-delegation principle prohibits the legislature from giving the executive the "power to do whatever is thought necessary to carry out their purposes and to enforce the laws, without other guide than that they must keep within the law." *Lewis Consol Sch Dist of Cass Co v Johnston*, 256 Iowa 236, 247; 127 NW2d 118 (1964). In fact, if the Governor's actions were not reasonable or necessary, then they would be arbitrary. But substantive due process already prohibits the Governor from taking arbitrary action. *Maple BPA, Inc v Bloomfield Charter Twp*, 302 Mich App 505, 518; 838 NW2d 915 (2013). In other words, the Governor's argument amounts to an assertion that the EPGA allows the Governor to do anything that does not violate substantive due process. That is not anything close to a "standard" or criteria that saves the EPGA from being an improper delegation. The relevant question is whether the statute contains any standard that "meaningfully constrains the Executive's discretion." *Amirnazmi*, 645 F3d at 577. The EPGA does not provide any limitations upon the Governor's discretion, because due process already requires the Governor to exercise her powers in a non-arbitrary manner.

Second, the Governor herself has repeatedly argued that the EPGA's use of the terms "reasonable" and "necessary" does not provide any real limitation on her authority. In each of the lawsuits filed against the Governor related to the COVID-19 pandemic, the Governor has argued that the courts must defer to her judgment over the appropriate response to the pandemic. And the courts have largely agreed. The Sixth Circuit, for example, recently held that the Governor's epidemic-related decisions ordinarily cannot be challenged under the federal



RECEIVED by MSC 7/21/2020 1:55:55 PM

Constitution even if the Governor's decisions are "unsupported by evidence or empirical data." *League of Indep Fitness Facilities & Trainers, Inc v Whitmer*, No. 20-1581, 2020 WL 3468281, at *3 (CA 6, June 24, 2020) (App. 219a). That is because, under *Jacobson v Massachusetts*, 197 US 11, 29 (1905), "the police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts." *League of Indep Fitness Facilities*, 2020 WL 3468281, at *2. The Governor has repeatedly argued that the courts must defer to her judgment about public-health related matters under the EPGA. Having taken that position, the Governor cannot claim that the EPGA imposes any real limitations on her authority.

As the Sixth Circuit put it, "[t]he decision to impose those costs [associated with COVID-19 shutdown orders] rests with the political branches of government, in this case, Governor Whitmer." *Id.* at *4. Michigan is therefore in a constitutionally perilous position. If the Governor is correct that the EPGA allows her to continue the emergency without heeding the Legislature's refusal to extend it, then the Governor's conduct under the EPGA is not subject to review or limitation by either the Legislature or the courts.

Third, the Governor's position is ultimately self-defeating. The Governor argues that, due to the unforeseen nature of an "emergency" or a "disaster," she necessarily needs a broadly defined range of action in order to be able to appropriately respond to whatever unique circumstances are posed by the particular emergency. But that cuts against the principle that, the greater the delegation of power, the more precise the standards constraining the executive's exercise of those powers must be. *Whitman*, 531 US at 475. And in any event, to pass muster, even emergency-powers statutes must impose at least some constraints on the executive. *Amirnazmi*, 645 F3d at 577. The EPGA contains—literally—none. If the Governor is correct that a months-long pandemic can be an "emergency," and if there is no time limit on the executive's power to



RECEIVED by MSC 7/21/2020 1:55:55 PM

RECEIVED by MSC 7/21/2020 1:55:55 PM

issue executive orders that have the effect of law, the Governor has open-ended authority to impose long-term policy solutions with the effect of law on every person in Michigan, even over the Legislature's explicit objection. Those longer-term policy solutions, like the Governor's six-phase plan that purports to control Michigan's response to the COVID-19 pandemic even after the pandemic is over, are quintessentially legislative, not executive.

If the EPGA neither is time-limited nor affords the Legislature the ability to terminate the emergency declaration, then the Governor's power under the EPGA has been transformed into an improper law-making power, rather than a short-term imposition of limited curfews, alcohol-sales controls, and the like.

### D. Separation of powers concerns are accorded particularly important weight because they implicate the very structure of our government.

Troublingly, the Governor has never identified a principle that adequately limits the expansive nature of her argument. In fact, the linchpin of the Governor's argument is that the Legislature, having enacted the EPGA more than 75 years ago, has irrevocably ceded to the executive the authority to continue an emergency declaration indefinitely—and the Legislature may not take that power back, unless it either amends the statute by overriding the Governor's veto or impeaches the executive.

That is a sobering assertion. Indefinite extensions of emergency declarations have always been recognized as posing unique and troubling implications for separation of powers. For example, the Tenth Circuit, ruling on President Ford's assertion that a 16-year-old federal declaration of emergency remained in place, observed,

> If President Ford was correct in his position that the provision of the National Emergencies Act for termination of an emergency by act of Congress is unconstitutional and, if the government is correct in the position which it takes in the instant case that the judiciary may not terminate an emergency, the awesome power of the President to declare an emergency and thereby activate 470 federal laws is

RECEIVED by MSC 7/21/2020 1:55:55 PM

> unfettered. . . . With all regard to separation of powers it seems clear that the indefinite prolongation of an emergency by presidential non-action long after the causative facts have ceased to exist is antithetical to our system of checks and balances and could present a serious threat to the concept of limited executive power.

*United States v Bishop*, 555 F2d 771, 776 (CA 10, 1977).

For good reason, then, both the federal government and the vast majority of states do not permit the executive to extend an emergency declaration indefinitely without approval from the legislature.[10] The ability of the legislature to provide a check on the executive's power by

[10] *See, e.g.*, 50 U.S.C. § 1706(b) ("The authorities described in subsection (a)(1) may not continue to be exercised under this section if the national emergency is terminated by the Congress by concurrent resolution . . ."); 50 U.S.C. § 1622(a), (b) (outlining the procedure whereby Congress must consider termination of the emergency by joint resolution every six months); Alaska Stat. Ann. § 26.23.020(c) ("A proclamation of disaster emergency may not remain in effect longer than 30 days unless extended by the legislature by a concurrent resolution."); Ariz. Rev. Stat. Ann. § 26-303(F) ("The powers granted the governor by this chapter with respect to a state of emergency shall terminate when the state of emergency has been terminated by proclamation of the governor or by concurrent resolution of the legislature declaring it at an end."); Ark. Code Ann. § 12-75-107(c)(1) ( "The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time."); Cal. Gov't Code § 8629 ("All of the powers granted the Governor by this chapter with respect to a state of emergency shall terminate when the state of emergency has been terminated by proclamation of the Governor or by concurrent resolution of the Legislature declaring it at an end."); Colo. Rev. Stat. Ann. § 24-33.5-704(4) ("The general assembly, by joint resolution, may terminate a state of disaster emergency at any time."); Fla. Stat. Ann. § 252.36(2) ("The Legislature by concurrent resolution may terminate a state of emergency at any time."); Ga. Code Ann. § 38-3-51(a) ("The General Assembly by concurrent resolution may terminate a state of emergency or disaster at any time."); Idaho Code Ann. § 46-1008(2) ("The legislature by concurrent resolution may terminate a state of disaster emergency at any time."); 20 Ill. Comp. Stat. Ann. 3305/7 ("Upon such proclamation, the Governor shall have and may exercise for a period not to exceed 30 days the following emergency powers"); Ind. Code Ann. § 10-14-3-12 ("The general assembly, by concurrent resolution, may terminate a state of disaster emergency at any time."); Iowa Code Ann. § 29C.3(3) ("The general assembly may, by concurrent resolution, rescind a proclamation of a state of public disorder emergency."); Kan. Stat. Ann. § 48-924(3) ("Upon making such findings the governor shall terminate the state of disaster emergency by proclamation, but except as provided in paragraph (4), no state of disaster emergency may continue for longer than 15 days unless ratified by concurrent resolution of the legislature."); La. Stat. Ann. § 29:724(B)(2) "The legislature, by petition signed by a majority of the surviving members of either house, may terminate a state of disaster or emergency at any time."); Me. Rev. Stat. tit. 37-B, § 743(2) ("The Legislature, by joint resolution, may terminate a state of emergency at anytime."); MD Public Safety § 14-107(4)(i) ("The General Assembly by joint resolution may terminate a state of emergency at any time."); Minn. Stat. Ann. § 12.31 (2)(b) ("By majority vote of each house of the legislature, the legislature may terminate a peacetime emergency extending beyond 30 days."); Mo. Ann. Stat. § 44.100(2) ("Any emergency, whether proclaimed by the governor or by the legislature, shall terminate upon the proclamation thereof by the governor, or the passage by the legislature, of a resolution terminating such emergency."); Mont. Code Ann. § 10-3-302 (3) ("A state of emergency may not continue for longer than 30 days unless continuing conditions of the state of emergency exist, which must be determined by a declaration of an emergency by the president of the United States or by a declaration of the legislature by joint resolution of continuing conditions of the state of emergency."); Neb. Rev. Stat. Ann. § 81-829.40(3) ("The Legislature by resolution may terminate a state of emergency proclamation at any time."); Nev. Rev. Stat. Ann. § 414.070 (West) ("Any such emergency or disaster, whether proclaimed by the Governor or by the Legislature, terminates upon the proclamation of the termination thereof by the Governor, or the passage by the Legislature of a resolution terminating the emergency or disaster."); N.H. Rev. Stat. Ann. § 4:45(II)(c) ("The legislature may terminate a state of emergency by concurrent resolution adopted by a majority vote of each

RECEIVED by MSC 7/21/2020 1:55:55 PM

terminating the emergency ordinarily is requisite to a finding that an emergency-powers statute is valid. For example, the Supreme Court of Oregon repeatedly noted when it upheld a challenge to Oregon Governor Brown's COVID-19-related orders that the legislature was able to terminate the declaration of emergency, if it so chose. *See Elkhorn Baptist Church v Brown*, 366 Or 506, 526 (Or, 2020) ("[T]he Governor's emergency powers are limited in that they can be terminated by the legislature.").

The concern of executive overreach is not a partisan one; it is a structural one. Executives on both sides of the aisle have used "emergency" powers in ways that have sparked controversy. The Governors of both Georgia and Texas, for example, used their emergency powers to prohibit local jurisdictions from imposing any penalty for individuals who failed to wear face-coverings during the COVID-19 pandemic. *See* Georgia Executive Order 07.15.20.01, at 32 (July 15, 2020); Texas Executive Order GA-28, at ¶ 15 (June 26, 2020).[11] On the federal level, the

---

chamber."); N.Y. Exec. Law § 28(3) ("The executive order shall include a description of the disaster, and the affected area. Such order or orders shall remain in effect for a period not to exceed six months or until rescinded by the governor, whichever occurs first. The governor may issue additional orders to extend the state disaster emergency for additional periods not to exceed six months."); N.D. Cent. Code Ann. § 37-17.1-05(3) ("The legislative assembly by concurrent resolution may terminate a state of disaster or emergency at any time."); Okla. Stat. Ann. tit. 63, § 6405(C) ("The State Legislature by concurrent resolution may terminate a state of catastrophic health emergency at any time."); Or. Rev. Stat. Ann. § 401.204(2) ("The state of emergency proclaimed by the Governor may be terminated at any time by joint resolution of the Legislative Assembly."); 35 Pa. Stat. and Cons. Stat. Ann. § 7301(c) ("The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time."); 30 R.I. Gen. Laws Ann. § 30-15-9(b) ("The general assembly by concurrent resolution may terminate a state of disaster emergency at any time."); S.C. Code Ann. § 25-1-440) ("A declared state of emergency shall not continue for a period of more than fifteen days without the consent of the General Assembly."); Tex. Gov't Code Ann. § 418.014(c) ("A declared state of emergency shall not continue for a period of more than fifteen days without the consent of the General Assembly."); Utah Code Ann. § 53-2a-206(3) ("A state of emergency may not continue for longer than 30 days unless extended by joint resolution of the Legislature, which may also terminate a state of emergency by joint resolution at any time."); 20 V.S.A. § 13 ("Upon receiving notice that a majority of the legislative body of a municipality affected by a natural disaster no longer desires that the state of emergency continue within its municipality, shall declare the state of emergency terminated within that particular municipality."); W. Va. Code Ann. § 15-5-6(b) ("Any state of emergency or state of preparedness, whether proclaimed by the Governor or by the Legislature, terminates upon the proclamation of the termination by the Governor, or the passage by the Legislature of a concurrent resolution terminating the state of emergency or state of preparedness: Provided, That in no case shall a state of preparedness last longer than thirty days."); Wis. Stat. Ann. § 323.10 ("A state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature.").

[11] The Governor of Texas subsequently reversed this portion of the executive order. *See* Texas Executive Order GA-29 (July 2, 2020).

President controversially declared a national emergency on the southern border of the United States in order to fund a border wall. *See California v Trump*, ___ F3d ___, No. 19-16299, 2020 WL 3480841, at *1 (CA 9, June 26, 2020) (App. 153a). The structural separation of powers principles that are reflected in both the federal and the Michigan constitutions are designed to restrain the executive—of any political party—from exceeding the appropriate bounds of their authority. If those boundaries are ignored in the present instance, then future executives will be given the same carte blanche to act under indefinite emergency declarations.

That is why it makes no difference to this case whether the Governor's motivations and policies are either wise or mistaken. "The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives, but of constitutional authority, for which the best of motives is not a substitute." *Panama Refining*, 293 US at 420. Here, the Governor's attempt in Phase Six of her reopening plan to impose unilateral policy solutions even to post-pandemic circumstances illustrates the danger of granting an executive the power both to define the existence of an "emergency" as well as to extend its duration indefinitely. Even the best-intentioned executive declarations are susceptible to mission creep.

Nor does it matter that the Legislature in 1945 acquiesced in the improper delegation of its authority to the executive. As Justice Kennedy noted in the federal context,

> It is no answer, of course, to say that Congress surrendered its authority by its own hand; nor does it suffice to point out that a new statute, signed by the President or enacted over his veto, could restore to Congress the power it now seeks to relinquish. That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow.



RECEIVED by MSC 7/21/2020 1:55:55 PM

RECEIVED by MSC 7/21/2020 1:55:55 PM

*Clinton v City of NY*, 524 US 417, 451–52 (1998) (Kennedy, J., concurring). *See also Free Enter Fund v Pub Co Accounting Oversight Bd*, 561 US 477, 497 (2010) ("[T]he separation of powers does not depend on the views of individual Presidents, nor on whether 'the encroached-upon branch approves the encroachment.'" (internal citation omitted)).

The fact that the EPGA addresses the emergency context does not alter the analysis, either. "Emergency does not create power." *Home Bldg & Loan Ass'n v Blaisdell*, 290 US 398, 425 (1934). Like the federal Constitution, the Michigan Constitution's "structure requires a stability which transcends the convenience of the moment." *Clinton*, 524 US at 449 (Kennedy, J., concurring).

To the extent that the Governor argues that invalidation of the EPGA would eliminate the executive's authority to respond to public health problems like an epidemic, that argument is incorrect. First, the EMA gives the Governor 28 days in which to respond to an emergency circumstance, with a substantial amount of discretion. Second, the Legislature can extend the 28-period as it deems necessary. In other words, instead of going solo, the Governor can make her case to the Legislature that she is taking appropriate action and can be entrusted not to issue unreasonable executive orders under her emergency powers.[12] If the Governor has been able to compromise with the Legislature to that degree, then the Legislature can extend the emergency declaration, and the Governor can continue to manage the government's response to the situation. That dynamic ensures that the Legislature is kept apprised of the executive's exercise of its extraordinary powers and that the State's government presents a unified response to an

[12] Notably, the Legislature decided to decline the Governor's request to extend the Governor's declaration of emergency shortly after the Governor issued EO 2020-42, which, among other things, criminalized the sale of paint, furniture, and flooring, and prohibited large retail stores from engaging in almost any advertising—a restriction that is almost certainly a facial violation of the First Amendment. (App. 99a). If the Legislature disagreed with the Governor's decisions, the Legislature was within its rights to decline to continue to give the Governor carte blanche—regardless of whether the Governor or the Legislature is correct, as a matter of policy, about the appropriate response to the pandemic.

RECEIVED by MSC 7/21/2020 1:55:55 PM

important public health challenge, rather than a fractured one. Third, the Legislature can pass statutes that are targeted to the pandemic and that grant the Governor the authority to implement a specific range of options to respond to the pandemic. The Legislature has substantial practice in passing statutes that both impose intelligible limits on the executive's conduct and nevertheless allow the executive branch to respond to public health concerns. *See, e.g.*, Hazardous Communicable Diseases Act, MCL § 333.5201, *et seq*. (providing procedures for quarantine and detention of individuals suspected of having infectious diseases).

Finally, the separation of powers problems posed by the EPGA endanger not just the careful balance of powers among our three branches of government but also the individual liberties protected by that government. "The structural principles secured by the separation of powers protect the individual as well." *Stern v Marshall*, 564 US 462, 483 (2011). Arguably, the structure of the Constitution plays an even greater role in protecting personal liberties than does any bill of rights. *See Mistretta*, 488 US at 381 (citing The Federalist No. 47)). In fact, "[s]o convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary." *Clinton*, 524 US at 450 (1998) (Kennedy, J., concurring).

That is why it is critical to carefully preserve the appropriate boundaries between the governmental branches. "[T]he doctrine of separation of powers is a structural safeguard . . . [I]t is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut v Spendthrift Farm, Inc*, 514 US 211, 239 (1995). "Slight encroachments" of one branch into another branch's domain "create new boundaries from which legions of power can seek new territory to capture." *Stern*, 564 US at 503. As interpreted by the Governor, the EPGA represents not merely a "slight encroachment" of the executive into the realm of the legislature; it is an enormous breach.

RECEIVED by MSC 7/21/2020 1:55:55 PM

## IV. The Governor cannot collaterally attack the federal district court's decisions.

Finally, the Governor previously filed a motion in this Court, seeking an opportunity to apprise this Court of alleged infirmities in the underlying federal-court litigation, such as the Governor's assertion that the federal lawsuit is moot. The Governor's assertions about those alleged infirmities should not carry the day, because the federal court has already assessed those arguments and rejected them. If this Court accepts the Governor's argument that this Court should not answer the certified questions, then the district court is poised to answer them on the merits itself. It is critical, however, that these certified questions be answered—by the Court that is the final authority on issues of Michigan law.

To the extent that the Governor continues to argue that this particular case is not an appropriate vehicle in which to answer the certified questions, the Governor's argument misses the mark. For example, the Governor may claim that the federal lawsuit is moot or is otherwise non-justiciable. But the federal district court rejected that argument. (App. 65a). The argument is also quite obviously wrong. The plaintiffs are still subject to various restrictions on their provision of medical services under EO 2020-145. And in any event, numerous states have reversed their attempts to re-open and have renewed prohibitions on non-essential medical procedures, and there is no certainty that Michigan will not follow suit. In fact, the Governor has extended Michigan's emergency declaration until mid-August (EO 2020-157)—marking fully five months of "emergency" rule—almost half of the current legislative session and almost a quarter of the tenure of the 100th Legislature. The notion that this case is moot was rightly rejected by the district court.

The Governor may also argue that she asked the federal district court to abstain from answering the state-law questions presented to this Court. The district court rejected that request, too, determining to certify them to this Court instead. (*Id.*). The Governor may assert that the federal-court claims are barred by the Eleventh Amendment. But the district court has rejected

that assertion, as well. (App. 58a). The Governor has attempted to appeal the federal court's order denying the Governor's motion to reconsider its determination to certify the state-law questions to this Court, but the district court's order is an unappealable interlocutory order, such that the Sixth Circuit lacks jurisdiction over the appeal. *See Brown v Argosy Gaming Co, LP*, 360 F3d 703, 705–06 (CA 7, 2004) (order certifying questions to the state supreme court is not an appealable interlocutory order); *Nemours Found v Manganaro Corp*, 878 F2d 98, 100 (CA 3, 1989) (same).

In any event, the primary consideration is not whether this Court disagrees with any of the federal court's rulings on these procedural matters. The Governor cannot collaterally attack the federal court's rulings on those issues in this Court. Instead, the primary consideration is whether this Court prefers to answer the certified questions itself or is willing to defer to the federal district court's determination of them.

## CONCLUSION

The questions presented to this Court are not a referendum on whether Governor Whitmer is making sound policy decisions in response to the COVID-19 epidemic. The questions before this Court are instead about the interpretation of two statutes and Michigan's Constitution. The medical providers' interpretation of the EMA and the EPGA harmonizes the statutes with the Constitution. If the Governor's expansive interpretation of executive power is accepted, however, future executives will be emboldened to declare emergencies and extend them indefinitely—knowing that they can sideline the Legislature for as long as they choose. That result would fundamentally re-order the balance of power between Michigan's branches of government.

The Court should rule that the Governor does not have the authority under the EMA or the EPGA to continue to issue emergency orders related to the COVID-19 pandemic, either as a matter of statutory construction, or because the EPGA violates Michigan's Constitution.



RECEIVED by MSC 7/21/2020 1:55:55 PM

Dated: July 21, 2020 By /s/ James R. Peterson

James R. Peterson (P43102)
Stephen J. van Stempvoort (P79828)
Amy E. Murphy (P82369)
Miller Johnson
Co-counsel for Plaintiffs
45 Ottawa Avenue SW, Suite 1100
Grand Rapids, Michigan 49503
(616) 831-1700
petersonj@millerjohnson.com
vanstempvoorts@millerjohnson.com
murphya@millerjohnson.com

Patrick J. Wright (P54052)
Mackinac Center Legal Foundation
Co-counsel for Plaintiffs
140 W Main St.
Midland, Michigan 48640-5156
(989) 631-0900
wright@mackinac.org

RECEIVED by MSC 7/21/2020 1:55:55 PM