STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

Supreme Court No.

Court of Appeals No. 353655
Court of Claims No. 20-000079-MZ

THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE, OR REGULATION OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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THE MICHIGAN LEGISLATURE'S EMERGENCY BYPASS APPLICATION FOR LEAVE TO APPEAL BEFORE DECISION BY THE COURT OF APPEALS

ORAL ARGUMENT REQUESTED

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ORDER APPEALED FROM AND RELIEF SOUGHT

On May 21, 2020, after the Michigan House of Representatives and Michigan Senate moved for declaratory judgment, the Court of Claims issued an opinion addressing the legality of certain executive orders issued by Governor Gretchen Whitmer in response to the COVID-19 pandemic. Those executive orders purportedly rested on two legislative acts: the Emergency Powers of the Governor Act of 1945 ("EPGA") and the Emergency Management Act of 1976 ("EMA"). See MCL 10.31–10.33; MCL 30.401–30.421. The court held that the Governor exceeded the authority granted to her in the EMA by declaring states of emergency and disaster in Executive Order 2020-68 over the Legislature's objection. But the court upheld the Governor's exercise of her authority under the EPGA in declaring a state of emergency in Executive Order 2020-67. Further, the court held that the EPGA's broad grant of gubernatorial lawmaking power did not offend the separation-of-powers doctrine. The Legislature filed a claim of appeal in the Court of Appeals on May 22, 2020.

The Legislature respectfully requests that this Court grant emergency-bypass review, reverse the decision of the Court of Claims in part, and hold (1) that the Governor exceeded her authority under the EPGA in declaring an indefinite statewide state of emergency in EO 2020-67; or (2) alternatively, that the EPGA violates the separation-of-powers doctrine in the 1963 Michigan Constitution because it upsets the balance of power that is central to the democratic process and does not provide sufficient standards to guide executive discretion. In either event, the Court should hold that the Governor's declaration of emergency in EO 2020-67 and the orders that rest upon the same are improper and invalid.

STATEMENT OF QUESTIONS PRESENTED

1. Should the Court grant bypass leave to appeal to determine whether the Emergency Powers of the Governor Act grants the governor the power to declare an indefinite statewide state of emergency premised on a pandemic over the Legislature's objection?

   The Legislature answers: "Yes."

   The Governor answers: "No."

   This Court should answer: "Yes."

2. Should the Court grant bypass leave to appeal to determine whether the Emergency Powers of the Governor Act is consistent with the separation-of-powers doctrine in the Michigan Constitution, where the act provides no functional standards to constrain the exercise of the broad lawmaking powers it delegates and results in the usurpation of the Legislature's role in formulating public policy?

   The Legislature answers: "Yes."

   The Governor answers: "No."

   This Court should answer: "Yes."

INTRODUCTION AND REASONS FOR GRANTING THE EMERGENCY BYPASS APPLICATION

This case concerns the power of a governor to exercise unconstrained lawmaking powers for an indefinite period throughout the state—all in the name of "emergency." In response to the COVID-19 pandemic, Defendant Governor Gretchen Whitmer has asserted vast executive-branch power to implement sweeping executive orders. She has premised these executive orders—orders that affect the otherwise lawful activities of every Michigander's day-to-day existence—on a series of separate executive orders declaring states of emergency and disaster. Governor Whitmer cited three supposed bases of authority to issue these declarations: Article 5, § 1, of Michigan's 1963 Constitution; the 1945 Emergency Powers of the Governor Act ("EPGA"), MCL 10.31–10.33; and the 1976 Emergency Management Act ("EMA"), MCL 30.401–10.421.

After the Legislature filed an action for declaratory judgment to deem the Governor's declarations invalid, the Governor abandoned any argument resting on any inherent authority found in Article 5, § 1. The Court of Claims then held that the Governor did not have authority to declare states of emergency or disaster premised on the EMA after April 30, 2020. Thus, the only remaining authority from which the Governor may draw to issue and sustain COVID-19-related declarations of emergency is the EPGA. That act, however, was only intended to address limited, localized emergencies, not the sort of statewide indefinite emergency that Governor Whitmer has sought to declare here. Even if it were not, the EPGA does not provide sufficiently definite standards or safeguards to render it constitutionally consistent

with the separation-of-powers doctrine. The EPGA, then, is of no use to the Governor. And lacking any genuine source of authority, the Governor's declarations—and the executive orders founded upon them—are all *ultra vires* acts that cannot be sustained.

If ever there were a case that warranted this Court's immediate involvement, then this would be it. The suit involves "a substantial question about the validity of [multiple] legislative act[s]." MCR 7.305(B)(1). It presents a serious question as to the constitutionality of the EPGA *and* a serious question as to the validity of the quasi-legislative acts that the Governor has unilaterally undertaken in the wake of COVID-19. These issues are undeniably of "significant public interest," in that they touch upon the daily lives of every person in Michigan (including those just passing through) and the republican form of government to which they are entitled. MCR 7.305(B)(2). The case involves a "subdivision" of the state on the one side (that is, the Legislature) and "an officer of the state … in [her] official capacity" (that is, the Governor) on the other. *Id.* The issue is one of "major significance to the state's jurisprudence," as it directly poses a central question of how the branches of government may exercise and balance their powers, particularly in a time of emergency. MCR 7.305(B)(3). Delaying final adjudication would do "substantial harm," as citizens and lawmakers would be left in a state of uncertainty at a time when confident decision-making is a requirement for survival. Michiganders are living under and attempting to interpret orders that never should have been implemented over their Legislature's objection; at the very least, they are living

under a cloud of ambiguity that can be rectified by this Court. MCR 7.305(B)(4)(a). The *ultra vires* nature of the Governor's actions puts at risk people who are relying on governmental direction to guide their conduct. Lastly, this appeal involves a ruling that has already declared one related "action of the … executive branch[] of state government invalid." MCR 7.305(B)(4)(b).

The Legislature therefore respectfully asks the Court to order expedited merits briefing, schedule oral argument as soon as possible, and then issue a decision. It asks the Court to hold that the EPGA does not grant the Governor the broad powers that she claims it does. Alternatively, the Legislature asks the Court to hold that the EPGA is an unconstitutional delegation and usurpation of lawmaking power. The Governor's ongoing emergency orders are improper and invalid as a matter of state constitutional and statutory law. COVID-19 presents real problems that call for a comprehensive and deliberative governmental response. The Court should restore the proper constitutional order and allow the branches to get to work—together.

BACKGROUND

The Governor's Exercise of Broad Lawmaking Powers

As the Court of Claims recognized, the underlying facts of this case are undisputed.

On March 10, 2020, on the same day that the first two presumptive-positive cases of COVID-19 were announced in Michigan, Governor Whitmer declared a state of emergency throughout Michigan. See EO 2020-4; State of Michigan, *Michigan announces first presumptive positive cases of COVID-19* <https://bit.ly/2zVg2XH> (last accessed May 5, 2020). The Governor's declaration of emergency cited three

sources of authority: Article 5, § 1, of Michigan's 1963 Constitution, the EMA, and the EPGA. EO 2020-4. A few weeks later, on April 1, 2020, the Governor issued an Executive Order titled "Expanded emergency and disaster declaration." EO 2020-33. In rescinding and replacing the March 10 declaration, the new order declared an expanded "state of emergency *and a state of disaster* … across the State of Michigan." *Id.* (emphasis added). This new declaration rested on the same three supposed sources of authority.

The EMA required the Governor to "declar[e] the state of emergency [or disaster] terminated, unless a request by the governor for an extension of the state of emergency [or disaster] for a specific number of days is approved by resolution of both houses of the legislature." MCL 30.403(3), (4). After the Governor's initial declarations, the Legislature by resolution approved the Governor's requested "extension of the state of emergency and state of disaster" from the March 10, 2020 order and April 1, 2020 order, setting April 30, 2020 as its new expiration date. 2020 SCR 24. The "extension" resolution was required to extend the states of emergency and disaster, at an absolute minimum, by the EMA. MCL 30.403(3), (4).

On April 27, 2020**,** a few days before the as-extended state of emergency was to expire, the Governor announced that she would request that the Legislature further extend her declaration of state of emergency. Exhibit 3, April 27, 2020 Letter. But the Legislature and the Governor were unable to agree to terms, so the next day passed without the Legislature entering a resolution to further extend the state of emergency and state of disaster. Rather than continuing to let all public policy

decisions be implemented via ad hoc executive orders, the Legislature offered to extend the states of emergency and disaster so long as any future "stay-at-home" requirements be passed as bipartisan legislation through the democratic process. This reflected the Legislature's position: although the Governor is best equipped to swiftly respond to a pandemic's more immediate challenges, the Legislature is equipped to arrive at more durable, consensus-based solutions through a deliberative process. The Legislature would have still permitted the Governor to supplement with executive orders as needed. The Governor refused and even vetoed legislation to codify many of her executive orders.

Even though the Legislature determined not to extend the declared states of emergency and disaster and instead revert to the ordinary democratic process to handle the state's long-term pandemic response, the Governor decided to ignore that judgment and move ahead on her own. In particular, on April 30, 2020, less than five hours before the as-extended state of emergency and state of disaster were set to expire, the Governor issued a series of executive orders.

First, she issued EO 2020-66, terminating the state of emergency declared under the EMA in the April 1, 2020 order. See EO 2020-33. The order observed that the EMA called for her to terminate a declaration of a state of emergency or disaster after 28 days. See EO 2020-66. The Governor acknowledged that the statute bound her: "Twenty-eight days, however, have elapsed since I declared states of emergency and disaster under the Emergency Management Act in Executive Order 2020-33. And while I have sought the legislature's agreement that these declared states of

emergency and disaster should be extended, the legislature … has refused to extend them beyond today." *Id.*

Second, one minute later, the Governor issued another order: a declaration of state of emergency under the EPGA. See EO 2020-67. After citing the EPGA, the Governor ordered that "[a] state of emergency *remains* declared across the State of Michigan under the Emergency Powers of the Governor Act of 1945[.]" *Id.* (emphasis added). The Governor ordered that the declaration would continue through May 28, 2020, adding vaguely that she would "evaluate the continuing need for this order prior to its expiration." *Id.* EO 2020-67 rescinded the April 1 order and stated that all previous executive orders that had rested on that earlier order now rested on this order. *Id.*

Third, the Governor issued EO 2020-68, an executive order that—in direct contradiction to her termination order issued moments earlier—declared "states of emergency and disaster under the [EMA]." This order, like the preceding order, specified that it would continue through May 28, 2020, and laid out no conditions for termination beyond the Governor's evaluation of the "continuing need for this order" prior to that date. But unlike the EPGA order, which stated that a state of emergency *remains*, this third order played a semantics game: it was phrased to *declare* states of emergency and disaster *now*: "I now declare a state of emergency and a state disaster across the State of Michigan under the Emergency Management Act." *Id.* All prior orders resting on the April 1, 2020, declaration of emergency and disaster were said to then rest on this order. *Id.*

Using these declarations, the Governor has continued issuing broad orders at a rapid pace. Indeed, relying on the powers that she believed the EMA and EPGA declarations afforded her, the Governor has issued 98 COVID-19 executive orders—more than any other governor in the nation. See Council of State Governments, *COVID-19 Response for State Leaders* <https://web.csg.org/covid19/executive-orders/> (accessed May 22, 2020). The initial "stay-at-home" order has been modified six times, changing the scope of criminal and non-criminal activities in the state nearly every week. *See* EO 2020-96 (noting the extensions and modifications of the various state-at-home orders). As of May 22, 2020, there are 44 "live" COVID-19 executive orders. The Governor's current declaration of emergency and disaster is EO 2020-99, under which the Governor declared an emergency under the EPGA and, despite the Court of Claim's May 21 order, the EMA. In EO 2020-100, the Governor clarified the duration of 14 COVID-19 executive orders: EOs 2020-26, 28, 36, 39, 46, 52, 55, 58, 61–62, 64, 69, 76, and 96. In addition to those 16 orders, 28 other COVID-19 executive orders are still effective: EOs 2020-14, 22, 27, 38, 63, 65, 71–75, 78–83, 85–89, 93, 95, 97, and 101–103.

These orders—including the "stay at home" orders—touch upon all aspects of life in Michigan; they confine Michiganders to their homes, limiting a broad swathe of available services and goods, changing legal rights, criminalizing a variety of otherwise ordinary activity, closing schools, and more. In public statements, the Governor has shown no intent to end the declared states of emergency or disaster any time soon. See Riley Beggin & Mike Wilkinson, Bridge, *When Will Gov. Whitmer*

Reopen Michigan? It's Complicated. And A Bit Vague. <https://bit.ly/2LLrcRw> (May 17, 2020) (quoting Governor Whitmer as saying that reopening "depends on human nature, it depends on human activity").

The Court of Claims Decision

Faced with a governor who was determined to unilaterally exercise broad lawmaking powers across the entire state for an undefined period, the Legislature was compelled to file suit against her. On April 30, 2020, both the House and the Senate authorized the suit. The Legislature then filed a complaint and motion for declaratory judgment in the Court of Claims on May 6. On May 21, the Court of Claims decided on the Legislature's motion for immediate declaratory judgment.

After briefly discussing an abandoned procedural requirement, the court concluded that the Legislature had standing. The court found that "the issue presented in this case is whether the Governor's issuance of EO 2020-67 and/or EO 2020-68 had the effect of nullifying the Legislature's decision to decline to extend the states of emergency/disaster." See Exhibit 1, Court of Claims Op, p 7. The nullification of the Legislature's decision was akin to the "special injury" required to justify standing in prior cases, including the one legislator who was deemed to have standing in *Dodak v State Admin Bd*, 441 Mich 547, 560; 495 NW2d 539 (1993). *Id.* at 8. The court further observed that "guidance as to the issues presented in this case will avoid a multiplicity of litigation." *Id.* at 9.

The court next dispensed with the Governor's brief references to Article 5, § 1 of Michigan's 1963 Constitution, which vests the "executive power" in the Governor. Although referenced in the executive orders at issue, the Governor had largely

abandoned any reliance on this provision in the proceedings below. The court confirmed that the "executive power" only grants the Governor the power to administer or execute the laws, and she had no right to act in this instance without applicable enabling statutes. *Id.* at 9–10. Thus, the trial court was focused on the EPGA and EMA. *Id.* at 10.

The court then held that the EPGA authorized EO 2020-67 and the executive orders that relied upon it. The Court of Claims read the EPGA to "bestow[] broad authority on the Governor," including police power extending across the entire state. *Id.* at 10. The court further believed that, notwithstanding legislative history to the contrary, certain terms used in the act were "not terms that suggest local or regional-only authority," and it noted that the terms were to be "broadly construe[d]." *Id.* at 12, 15. The court agreed with the Legislature that the EPGA must be read together with the EMA. *Id.* at 14. But it found no problem in allowing the evidently limitless authority of the EPGA to be extended to the same subjects as the expressly limited authority of the EMA. *Id.* "[T]he Court can harmonize the two statutes," it said, "by recognizing that while both statutes permit the Governor to declare an emergency, the EMA equips the Governor with more sophisticated tools and options at her disposal." *Id.* The court did not say what those tools or options might be, nor did it provide any functional explanation of how the two laws interact.

The court found that this broad construction of the EPGA did not present any separation-of-powers concerns under the Michigan Constitution. The court considered whether the EPGA afforded sufficient standards to channel the

executive's exercise of delegated power. *Id.* at 16–17. The court believed this evaluation was shaped by the emergency circumstances of this case. *Id.* at 17 ("[T]he standard by which this Court must view the standards ascribed to the delegation at issue must be informed by the complexities inherent in an emergency situation."). With that more relaxed approach in mind, the court held that sufficient standards could be found in the EPGA because a declaration could only be issued during certain times or at the request of certain persons. *Id.* Further, once the declarations were issued, the Governor was empowered to take "reasonable" and "necessary" actions. *Id.* at 18. And the act contained "examples" of what a governor could or could not do after declaring a state of emergency. *Id.* at 18–19.

The court went on to hold, however, that the Governor's post-April-30 exercise of authority under the EMA was "ultra vires." *Id.* at 19. The Governor had taken the EMA's instructions "out of context." *Id.* at 23. Under the EMA, the Governor was obliged to terminate the declaration of emergency or disaster after 28 days absent a legislative extension, full stop. *Id.* at 23. The Governor's formalistic approach—which would allow her to declare, terminate, and then redeclare states of emergency and disaster repeatedly—would render that provision "meaningless." *Id.*; see also *id.* at 24 ("To adopt the Governor's interpretation of the statute would render nugatory the express 28-day limit and it would require the Court to ignore the plain statutory language. … [T]hat position conflicts with the plain statutory language."). What is more, the court rejected the Governor's attempt to extract from the EMA an "additional, independent source of authority" outside the context of a declaration of

emergency or disaster. *Id.* at 24. Lastly, the court disagreed with the Governor that the 28-day extension provision was an impermissible legislative veto. *Id.* at 25–26.

The Legislature filed a timely claim of appeal with the Court of Appeals on May 22, 2020. This application for leave followed.

STANDARD OF REVIEW

Whether to grant leave to appeal is within this Court's discretion. To obtain review by this Court, an appellant must show only that his case meets one or more of the criteria set forth in MCR 7.305(B).

Should this Court determine to grant leave to appeal, review will be *de novo*. See *Mich Dept of Transp v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008) ("Questions of constitutional interpretation and statutory interpretation are questions of law reviewed de novo by this Court."); *Petition of Cammarata*, 341 Mich 528, 540; 67 NW2d 677 (1954) (applying de novo standard of review to allegation that executive action was ultra vires).

ARGUMENT

I. The Court should grant leave to decide whether the Governor can use the EPGA to justify an indefinite, statewide state of emergency in light of COVID-19.

The Governor and the Court of Claims both embrace an interpretation of the EPGA that presents serious problems, particularly when read together with the EMA. This Court should grant leave to address those problems before more damage is done. The EPGA was meant for localized emergencies, not statewide ones.

A. The Governor's interpretation of the EPGA creates an irreconcilable conflict with the EMA.

"[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." *People v Hall*, 499 Mich 446, 459 n 37; 884 NW2d 561 (2016) (cleaned up). "The application of *in pari materia* is not necessarily conditioned on a finding of ambiguity." *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 73 n 26; 894 NW2d 535 (2017). Even "a statute that is unambiguous on its face can be rendered ambiguous by its interaction with and its relation to other statutes." *People v Valentin,* 457 Mich 1, 6; 577 NW2d 73, 75 (1998) (cleaned up); see also *Bd of Rd Comm'rs of Wayne Co v Lingeman*, 293 Mich 229, 236; 291 NW 879 (1940) ("Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it, which modifies the meaning of the words, and even the structure of the sentence." (citation and quotation marks omitted)). Fundamentally, a statute "cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum L Rev 527, 539 (1947). And here, the EPGA and EMA should be read *in pari materia.* They occupy the same realm of the law. The cover the same general topic: gubernatorial emergency powers. They have the same goal: immediate crisis control pending more durable legislative action.

If these statutes are properly read together, and the Governor's approach is embraced, then the EMA becomes a purposeless redundancy to EPGA. The Governor,

after all, insists that she can do most anything she wants under the EPGA that she could also do under the EMA. If the Governor were right, then all the statutory protections and safeguards found in the EMA—including, most notably, the 28-day automatic termination provision and the need for legislative approval—would be pointless. For why would a Governor acquiesce to the more rigid procedures of the EMA when she could have all she wanted through a brute-force application of the EPGA? Even the Court of Claims did not purport to answer that question; it could only suggest that the statutes could be "harmonize[d]" by "recognizing" that the "EMA equips the Governor with more sophisticated tools and options at her disposal." Exhibit 1, p 14. But what tools? What options? When it comes to the power to issue executive orders deriving from a declared state of emergency, the reader of the Court of Claims opinion is only left guessing as to why the EMA would have ever be implicated at all. And now that the EPGA has been so thoroughly enlivened by the Court of Claims, the EMA might well become dead letter when a governor is looking to exercise broad authority via executive authority.

Of course, a court's construction of a given statute should not operate like this, that is, it should not render a provision—let alone a whole separate statutory scheme—surplusage or nugatory. *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007) (citation omitted). A provision "is rendered nugatory when an interpretation fails to give it meaning or effect." *Id.* Courts have also said that interpretations must avoid rendering a portion of a statute "meaningless," *Herald Wholesale, Inc v Dept of Treasury*, 262 Mich App 688, 699; 687 NW2d 172 (2004);

People v Morey, 230 Mich App 152, 158; 583 NW2d 907 (1998), or "unnecessary," *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 399; 738 NW2d 664 (2007); *Gross v Gen Motors Corp*, 448 Mich 147, 159; 528 NW2d 707 (1995). However phrased, the Court must apply "any reasonable construction" before it accepts an interpretation that renders all or part of a statute "nugatory." *Ex parte Landaal*, 273 Mich 248, 252; 262 NW 897 (1935). The Court of Claims' order ignores that basic idea, stripping out the teeth from the EMA for the sake of building broader authority from the EPGA's vaguer text.

Even if the court was correct in applying both laws to statewide emergencies, the odd result of allowing an earlier, broader statute (the EPGA) to effectively neuter a later, more specific one (the EMA) is inconsistent with other fundamental canons of construction, too. For one, "[w]hen two statutes are *in pari materia* but conflict with one another on an issue, the more specific statute must control over the more general statute." *Donkers v Kovach*, 277 Mich App 366, 371; 745 NW2d 154 (2007). Yet the Court of Claims has done just the opposite: allowed what it interprets as the more general, abbreviated statute of the EGPA to remove the statutory guardrails found in the more specific and well-defined EMA. For example, regarding duration, the EMA provides a mechanism to decide the length of a state of emergency or disaster and a formal process to terminate the state of emergency or disaster, see MCL 30.403(3), (4), while the EPGA only refers vaguely to a "declaration by the governor that the emergency no longer exists" without providing guidance as to when or how that declaration is made, MCL 10.31(2). The EPGA, then, should be yielding

to the EMA, not the other way around. For another, in construing two evidently conflicting statutes *in pari materia*, the older statute must yield to the newer one. See *Metro Life Ins Co v Stoll*, 276 Mich 637, 641; 268 NW 763 (1936); *Parise v Detroit Entmt, LLC*, 295 Mich App 25, 28; 811 NW2d 98 (2011). The EPGA was passed in 1945 and the EMA in 1976; thus, the EMA provisions should control as the more recent expression of legislative intent. And as the Court of Claims recognized, an indefinite statewide declaration of emergency without legislative approval is not contemplated by the EMA.

The Court of Claims accepted the Governor's argument that these problems can be dismissed because of single fleeting provision in the EMA. That provision says that the EMA is not intended to "[l]imit, modify, or abridge the authority of the governor to *proclaim* a state of emergency pursuant to [the EPGA]." MCL 30.417(d) (emphasis added). Allowing the EMA to control as the more specific and recent statute, however, would only limit the Governor's ability to extend an emergency over the Legislature's objection, not her ability to proclaim a state of emergency at the onset under the EPGA. Even if it did, that problem is only caused by the lower court's supposed harmonizing of the EMA and EPGA in which both apply to the same kinds of statewide crises. If, however, the EMA and the EPGA were confined to distinct spheres, then there would be no modification, implicit or otherwise. The conflict would disappear.

And indeed, there is a way to keep each statute in its proper lane: by acknowledging that the EPGA is meant for specific, localized emergencies. Reading

the EPGA's conception of an "emergency" against the EMA's definition of the "emergency" highlights the former's local bent. The EPGA contemplates, for example, that the Governor will act in "emergency" instances like "rioting"—a decidedly local problem. MCL 10.31(1). The later-enacted EMA references "emergency," too, explaining that an emergency exists whenever the Governor decides "state assistance is needed to supplement local efforts." MCL 30.402(h). In other words, even in the EMA, a declared "emergency" is a local problem that becomes so severe the State must help. But the EMA goes further, providing for the further power to declare a state of *disaster*. A disaster is an occurrence of "widespread" damage, including, among other things, "epidemic[s]." MCL 30.402(e). Other examples of disasters confirm their wide geographical scope; they include "blight, drought, infestation," "hostile military action or paramilitary action, or similar occurrences resulting from terrorist activities." *Id.* Importantly, while the EPGA does briefly reference a "disaster," it does *not* empower the Governor to declare a "state of disaster." And when the EMA was originally passed, it gave the Governor the power to declare only disasters, leaving local emergencies to the EPGA. See 1976 PA 390. The Legislature expanded the scope of the EMA to include emergencies only to comply with the federal Emergency Planning and Community Right-To-Know Act—and even those amendments maintained a notably statewide focus. See Exhibit 4, Senate Fiscal Analysis, 1990 PA 50 (1990).

This deliberate distinction—wherein one statute has a "state of disaster" and the other does not—must be given meaning. See *Pike v N Michigan Univ*, 327 Mich

App 683, 696; 935 NW2d 86 (2019) ("[W]hen the Legislature uses different words, the words are generally intended to connote different meanings." (cleaned up)). On the other hand, "emergency," which appears in both places, should be defined consistently across the two acts. See *Paige v City of Sterling Hts*, 476 Mich 495, 520; 720 NW2d 219 (2006) (rejecting the notion that "absolutely identical phrases in our statutes … [can] have different meanings in different statutes"). The net effect is that "emergencies" (of the kind that can trigger the EPGA or the EMA) are local, while "disasters" (of the kind that can justify action *only* under the EMA) are statewide events. (Of course, "disasters" might involve or cause one or more "emergencies," but they still carry different meaning.)

Further, the EMA's administrative components contemplate emergencies more in the order of a statewide or widespread crisis—or problems at least requiring state-level resources. For example, it provides for federal aid, MCL 30.404(3), 30.405(1); includes detailed rules for compensation for property, MCL 30.406; establishes departments and department heads to oversee state administration, MCL 30.407–.408; provides for county representatives from each county, MCL 30.409; and many similar provisions. In contrast, the EPGA is barely a half-a-page of text—far more fitting for small, local management. It imagines only that the Governor will issue "orders, rules, and regulations" in an undefined way. MCL 10.31(1). The comparison is striking.

The import of all this is obvious: the Governor should not be permitted to generate statutory conflict by using the EPGA to impose a statewide, indefinite state of emergency.

B. Even aside from the conflict with the EMA that the Governor has created, the EPGA's text confirms that it is a locally focused statute.

The words of a statute should drive its interpretation. See *Hall*, 499 Mich at 453; *O'Leary v O'Leary*, 321 Mich App 647, 652; 909 NW2d 518 (2017). "[N]ontechnical words and phrases should be construed according to their plain meaning, taking into account the context in which the words are used." *S Dearborn Envtl Improvement Assn, Inc v Dept of Envtl Quality*, 502 Mich 349, 361; 917 NW2d 603 (2018) (cleaned up). In doing so, the Court "may consult dictionary definitions." *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Applying these principles to the EPGA confirms that the statute was intended to address only instances of local concern.

The statute starts by noting that the Governor may act during times of public emergency "within" the State. MCL 10.31(1). "Within" is a meaningful choice. "'Within' means 'on the inside or on the inner-side' or 'inside the bounds of a place or region.'" *State v Turner*, --- N.E.3d ----, No. CA2018-11-082, 2019 WL 4744944, at *4 (Ohio Ct App, September 30, 2019) (quoting *Webster's Third New International Dictionary* 758 (1993)). Thus, something defined as "within" relative to something else implies that the former is engulfed (and therefore smaller in size) than the latter. The Court of Claims assumed that "within" just marks the jurisdictional boundaries for the application of the statute. But it does not make sense to say that the state is

"within" the state. And had the Legislature meant for the legislation to apply to the state writ large, it would have said so, as it has done in other legislation. See, e.g., MCL 28.6 (requiring the commissioner of the Michigan State Police to "put into effect plans and means of cooperating with the local police and peace officers *throughout* the state" (emphasis added)).

Similarly, the statute reaffirms its local, geographic focus in repeatedly referring to an "area," "section," or "zone." The scope of the Governor's emergency declaration power under the EPGA is limited to "the *area* involved," and any orders she promulgates have to be calibrated to "the affected *area*." MCL 10.31(1) (emphasis added). She may take measures "to bring the emergency situation within the affected area under control." *Id.* The Governor's powers include controlling traffic "*within the area or any section of the area*" designated as the emergency area. *Id.* (emphasis added). And when the Governor controls the "ingress and egress of persons and vehicles" to and from properties, she does so within "designat[ed] … zones within the area." *Id.* (Contrast the EPGA's contemplation of gubernatorial power over a single "area" with the EMA, which expressly contemplates that the Governor's declaration under that act might reach "*areas*." MCL 30.403(3).)

These words—"area," "zone," and "section"—all establish that the Governor's power is intended to apply to some subpart of the state as a whole. For example, *Merriam-Webster's Online Dictionary* defines "area," in relevant part, as "a particular extent of space or one serving a special function," such as "a geographic region." Merriam-Webster's Online Dictionary, *Area* <https://bit.ly/3c17JYu> (accessed May

22, 2020). Similarly, *Webster's New World College Dictionary* defines "area" as "a part of a house, lot district, city, etc. having a specific use or character." Likewise, a "zone" contemplates "[a]n area that is different or is distinguished from surrounding areas." *Black's Law Dictionary* (11th ed. 2019), while a "section" is "a part of something" or "any of the more or less distinct parts into which something is or may be divided." *Forrester Lincoln Mercury, Inc v Ford Motor Co*, No. 1:11-cv-1136, 2012 WL 1642760, at *4 n 6 (MD Pa, May 10, 2012) (quoting dictionary definitions). None of these words, then, imply that the Governor's powers under the EPGA are intended to reach the entirety of the state. Yet the Court of Claims did not address them at all.

The EPGA's structure and language is consistent with other states that have applied their emergency statutes locally. See also, e.g., NY Exec Law 24 (statute borrowing EPGA's language but expressly noting that it creates a "local state of emergency"); La Stat 14:329.6 (statute borrowing EPGA's language but expressly noting that the state of emergency is declared as to "any part or all of the territorial limits of [a] local government").

The Court of Claims chose not to focus on all these textual provisions. Instead, the Court of Claims drew significant meaning from the statute's frequent reference to "public" emergencies and determined that the statute vested the entire "police power" in the Governor. The court's emphasis, one not even pressed by the Governor, is an unusual one. "Public" is used to emphasize the problem is one that reaches beyond an individual to affect a broader community. See, e.g., *Black's Law Dictionary* (11th ed 2019) (defining "private" to mean "[o]f, relating to, or involving an individual,

as opposed to the public or the government"). In other contexts, "public" is just used to refer to things that trigger the sovereign power of government; it is not a synonym for "statewide." See, e.g., *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 225; 507 NW2d 422 (1993) (noting the Open Meetings Act's definition of "public body" as one that "exercise[s] governmental or proprietary authority"); *Hays v City of Kalamazoo,* 316 Mich 443, 458; 25 NW2d 787 (1947) (finding a city's participation in the Michigan Municipal League served a "public" purpose because "the welfare of the city was thereby served"); *People v Freedland*, 308 Mich 449, 455; 14 NW2d 62 (1944) ("[A]n individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public[.]"). It is not helpful—and entirely circular—to say that the EPGA is triggered by instances in which the power of the government should become involved.

The Court of Claims also repeatedly focused on a statutory declaration of intent. Yet that provision says only that the statute was meant to give the Governor "sufficiently broad power of action" to "provide adequate control" during crisis periods. MCL 10.32. The "power of action" refers to what *acts* the Governor may perform. The Legislature and the Governor agree that those acts—that is, the tools that the Governor may employ—are broad. But the "power *of action*" says nothing about where those actions may be done. And the expansive power granted to the Governor is *more* reason to believe that the statute did not contemplate statewide action, not less—for it defies common sense to think that the Legislature would have closely cabined the statewide powers of the EMA while at the same time recognizing

even broader statewide powers within the EPGA. Aside from all that, a "rule of liberal construction does not override other rules if the application would defeat the evident meaning of the act." *Little Caesar Enterprises v Dept of Treasury*, 226 Mich App 624, 629; 575 NW2d 562 (1997). The Governor's interpretation would do just that, transforming an act meant for limited areas into one providing boundless power.

Thus, even when the EPGA's words are read without reference to the EMA, they signify that the EPGA is intended to address specific, local concerns—not matters covering every inch of the state.

C. The historical context shows that the EPGA was meant for local matters, too.

Context also matters. A crucial factor in determining the Legislature's original intent is the historical context in which the statute was passed and implemented. See *Dept of Envtl Quality v Worth Tp*, 491 Mich 227, 241; 814 NW2d 646 (2012) (holding that courts must read statutes "in conjunction with" the "historical context").

The context of the EPGA's enactment shows that the Act was designed for local issues. A *Lansing State Journal* article written on April 6, 1945 noted that the EPGA "result[ed] from the 1943 Detroit race riot" and would "give the governor wide powers to maintain law and order in times of public unrest and disaster." Exhibit 5, Article; see also Michael Van Beek, *Emergency Powers Under Michigan Law*, available at <https://bit.ly/2z3f8rC> (last accessed May 5, 2020) (explaining that the EPGA "was enacted in response to race riots in Detroit in 1943," a situation that had required troops and a curfew). It should come as no surprise then that provisions of the EPGA read like riot-control measures in a specific area within the state, under which the

Governor can establish curfews, control public streets, and limit the dissemination of alcohol and explosives. See MCL 10.31(1). In sum, the EPGA's historical context shows that it was passed to allow the Governor to address localized crises—specifically to preserve law and order in the face of civil unrest.

This "local riots" idea was the common understanding of the EPGA for decades and became part of the impetus for passage of the EMA. In the mid-1970s, for example, Governor Milliken expressed concern over the danger presented by high-water levels in the Great Lakes. In a special message to the Legislature on non-manmade disasters in 1973, he reiterated that the EPGA was "pertinent to civil disturbances" and concluded that "[u]nder existing law, the powers of the Governor to respond to disasters is unduly restricted and limited." See Exhibit 6, Milliken Special Message. Because the EPGA was insufficient to address a statewide, natural disaster, he asked "that the Legislature give the Governor plenary power to declare states of emergency both as to actual and impending disasters." *Id.* He repeated this same message in 1974 and 1975. The Legislature responded by passing the EMA. This legislative leadup confirms that the EMA is the device for broader emergencies, not the EPGA. Again: why would Governor Milliken have thought the EMA necessary if he already had everything he needed in the EPGA?

Court cases show the same. The only three court cases that even mention the EPGA all confirm this local understanding. Two discuss the EPGA in the context of local responses to localized emergencies—local curfews. See *Walsh v City of River Rouge*, 385 Mich 623; 189 NW2d 318 (1971); *People v Smith*, 87 Mich App 730; 276

NW2d 481 (1979). The last touches upon the EPGA's potential preemption of a local law designed to corral university students during "a drunken, raucous semi-annual event." *Leonardson v City of E Lansing*, 896 F2d 190, 192 (CA 6, 1990). Obviously, none of these concern widespread statewide disasters, let alone pandemics.

Past Governors understood the limited nature of the EPGA as well. To the Legislature's knowledge, no prior Governor has used the EPGA in at least 30 years (as far back as electronic records are available) for any emergency, let alone statewide emergencies. Before the present administration, the Legislature is not aware of a single use of the EPGA to manage a statewide crisis. In fact, when the Michigan Department of Community Health conducted an assessment in cooperation with the Centers for Disease Control and Prevention of all laws that might be relevant in responding to a pandemic, the EPGA barely warranted a mention (particularly as compared to the EMA). See Exhibit 7, *Social Distancing Law Project: Assessment of Legal Authorities* (2007). The EPGA was referenced only in noting the Governor's power to impose a curfew. *Id.* at 16. This Governor, however, has nevertheless invoked the EPGA almost 100 times in the last few months.

The Court of Claims' endorsement of the Governor's novel approach to the EPGA is inconsistent with the context in which this statute was first implemented and has since operated. It should not be credited.

D. The Legislature's construction of the EPGA avoids constitutional concerns.

Lastly, the Court should find that the EPGA is limited to local matters because to do otherwise would raise constitutional concerns. "[A]s between two possible

interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [the Court's] plain duty is to adopt that which will save the act." *Hunter v Hunter*, 484 Mich 247, 264 n 32; 771 NW2d 694 (2009). Yet ignoring the EPGA's geographic limitations is constitutionally fraught. As explained below, the Court of Claims' interpretation of the EPGA creates an impermissible delegation of powers; it delegates too much raw power with too few standards for the Governor's exercise of power—and no meaningful temporal limitation at that. The Court should therefore accept the Legislature's argument, which preserves the EPGA's constitutionality. "A statute may be constitutional although it lacks [express] provisions which meet constitutional requirements, if it has terms not excluding such requirements." *Council of Organizations & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 584; 566 NW2d 208, 221 (1997) (cleaned up).

II. The Court should grant leave to decide whether the EPGA's supposed delegation of broad lawmaking powers offends the separation of powers.

The Court could determine that the EPGA did not grant the Governor the power to declare a statewide state of emergency and stop there. But even if the Governor acted within her statutory authority, her ongoing declarations (and the attendant executive orders) face another problem: separation of powers. In effectively exercising standardless lawmaking authority to formulate public policy rather than the democratic process, the Governor has usurped the Legislature's power.

A. The lawmaking power rests exclusively with the Legislature.

"[T]he legislature makes, the executive executes, and the judiciary construes the law." *Wayman v Southard*, 23 US 1, 46; 6 L Ed 253 (1825). These are not civics-

class platitudes, but the foundation of our constitutional system. Michigan's 1963 Constitution adheres to these same separation-of-powers principles. See *Westervelt v Nat'l Resources Comm'n*, 402 Mich 412, 427–429; 263 NW2d 564 (1978) (repeating the same principles). In fact, every Michigan Constitution since our first in 1835 has included a provision making the separation of powers explicit. In Michigan's 1963 Constitution, that provision is Article 3, § 2: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

This separation exists because, "[w]hen the legislative and executive powers are united in the same person or body[,] . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." *Soap and Detergent Ass'n v Nat Resources Comm'n*, 415 Mich 728, 751; 330 NW2d 346 (1982), quoting *The Federalist* No. 47 (Madison); see also *Musselman v Governor*, 200 Mich App 656, 665; 505 NW2d 288 (1993) (quote Justice Cooley's exposition of the separation of powers). "By separating the powers of government, the framers of the Michigan Constitution sought to disperse governmental power and thereby to limit its exercise." *Fieger v Cox*, 274 Mich App 449, 464; 734 NW2d 602 (2007) (cleaned up). Thus, "if there is any ambiguity, the doubt should be resolved in favor of the traditional separation of governmental powers." *Civil Serv Comm'n of Michigan v Auditor Gen*, 302 Mich 673, 683; 5 NW2d 536 (1942).

As part of this scheme, the lawmaking power is vested exclusively in the Legislature. Article 4, § 1, of Michigan's 1963 Constitution says that *all* legislative power is vested in the Legislature. "The legislative power, under the Constitution of a state, is as broad, comprehensive, absolute, and unlimited as that of the Parliament of England, subject only to the" US and Michigan constitutions. *Young v City of Ann Arbor*, 267 Mich 241, 243; 255 NW 579 (1934). Even more specifically, Article 4, § 51, explicitly gives the lawmaking power *to protect public health* to the Legislature: "The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health."

Michigan's courts have accordingly held time and again that when public policy decisions are required, the Legislature is the branch best equipped to make them. *Henry v Dow Chem Co*, 473 Mich 63, 91 n 22; 701 NW2d 684 (2005) (stating that public policy must be set by "the Legislature—the branch of government best able to balance the relevant interests in light of the policy considerations at stake"); *People v Mineau*, 194 Mich App 244, 248; 486 NW2d 72 (1992) (stating "public policy issues are best addressed by the Legislature"). Indeed, the more complex the policy problem, the more appropriate that the Legislature decide it. See *N Ottawa Cmty Hosp v Kieft*, 457 Mich 394, 408 n 14; 578 NW2d 267 (1998) ("The public policy issues surrounding these circumstances are complex, and we think that such issues are best taken up by the Legislature[.]"); *Van v Zahorik*, 227 Mich App 90, 98; 575 NW2d 566 (1997), aff'd

460 Mich 320; 597 NW2d 15 (1999) (citing the need to "defer[] to the Legislature in matters involving complex social and policy ramifications" (cleaned up)).

In contrast with Article 4's articulation of the Legislature's law-making power and processes, Article 5—which applies to the executive branch—says nothing about the lawmaking power, excepting two narrow sections on the veto power and reorganization of departments that are not relevant here. See Const 1963, art 5, § 1 (explaining that the *executive* power rests with the Governor).

B. The Governor is unilaterally making laws.

The Governor's ongoing COVID-19-related orders have strayed far into the realm of legislative power. In contrast with executive power—the authority to *execute* laws—"legislative power is the authority, under the Constitution, *to make laws*, and to alter and repeal them." 1 Cooley, Constitutional Limitations (2d ed), pp 89–90. A law is any "regime that orders human activities and relations through systematic application of the force of politically organized society." *Black's Law Dictionary* (11th ed. 2019). There can be no reasonable debate that these executive orders do exactly that.

The Governor's flagship order, the stay-at-home order, EO 2020-96, provides just one example of how these executive orders have strayed far into the realm of lawmaking. The order commands all Michigan residents "to stay at home or at their place of residence," subject to certain exceptions, and prohibits most gatherings. ¶ 3. Michiganders may leave home to get groceries, or to engage in outdoor recreational activities, exempted employment, care for others, or gather in groups with 10 or fewer people. *Id.* ¶ 8. But these exceptions have exceptions, too. For example, a citizen

can get necessary groceries, but if she needs "non-necessary supplies" she can only get them curbside. *Id.* ¶ 8(a)(7)–(8). Besides a few categories, "travel is prohibited, including all travel to vacation rentals." *Id.* ¶ 8(b)–(c). Michigan's businesses are affected, too. Citizens who run businesses that the Governor has declared non-essential, must, among other things, suspend all non-basic operations that require people to leave home. *Id.* ¶ 5. There is, again, an exception for those "who perform resumed activities," *id.* ¶ 5(c); and resumed activities include 18 different categories, but there are many additional exceptions that depend on which "region" the worker is in and what the date is. All "short-term vacation property" rentals are prohibited. *Id.* ¶ 13. Violating the order is punishable as a misdemeanor. *Id.* ¶ 20.

To be sure, this is not just about one order. The Governor has issued 98 COVID-19-related executive orders—more than any other governor. These orders are not only numerous, but the most expansive in scope. EO 2020-54 prohibits entering a building to evict someone. EO 2020-17 suspended all "non-essential medical and dental procedures." EO 2020-58 purports to extend the statute of limitations, and EO 2020-38 to revise and suspend certain FOIA mandates. And EO 2020-70 restricted the ability of the faithful to congregate and freely exercise their religion. Five signatures, by one person, unilaterally overrode the legislatively-enacted laws, and imposed new laws, for whether Michigan's property owners may regain control of their property, how Michigan's doctors may practice medicine, which patients may seek what treatments, when Michigan defendants are relieved of lawsuits that the Legislature had declared stale, how long Michigan's citizens can be

made to wait for public documents, and how people choose to worship their creator. And these are just a few of the orders. The overwhelming majority of the Governor's orders are in this same vein.

The Governor's executive orders improperly exercise lawmaking power. They reorder the way Michigan's citizens work, the way we shop, the way we realize our rights, the way we interact with our neighbors, the way we travel, the way we spend our leisure, and how we may see our family. Michigan residents are at this moment foregoing Governor-declared non-essential functions of civilization to "follow the law." And Michigan's businesses are refusing otherwise lawful transactions with willing patrons because the Governor has declared those transactions criminal. In fact, the threat of criminal enforcement looms over many otherwise unexceptional activities because the Governor says her orders are the law. This restructuring of the livelihoods and social interactions of Michigan's citizens is incontrovertibly lawmaking.

C. The separation of powers is not diminished by crisis.

"The Constitution … is concerned with means as well as ends. The Government has broad powers, but the means it uses to achieve its ends must be consistent with the letter and spirit of the constitution." *Horne v Dept of Agric*, 576 US 350; 135 S Ct 2419; 192 L Ed 2d 388 (2015). "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." *Id.* "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon

power granted or reserved." *Home Bldg & L Ass'n v Blaisdell,* 290 US 398, 425; 54 S Ct 231; 78 L Ed 413 (1934).

This Court, and many other state supreme courts, have said the same. See *People ex rel Twitchell v Blodgett*, 13 Mich 127, 139 (1865); see also, e.g., *Fed Land Bank of Wichita v Story*, 1988 OK 52; 756 P2d 588, 593 (1988); *State ex rel Dept of Dev v State Bldg Com'n*, 139 Wis 2d 1, 9; 406 NW2d 728 (1987); *Matheson v Ferry*, 641 P2d 674, 690 (Utah, 1982); *Worthington v Fauver*, 88 NJ 183, 207; 440 A2d 1128 (1982); *Opinion to the Governor*, 75 RI 54, 60; 63 A2d 724 (1949). Indeed, when state courts consider the "executive powers exercised by state officials during emergencies," their decisions "consistently reinforce[] the understanding that there are no inherent executive powers under state constitutions, only delegated powers that must be managed by previously adopted statutes." Rossi, *State Executive Lawmaking in Crisis*, 56 Duke L J 237, 252 (2006).

Nor can the Governor usurp the lawmaking power merely because she disagrees with the Legislature's response to the COVID-19 crisis. The separation of powers must be respected, even when one branch's "power is usurped or abused" by another. Even then, another branch may not "attempt[] to correct the wrong by asserting a superior authority over that which by the constitution is its equal." *Musselman*, 200 Mich App at 665; see also, e.g., *Maryville Baptist Church, Inc v Beshear*, No 20-5427, 957 F3d 610, ___, at *7 (CA 6, May 2, 2020) ("[W]ith or without a pandemic, no one wants to ignore state law in creating or enforcing these [executive] orders."); *Wisconsin Legislature v Palm*, No. 2020AP765-OA, 2020 WL 2465677, at

*22 (Wis, May 13, 2020) ("Fear never overrides the Constitution. Not even in times of public emergencies, not even in a pandemic.").

Many of these ideas were captured in Justice Jackson's famous concurrence in *Youngstown Sheet & Tube Co v Sawyer,* 343 US 579; 72 S Ct 863; 96 L Ed 1153 (1952). There, Justice Jackson noted that the Executive Branch had functionally asked "for a resulting power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law." *Id.* at 646. Though many thought that finding such power for the executive "would be wise," that "is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies." *Id.* at 649–650. Nevertheless, Justice Jackson explained, "emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them." *Id.* at 652. He concluded: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." *Id.* at 655. So too here.

Because the separation of powers is a cornerstone of our form of government, and because it is *the* foundational structural protection against the abuse of our liberties, the courts must resist all temptations to sacrifice it for expediency. "The hydraulic pressure inherent within each of the separate Branches to exceed the outer

limits of its power, even to accomplish desirable objectives, must be resisted." *Immigration and Naturalization Serv v Chadha*, 462 US 919, 951; 103 S Ct 2764; 77 L Ed 2d 317 (1983).

D. The EPGA's supposed delegation of power cannot save the Governor's COVID-19 executive orders.

Michigan's foremost constitutional law expert, Justice Cooley, considered it a "settled maxim[] in constitutional law" that "the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority." 1 Cooley, Constitutional Limitations (2d ed), p 116 ("Where the sovereign power of the State has located the authority, there it must remain[.]"). The Legislature may not "relieve itself of the responsibility" to make laws, nor may it "substitute the judgment, wisdom, and patriotism of any other body" for its own. *Id.* at 116–117. At most, "the Legislature, within limits defined in the law, may confer authority on an administrative officer or board to make rules as to details, to find facts, and to exercise some discretion, in the administration of a statute." *Ranke v Michigan Corp & Sec Comm*, 317 Mich 304, 309; 26 NW2d 898 (1947). These acts of execution are far different from lawmaking.

The EPGA, as interpreted by the Governor and affirmed by the Court of Claims, is functionally an open-ended grant of legislative power. The EPGA states that, after the Governor declares an emergency, she "may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31. As outlined above, the Governor believes this language entitles her to

make rules touching the most intimate parts of Michiganders' lives. Judging from the orders she has issued, the Governor has not felt constrained by the examples of statutory power reflected in the actual statutory text. She has even rendered many ordinary activities of daily life criminal. But the power to "declare what shall constitute a crime, and how it shall be punished, is an exercise of the sovereign power of a state, and is inherent in the legislative department of the government. Unless authorized by the constitution, this power cannot be delegated by the legislature to any other body or agency." *People v Hanrahan*, 75 Mich 611, 619; 42 NW 1124 (1889); see also *Fahey v Mallonee*, 332 US 245, 249; 67 S Ct 1552; 91 L Ed 2030 (1947) (noting that in two prior cases where the US Supreme Court struck down statutes as violations of the non-delegation doctrine, both "dealt with delegation of a power to make federal crimes of acts that never had been such before and to devise novel rules of law in a field in which there had been no settled law or custom").

The Governor construes the EPGA to mean that she can rule by executive fiat on any public policy issue remotely touched or affected by the COVID-19 pandemic. For example, her statute-of-limitations executive order is not aimed at controlling the COVID-19 pandemic itself—it is aimed at controlling the legal ramifications. Many of her COVID-19 executive orders aim to control the secondary social effects of the pandemic, not the pandemic itself. Some, in an exercise of power two or three degrees divorced from the pandemic, seek to regulate the effects of the executive orders themselves. See, e.g., EO 2020-63 (suspending the expiration of personal protective orders because "proceedings designed to protect vulnerable individuals" have in

"some cases" become "exceedingly difficult" in part because of the Governor's own control measures). If the EPGA can be interpreted to give the Governor power to control literally any aspect of our social structure that is affected by the pandemic, with no deadline for the end of that exercise of raw power, it provides her substantively limitless legislative power. With a little creativity, this approach would effectively transfer the entire legislative power of the State (if not more) to the Governor during an emergency. No statute can transfer that amount of raw legislative power to another branch. Cf. *Michigan State Hwy Comm v Vanderkloot*, 43 Mich App 56, 62; 204 NW2d 22 (1972) ("[A] statute which in effect reposes an absolute, unregulated, and undefined discretion in an administrative agency … pass[es] beyond the legitimate bounds of delegation of legislative power."). If the Governor believes the EPGA did, she is wrong, and her actions unconstitutional. And if the Court of Claims were correct that the EPGA delegates such unlimited authority, the EPGA would be unconstitutional.

Even assuming that this *amount* of power is delegable, the EPGA contains insufficient standards to guide its use. To avoid an unconstitutional delegation of legislative power, a statute "must contain language, expressive of the legislative will, that defines the area within which an agency is to exercise its power and authority." *Westervelt*, 402 Mich at 439. "[A] complete lack of standards is constitutionally impermissible." *Oshtemo Charter Tp v Kalamazoo Co Rd Com'n*, 302 Mich App 574, 592; 841 NW2d 135 (2013). Importantly, standards exist on a spectrum—what is appropriate in one case will not be appropriate in another. "[D]elegation must be

made not on the basis of the scope of the power alone, but on the basis of its scope plus the specificity of the standards governing its exercise. When the scope increases to immense proportions … the standards must be correspondingly more precise." *Synar v United States*, 626 F Supp 1374, 1386 (DDC, 1986); accord *Osius v City of St Clair Shores,* 344 Mich 693, 698; 75 NW2d 25, 27 (1956) (explaining that "the standards prescribed for guidance [must be] as reasonably precise as the subject-matter requires or permits"). To put it simply: greater delegation requires greater standards. And standards are especially important when delegating to the Governor; delegating to a chief executive "pose[s] the most difficult threat to separation of powers, and therefore require the strictest standards," because a chief executive "is less closely scrutinized by [the Legislature] than are agencies." Kaden, *Judicial Review of Executive Action in Domestic Affairs*, 80 Colum L Rev 1535, 1545 (1980). The Court should therefore exercise a heightened level of scrutiny and skepticism.

To decide whether a statute contains sufficient standards, the Court applies a three-step analysis. First, the statute "must be read as a whole; the provision in question should not be isolated but must be construed with reference to the entire act." *State Conservation Dept v Seaman*, 396 Mich 299, 309; 240 NW2d 206 (1976). Second, the standard must be "as reasonably precise as the subject matter requires or permits." *Id.* (cleaned up). And third, "if possible[,] the statute must be construed in such a way as to render it valid, not invalid, as conferring administrative, not legislative power and as vesting discretionary, not arbitrary, authority." *Id.* (cleaned up).

The EPGA, at least as the Court of Claims has interpreted it, fails each part of the relevant test.

First, taking the statute as a whole, there is little guidance for the Governor to be found in the EPGA. The statute is exceptionally short. It is comprised of three sections, only one of which is substantive. That substantive section says that "[d]uring times of great public crisis . . . the governor may proclaim a state of emergency." MCL 10.31(1). After so declaring, the governor "may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." *Id.* Although the section gives examples of such orders, it says the governor's powers are not limited to those orders. *Id.* There is no temporal limitation. It set out just one thing that the Governor cannot do: seize guns. *Id.* In sum, the EPGA's standard consists solely of two words: "reasonable" and "necessary." And the statute itself (at least as read by the Court of Claims) suggests that this passing pair of words is not intended to provide any functional limit on the governor's judgment, because the provision laying out the "construction of the act" emphasizes that the governor must be given "sufficiently broad power" to do what she reach some unspecified level of "adequate control over persons and conditions." MCL 10.32.

Second, in the Court of Claims' apparent view, the subject matter of the EPGA includes any possible public-policy area affected by COVID-19. Again, given the inherent nature of a contagious disease, this spin on the EPGA allows orders on practically every imaginable topic. Thus, as the Court of Claims has applied it here,

the Legislature shifted to the executive branch vast lawmaking power over every corner of the economy and social life with only the guiding words "reasonable" and "necessary." "Reasonableness" is already the lowest standard of acceptable governmental action; actions that fail to meet that standard—in other words, arbitrary and capricious conduct—are always unlawful. And importantly, the "necessary" referenced in MCL 10.31 isn't even the formulaic "necessary to implement this act." Rather, it is "necessary to protect life and property" or bring the crisis "under control"—a far broader mandate, which, as interpreted by the Governor, includes actions unrelated to the crisis at hand. The words grant pure discretion, unguided by any other standard. See, e.g., *Yant v City of Grand Island*, 279 Neb 935, 945; 784 NW2d 101 (2010) ("[R]easonable limitations and standards may not rest on indefinite, obscure, or vague generalities[.]"); *Lewis Consol Sch Dist of Cass Co v Johnston*, 256 Iowa 236, 247; 127 NW2d 118 (1964) ("Is it sufficient that an administrative officer, or body, be given 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? We think something more is required.").

The Court of Claims believed that a provision referring to the need "to protect life and property or to bring the emergency situation within the affected area under control" provides additional standards. The ruling confuses the statute's *goals* with its *standards*. The goal of the EPGA is to protect life and property and to manage unforeseen crises. Even that goal is rather ambiguous. But more to the point, *how* the Governor achieves that goal is signing "reasonable," "necessary" executive orders.

In short, these other phrases are *not* the standards, but objectives. The only *standards* guiding how the Governor achieves that objective are that her orders be "reasonable" and "necessary." See *Palm,* 2020 WL 2465677, at *8 (holding that claimed delegation of lawmaking authority during existence of authority was improper given lack of procedural safeguards and standards accompanying the delegation); cf. *United States v Amirnazmi*, 645 F3d 564, 577 (CA 3, 2011) (holding that emergency statute was not improper delegation of authority only because it "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 by creating more opportunities for congressional input").

Similarly, the Court of Claims appeared to deem an expressly *non-exhaustive* list of *examples* of appropriate actions under the EPGA as a silent constraint on the Governor's abilities under the act. A list that says powers are "not limited to" those listed cannot constitute a "limit." See, e.g., *State v Thompson*, 92 Ohio St 3d 584, 588; 752 NE2d 276 (2001) (explaining that "[t]he phrase 'including, but not limited to' 'indicates that what follows is a nonexhaustive list of examples,' such that a decisionmaker looking at a list of such factors may nevertheless consider whatever he deems relevant). Likewise, the Court of Claims found it important that the statute defined some moments when the Governor's authority was said to be triggered under the act. But those times are determined at the discretion of the Governor. And that

aside, defining when powers are triggered does very little to provide guidance in how to *exercise* those powers.

The Governor also rested her claimed authority on a permutation of the "emergencies justify laxity" approach. She has repeatedly said that EPGA's subject matter—unforeseen crises—requires flexibility, such that the "reasonable" and "necessary" standards are as specific as they can be. The Court of Claims seemed to bite at this notion. Yet it sounds much like the argument from necessity that Justice Jackson so persuasively refuted in *Youngstown*. And it is a double-edged sword: as the breadth of her powers grow, so does the need for proportionally strong standards. If the EPGA really gives her such broad powers in the event of unforeseen crises, there must be better standards than "reasonable" and "necessary." "Necessary" may be good enough when the question is whether an employee's term of employment may be extended past a mandatory retirement age. See *Klammer v Dept of Transp*, 141 Mich App 253, 261–262; 367 NW2d 78 (1985) (explicitly limiting its holding regarding "necessary" to "the context of th[e] case"). But that is a far different determination than exercising minute-by-minute regulation of basic actions by all Michiganders with the bite of criminal sanctions lurking in the background. See *United States v Robel*, 389 US 258, 275; 88 S Ct 419; 19 L Ed 2d 508 (1967) (Brennan, J., concurring) ("The area of permissible indefiniteness [in delegation standards] narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights[.]"). Similarly, the Court of Claims was mistaken in finding authority in a Michigan no-fault insurance statute allowing for the recovery of "reasonable" medical

charges. See MCL 500.3107(1)(a). That statute does not in any way concern a limit on the exercise of delegated authority, and a jury's determination of "reasonableness" is far different from an executive's exercise of constitutionally un-cabined authority.

In the end, this case is much like *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 55; 367 NW2d 1 (1985), in which this Court applied the *Seaman* factors and concluded that a statute was an impermissible delegation. There, the Court confronted a statute establishing a panel of three actuaries to resolve risk-factor disputes. The Court held the statute violated *Seaman*'s test where it simply provided the Insurance Commissioner with the discretion to "approve" or "disapprove" risk factors proposed by health care corporations. *Id.* at 53–54. Importantly, *Blue Cross* struck down the provision even though the statute had a clearly and specifically articulated public policy *goal* to guide execution of the act: "to . . . secure for all of the people of this state who apply for a certificate, the opportunity for access to health care services at a fair and reasonable price." MCL 550.1102(2). Like the statute in *Blue Cross*, the EPGA, under the Court of Claims' interpretation, includes statutory goals but vests the Governor with nearly discretion-less power to meet those goals. See also *Oshtemo Charter Tp*, 302 Mich App at 592 (expressing "extreme[] skeptic[ism]" towards a statute that "contain[ed] neither factors for the [decisionmaker] to consider … nor guiding standards").

The Court of Claims thought this case was closer to *Blank v Dept of Corr*, 462 Mich 103, 124; 611 NW2d 530 (2000), but *Blank* is fundamentally different. There, this Court considered whether the Department of Correction's ("DOC") enabling act

was an "unconstitutionally broad delegation of legislative power." The Court held that the statute's "many" limitations on the DOC's authority were "sufficient guidelines and restrictions." *Id.* at 125–126. These guidelines included, among many others, abiding by the Administrative Procedures Act ("APA"); promulgating "rules only for the effective control and management of DOC"; prohibiting rules that applied to smaller municipal jails; taking "necessary or expedient" action to properly administer the act; and forbidding rules on firearms and name changes. *Id.* at 126. The delegation was therefore "sufficiently limited to pass constitutional muster." *Id.*

The DOC's enabling statute's standards included significant limitations; in contrast, the EPGA's include two perfunctory words. *Blank* also required adherence to the APA; the EPGA does not. *Blank* further included specific substantive limitations; as interpreted by the Court of Claims, the EPGA does not. And *Blank*'s use of the "necessary or expedient" language was related to actions implementing the act, not a category so broad as "protecting life and property." In short, the power the Governor claims under the EPGA is much greater than the power delegated to the DOC, but it is controlled by a fraction of the standards. The Court of Claims, however, took only one of the *Blank* standards ("necessary and expedient"), held it up in isolation, and declared the "necessary" and "reasonable" language at issue here was therefore good enough on its own.

Third, and finally, the Legislature has already offered the Court a construction of the EPGA that could save it from invalidation. That construction would, however, invalidate the Governor's particular *use* of the EPGA in this instance. That is

unavoidable. Because, as the Governor interprets it, the EPGA includes no real, substantive standards governing her exercise of an unparalleled delegation of authority, the Court should find that her interpretation, and that of the Court of Claims, is unconstitutional. If the Governor's reading of the statute is wrong, then her acts are without authority. If she is right, then the act itself must fall.

CONCLUSION

"[I]t may easily happen that specific [legal] provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding." *Twitchell*, 13 Mich at 139. The EPGA does not give the Governor the power that she insists it does. Even if it did, it would be an impermissible, standard-free delegation of the Legislature's lawmaking power. In either event, the Governor's declaration of a state of emergency—and all the executive orders that derive from it—cannot stand. For all these reasons, then, the Legislature respectfully asks that this Court grant the Legislature's emergency bypass application for leave to appeal and reverse that part of the Court of Claims' decision sustaining the Governor's actions under the EPGA.

Respectfully submitted,

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Dated: May 22, 2020

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

Supreme Court No.

Court of Appeals No.
Court of Claims No. 20-000079-MZ

THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE, OR REGULATION OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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INDEX OF EXHIBITS

Exhibit	Description
1	May 21, 2020 Order of Court of Claims
2	May 15, 2020 Transcript of Hearing Before Court of Claims
3	Governor's April 27, 2020 Letter
4	Senate Fiscal Analysis, 1990 PA 50 (1990)
5	April 6, 1945 *Lansing State Journal* Article
6	Milliken Special Message
7	Social Distancing Law Project: Assessment of Legal Authorities (2007)

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EXHIBIT 1

MAY 21, 2020 ORDER OF COURT OF CLAIMS

STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN HOUSE OF REPRESENTATIVES, and MICHIGAN SENATE,

Plaintiffs,

v

GOVERNOR GRETCHEN WHITMER,

Defendant.
_____/

OPINION AND ORDER

Case No. 20-000079-MZ

Hon. Cynthia Diane Stephens

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

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

I. BACKGROUND

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

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

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

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

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

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

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

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

COMPLIANCE WITH MCL 600.6431

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

STANDING

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

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS OF AUTHORITIES CITED IN THE CHALLENGED EXECUTIVE ORDERS

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

ARTICLE 5 OF THE MICHIGAN CONSTITUTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EXECUTIVE ORDER 2020-68 WAS NOT AUTHORIZED BY THE EMA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Dated: May 21, 2020

Cynthia Diane Stephens, Judge
Court of Claims

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

Supreme Court No.

Court of Appeals No.
Court of Claims No. 20-000079-MZ

THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE, OR REGULATION OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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EXHIBIT 2

MAY 15, 2020 TRANSCRIPT OF HEARING BEFORE COURT OF CLAIMS

STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN HOUSE OF REPRESENTATIVES
and MICHIGAN SENATE,
Plaintiffs,

Case No. 20-000079-MZ

v Hon. Cynthia Diane Stephens

GOV. GRETCHEN WHITMER,
Defendant.
/

PAGE 1 TO 60

The Hearing before the Honorable
Judge Cynthia D. Stephens,
Taken via Hanson Remote,
Commencing at 10:00 a.m.,
Friday, May 15, 2020,
Before Shacara V. Mapp, CSR-9305.

Court reporter, attorneys & witness appearing remotely.

APPEARANCES:

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Remote Hearing

Friday, May 15, 2020

About 10:00 a.m.

* * *

JUDGE STEPHENS: This is the case of the Michigan House of Representatives and Michigan Senate versus Gretchen Whitmer. It's Case No. 20-000079. It is in the State of Michigan, Court of Claims.

Representing the Plaintiffs are Patrick G. Seyferth, Susan M. McKeever, Hassan Beydoun, William R. Stone. And appearing today, Michael R. Williams, who is also joined by Frankie A. Dame.

Representing the governor and the State of Michigan are Christopher Allen, Joseph T. Froehlich, Joshua Booth, John Fedynsky, all from the Michigan Department of Attorney Generals.

Could we please bring in the parties?

Good morning, Counsel. If you would, unmute and state your appearances for the record.

MR. WILLIAMS: Well, good morning, Your Honor, Michael Williams appearing for the Michigan House of Representatives and the Michigan Senate.

MR. ALLEN: Good morning, Your Honor, Assistant Solicitor General Chris Allen on behalf of the governor.

THE COURT: Okay. Gentlemen, we are gifted with technology, which has both its benefits and its dangers. We are going to presume that Ms. Mapp is going to be able to hear each and everything that is said. But if at any time she does not, she's going to let us know immediately, so that we can have it repeated or if it's something you're showing, demonstrated again.

By the same token, we are gifted with the assistance of the IT Department from the Court of Appeals. And they will let us know if anything happens out there in IT land. I'll get a text or some sort of a notification.

By the same token, gentlemen, if at any point in time, you can't hear what's going on, please let us know so that we can correct that as soon as possible. Can we agree?

MR. WILLIAMS: Absolutely, Your Honor.

MR. ALLEN: Yes, Your Honor.

THE COURT: Okay. I stated the names of all the other persons who have joined you, and I appreciate the fact that with the many fine lawyers that are involved, you dwindled it down to the lucky two as opposed to all of you.

Preliminarily, the Court would indicate for

the record, and to those who are watching this, that we did receive a single motion for intervention in this case. It was filed on behalf of John Brennan, Samuel Gunn, Eric Rosenberg, Mark Buchi and Martin Leith, all members of the State Bar of Michigan.

The Plaintiff, in response to this, said it took no position, but reminded us that time was of the essence and asserted that they, in fact, had more than an adequate representation of the issues in the case.

The Defendant, similarly, reminded us that time was of the essence and was opposed to the motion.

The Court made the determination that while motions for intervention should be liberally allowed, that in this particular case, there was a more than adequate representation of the key issues in the case; that the gentlemen in the proposed interveners were focused additionally on particular issues relative to the practice of law and the rights, duties, and responsibilities of litigants, and that those issues were probably best handled separately.

To that end, the Court declined; and the intervention also noting, that bringing them in was going to mean that we would be delaying this probably by another week in order to give everyone an adequate opportunity to respond.

The Court also received a series of motions to file amicus curiae. We received them from the Michigan House Democratic Leader, Christine Greig, and the House Democratic Caucus; from the Michigan Senate House Democratic Caucus from Professor Richard Primus, from 41 Healthcare Professionals, from the Michigan Nurses Associations, for the Michigan United for the Liberty, and from the Mackinac Center for Public Policy. There was an acquiescence on the part of the parties to 41 Healthcare Professionals. And the Court made the determination that it would accept all the other's amicus curiae briefs, that they would be received by the Court, and any other briefs that was received by 5:00 yesterday. There may have been some more, I don't know. I'll go back and look at them.

We made the determination that additionally, that while we appreciate their briefing and their insight and their intelligence, that we would restrict the issues of oral argument to the parties in this case.

As we begin the oral argument today, I'm going to ask that we slightly alter our traditional trajectory, which would be for the petitioner, the Plaintiff, to say everything you have to say, save a couple seconds for rebuttal, hear from the respondent

and then hear your rebuttal. What I'd like to do is to start out with two issues: The issues of standing and compliance with MCL 600.643(1), and then get to the meat of the arguments that you've presented.

With that in mind, on behalf of the plaintiffs, could you address both, and I guess in your case first, MCL 600.6431, the need for verification for cases filed in the Court of Claims and the standing of your clients?

MR. WILLIAMS: Thank you, Your Honor. I'll start with the verification requirement. I think this issue is fairly straight forward.

The statute contemplates that the pleadings of the State need not be verified. And as Your Honor noted actually, in an argument I believe was held last week, on issues that were similar, somewhat related, the Attorney General's, Office, themselves, succeeded that an arm of the state like the legislative branch, or in that case, the executive branch, is essentially the same. Like I believe they characterized it as exactly the same.

So in that sense, the requirement for a verified pleading, we would contend would not apply to the Michigan House of Representatives and the Michigan Senate because they constitute the pleadings of the

State. But even if they did need a verifying pleading or at least a notarized pleading, we would contend that there's no reason for this Court to take an action such as dismissal in this case for a few reasons.

One, is that under the Arnold decision, the provision requiring the verification and notarization of pleadings is not a jurisdictional provision. The Court of Claims determined in that case, that it was actually error to dismiss an action based on the sole lack of a notarization on the presence of a pleading in that case.

There obviously are authorities that in some circumstances, the lack of a notarization was deemed sufficient to justify dismissal. But in those cases, there were statute of limitations in other time bars that were implicated, such that the lack of a notarization or the lack of a verification coming after the time bar, basically prevented a fully complete, fully compliant pleading from being filed within the time restrictions that are imposed by the Court of Claims Act in other statutes.

In this case, of course, the legislature has filed an additional verification that, itself, contains a notary stamp. That was filed just a couple days ago. So in that sense, there's no issue whatsoever with the

time bar or the statute of limitations or any of the concerns that animated or led the Court in other cases, to find that there was a reason to dismiss based on a lack of a notarized verification.

Based on that cure, based on the legislature statuses, a part of the State and based on Arnold's position, that this is a non-jurisdictional issue, as well as I think the State's position that they have not actually come out and contended for dismissal based on the lack of a notarization.

I think this Court can move forward with the lawsuit and not require, for instance, the resubmission of an identical complaint with a notarization followed by resubmissions of identical motions and argument.

But as to the standing issue, I think, Your Honor, we addressed some of this in our reply and I don't want to tread down the same road all over again, but there are a few essential points that I think are important to consider here.

The Arizona legislature case, I think, is a great example of how the Michigan legislature has a special position as a litigant in a case like this one. Obviously, that was a federal decision. Obviously, Article 3, standards are different. Frankly, they're stricter. And we have to be careful when applying

federal decisions, although the Michigan Supreme Court has done so.

All that said, what Arizona legislature does is, is acknowledge the commonsense idea, that the legislature being the lawmaking body of the state has an interest in protecting itself from infringements upon that lawmaking power.

What the authorities of the state say is that the powers of the relative branches are essentially -- mutually exclusive; that when one exercises a power that properly is held by another, that seizes the power from the other branch. So in that sense, there's a very direct injury.

I think this is even acknowledged, Your Honor, in the DoDAAC decision that the governor principally relies upon in pressing the standard argument. In that case, the Court actually did find standing on -- as to one individual legislature because that individual legislature's votes had effectively been nullified.

And in this cause, of course, there's a similar idea. The acts of the legislature have effectively been defeated by the acts of the governor extending, for instance, the declaration beyond the 28-day provision.

I think that we have to be careful with DoDAAC because standing cases in both Michigan courts and the federal courts recognize a serious distinction between individual standing and institutional standing. And the legislature here is acting in its institutional capacity. And in that sense, that changes the calculus from the provisions that the governor is citing from DoDAAC, for instance.

So given all those considerations and given the clear affront to the separation of powers and the clear infringement on the legislature's lawmaking power, we would contend that the legislature is properly empowered and has standing to move forward with this case.

JUDGE STEPHENS: Mr. Allen.

MR. ALLEN: Your Honor, first to address MCL 600.643 (1). I would agree with opposing counsel insofar as, we have not asked for dismissal of this case. There's no time bar that's effective at this point. We were -- we noted the deficiency in our responsive pleading. Essentially, you get the plaintiffs to cure the defect.

And so, we're not asking this Court to dismiss the matter if need not, but we essentially wanted the legislative plaintiffs to follow the Court

of Claims Act to ensure that their complaint was properly filed and verified.

Moving on to the standing issue, I think to set the background here, a large part of the claim or one of the claims before this court is a constitutional challenge to a law that the legislature passed.

And I think that while DoDAAC is informative, the League of Women Voters case is even more so here, and just released. You're quite familiar with it, Your Honor.

But in that case, the House and Senate lacked standing. But they presented, at least, a colorful claim of it. There the House and Senate purported to protect the constitutionality of certain ballot restrictions that they imposed. But even there, the Court found that there was an insufficient actual controversy. But essentially once -- once the legislature does its job, passes a bill that's active into law, they have no legal interest in what happens after that point.

And here, I think, to distinguish -- not to distinguish League of Women Voters, but to sort of drive its point home, in that case, they sought to at least protect the constitutionality of their -- their loss. Here, they're seeking to do the opposite. So

their interest here in that is it's unclear.

There's another way to get to the result that they seek, which is to amend the law. Which they remained fully empowered to do, despite their protestations that essentially, the governor had stolen power from the legislature. They remained perfectly able to pass laws, hold hearings, introduce bills, do all the things that a legislature does. And so therefore, the legislature lacks an institutional injury. There's no disruption to that body's specific power to legislate.

And I think a related point regarding the -- the relief sought in the declaratory judgment, whatever Your Honor -- whatever order Your Honor ultimately enters is not going to affect the Plaintiff's legal rights. It may affect the political considerations or how votes are counted, but as far as the institutions go, those are the plaintiffs before us, before Your Honor, the institutions are fully able to do everything today, as they would be tomorrow, no matter what your declaratory judgment -- whatever your decision on the declaratory judgment relief is.

And so, for those reasons, the plaintiffs seek only to default the governor from doing something. Their full ability to continue to act remains.

JUDGE STEPHENS: Okay. Do you have anything further on about behalf of the plaintiffs in this regard?

MR. WILLIAMS: Briefly, Your Honor, because Counsel did touch upon the League of Women Voters' case and the decision of the Court of Appeals that's currently pending before the Michigan Supreme Court.

I think this is pretty easily distinguishable from the League of Women Voters' case, Your Honor. For one, that was merely the legislature saying we want to seek enforcement of this law. That's quite distinct from the argument that the legislature's presenting here, Your Honor, where we're contending that the Executive has actually seized the exercise of power that would ordinarily be reserved to the legislature itself.

This is not just about whether we agree with the manner in which a law has been executed. This is about her depriving us of the legislative tools that we would otherwise possess, to help manage this pandemic. And in that way, this is exactly the situation that the League of Women Voters cut case contemplated, when it said the legislature there was not asserting that it was deprived of personally and legally cognizable authority that is peculiar to those chambers alone.

The lawmaking power is, of course, peculiar to the chambers of the legislature as defined in the Michigan Constitution.

So for that reason, Your Honor, we would say that League of Women Voters is simply not helpful to the governor's position.

JUDGE STEPHENS: Okay. As we start to look at the major issue for the purposes of framing this, there is no factual dispute in this case. Everyone agrees that the orders at issue were issued under 202067 and 202068, under both the EPGA and under the EMA, that they were based upon an assertion of an emergency condition relative to COVID-19.

There is also not a controversy for the purposes of our conversation today, as to whether or not, and what the extent to which COVID-19 occasions a danger or a harm to the people of the State of Michigan.

The issue here is purely whether the government -- governor's actions were ultra vires, either under the Constitution of the State of Michigan, under the Emergency Manager Act or under the Emergency Powers of Government Act. And then secondarily, whether or not the EMPGA is itself, unconstitutional.

So understanding that, many of the parties

who filed the amicus briefs focused on the nature of COVID-19, its impact on the people of the State of Michigan, and many other policy determinations. Those are important, certainly. But this is an as-written challenge.

You're saying on behalf of the plaintiffs, that the orders on their face are facial and valid because of a lack of authority. And we're not really concerned, at this point, although we may at some other point, have to be concerned about whether or not they are the individual orders, and there are many of them, are appropriate, are either reasonable or reasonably tailored and narrowed.

So with that, Mr. Williams, if you would begin your argument as to the main claim and your request that we declare the emergency order 2020-67, 2020-68, and all other emergency executive orders that arise from those two, to be invalid.

MR. WILLIAMS: Thank you, Your Honor.

And Your Honor is exactly right. That's one of the most important things to understand and engage in with these issues is that this is not an argument about the existence or non-existence of a crisis.

This case is instead about a question of whether a governor, this governor or any governor in

the future can exercise effectively, a limitless-unilateral-temporally-unbounded authority, exercising the lawmaking power of this state for as long as the governor wishes.

In the 1963 Michigan Constitution, the Constitution gave the power and the duty to pass suitable laws for the protection and promotion of the public health to the legislature. The legislature was charged with the responsibility of ensuring that Michiganders are safe and healthy.

In discharging that duty, the legislature has, in fact, given some degree of authority to the governor, to assist in that task. But in doing so, the govern -- the legislature also ensured the governor was in some ways limited; in some ways, constrained. Because again, the governor is ultimately in the executive office whose ultimate job is to execute the laws and not make them.

So there are two principle laws, of course, that we're dealing with here: The EMA, the 1976 provision; and the 1945 EPGA, the Emergency Powers of the Governor's Act. Both of those authorizations contained particularized limits on the execution of the powers given within them.

The governor here, however, has tried to take

the powers that are granted by those acts and leave the limits on the table. And as we explained in our briefing, Your Honor, that's simply unacceptable. Not only that, Your Honor, she has construed the EPGA, in particular, so broadly, as to create serious problems under the separations of powers doctrine in the Michigan Constitution.

Like the president's actions in Youngtown -- Youngstown Sheet and Tube, the governor has acted against the expressed will of the legislature. And in that way, is exercising authority that does not exist. It exists at its so lowest ebb. And for that reason, Your Honor, it would not be constitutional if the governor's EPA construction were, in fact, the proper one.

So I want to start, Your Honor, with the provision that actually applies clearly to statewide circumstances and emergencies. And that's the EMA, 1976 Emergency Management Act. This is the statue that actually contemplates statewide conditions and specifically refers to an epidemic.

The provision, as you know, contemplates that declared states of emergency and disaster will last no longer than 28 days, absent an extension from the legislature. At that point in time, the governor must

terminate the declaration of declaring state of emergency or disaster.

On April 30th, Governor Whitmer did, in fact, terminate her declared states of emergency and disaster because after one extension, the legislature declined to grant an additional extension of her emergency powers under the EMA. But then, just one minute later, Governor Whitmer re-declared her states of emergency and states of disaster. And incredibly, she now contends that that's fully compliant with the text of the EMA.

Your Honor, I'm sure you noticed this. In the 60-some pages of briefing that the governor submitted in justification of her actions in this case, I was unable to find any rational explanation for why the 28-day provision would exist if the governor's construction were appropriate and proper.

If the governor could go to the legislature and say I need an extension, have the legislature decline such an extension, and then nevertheless reinstate the declaration all over again, then the 28-day provision in the Emergency Management Act would be meaningless. They treat this, Your Honor, instead as something like a renewal provision, a time for public testimony where the governor comes forward and

says the reasons why she's going to re-enter a declaration of emergency or disaster.

That is not at all consistent with the plain text of the statute. And frankly, it would be needless because the statute itself, already requires the governor to terminate the declarations of emergency disaster immediately upon the determination that those conditions have ended. So she's already required to continually justify why she's leaving these declarations in place. The 28-day cutoff just wouldn't be necessary.

And the other part about this is, the legislature wouldn't have any role in that process. There would be no need for a request to the legislature to extend, followed by a declination, followed by the governor's moving ahead with the exact thing the legislature had declined to offer her. The governor --

JUDGE STEPHENS: Mr. Williams, I have a question, if I may.

MR. WILLIAMS: Certainly.

JUDGE STEPHENS: I understand that the one minute is certainly not enough. But let's assume for the sake of our conversation, that on April the 30th, all of the executive orders evaporated and either the legislation that was sent to the governor's desk was

accepted or vetoed and overridden or not; and we get to the fall and in the fall, the conditions materially exacerbate. There is either a different mutation of COVID-19 or a rapid resurgence. Is that a new emergency triggering a new 28 days?

MR. WILLIAMS: Well, I think we have to look to the text of the statute itself, Your Honor, to make that determination. It's not as simple as a time cutoff, unfortunately. But the statute gives us the answer.

The statute says that you have to look to the nature of the disaster, the area or areas threatened, the conditions causing the disaster and the conditions permitting the termination of the state of disaster. There's obviously parallel language in the state of emergency as well.

So I think what a Court would be charged with doing is saying, would the fall declaration, based on a second wave, present a new type of disaster, new areas threatened, new conditions causing the disaster and new -- new conditions permitting termination of that state.

And I think here, Your Honor, there's no contention whatsoever that the conditions as of one minute after the termination had materially changed in these four regards, between the termination and the

second declaration.

So I think that's why the legislature, Your Honor, finds such a substantial problem with the on-again, off-again light switch approach to a 28-day declaration.

Obviously, as Your Honor said, if there is a mutation, for instance, if there's a new condition, if there are material -- material and substantial differences that are identifiable and can be tested by a Court and measured as a standard, then I think in those circumstances, the 28-day limitation would, in fact, be respected.

JUDGE STEPHENS: Okay. Please continue.

MR. WILLIAMS: And I think, Your Honor, your question about the fall raises a good point, which is that under the governor's construction, this 28-day provision would essentially extend itself indefinitely. The governor has not been entirely consistent in what she considers to be the conditions that would justify termination of the disaster or the emergency declaration.

At times, for instance, she's suggested that the conditions would not end until such time as a vaccination would be created, for instance. That would mean we would be talking about 2021, 2022, perhaps

later. At other times, she's talked about the economic consequences of the disaster.

Just this morning, there were studies that talked about how the unemployment consequences of this -- this pandemic could last well into 2022, 2023, even 2024.

So based on her construction where, if she just continues to view there being an emergency or a disaster, then she can turn it on and off with a ministerial act of terminating and re-declaring. We would be talking the exercise of executive power with no legislative input for a period of years, based on the exact same conditions that existed at first precipitated the declaration back in March and April.

I think that's not at all what this Act was meant to do. And we know that, for instance, from looking at the legislative history for instance, where there's discussion in -- for instance, the -- when the legislature extended the 14-day window which is what it originally was, to 28 days. There's discussions about the need to get legislators back to Lansing to convene and pass legislation.

So what's clearly contemplated through this 28 days is essentially that the governor will act expeditiously. She gets to do the initial quick

reaction. But that once there's time for the legislature to reconvene and act, then it should, in fact, assume its constitutional role as the lawmaking authority in the State of Michigan.

And I think beyond that, Your Honor, the governor's new argument, never before advanced until the response that they filed in this case, that the governor possesses some generalized authority that in some indeterminate way justifies her actions here, really highlights the danger that -- that lies in the governor's broad construction of the EMA.

The EMA is structured in a way that has very particular safeguards, very particular standards that are meant to be met. But then the governor, in filing their brief in this case, suggests that there's an authorial sense of authority. That the governor can exercise, at essentially, her total discretion.

Your Honor, I've never heard that articulated by any other governor. Certainly has not been suggested in any of the legislative text. And even to this point, I have not heard that suggested by Governor Whitmer until the response in this case.

And again, that's important because it shows the need for some checks and balances. If a governor is really going to assert that degree of broad power,

that degree of just generalized all-encompassing power, there needs to be some mechanism by which the People's legislators can say, no, we're ready to take the reins, we are ready to be the ones to actually reassume the lawmaking power now that the expedience has passed.

I think, Your Honor, the governor, for instance, offered an analogy about the ringing of a fire alarm and that the fire men don't drop the hose when the fire alarm stops ringing. I think that's the wrong way to think about this provision. The right way to think about this provision is to imagine that your neighbor's house is on fire and you run outside with your garden hose because you're next door, you're a minute away, and you start spraying water at the house in an effort to help your neighbor. But when the fire men arrive on scene, when they have the hoses and the better equipment, they're the ones who should take control of the situation and fight the fire.

And I think that from looking at the text of the statute, from the structure of the status, from the legislative history of the statute, that's the way this is meant to work. And instead, we find ourselves with a governor who has determined that she wants to continue with the garden hose and leave the firemen aside, and insist upon continuing on her own course

even as the legislature has expressly said they would not wish her to do so.

Given all that, Your Honor, I think those are the most troubling aspects of the EMA argument. To be honest with you, Your Honor, I have trouble engaging with the governor's EMA argument because most of it does not actually engage with the 28-day provision. Most of it simply talks about the need for emergency powers and the need for emergency response. The legislature does not quibble with that.

The only thing the legislature thinks is that there needs to be reasonable limitations on the exercise of those emergency powers, less they become too broad, less the constitutional distinctions between the executive and legislative branches be lost. And one of those important provisions, Your Honor, is the 28-day provision.

Would Your Honor like me to go on to the EPGA, or do you want me to take each of these in turn?

JUDGE STEPHENS: Why don't we hear from your colleague about the EMA first.

MR. WILLIAMS: Thank you.

MR. ALLEN: Thank you, Your Honor.

As we talk about the EMA, I'd just like to emphasize that states across the country have granted

their legis -- the legislatures have granted the governors broad police powers to respond in crisis like this.

And as to the Acts, I think the interplay between them is important. The 1945 Act, the EPGA, provides for this broaden trusting of the state's police power during public emergencies. And the '76 law does as well, but it also provides a more detailed statutory rubric that activates and guides state and local efforts, in response to these emergencies and disasters.

And I think we glossed over a little bit, their challenge to the EPGA, her authority under that, separate and apart from the non-delegation issue that we'll get to in a bit.

The 1976 EMA makes clear that it is a supplement to the 1945 law. MCL 30.417(d) makes it clear that the new law shall not be construed to limit or modify, or abridge in the governor's authority under the 1945 Act or any other power of the governor, independent of the '76 Act.

In other words, we don't need to look to traditional hands of statutory construction, which are an aid in finding legislative intent. Legislative's intent is clear on its face. They intended the Act to

be distinct in overlapping or compounding sources of authority. Which makes sense because in emergency, in a circumstance in which, a nimble response is necessary, the -- the legislature presumably didn't want to have any holes in that authority.

And so, adding the EMA in addition to the EPGA makes perfect sense. There is no need to try to read those together so that there's no overlap whatsoever, because the legislature told us not to.

Now, moving specifically to the EMA, as Your Honor has directed, there are two distinct strains of authority: There's a general authority, and in Sections 1 of 2 of 30.403. And in 30.403, three and four discusses kind of what we've been talking about, these declarations. The governor's substantive actions like the stay-at-home order and all the substantive underlying executive orders are supported by both.

But as Your Honor noted, there is no dispute about the existence of an ongoing disaster or emergency.

And under the EMA, the governor shall declare such a disaster or emergency, which is issue an executive order, that's how the statute defines state of disaster, state of emergency. Those are defined terms of the statute. Those are species of executive

orders. It's not some femoral concept about state of disaster. It is a -- it is a document that's issued by the governor that actuates particular powers that are outlined throughout the EMA.

And so, when the governor terminated her earlier executive order, in EO 2266, she was following the plain language of the statute that the legislature enacted. There are three ways in which the executive order, the declaration, must be terminated: Conditions have passed, or if they've been dealt with, or after 28 days, if absent legislation ratification.

The first two obviously didn't happen. The plaintiffs concede that. And it had been in 28 days. So on the 28th day of the extension -- or excuse me, the legislative extension of the earlier declaration expired on April 30th. So at this time, the governor terminated that executive order as she was required to do. But despite that, her duty to declare an emergency, if the conditions require it, persists.

There's nothing in the text, at all, about the governor's inability to continue responding if the disaster exist. And that's, I think, part of the absurdity here, Your Honor. There's no dispute that a disaster and emergency exists. Yet, the legislature withheld. And they can do that under the statute. I'm

not saying they were statutorily obligated to do so, but they didn't. That does not remove the governor's duty to declare if the conditions warranted.

And so, the -- there's been some discussion about the re-issuance of the declaration. It's an entirely new executive order. And I think it's fair to say that, you know, most emergencies or disasters largely resolved after 28 days. If it's a, you know, uprising or a tornado or a flood. So the 28-day limitation serves an important purpose. It provides an automatic expiration should -- of that initial declaration.

And at this point --

JUDGE STEPHENS: So, Mr. Allen, your perspective then would be, so long as the governor perceives there to be an emergency, the governor is free every 28 days to terminate one emergency and declare an identical emergency to have begun the next day, and that that's entirely valid under the EMA?

MR. ALLEN: Correct, Your Honor.

Yes, I agree it is by the plain statutory language. And it's --

JUDGE STEPHENS: But it's plain statutory language, from your perspective, the governor could declare a state of emergency for an entire term of

office, and there would be nothing that the legislature could do about it if they disagree; is that correct?

MR. ALLEN: Your Honor, the con -- if the con -- not necessarily, Your Honor, because the conditions --

JUDGE STEPHENS: Then what could they do?

MR. ALLEN: Well, the -- I wanted to answer your question in two parts. I think it was two parts.

First of all, the governor can't just declare an emergency if she feels like it. The conditions have to exist. And that is undisputed here.

And so, if the -- unless the plaintiffs want to argue that shall doesn't mean shall, then she is obligated to issue a declaration and executive order under the same --

JUDGE STEPHENS: Okay. But that wasn't what I asked you.

Your perception is so long as she perceives validly or invalidly that there is an emergent condition, she can terminate one order and start another for as long as she deems appropriate. And the legislature would have no role, under the EMA, to do anything about it?

MR. ALLEN: No, Your Honor.

JUDGE STEPHENS: That's kind of a yes or no.

MR. ALLEN: No. Because, and I think the language --

JUDGE STEPHENS: No, they can't do anything about it; that's what you're saying?

MR. ALLEN: No. Your Honor, what I'm saying is validly or invalidly, I think is the crux of the matter. She can't just say that there's an emergency if there isn't. And her declaration is --

JUDGE STEPHENS: Why not? Who can do anything about it?

MR. ALLEN: The -- as we've acknowledged this in our brief, Your Honor, that a plaintiff could challenge the governor's declaration if it's not supported by the facts. Now, of course, there's substantial deference given to her judgment, but that's a judicially reviewable decision, Your Honor. That's not our case.

JUDGE STEPHENS: So your contention is the governor can act, and a pry -- it is up to an individual and private citizen then, to seek to terminate? There is no institutional role; is that correct?

MR. ALLEN: The institutional role, Your Honor, I think that that moves into a problem with the legislation with the EMA if the legislature's right

about their position. Because I think that implicates, and it sort of moves to a different argument. I don't mean to pivot you, Your Honor, but I think this is part and parcel of the same question.

If the legislature's right, that the governor has this authority, but that they can revoke it from her after 28 days, with a mere resolution, that creates its own constitutional problems under the legislative veto doctrine. And I think to -- it's not --

JUDGE STEPHENS: Okay. So whenever the -- that is probably the worst argument you have. Just real honest with you. That one is not going to go very far with me.

The legislature acting is not a veto. The legislature has the privilege and the obligation to act. The two entities don't agree with each other. I got that. But my concern is that if I understand you correctly, so long as a governor perceives there to be an emergent condition, albeit one that has lasted much longer than 28 days, that governor has the ability to declare a new state of emergency or a continuing state of emergency, and that the only -- there is no role for the legislature in seeking the termination of that authority, that that role is left to the private citizenry. That's what I understand you to say. Why,

doesn't matter. But it would have to be to the private citizenry. Because first, you said they had no standing to begin with.

So if they had no standing to begin with, certainly, it's not going to get more standing. But you believe this is a private citizen issue; is that correct?

MR. ALLEN: Your Honor, I don't believe it's a private citizen issue. I think the characterization that the governor can completely decide whether there's an emergency or not is -- that's not our position. The emergency and disaster are defined by the statute as contained in certain --

JUDGE STEPHENS: But if the people don't -- okay. I get it. If the legislature doesn't agree, they act one certain way. You said they didn't have the authority to do that. So okay, the only person, the only entity then, that can come in and say to the governor, we know you've got good faith, but we think you're wrong, this is not, in fact, an emergent condition or it is not a crisis condition would have to be a private citizen, wouldn't it?

MR. ALLEN: I think it -- that -- that would be the case, Your Honor. And again this is not --

JUDGE STEPHENS: Okay.

MR. ALLEN: This is the operation of the statute as it was written.

I believe that the legislature could have, and really still could decide that it didn't want the governor to -- it wanted to bar, by operation of law, and not mere resolution, her ability to declare an emergency as the statute otherwise, requires her to. It could have said the governor --

JUDGE STEPHENS: Okay. So you didn't -- so the resolution wasn't good.

If they had passed a statute as opposed to a resolution, and it would be a one-subject bill and the one-subject bill would be, there is no emergency, that would be valid?

MR. ALLEN: No. Your Honor, what I'm saying is, if the legislature built into the EMA, a prohibition on the governor's ability to reissue or to issue a new declaration based on substantially similar circumstances, they certainly could have done that. They did not do --

JUDGE STEPHENS: So what do we do about this? So your contention is the 28 days is a benchmark, but not a termination?

MR. ALLEN: Well, it is a termination, Your Honor, under the way the statute operates because the

executive order terminated. And the legislature defined state of disaster and state of emergency as executive orders. It's not, again, about this general idea about a state of disaster. It is a particular document. And she terminated that and thereafter, declared a new one because as the statute requires, she --

JUDGE STEPHENS: Because it occurred in a minute. Okay. I understand.

Is there anything more you want to say just about the EMA?

MR. ALLEN: I believe we've responded adequately to the Plaintiff's argument there.

JUDGE STEPHENS: Okay. Is there something you feel compelled to say in addition to the 200 pages you gave me, on the EMA? Or are we ready to go to the EMPG, the Emergency Powers of Governors Act?

MR. WILLIAMS: I will take your cue and offer only two very concise points. One of which is that the govern insists that she has the duty under the statute to continually and contradictorily declare and terminate and declare and terminate the states of disaster and emergency.

The duty says she has a duty to declare a state of emergency. That contemplates once, a duty to

declare, not multiple times, once, upon the existence of a disaster or emergency. So that duty was fulfilled when the governor first declared the state of emergency and state of disaster in the State of Michigan after COVID-19 arose here. It's not -- there's nothing to suggest that it is a continuing forever seriatim duty.

The other thing I think is important to note here, Your Honor, is that this -- there's an irony, I suppose, in the -- what the governor has declared our interpretation to be. Part of the absurdity, I think was the phrase. I think that it does not make any sense for the legislature to require the governor to contradict herself in mere seconds, by terminating and declaring states of emergency one after another as the governor insists she not only can do, but must do. And so for that reason, we would suggest that the EMA is not properly applied here.

JUDGE STEPHENS: Okay. So let's turn to the Emergency Powers of the Governor Act.

MR. WILLIAMS: And certainly -- oh, sorry, Your Honor.

JUDGE STEPHENS: One of the things I really would like to know is the language in the EMA which said that it did not diminish the powers in the EMPGA.

MR. WILLIAMS: Absolutely, Your Honor. And I

think that's telling because it's actually consistent with the legislature's position that these two Acts are meant to operate in separate lanes. I think it was a significant tell, Your Honor, when asked to engage with the EM -- EMA, the governor's default position was just to move to the EPGA. And that's because the governor is necessarily taking broad language that was meant to be confined to specific localized circumstances and using them to basically render the EMA, a redundancy.

But Your Honor, the language that says that the EMA is not meant to limit or abridge or otherwise modify the EPGA only works if the EPGA is properly confined to localized emergencies.

And as Your Honor saw from the legislative history, legislative history that was never disputed by the governor, the impetus for the EPGA, was localized concerns. In particular, at that time, rioting in the City of Detroit that had gotten out of the hand of local authorities and required more of the state level resources just by virtue of manpower, money, and the like.

Governor Milliken was effectively pleading for the EMA because he felt that the EPGA was so inadequate to respond to conditions on a statewide level.

And so, Your Honor, I think that the proviso, I guess I would call it the savings clause that says that the EMA doesn't modify, abridge, or suspend. That's just a recognition, again, that there are certain abilities that exist on a localized level that are not affected by the more statewide broader context of the EMA.

And I think that it's telling as well that the governor is calling these two statutes a belt-and-suspenders' approach. I think that that's just a nice analogy for redundancy. And of course, this Court has an obligation to ensure that statutes are not rendered redundant or surplusage, or whatever word you care to use.

The governor's broad construction of the EPGA necessarily renders, much if not all, at least for the governor's powers, entirely redundant. It's only the legislature's history-based focus that that ensures that the EMA is not then rendered redundant.

And it's not just the legislature, Your Honor. I would note that when the Executive Branch made a report to the CDC a few years ago about the Executive Branch's authority or Michigan -- the State of Michigan's authority to implement responses to pandemics, responses like social distancing, by name,

the EPGA barely warranted a mention. It was mentioned in passing as a reference to the ability to establish curfews. Again, curfews being a typical response to local civil unrest, local riots; the very things that were the focus point, and the reason why the actual events that are meant to be addressed by the EPGA.

So, Your Honor, all the legislature's asking the Court to do is to return the EPGA to its time-honored understanding, the one that was fully understood by every governor and every legislature up until this governor.

Remember, again, the legislature only could find one single instance where the EPGA was even employed in the last 43 years. And that was on a localized emergency based on, I believe, a winter storm in Southwest, Michigan.

So the governor's insistence that the EPGA has actually been lying in wait and grants these broad powers just is not consistent in the way in which that statute was implemented. It is not consistent in which the way the statute has been treated ever since. And it would not be consistent with the EMA's existence because it would render one or the other of those two provisions redundant.

And I would say it's exceptional to me that

in answering this argument, the governor's key response looked to be, we shouldn't use in pari materia, for instance, to interpret the language of the EPGA. It's an exceptional idea to me, that these two obviously intimately related statutes cannot be construed together. And when you do that, the reason why they're running away from in pari materia so, so quickly is because that canon makes clear that the legislature's localized understanding is the right one. We see that in the use of "area," for instance.

The EMA talks about area or areas, suggesting the State of Michigan contains more than one area. The whole state is not an area.

The EPGA also talks about zones, sections. It refers to local officials. And there's this balancing between disasters and emergencies that I always think shouldn't get lost. The EPGA talks about emergencies. The EMA talks about emergencies and disasters. But in defining the two of them, disasters are statewide. They're epidemics. It's named in the statutory definition of a disaster. I think the language of the definition actually refers to widespread. Emergencies on the other hand, are local circumstances that have merely escalated to the point where local resources are no longer enough to respond.

So again, that understanding of the E -- of emergency within the EMA can inform the understanding of how emergency was meant to operate in the EPGA and it reaffirms the legislature's tax-based history-focused contextual reading as the EPGA being limited to localized circumstances. And I think that --

JUDGE STEPHENS: And so you're not -- you don't believe that you're adding words to the actual text of the Act?

MR. WILLIAMS: No, Your Honor.

JUDGE STEPHENS: We talked about we don't want to render anything nugatory.

MR. WILLIAMS: Right.

JUDGE STEPHENS: Do we then, just because it says area, we decide that an area can't be the entire state because it doesn't say "the state?"

MR. WILLIAMS: Well, I think there's a few reasons why area could be interpreted to mean something less than the entire state. One is what I've just discussed in terms of the use of the area in the EMA, informing the intention of the use of the word "area" in EPGA. That's not a limitation. That's not a modification. That's merely using legislative action to inform an earlier understanding.

But I think it's also we are allowed to understand history in context. And the history in context, again, which was unanswered by the governor makes it so obvious that there was a localized focus in passing this legislation.

And, Your Honor, I think that the governor is kind of setting up something of a Stormont here. The legislature's position has never been that you just stick the 28-day provision onto the EPGA because we like the 28-day limitation. It's instead that these two statues occupy separate lanes and that a statewide declaration of the scale that we've seen through COVID-19 is simply not the type of situation that the EPGA was meant to address. So the EPGA never should have been triggered here at all. It's only the MEA that really is meant for the governor to take action as to those sorts of circumstances.

JUDGE STEPHENS: Do you want to address your assertion that if, in fact, it is applied, it is unconstitutional because it fails to have appropriate standards?

MR. WILLIAMS: Yes, Your Honor. And Your Honor's characterization is exactly right. This is an as-applied challenge. So we're not suggesting that the EPGA is entirely unconstitutional. If it had been

applied, for instance, to a riot in the City of Detroit as it was -- as, you know, in the 1940s, the situation that spurred its passage, then we, I don't think, would have any issue with this.

The problem is that when this degree of power is imposed statewide for an indefinite period of time because there is no temporal limitation in the EPGA, and only driven by the simple requirement that there be a gubernatorial determination that it's necessary, that that simply is not enough.

We see that, for instance, Your Honor in cases like Blue Cross Blue Shield v. Milliken. In that case, the governor ran away from it. And I understand exactly why. It's because in that case, the Court was grappling with a statute that required an administrative agency to pursue policies that were towards securing reasonable prices for insurance.

It's the same sort of indefinite aspirational policy goal that's articulated in the EPGA. That's not a workable definable standard. The proof is in the pudding, Your Honor.

Cases talk about the ability of a Court to measure the compliance of a -- of an executive officer with the standards that are put in place in the statutory text. And it would be very hard indeed, for

this Court to look at the standards that are implemented in the EPGA and say no, that one's not especially reasonable. That one's not especially necessary. I'm just not going to -- I don't agree with that. That's not a clear legal task. It's not clear legal standards. It's not the sort of articulation and clarity that this Court is used to applying in measuring executive decision making.

So for that reason, Your Honor, I think particularly given that these indefinite standards exist, and not only that, allow the governor to implement criminal sanctions for the citizens of Michigan based on her ambiguous determination that this indefinite state of emergency can exist based on, I guess the "ephemeral" word that was used by my Brother Counsel a minute ago -- that's a good word -- that there's a necessity that the governor has reached in her own mind. That, Your Honor, offends the separation of powers. And that particular application would, in fact, be a violation of the separation of powers for lack of standards.

JUDGE STEPHENS: Okay. Thank you.

MR. WILLIAMS: Thank you.

JUDGE STEPHENS: Mr. Allen.

MR. ALLEN: Your Honor, I'll start back with

the language of the EPGA, which I think is where we should start. Brother Counsel started with this history lesson about what prior governors believed that this law may have done. Now, we don't have a complete picture of what that means, but I think more importantly, how prior governors interpreted the law is of no moment. It's what the legislature interpreted when they wrote down the very words they did.

This is a bit of background. I would like to point this Court to the second and three sections in the EPGA 10.32, that in which the legislature made clear that it intended the words to be interpreted broadly to effectuate its purpose. And so, the -- the contrary arguments, the narrowing arguments that plaintiffs make here are not only inconsistent with the statute language, the sort of action language of the governor's authority, but contrary to the legislature's own stated intention of how this Court should interpret her authority, the governor's authority.

The -- I believe, Your Honor pointed to your definition of area. We gladly accept their definition, their dictionary definition of area because it would encompass the entire state. These other narrowing words are not about her authority. They're about suggestions about what a governor might do in

particular circumstances.

The actuating language in the EPGA is also broad. Great public crisis, disaster, similar public emergency within the state. That's what permits a governor to declare a state of emergency under the EPGA. It's difficult to understand within that language, how this is limited to local -- local uprisings, which is, although the Act may have been passed in the wake of uprising in Detroit, it does not mean that the language was only proclaimed to meet that precise circumstance.

And so, I think just reading the plain language of the text in conjunction with the requirement that the legislature put on courts to read its language broadly, its plain language broadly, gives us the answer about the governor's authority under the EPGA.

Now, the opposing counsel talks about in pari materia as being really essential here. But again, I would like to go back to the 1976 EMA statute that says that statute does not limit, modify, or abridge the governor's authority under the '45 Act, or more broadly, any other authority that she has or any governor has independent of the Act. And so, that's a clear recognition that these aren't supposed to be

interpreted as married together. One is atop the other. And insofar as they overlap, that is what the legislature intended. We look at the language that they use in both Acts and apply it.

I would like to also note that the -- the -- insofar as the plaintiffs wish to construe these statutes as being complementary, not overlapping at all, the EMA plainly authorizes states of emergency and disasters in localized areas. And so, their reading of the EPGA as being, you know, the local statute and the EMA being the broad, statewide statute is simply not borne out by the EMA -- the EMA's permission of acting locally.

The vast majority of the statute concerns local actors and how to deal with local emergencies and disasters and setting up the rubric for responding.

Unless Your Honor has any questions about the kind of textural transport of the EPGA, I'll move to the constitutional challenge.

JUDGE STEPHENS: Feel free.

MR. ALLEN: And the challenge here is one nominally, a separation of powers. And the plaintiffs have gone at length about the separation of powers, sort of in the abstract. But the -- to get right down to it, the -- this argument brings the legislature, and

perhaps this incorporates standing a little bit, the legislature is asking this Court to declare its own law unconstitutional. That in itself is very striking and a very telling indication about why we're really here. But that argument really, on the law is not worn out.

The standards that govern delegations from sharing power from one branch to the other, that's permitted under the state Constitution, federal constitutions, constitutions across this country. There is no bright line between the legislature and the Executive, insofar as they're permitted to share these authorities to make our government work.

And so, the courts have essentially distilled the rubric in how we look at whether a legislature has essentially gone too far. And it's to grant broad latitude to the legislature, broad entrustment to them, to know that they are permitted to delegate to the Executive. And so the standards must only be as reasonably precise as the subject matter requires or permits.

In public emergencies, whether it's a pandemic or a flood or some kind of other local or statewide response, they demand broad authority, not narrow nitpicking. Future emergencies are unknown and they're unknowable.

And the orders that the governor's declaration are -- excuse me. The orders issued pursuant to the governor's declaration are that it only be reasonable and directed at being held necessary to bring the emergency under control, necessary to protecting life and property, and only within the affected areas. And so the governor does not have a blank check here.

Indeed, as we've cited several cases in our brief, our courts have upheld substantially more vague language, whether it be necessary or good cause, things of those natures. Those have been upheld as sufficiently -- sufficiently guiding of the Executive, to guide their discretion.

And again, because this circumstance is temporary and because it requires latitude, the legislature saw fit to grant the governor that wide latitude while not making it unbounded. There's a reason that states across the country have similar schemes and are acting under them.

And again, Your Honor, if the legislature should want a different path of, you know, deliberation and Robert's Rules of Order, the legislature has the means to make the very changes they want to these laws in their own chamber. But the legislature of mere

past, they wisely recognized and properly delegated that emergency authority to the governor. And that's the law related to this non-delegation issue that they raise.

JUDGE STEPHENS: Okay. Thank you.

Do you have anything finally, sir?

MR. WILLIAMS: Briefly, Your Honor.

Just to address this first point that the legislature is attacking its own law as unconstitutional. I think that that's exceptionally misleading. I think we can look at circumstances, one of which was cited within the governor's brief themselves; the blank case where the governor signed a law and then turned around and sued to declare the same law unconstitutional. This is a function of our constitutional system that branches of government will sometimes question the constitutionality or the legality of Acts in which they were involved. That should not guide the analysis in any way.

More to the point, the legislature is not questioning the -- the application of its own law as unconstitutional. This is not a facial challenge. This is an as-applied challenge. It's the governor's broad construction of the statute, not the legislature's passage of that statute that poses the

constitutional problems in this case.

The governor accuses the legislature of creating a constitutional crisis on top of a public health crisis. But it's the governor's broad efforts and the governor's broad application of the statute that, in fact, creates the constitutional crisis. So in that way, we can put aside any kind of suggestion that this is disingenuous for the legislature to question the appropriateness. And the application of the statute --

JUDGE STEPHENS: Counsel, if this morphs into an as-applied analysis, an as-applied analysis, generally speaking, requires a determination of facts. And as I understood this, you were telling me that facially, these EOs were invalid because of various reasons. So if I'm left to, as-applied, I'm looking at arguably, whether or not the EOs and the facts meet. And I'm not taking testimony on facts. So help me.

MR. WILLIAMS: I think there's -- I think I used some sloppy language, so let me correct that.

It is not an as-applied challenge to the application of the EOs. It's a -- we are absolutely applying or challenging the EOs and the declaration of emergency and disaster on their face. What I'm suggesting, Your Honor, is that the constitutional

issues as to the EPGA are an as-applied challenge because in that, we're not suggesting that the EPGA in all of its applications would be unconstitutional.

Does that address Your Honor's concern?

JUDGE STEPHENS: I still don't think you want to say as-applied.

MR. WILLIAMS: Well, I think --

JUDGE STEPHENS: I think you want to tell me that this -- that the EPGA is being applied in a legally inconsistent manner that, therefore, you can see on its face. That from the language of the statute, it does not apply to the circumstance in the light most favorable to the Defendant.

MR. WILLIAMS: I think, Your Honor, there's a why Your Honor is on the bench. You just did a better job of articulating the argument I was trying to make, which is exactly right. Which, this is an overly broad, overextended construction by the governor. And --

JUDGE STEPHENS: So, Counsel, here's where I want you to focus my attention.

MR. WILLIAMS: Sure.

JUDGE STEPHENS: The EPGA says the governor may promulgate reasonable orders, rules and regulations as he or she considers necessary to protect life and

property or to bring the emergency situation within the affected area under control.

Let's look at Klammer versus Department of Transportation, where they said giving authority to administrative body to employ an individual for such period as was necessary. That necessary was a sufficient standard.

Why is it an insufficient standard in this case?

MR. WILLIAMS: I think the context is important, Your Honor. I think that the Sinard case, for instance, a case in which Justice Scalia was on, a three-judge panel, back when he was a circuit judge. It talks about the need for more definite and specific standards in guiding decision making when the grant of authority is, itself, broader. I haven't heard the governor challenge that proposition.

At the same time, they concede, I think the term that Counsel just used was the "actuating language within the statute is exceptionally broad."

So they can see that this is much different. For instance, in that case, we were talking about, I believe, the ability to manage state workers in handling retirement age.

Some of the other cases in which where the

governor's citing some rather ambiguous language include: Oversized loads on the freeway or the ability to revoke a business license. This is not the ability to exercise control over essentially every aspect of 10 million Michigander's lives.

So I think given the analysis found in Sinard and related authorities, there needs to be some more definite standard and some degree of greater clarity, particularly when the governor in insisting that she has unbridled discretion for which the way --

JUDGE STEPHENS: And if Sinard was in Michigan, we would be in a different space. But yes.

MR. WILLIAMS: Understood, Your Honor.

Of course, as I mentioned earlier, Michigan does look to federal authorities on occasion and interpret --

JUDGE STEPHENS: Not -- not to interpret the Michigan Constitution usually, but thank you.

MR. WILLIAMS: Fair enough.

JUDGE STEPHENS: Is there anything, even though this isn't the way we normally do it, anything else that the Defendant would wish to say? And I'll give you then your last chance, Mr. Williams, to indicate any additional items that you think should come to my attention.

Mr. Allen?

MR. ALLEN: Yes, Your Honor. Just a few quick points.

The context. Opposing counsel mentioned context as being important. And I think Michigan law makes clear that the nature and substance of the delegation is important in considering how much leeway the legislature is permitted to grant the Executive. And I don't think anyone would dispute that in emergency circumstances and disaster circumstances, leeway is the virtue of having -- of the legislature's wise decision to delegate this authority to the governor.

The Klammer case and the GF Redman case, and the others who we've cited in our brief, Your Honor, I think are the right guiding principles here. That the court system provides great leeway for the legislature to provide delegation. Certainly, there's a limit, but that limit is not effectuated here in this case.

In the Blue Cross Blue Shield decision that opposing counsel mentioned, the -- the Court in that case, looked at the language which required only that the actor, or the commissioner, I believe, approve or disapprove of certain risk factors. There was complete discretion. There was no guidance whatsoever. And so

Blue Cross, I think is a poor comparison. It might be the only law or the only case on the books that, in Michigan at least, that was a favorable or a non-delegation challenge that succeeded. It's exceedingly rare because the courts have recognized that the legislature generally knows how to delegate its authority while retaining, or while guiding the delegator sufficient guidance.

And I just wanted to point out one more about the discussion between as-applied and facial challenges here. The -- my understanding of a non-delegation challenge is, there's no as-applied non-delegation challenge. That's not how the doctrine works. It's about whether the statute has sufficient guidance or limitations on the authority. There's no as-applied delegation.

JUDGE STEPHENS: I don't think your colleagues substantially disagrees. Sometimes we get used to -- the language of doctors is more precise than that of lawyers. Let's put it that way.

So I think he agrees with you that it's a question of is there authority or is there not. Is it sufficient to meet constitutional muster? You have one analytical framework, he has another.

MR. ALLEN: Thank you, Your Honor.

JUDGE STEPHENS: Thank you, very much, sir.

Mr. Williams?

MR. WILLIAMS: Thank you, Your Honor.

I think when you look back at what Counsel just said, for instance, about the rarity of a nondelegation authority cases, and, you know, the Austinmer Charter Township case is just one other example I think issued before the Court of Appeals, declared that there was a delegation from the lack of standards. Actually, in that case, there were very similar standards to the ones that we're seeing here.

It gives sort of an ambiguous task to the lower authority and says go for it. And I think that's in some sense what we're dealing with here.

But at a broader level, Your Honor, I think that even at a time of crisis, we have to remember that the language of the law needs to prevail. And these cases really clearly require the legislature to give some guidance and guardrails, some direction to the execution of authority. And though Counsel's suggesting that there's Michigan authorities suggesting that you can almost dispense with the guardrails because of the complexities of dealing with a pandemic, respectfully, Your Honor, I think that would be inconsistent with the way that our constitutional

system conceives of the separation of powers doctrine.

So for those reasons, Your Honor, I think this application and this use of the EPGA here remains problematic. And it's only in adopting the construction that the legislature offers, that the Court would avoid having to reach those difficult constitutional questions in their entirety.

So for those reasons, Your Honor, we would just ask that Your Honor declare the declarations of state of emergency and disaster invalid and improper, and its ultra vires acts unsustained by the Constitution or statute.

JUDGE STEPHENS: Thank you, very much. The -- Ms. Mapp, do you know when we are likely to have a transcript.

THE COURT REPORTER: Whenever you need it, I can have it ready.

JUDGE STEPHENS: They needed it yesterday, before they even opened their mouths. If I could get it by Tuesday of next week, I'd be deeply appreciative.

THE COURT REPORTER: Okay.

JUDGE STEPHENS: Thank you, very much.

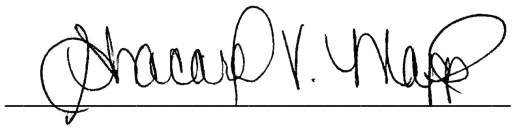
And with that, this session of the Court of Claims will conclude.

(The proceeding was concluded at 11:14 a.m.)

CERTIFICATE OF NOTARY

STATE OF MICHIGAN)
) SS
COUNTY OF MACOMB)

I, Shacara V. Mapp, Certified Shorthand Reporter, a Notary Public in and for the above county and state, do hereby certify that the above deposition was taken before me at the time and place hereinbefore set forth; that the witness was by me first duly sworn to testify to the truth, and nothing but the truth; that the foregoing questions asked and answers made by the witness were duly recorded by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor of counsel to either party, nor interested in the event of this cause.



Shacara V. Mapp, CSR-9305
Notary Public,
Macomb County, Michigan

My Commission expires: 07-25-2024

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STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

Supreme Court No.

Court of Appeals No.
Court of Claims No. 20-000079-MZ

THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE, OR REGULATION OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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EXHIBIT 3

GOVERNOR'S APRIL 27, 2020 LETTER

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST
LT. GOVERNOR

April 27, 2020

VIA EMAIL

The Honorable Mike Shirkey
Senate Majority Leader
Michigan Senate
P.O. Box 30036
Lansing, Michigan 48909

The Honorable Lee Chatfield
Speaker of the House
Michigan House of Representatives
P.O. Box 30014
Lansing, Michigan 48909

Re: Extension of emergency and disaster declaration in Executive Order 2020-33

Speaker Chatfield and Leader Shirkey,

The COVID-19 pandemic continues to ravage our state. To date, Michigan has 38,210 confirmed cases of COVID-19 and 3,407 confirmed deaths caused by the disease. Many thousands more are infected but have not been tested. This disease, caused by a novel coronavirus not previously identified in humans, can easily spread from person to person and can result in serious illness or death. There is currently no approved vaccine or antiviral treatment.

To fight this unprecedented threat, I issued Executive Order 2020-4 on March 10, 2020, which declared a state of emergency across our state. On April 1, 2020, I issued Executive Order 2020-33, which rescinded the previous declaration and declared a new state of emergency and a state of disaster, reflecting the broader crisis we face. Since I first declared an emergency, my administration has taken aggressive measures to fight the spread of the virus and mitigate its impacts, including temporarily closing schools, restricting the operation of places of public accommodation, allowing medical professionals to practice to the full extent of their training regardless of licensure, limiting gatherings and travel, requiring workers who are not necessary to sustain or protect life to stay home, and building the public health infrastructure necessary to contain the infection.

There remains much more to be done to stave off the sweeping and severe health, economic, and social harms this disease poses to all Michiganders. To meet these demands, my administration must continue to use the full range of tools available to protect the health, safety, and welfare of our state and its residents. I welcome your and your colleagues' sustained partnership in fighting this pandemic. While I have multiple independent powers to address the challenges we now face, the powers invoked by Executive Order 2020-33 under the Emergency Management Act, 1976 PA 390, as amended, MCL 30.403 et seq., provide important protections to the people of Michigan, and I hope you agree they should remain a part our state's ongoing efforts to combat this pandemic throughout the full course of that fight.

For that reason, and in shared recognition of what this fight will require from us, I request a concurrent resolution under MCL 30.403(3) and (4) extending the state of emergency and the state of disaster declared in EO 2020-33 under the Emergency Management Act by 28 days from the date that Senate Concurrent Resolution No. 24 expires. As to the individual emergency orders I have issued, including Executive Order 2020-59, these measures expire at the time stated in each order, unless otherwise continued.

Sincerely,

Gretchen Whitmer
Governor

cc: House Democratic Leader Christine Greig; Senate Democratic Leader Jim Ananich

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

Supreme Court No.

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EXHIBIT 4

SENATE FISCAL ANALYSIS, 1990 PA 50 (1990)

SFA BILL ANALYSIS

Senate Fiscal Agency • Lansing, Michigan 48909 • (517) 373-5383

House Bill 5263 (Substitute H-1 as reported without amendment)
Sponsor: Representative James M. Middaugh
House Committee: Conservation, Recreation, and Environment
Senate Committee: Natural Resources and Environmental Affairs

Date Completed: 3-20-90

RATIONALE

Congress recently enacted the Emergency Planning and Community Right-To-Know Act, which requires the designation of state and local entities to coordinate emergency planning, including prevention and management of all disaster and emergency situations. Some feel that, in order to meet the Federal requirements, the State should expand the Emergency Preparedness Act to encompass prevention and response activities, at both the State and local levels, for emergencies and disasters.

CONTENT

The bill would amend the Emergency Preparedness Act to change the name of the Act to the "Emergency Management Act", change the name of the "Emergency Preparedness Plan" to the "Emergency Management Plan", and extend the Act's "disaster" provisions to "emergencies".

The bill also would do all of the following:

- **Outline the duties and responsibilities of the Department of State Police's Emergency Management Division.**
- **Specify local units' duties and responsibilities pertaining to emergency management activities.**
- **Provide limited immunity from liability to certain parties.**
- **Revise certain funding requirements under the Act.**
- **Repeal a section of the Act pertaining to the primacy of emergency orders in the event of a foreign attack.**

The Act requires the Governor to declare a "state of disaster" if a disaster has occurred or a threat of disaster is imminent. The Act would change that requirement to apply if the disaster had occurred or the threat of disaster existed, and would impose a parallel requirement for the declaration of a "state of emergency". The bill would define "disaster" as "an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to, fire, flood, snowstorm, ice storm, tornado, windstorm, wave action, oil spill, water contamination, utility failure, hazardous peacetime radiological incident, major transportation accident, hazardous materials incident, epidemic, air contamination, blight, drought, infestation, explosion, or hostile military action or paramilitary action, or similar occurrences resulting from terrorist activities, riots, or civil disorders". "Emergency" would mean "any occasion or instance in which the governor determines state assistance is needed to supplement local efforts and capabilities to save lives, protect property and the public health and safety, or to lessen or avert the threat of a catastrophe in any part of the state".

Emergency Management Division

The bill would delete sections of the Act requiring the Director of the Department of

State Police to maintain a division within the Department to coordinate "predisaster emergency service activities" and to be responsible for the preparation and updating of the "Michigan Emergency Preparedness Plan" and its compatibility with similar Federal, county, and municipal plans.

In place of those provisions, the bill would require the Department of State Police to establish an "Emergency Management Division" to coordinate emergency management activities of the State, counties, municipalities, and the Federal government. The Division would be responsible for preparing and maintaining a "Michigan Emergency Management Plan" that encompassed preparedness, mitigation, response, and recovery activities. The Division could receive available State and Federal emergency management and disaster-related grants and would have to administer and apportion those grants to agencies of the State and local units of government according to established guidelines. The Division would be empowered to do the following:

-- Promulgate rules to establish standards and requirements for the appointment, requirements, training, and professional development of emergency management coordinators.
-- Promulgate rules to establish requirements and standards for local and interjurisdictional emergency management programs, and periodically review local and interjurisdictional plans.
-- Promulgate rules to establish standards and requirements for the emergency training, exercise, and public information programs.
-- Survey both public and private industries, resources, and facilities necessary to carry out the Act.
-- Prepare, for the Governor's issuance, executive orders, regulations, and proclamations that were necessary or appropriate in coping with emergencies or disasters.
-- Provide for at least one State "Emergency Operation Center" to provide for the coordination of emergency response and disaster recovery.
-- Provide for the cooperation and coordination of State agencies and departments with Federal and local entities in emergency management activities.
-- Cooperate with the Federal government and any other public or private entity in achieving the Act's purposes and in implementing disaster preparation, mitigation, response, and recovery programs.
-- Perform other necessary, appropriate, or incidental activities for the Act's implementation.

Local Units

The Act requires each county board of commissioners to appoint a coordinator of emergency planning and services. The bill would refer to such a person as an "emergency management coordinator", and specifies that he or she would be responsible for "emergency management" rather than "emergency planning and services". In addition, in the absence of an appointed coordinator, the bill would require that the chairperson of the board of commissioners be the coordinator. While the Act allows the county boards of commissioners of up to three adjoining counties to agree upon and appoint a multicounty coordinator, the bill would delete a provision allowing a multicounty coordinator to be "compensated in a manner provided in the appointing resolutions".

The Act allows a municipality with a population of 10,000 or more to appoint a municipal coordinator, who is required to act for and at the direction of the municipality's chief executive. The bill would retain that provision and require a municipality with a population of 25,000 or more either to appoint a municipal emergency management coordinator or appoint the county's coordinator as the municipal emergency management coordinator. Absent an appointment, the municipality's chief executive would be the coordinator. Appointment of a coordinator would have to be made by the municipality's chief executive in a manner provided in its charter. The emergency management coordinator of a municipality with over 25,000 residents would have to act for and at the direction of the municipality's chief executive or the official designated in the municipal charter. The bill would delete a provision under which municipalities with at least 10,000 inhabitants and counties may enter into reciprocal aid agreements or compacts with

other counties or eligible municipalities; the bill provides, instead, that counties and municipalities of any size could enter into mutual aid or reciprocal aid agreements or compacts with other counties, municipalities, and/or public or private agencies. As with the current provision, a compact would be limited to the exchange of personnel, equipment and other resources during times of emergency or disaster, and the arrangement would have to be consistent with the Michigan Emergency Management Plan.

The Act lists a number of actions available to a county or municipality. The bill would grant these only to counties or municipalities that appointed an emergency management coordinator, and would add the following powers to that list:

-- Direction and coordination of the development of emergency operations, plans, and programs in accordance with policies and plans established by State and Federal agencies.
-- Declaration of a local state of emergency if circumstances indicated that the occurrence or threat of widespread or severe damage, injury, or loss of life or property existed. Directives restricting travel on county or local roads also could be issued.
-- Direction and coordination of local multi-agency response to emergencies within the county or municipality.
-- Appointment of a local emergency management advisory council.

County or municipal departments or agencies required by the local unit's emergency operations plan to provide an annex to the plan would have to prepare and update the annex to provide for, and coordinate, emergency management activities by the department or agency. The power to declare a local state of emergency would be vested in the chief executive of the county or municipality or the official so designated by charter, and could not be continued or renewed longer than seven days, except with the consent of the county's or municipality's governing body. A proclamation or declaration would have to be filed promptly with the State Police Emergency Management Division, unless circumstances prevented or impeded prompt filing.

Immunity from Liability

The bill specifies that a volunteer disaster relief worker or a member of an agency engaged in disaster relief activities would not be liable for damages resulting from an act or omission that arose out of and in the course of his or her good faith rendering of the disaster relief activity, unless the act or omission were the result of gross negligence or willful misconduct. The immunity provision would not apply, however, to a person who was engaged in disaster relief activity "for remuneration beyond reimbursement for out-of-pocket expenses".

Funding

The Act authorizes the Governor to apply for, accept, and disburse Federal grants after the President declares a major disaster to exist in Michigan. The bill would extend that authorization to cases in which the President declared an emergency to exist in the State. In addition, the Act authorizes the Governor to pledge the State's share for such financial grants and specifies that the State's share cannot "exceed 25% of the actual cost of the expenses and needs" and cannot exceed $5,000 to one individual or family. The bill would retain the authorization to pledge the State's share, but would delete the specific maximum amounts.

The Act created the Disaster Contingency Fund and mandates that it be maintained by annual appropriations at a level not in excess of $500,000. The bill would raise the maximum level of the Fund to $750,000 and require a minimum level of $30,000. The Act allows the Governor to authorize spending from the Fund to provide State assistance to local units if Federal assistance is unavailable. The bill provides that such assistance could be granted only if the Governor also declared a state of disaster or state of emergency. The maximum level of a State assistance grant to a local unit under the Act is $20,000 or 10% of the local unit's total annual operating budget for the preceding fiscal year, whichever is less. The bill would increase the maximum grant to $30,000 or 10%.

The bill would authorize the Director of the Department of State Police, or his or her designee, to promulgate rules to govern the application and eligibility for the use of the

Fund. The bill also specifies that rules promulgated before December 31, 1988, for that purpose would remain in effect until revised or replaced.

Repeal

The bill would repeal a section of the Act that grants a county or municipal ordinance or rule "the full force and effect of law" if there is a foreign attack upon Michigan. The provision that would be repealed also provides that all existing laws, rules, and ordinances that conflict with the Act, or with any order, rule, or directive issued under the Act, are to be suspended during the period that a conflict exists. The section also requires that all action taken under the Act be done with "due consideration to the relevant orders, rules, regulations, actions, recommendation, and request" of Federal authorities and that the actions be consistent, to the extent permitted by law, with those Federal measures.

MCL 30.401 et al.

FISCAL IMPACT

If enacted, the bill would require increased appropriations for the Department of State Police for: 1) maintaining a minimum balance of $30,000 in the Disaster Contingency Fund (in which there currently are no funds); and 2) increasing the amount of disaster relief available to local jurisdictions from $20,000 per jurisdiction to $30,000 per jurisdiction. The total impact of this bill would be a one-time appropriation of $30,000 and subsequent appropriations depending on the number of jurisdictions that qualified for disaster relief funds in a year. The increased costs to the State would be $10,000 per jurisdiction per disaster.

ARGUMENTS

Supporting Argument

The bill would bring the State's emergency management programs into conformance with Federal law and increase the scope, efficiency, and funding levels of Michigan's emergency management system.

Legislative Analyst: P. Affholter
Fiscal Analyst: M. Hansen

H8990\S5263A

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

Supreme Court No.

Court of Appeals No.
Court of Claims No. 20-000079-MZ

THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE, OR REGULATION OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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EXHIBIT 5

APRIL 6, 1945 LANSING STATE JOURNAL ARTICLE

Measure Gives Governor Wide Emergency Powers

Legislation, reportedly resulting from the 1943 Detroit race riot, was introduced in the senate Friday to give the governor wide powers to maintain law and order in times of public unrest or disaster.

It was introduced by Senators Charles N. Youngblood (D) of Detroit and Harry F. Hittle (R) of Lansing, at the request of the state police.

It would permit the governor, on application of a sheriff, state police commissioner or on his own volition, to declare of state of emergency in a specific area and to order almost unlimited controls over public activities and movements.

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EXHIBIT 6

MILLIKEN SPECIAL MESSAGE

The Honorable William Ryan
Speaker of the House
State Capitol
Lansing, Michigan
Dear Speaker Ryan:

Transmitted to you with this letter is my Special Message on Natural Disasters to the First Session of the Seventy-Seventh Michigan Legislature.

Sincerely,
WILLIAM G. MILLIKEN
Governor

The message was referred to the Clerk and ordered printed in the Journal.

SPECIAL MESSAGE TO THE LEGISLATURE ON NATURAL DISASTERS

I am sending you this message today on a matter of utmost urgency.

Michigan is being threatened by the destructive forces of nature on a scale rarely experienced across the state. Seldom have our citizens been so helpless as individuals in coping with a sustained natural threat.

Waters bordering our shores have reached record high levels, and are going higher.

Wave action accelerated by wind is causing extensive flooding and serious erosion along hundreds of miles of shoreline.

Water that has long been about us is now upon us.

Numerous counties have been declared disaster areas, millions of dollars in property has been destroyed, thousands of people have been forced to evacuate their homes, scores of homes have been toppled into the lakes, and hundreds more are endangered.

Michigan State Police and National Guardsmen from more than a dozen cities, as well as trucks, helicopters and other equipment, have repeatedly been mobilized for emergency services, and prison trustees have provided emergency manpower.

Other steps have been taken to cope with the immediate and long-term effects. But we face a sustained threat and we need sustained efforts at the local, state and federal levels to meet it.

There is a critical need for greater emphasis on pre-disaster action.

Last November, I noted that the federal government had not viewed the Great Lakes problem with the sense of urgency that it deserved.

At that time, I asked for a nine-point program for federal assistance to cope with our shoreline problems. It now appears that a favorable response is developing.

In addition to elaborating today on steps that must be taken at the federal level, I want to outline what steps are being taken at the state level, and what further state action is needed, including prompt legislative action.

This is the situation in Michigan today:

— Lakes Erie and St. Clair are at the highest levels in this century and Lakes Huron and Michigan are near the highest mark for the century. Summer levels are now predicted to be 10 inches higher than last summer on Lakes Michigan and Huron, and five to six inches higher on Lake St. Clair and Lake Erie.
— We have flooding along 140 miles of Michigan shoreline, and there are more than 500 miles with extremely serious erosion problems. A dozen public water supply systems are in jeopardy.
— There are high risk shoreline areas in 35 of our 83 counties.
— About 5100 homes are threatened by flooding.
— Damage to public and private property totals an estimated $30 million from flood-damage alone, and millions more in erosion damage.
— Upwards of 20,000 people have been forced to evacuate their homes.

All indications are that the situation will get worse before it gets better.

Above normal precipitation in recent years has filled our lakes to the brim and left surrounding land so saturated it cannot retain additional water.

There is no immediate hope of controlling the rising lake levels. We have succeeded in getting temporary controls on flow into the lakes from the north. But this will have little immediate effect. Nor would it help greatly to increase the flow from the south. Just as we have had no control over natural events which precipitated the current problem, we have no control over the elements of nature necessary to ease the problem.

I am urging the U.S.—Canadian International Joint Commission to control the regulatory works at Sault Ste. Marie as to provide maximum relief from flooding and erosion along Michigan shores. Changing the regulatory mechanism will help, but it will not result in major lowering of levels.

We cannot turn back Nature, nor can we eliminate all risk for those who live close to some of its greatest wonders. But the State has a responsibility to help its citizens cope with disaster, and to avert it to the extent possible.

While nearly 80 percent of the Great Lakes shoreline is privately owned, the problem is a matter of not only private but public concern. The multiple issues of flooding, public and private property damage, loss of beaches, effect on water quality and loss of tax base require a well-developed, sound program for coastal protection.

State Action

We have taken legislative and other steps to give us a shoreline management program that will help us avoid serious problems in the future.

But we need prompt action, including legislative action, that will provide state assistance for local and individual self-help efforts in the face of a sustained threat of natural disaster.

I am therefore taking and recommending these steps:

1. I have instructed the Michigan State Police, the Michigan National Guard, and other state agencies to develop contingency plans for rescue, evacuation and other emergency services in all shoreline areas. This has been done and plans are being implemented where needed.

2. I have instructed the Emergency Services Division of the Michigan State Police to mobilize a standby force of prison trustees and personnel from voluntary agencies for use where there are urgent manpower needs for diking and other emergency operations. Trucks and other equipment will be provided where needed.

3. I am recommending that an Emergency Contingency Fund, amounting initially to $500,000, be created for allocation by the Governor in emergency situations.

4. I urge the Legislature to expedite consideration of my February 26 request for a $370,000 supplemental appropriation to provide technical assistance for individuals and localities, and to develop a pilot program for shoreline protection. Only the federal government has the resources to provide for substantial construction of protective devices. But we should move ahead with a state demonstration program now to determine feasibility of protection techniques, and with means of providing technical assistance to those who can't wait for federal aid.

5. I urge the Legislature to revise the General Property Tax Act to exempt flood and erosion protective devices from property taxation. Land owners now in effect are penalized for such devices. Under existing law they become capitalized improvements for tax purposes.

6. I urge local tax assessors to act favorably on the March 29 request of the Michigan State Tax Commission, made in response to Senate Concurrent Resolution 74, to review the assessment of property which has been devalued because of natural disaster. The Commission made the request in telegrams to about 560 assessors in counties bordering the Great Lakes.

7. It is essential that local units of government be given legal authority to help themselves to combat natural disasters. The police powers of some political subdivisions are, at best, vague at the present time. We must clarify the role of government at the local level and the use of private property where that is the most appropriate method of dealing with actual or threatened disasters. To that end, I will prepare amendments to existing village, township and county laws that would give local governments the tools to get the job done. Such legislation should have high priority. I also want to work with the Legislature in determining means of giving local communities ability to create special assessment districts which would provide the benefits of long-term financing to those shoreline residents who want to help themselves.

8. The state law is unclear with respect to utilizing the National Guard for pre-disaster assistance. Accordingly, I will recommend legislation which will clearly address itself to the technical problems of the state's ability to deliver services at critical periods without being bound by bureaucratic and administrative red tape.

9. I recommend that the Legislature give the Governor plenary power to declare states of emergency both as to actual and impending disasters.

Under existing law, the powers of the Governor to respond to disasters is unduly restrictive and limited. The existing Civil Defense law which was enacted in 1953 was primarily intended to cover catastrophies that might ensue from military attack. There is a need to clarify and define the types of natural disasters and further to grant extraordinary powers where the imminent and practical threat of disasters is a reality.

While it is possible that many of the special problems created by non-military disasters can be handled by broad interpretation of existing Michigan law, the Governor's emergency powers are not specifically addressed to the imminent potential of disasters.

The existing civil defense powers of the Governor are general in nature and specify that they are to be exercised under conditions of attack. The emergency power of the Governor, set forth in Act 302 of 1945, are pertinent to civil disturbances, and only indirectly relate to natural disasters. The Act is silent with respect to powers necessary to combat imminent disasters.

Because many types of disasters such as floods, winds of varying degrees of velocity and blizzards often can be foretold as to where and when they will strike, it appears prudent to permit the disaster apparatus to function before there is an actual incidence of calamity. This would avert needless loss of life and property and tremendously reduce losses.

Accordingly, I recommend that the Governor have plenary power to declare states of emergency both as to actual and impending disasters and to take certain steps pursuant to that declaration. I will specify these steps in draft legislation that I will forward to you promptly with a request that it receive prompt action.

Local Action

I view the role of the State as secondary to that of local political subdivisions, and as the coordinating entity to maximize full federal participation. That is one reason I recommended the statutory clarification of the role of local government.

Local units of government should make all possible effort, and use all possible resources, prior to seeking state assistance. The State, in turn, uses the Emergency Services Division of the State Police as a clearing center for requests for assistance and for coordinating the state's response.

Federal Action

Congress has recognized that the states are generally unable to commit massive financial resources in disaster situations. In 1970, the Congress passed the Federal Disaster Relief Act, commonly known as P. L. 91-606, as primary mechanism to compensate public and private damaged losses as a result of natural disasters. As Governor, I must certify that the state has expended at least $3.5 million in unreimbursed expenses in the 12 months preceding the disaster. With that certification, I can request that the President designate counties as federal disaster areas, thus making available the full resources of P. L. 91-606.

During the severe ice storm of March 13-15, 1972, we estimated a loss of about $3.5 million dollars in damage to public and private property. I immediately designated 10 counties as disaster areas and requested presidential declarations so that the state and local units could be reimbursed for some of their damages. A presidential declaration was made on April 5 for seven counties and thereafter almost $2 million in federal assistance was forthcoming to reimburse expenditures for public property loss.

On November 14, 1972, exceedingly high winds, coupled with the high lake levels, created disastrous flooding conditions in nine counties causing in excess of $10 million in damages. I immediately designated those counties as disaster areas and authorized the full use of the National Guard where necessary for evacuation and other purposes. I subsequently requested a presidential declaration which the President issued November 20. As of this date, Michigan citizens have received and are still receiving federal assistance, and approximately $5 million in federal loans under the Small Business Administration and the Farmers Home Administration have been disbursed.

The recent storm of March 16 caused extensive flooding again in 12 counties resulting in total property damage approximating $16 million. On March 23, I requested a presidential declaration for assistance to those counties and also for full federal resources for pre-disaster assistance.

Michigan was hit with another storm on April 9 which in some areas caused more extensive flooding than during the previous month. It also accelerated erosion damage to an extent that there is danger of flooding in areas not previously vulnerable to floods.

Since the November storms, our efforts at the state level to minimize future disasters have been a joint undertaking with federal authorities. The Department of Natural Resources was authorized to explore all avenues of federal preventive assistance as a review of state resources recognized our inability to adequately solve the problem. Preventive flood measures require massive financial outlay as well as materials and labor, all of which are beyond the scope of state capabilities.

The U.S. Army Corps of Engineers is authorized by federal law to administer a flood preventive program called Operation Foresight. It is intended to provide temporary protection in low-lying areas for high lake levels and impending storms which pose a threat to life and property. Federal law requires that projects be (1) determined to be beyond state or local capacity, (2) justifiable from economic and engineering standpoints, (3) designed to cope with expected high water levels and solely of a temporary nature, and (4) feasible for timely completion. The federal law does not allow emergency measures to prevent or mitigate shoreline or beach erosion. For this reason, only on-shore protective devices are available.

On December 20, 1972, the Corps of Engineers advised me that it would begin Operation Foresight in Michigan. On January 25, 1973, I advised the Corps, as required by federal law, that the State of Michigan did not have resources to complete the program and designated the Department of Natural Resources and the Emergency Services Division of the State Police as coordinating agencies to work with the Corps of Engineers. We pledge our state resources to assist the Corps in this endeavor.

During January, February and March, 1973, the Corps and state officials conducted over 25 meetings and site inspections in shoreline communities explaining the requirements of Operation Foresight and offering extensive technical assistance.

Over 30 communities have submitted resolutions to the Department of Natural Resources requesting Operation Foresight assistance and the Corps has approved plans in at least 21 of these areas. The Corps of Engineers already has provided about $5 million in construction aid, and has supplied more than 5 million sandbags for Michigan.

We have, then, had federal assistance in the form of President Nixon s responses to my requests for designation of disaster areas, and through the Operation Foresight program.

But more needs to be done for pre-disaster assistance.

I have outlined in this message a state action program which would give the State of Michigan a far greater capacity to deal with impending problems.

We need this further federal action:

1. At the present time Operation Foresight is primarily a diking preventive program. Offshore devices are prohibited under the federal law. I am asking our congressional delegation to press for the passage of federal legislation which would authorize the Corps of Engineers to repair, construct or modify flood and erosion control structures offshore where they will often do more good than onshore devices. This can help prevent erosion that, among other things, can lead to flooding.

I urge that you lend your support and pass appropriate resolutions expressing your support and urge our congressmen and senators to work for these amendments.

2. In the same context, the Federal Disaster Relief Act does not clearly define the areas of pre-disaster assistance that are intended to be covered. We are unable thus far to receive presidential approval for pre-disaster assistance under the Relief Act and I request that you join with me in urging our congressional delegation to work for prompt action on clarifying language that will clearly identify the areas of pre-disaster assistance that should be covered by federal laws.

3. Appropriation of sufficient funds to construct works authorized under Section 111 River & Harbor Act, 1968 PL 90-483.

4. Appropriation of sufficient funds to construct works authorized by Section 14, Flood Control Act of 1946—Construction of emergency works to protect roads, bridges and public works.

5. Amend Section 165 (c) (13) of the Internal Revenue Code of 1954 to allow casualty loss deductions for expenditures to construct protective works or to move homes from their original locations to prevent future storm losses.

6. Clarification by Internal Revenue Service of revenue ruling 79 as it relates to loss of land from erosion as a casualty loss.

7. Federal participation in construction of protective works for both public and private property.

8. Construction of low cost demonstration projects.

9. Provide research funds for lake level forecasting techniques which would be applicable to critical areas for prediction of specific erosion rates and flood damage.

10. Provide additional funding to coastal engineering research center of the Corps of Engineers for erosion-related activities on the Great Lakes.

11. Authorize the use of federal equipment for emergency control programs.

Conclusion

I have in this Special Message on Natural Disasters informed you of the role of the State of Michigan in recent months, and requested your urgently needed assistance in helping us cope with the problems facing us in the months ahead.

We have been effective in reacting to natural disasters.

We must be no less effective in preparing for them. In so doing, we can save lives and property.

From 1955 to 1969, our state suffered losses from flood damages of less than $3 million. Since 1970, we have suffered well over $30 million in damages to property, not to mention countless millions of dollars of damage to our shorelines.

All citizens of Michigan have a stake in the program I have outlined, including those who live far from a shoreline.

Today we are ravaged by one of our most precious resources — our water. We know not the form or the boundary of the natural disasters of tomorrow.

But we know that we must prepare for them.

Introduction of Bills

Rep. F. Robert Edwards introduced

House Bill No. 4535, entitled

A bill to amend chapter 66 of the Revised Statutes of 1846, entitled "Of estates in dower, by the curtesy, and general provisions concerning real estate," as amended, being sections 554.131 to 554.139 of the Compiled Laws of 1970, by adding section 34a.

The bill was read a first time by its title and referred to the Committee on Taxation.

Reps. Geake, Ziegler, Smart and Bennett introduced

House Bill No. 4536, entitled

A bill to amend section 35 of Act No. 331 of the Public Acts of 1966, entitled "Community college act of 1966," being section 389.35 of the Compiled Laws of 1970; to add section 34a; and to repeal certain acts and parts of acts.

The bill was read a first time by its title and referred to the Committee on Colleges and Universities.

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EXHIBIT 7

***SOCIAL DISTANCING LAW PROJECT: ASSESSMENT OF LEGAL AUTHORITIES* (2007)**

Social Distancing Law Project

Michigan Department of Community Health

Assessment of Legal Authorities

Introduction

This report provides an assessment of Michigan's legal readiness to address pandemic influenza. This assessment includes both legal authority for pharmaceutical and non-pharmaceutical (social distancing) measures. As set out in the CDC's *Interim Pre-pandemic Planning Guidance*[1], at the beginning of an influenza pandemic, the most effective mitigation tool (i.e., a well-matched pandemic strain vaccine) will probably not be available. Therefore, Michigan must be prepared to face the first wave of the pandemic without vaccine and, possibly, without sufficient quantities of influenza antiviral medications. Instead, Michigan must rely on an early, targeted, layered application of multiple, partially effective, non-pharmaceutical measures. These include restrictions on the movement of people and "social distancing measures" to reduce contact between individuals in the community, schools, and workplace.

This report focuses on the ability of Michigan to implement social distancing measures to prevent and control the spread of pandemic influenza, both when an emergency has been declared and in the absence of a declared emergency. Communicable disease surveillance, investigation, or outbreak control may involve the following potential public health procedures or social distancing measures, based upon the current Michigan Department of Community Health All Hazards Response Plan and Pandemic Influenza Plan:

- Travel alerts, warnings, or bans
- Communicable disease surveillance at borders
- Border closures
- Individual or group isolation
- Individual or group quarantine
- Altered work schedules or environmental controls to be enacted in workplaces
- Cancellation of public gatherings
- Identification of buildings for community isolation or quarantine
- Monitoring of isolated or quarantined individuals or groups

In its Pandemic Influenza Plan, MDCH addresses social distancing and other measures to be implemented, as appropriate, for each WHO phase / federal government response

[1] *Interim Pre-pandemic Planning Guidance: Community Strategy for Pandemic Influenza Mitigation in the United States – Early, Targeted, Layered Use of Nonpharmaceutical Interventions*, which can be found at http://www.pandemicflu.gov/plan/community/community_mitigation.pdf

stage of a pandemic. MDCH's current plan (Draft 3.1, May 2007) is posted on the Internet at http://www.michigan.gov/documents/mdch/MDCH_Pandemic_Influenza_v_3.1_final_draft_060107_2__198392_7.pdf. Social distancing interventions can and should be undertaken voluntarily. However, this report covers establishment and enforcement of social distancing means by state and local authorities if necessary to protect public health. This report also covers inter-jurisdictional cooperation and mass prophylaxis readiness.

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Assessment of Legal Authorities

The following definitions apply to terms used in this report:

1. "Jurisdiction" refers to Michigan, which is one of the 18 jurisdictions selected for review in the study.
2. "Legal authority" means any provision of law or regulation that carries the force of law.

3. "Procedures" means any procedures established by the jurisdiction relating to the legal question being researched, regardless of whether the procedures have the force of law.
4. "Restrictions on the movement of persons" means any limit or boundary placed on the free at-will physical movement of adult natural persons in the jurisdiction.
5. "Closure of public places" means an instruction or order that has the effect of prohibiting persons from entering a public place. "Public place" means a fixed space, enclosure, area, or facility that is usually available for entry by the general public without a specific invitation, whether possessed by government or private parties.
6. "Curfew" means an order or regulation prohibiting persons from being in certain public places at certain times.
7. "Person" [unless indicated otherwise] means a natural person, whether or not individually identified.
8. "Public health emergency" means any acute threat, hazard, or danger to the health of the population of the jurisdiction, whether specific or general, whether or not officially declared.
9. "Superior jurisdiction" means the federal government in respect to a state, or a state in respect to a locality.
10. "Inferior jurisdiction" means a state in respect to the federal government, or a locality in respect to a state government.

Exclusions:

1. This assessment excludes federal law.
2. This assessment excludes the closure of schools, which will be covered by another project of the CDC Public Health Law Program. However, the issue of school closures will likely come up during discussions at the legal consultation meetings in response to the overall fact pattern. The CDC Public Health Law Program will make the results of the CDC project on school closure available for the Legal Consultation Meeting associated with this project.

I. Restrictions on the Movement of Persons

A. *Legal powers/authorities to restrict movement of persons during a declared public health emergency – What legal powers or authorities exist that could enable, support, authorize, or otherwise provide a legal basis for any restrictions on the movement of persons during a declared public health emergency? List all legal powers, authorities, and procedures (including but not limited to police powers, umbrella powers, general public health powers, or emergency powers or authorities) that could be used to authorize specific movement restrictions. (Examples: state's legal powers, authorities, or doctrines for quarantine (see also subsection I-C below), isolation, separation, or other orders for persons to remain in their homes.)*

The Michigan Emergency Management Act, 1976 PA 390, MCL 30.401 *et seq.*, provides for planning and response to disasters and emergencies within the state. The Emergency Management Act distinguishes between a disaster and emergency as follows: a disaster is defined as "an occurrence or threat of widespread or severe

damage, injury, or loss of life or property resulting from a natural or man-made cause, including but not limited to, …radiological incident, …epidemic, air contamination…." MCL 30.402(e). An emergency is defined as "any occasion or instance in which the governor determines state assistance is needed to supplement local efforts and capabilities to save lives, protect property and the public health and safety, or to lessen or avert the threat of a catastrophe in any part of the state." MCL 30.402(h). The governor is required to issue an executive order or proclamation declaring a state of disaster or emergency if she finds a disaster or emergency has occurred or the threat of a disaster or emergency exists.

This question includes all provisions of law or procedure that:

1. *Regulate the initiation, maintenance, or release from restrictive measures, including, but not limited to:*

   a. *Who can declare or establish such restrictions?*

   In a declared state of emergency the governor "is responsible for coping with dangers to this state or the people of this state presented by a disaster or emergency." MCL 30.403(1). Among the express powers, is the authority to "utilize the available resources of the state and its political subdivisions, and those of the federal government made available to the state, as are reasonably necessary to cope with the disaster or emergency." MCL 30.405(1)(b). The governor is also authorized to "prescribe routes, modes, and destinations of transportation in connection with an evacuation," to "control ingress and egress to and from a stricken or threatened area, removal of persons within the area, and occupancy of premises within the area" and to "suspend a regulatory statute, order or rule prescribing the procedures for conduct of state business…except for criminal process and procedures." MCL 30.405(1)(a), (f), (g). In addition to those powers expressly granted under the Emergency Management Act, the governor may "direct all other actions which are necessary and appropriate under the circumstances." MCL 30.405(1)(j).

   b. *Who can enforce such restrictions?*

   If the declaration is of a public health emergency, the governor may direct the Michigan Department of Community Health (MDCH) to coordinate all matters pertaining to the response of the state to a public health emergency. MCL 30.408. Accordingly, the MDCH director or his or her designee could issue an order for quarantine. In addition, should the governor issue the order, enforcement could be by any law enforcement officer, since a violation of the governor's emergency orders is a misdemeanor. MCL 30.405(2).

   c. *What are the legal powers and authorities for group quarantine?*

   Under the Emergency Management Act, the governor has broad power to issue such orders which are "necessary and appropriate under the circumstances."

Thus, if necessary and appropriate, a group quarantine order may be issued. Anyone violating the order would be guilty of a misdemeanor.

d. What are the legal powers and authorities for area quarantine?

The governor has broad authority under the Emergency Management Act to eliminate any obstacles to implementation of necessary population control measures in a public health emergency.

e. What are the penalties for violating movement restrictions?

A violation of an executive order issued by the governor following the declaration of a disaster or emergency is punishable as a misdemeanor. MCL 30.405(2). In such circumstances, the maximum penalty is 90 days in jail and/or a fine of $500. MCL 750.504.

2. *Provide any due process measures for a person whose movement is restricted.*

   Because a violation of an order is a criminal offense, all due process measures attendant to a deprivation of liberty attach to an individual who violates an executive order restricting movement. In addition, any individual who can demonstrate the requisite standing could bring a civil action to challenge the propriety of the declaration or the application of the executive order to the petitioner.

3. *Relate to how long such measures can last, whether and how they can be renewed, and the authority/process/notice requirements for ending the measures.*

   The Emergency Management Act provides that the governor's declaration of an emergency or disaster can last for up to 28 days. After 28 days, any extension would require a joint resolution of both houses of the legislature. MCL 30.403.

4. *May create liability for ordering the restriction of movement of persons.*

   Any order that results in an illegal arrest or deprivation of civil rights is actionable under state or federal law. As a general rule, civil liability is limited under state law by governmental immunity. Health officials rendering services during a declared emergency are "not liable for an injury sustained by a person by reason of those services, regardless of how or under what circumstances or by what cause those injuries are sustained," willful acts and omissions excepted. MCL 30.411.

5. *Would otherwise tend to limit the legal basis of the jurisdiction.*

   None known.

B. *Sufficiency of powers/authorities – Discuss the sufficiency of the authorities and powers to restrict the movement of persons during a declared emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

   The Emergency Management Act is broad and provides sufficient authority for the governor to issue any order necessary to restrict movement of persons during an emergency or disaster.

2. *Uncertainties?*

   None known.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's legal basis to restrict the movement of persons? (Examples: state administrative practice acts, specific provisions in law related to movement restrictions.)*

   As discussed under "D" (page 7) below, the penalty for violating an order of MDCH's director is a misdemeanor punishable by six months in jail and/or a fine of $200. Violating the governor's order is punishable by 90 days in jail and/or a fine of $500. Michigan's legislature might consider increasing the jail term for violating an order of the governor to six months. In Michigan, if the penalty for a misdemeanor is greater than 92 days imprisonment, law enforcement can arrest based on reasonable cause. If the penalty is 92 days or less, then law enforcement must obtain an arrest warrant or have witnessed the violation. MCL 764.15(1)(d).

C. *Legal powers/authorities specifically related to quarantine enforcement – Specifically related to quarantine orders, identify all state and/or local powers and authorities to enable, support, authorize, or otherwise provide a legal basis for enforcement of quarantines during a public health emergency.*

1. *What are the legal powers and authorities authorizing law enforcement to enforce quarantine orders issued by the jurisdiction?*

   The Emergency Management Act provides criminal penalties for any violation of an emergency executive order. Accordingly, any law enforcement officer may be called upon to enforce the order. In addition the governor may ask the attorney general to seek civil enforcement. State agencies, such as MDCH may be directed to take administrative action to enforce the order.

2. *What are the legal powers and authorities prohibiting or inhibiting the use of law enforcement to enforce a quarantine order issued by the jurisdiction?*

   None known.

3. *What are the legal powers and authorities authorizing law enforcement to enforce a federal quarantine order?*

   If a violation of the federal order is subject to a criminal penalty, law enforcement

officers in the state of Michigan may assist in the enforcement of the order.

4. *What are the legal powers and authorities prohibiting or inhibiting the use of law enforcement to enforce a federal quarantine order?*

   The only question will be whether the officer is enforcing a criminal law of the United States.

5. *What are the legal powers and authorities prohibiting or inhibiting the use of law enforcement to assist the federal government in executing a federal quarantine order?*

   If a violation of the federal order is subject to a criminal penalty, law enforcement officers in the state of Michigan may assist in the enforcement of the order. In this regard, the Michigan Attorney General has opined that peace officers of the state may enforce violations of federal laws and regulations, at least when a criminal penalty attaches. OAG, 1967-1968, No 4631, p 194 (March 5, 1968). However, Michigan law provides no authority for law enforcement officers to enforce federal civil quarantine orders.

   Potentially, if the governor declares a state of emergency or disaster, she can issue an executive order expanding the powers of the various police agencies to assist federal and state agencies in enforcing quarantine and isolation orders (MCL 30.405). Alternatively, this gap might be addressed by developing a process to appoint local and state police federal agents (much as they are sometimes appointed deputy marshals), in which case they would be acting pursuant to their federal appointment and authority. The governor or the MDCH could also accomplish enforcement by issuing quarantine orders that mirror the federal government's. State and local police could then enforce a violation of the governor's or MDCH's orders as a criminal act.

D. *Sufficiency of powers/authorities to enforce quarantine – Discuss the sufficiency of the authorities and powers to enforce quarantine orders and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

   The most prominent gap is the lack of authority by law enforcement to enforce a quarantine order, short of making an arrest. Law enforcement may benefit by the passage of legislation giving law enforcement specific authority to enforce public health orders for communicable diseases. Public health also needs to explore the options available for law enforcement in the manner of enforcement of public health orders. An individual who is ordered into isolation because he is ill would be taken to a treatment facility, however, the noncompliant subject of a quarantine order is another question. If police officers arrest and incarcerate people violating quarantine or round up and detain people who refuse an order not to congregate they will likely undo the effects the social distancing measures were intended to bring about.

2. *Uncertainties?*

   None known.

3. *Are there any other legal provisions not previously listed in I-C above that could inhibit, limit, or modify the jurisdiction's legal basis to restrict the movement of persons? (Examples: state administrative practice acts, specific provisions in law related to quarantine.)*

   None known.

E. *Legal powers/authorities to restrict movement of persons <u>in the absence</u> of a declared public health emergency – What legal powers or authorities exist that could enable, support, authorize, or otherwise provide a legal basis for any restrictions on the movement of persons in the absence of a declared public health emergency? List all legal powers, authorities, and procedures that could be used to authorize specific movement restrictions in the absence of an emergency declaration. (Examples: the state's legal powers, authorities, or doctrines for quarantine, isolation, separation, or other orders for persons to remain in their homes.)*

MDCH has broad and flexible powers to protect the public health, welfare and safety of persons within the state. These powers are set out in the Public Health Code, which is to be liberally construed for the protection of the health, safety, and welfare of the people of Michigan. MCL 333.1111(2). MDCH is required to generally supervise the interests of the health and life of Michigan's residents, implement and enforce public health laws, prolong life, and promote public health through organized programs. It is also specifically responsible for preventing and controlling disease; making investigations and inquiries as to the cause of disease, especially of epidemics; and the causes, prevention, and control of environmental health hazards, nuisances, and courses of illness. MDCH may exercise authority to safeguard properly the public health, prevent the spread of diseases and the existence of sources of contamination, and implement and carry out the powers and duties vested by law in the department. MCL 333.2226(d).

Michigan's Supreme Court has long recognized the authority of health officers to issue reasonable orders or regulations to control the spread of disease under their general statutory authority to prevent the spread of infection. *People v Board of Education of City of Lansing*, 224 Mich 388 (1923) (local board of health has authority to issue regulation to exclude unvaccinated children from schools, over the objection of the school board, while 17 cases of smallpox still existed in the city), *Rock v Carney*, 216 Mich 280 (1921) (health officer has quarantine power when sufficient reasonable cause exists to believe that a person is afflicted with a venereal disease).

In addition to a general grant of authority, the Public Health Code grants the state health director specific power to issue orders to address an emergency, as described in "1" (pages 9-10) below.

Most public health activities, including the prevention and control of communicable diseases, are carried out by Michigan's 45 local health departments. Local health departments, acting through their local health officers, hold the general powers described above. Further, both state and local health departments are granted "powers necessary or appropriate to perform the duties and exercise the powers given by law … and which are not otherwise prohibited by law." MCL 333.2221(2)(g), MCL 333.2433(2)(f). Local health officers are also authorized to issue emergency orders, warning notices, and bring court actions, concerning residents within their jurisdictions. The organization and powers of local health departments are set out in MCL 333.2401 – 333.2498.

This question includes all provisions of law or procedure that:

1. *Regulate the initiation, maintenance, or release from restrictive measures, including, but not limited to:*

   a. *Who can declare or establish such restrictions?*

   If the state health director determines that conditions anywhere in the state constitute a menace to the public health, she is authorized to take full charge of the administration of applicable state and local law, rules, regulations, and ordinances. MCL 333.2251(3). Additionally, the Public Health Code grants the state health director (and local health officers) power to issue the following orders to address an emergency:

   - **Imminent Danger Orders**. Upon determining that an "imminent danger" to the health or lives of individuals exists in this state, the director shall inform the individuals affected by the imminent danger and issue an order. The order shall be delivered to a "person" authorized to avoid, correct, or remove the imminent danger or be posted at or near the imminent danger. MCL 333.2251(1). "Person" includes an individual, any type of legal entity, or a governmental entity. MCL 333.2251(4)(b). "Imminent danger" is defined as "a condition or practice [that] could reasonably be expected to cause death, disease, or serious physical harm immediately or before the imminence of the danger can be eliminated through enforcement proceedings otherwise provided." MCL 333.2251(4)(a). In her order, the director shall incorporate her findings and require immediate action necessary to avoid, correct, or remove the imminent danger. The order may specify action to be taken or prohibit the presence of individuals in locations or under conditions where the imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove the imminent danger

   - **Orders to Control an Epidemic.** Upon determining that the control of an epidemic is necessary to protect the public health, the director, by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure

continuation of essential public health services and enforcement of health laws. MCL 333.2253. "Epidemic" means "any increase in the number of cases, above the number of expected cases, of any disease, infection, or other condition in a specific time period, area, or demographic segment of the population." R 325.171(g).

- **Orders to Abate a Nuisance.** The director may issue an order to avoid, correct, or remove, at the owner's expense, a building or condition that violates health laws or which the director reasonably believes to be a nuisance, unsanitary condition, or cause of illness. MCL 333.2455.

Finally, the Public Health Code provides for the involuntary detention and treatment of individuals with hazardous communicable disease. MCL 333.2453(2). Upon a determination by a representative of MDCH (or the local health department) that an individual is a "carrier" and is "a health threat to others," MDCH's representative shall issue a warning notice to the individual requiring the individual to cooperate with MDCH or the local health department in efforts to prevent or control transmission of "serious communicable diseases or infections." The warning notice may also require the individual to participate in education, counseling, or treatment programs, and to undergo medical tests to verify the person's status as a carrier.

A "carrier" is "an individual who serves as a potential source of infection and who harbors or who the department reasonably believes to harbor a specific infectious agent or a serious communicable disease or infection, whether or not there is present discernible disease." MCL 333.5201(1)(a). "Health threat to others" means that the individual "has demonstrated an inability or unwillingness to conduct himself or herself in such a manner as to not place others at risk of exposure to a serious communicable disease or infection." MCL 333.5201(1)(b).

A warning notice:

- Must be in writing (may be verbal in urgent circumstances, followed by a written notice within 3 days).
- Must be specific and individual, cannot be issued to a class of persons.
- Must require the individual to cooperate with the health department in efforts to control spread of disease.
- May require the individual to participate in education, counseling, or treatment programs, and to undergo medical tests to verify carrier status.
- Must inform the individual that if the individual fails to comply with the warning notice, the health department shall seek a court order.

If the individual fails or refuses to comply with the warning notice, the health department must petition the circuit court (family division) for an order requiring testing, treatment, education, counseling, commitment, isolation, etc., as appropriate.

In an emergency, the health department may go straight to court (without first issuing a warning notice). Upon filing of affidavit by the health department, the court may order that individual be taken into custody and transported to an appropriate emergency care or treatment facility for observation, examination, testing diagnosis, treatment, or temporary detention. The court's emergency order may be issued *ex parte*; however, the court must hold a hearing on the temporary detainment order within 72 hours (excluding weekends and holidays).

b. Who can enforce such restrictions?

MDCH would need to rely on law enforcement and courts to enforce its orders. Violation of an order of the director is a misdemeanor, punishable by six months in jail or $200, or both. MCL 333.2261. In Michigan, if the penalty for a misdemeanor is greater than 92 days imprisonment, law enforcement can arrest based on reasonable cause (i.e., without an arrest warrant or witnessing the violation), pursuant to MCL 764.15(1)(d).

While violation of the director's order is a misdemeanor, there is no parallel provision in the Public Health Code for violation of a local health officer's order. State law provides that a violation of a local health regulation is a misdemeanor. Therefore, this gap can be addressed by each local government adopting a regulation requiring persons to comply with a lawful order of the local health officer. Failure to comply with an order of the local health officer would be a violation of the regulation and punishable as a misdemeanor under state law. In some circumstances, a local health department may be able to seek enforcement under a provision of the Public Health Code that states it is a misdemeanor to willfully oppose or obstruct a representative of MDCH, the state or a local health officer, or any other person charged with enforcement of a health law in the performance of that person's legal duty to enforce that law. MCL 333.1291.

Finally, MDCH (and local health officers) can go to court to seek enforcement of its orders. MCL 333.2251(2), MCL 333.2451(2). The court could punish civilly or criminally via contempt. MDCH (and local health officers) may also maintain injunctive action "to restrain, prevent, or correct a violation of a law, rule, or order which the department [local health officer] has the duty to enforce or to restrain, prevent, or correct an activity or condition which the department believes adversely affects the public health." MCL 333.2255, MCL 333.2465.

c. What are the legal powers and authorities for group quarantine?

"Group quarantine" is not explicitly addressed in the Public Health Code. However, MDCH's director and local health officers have the authority to issue an imminent danger order, and require "group quarantine" as action required to avoid, correct, or remove the imminent danger. Alternatively, the director or local health officer could issue an emergency order to control an epidemic and require group quarantine as a procedure to be followed during the epidemic.

d. What are the legal powers and authorities for area quarantine?

"Area quarantine" is not explicitly addressed in the Public Health Code. However, MDCH's director and local health officers have the authority to issue an imminent danger order, and require "area quarantine" as action required to avoid, correct, or remove the imminent danger. Alternatively, the director or local health officer could issue an emergency order to control an epidemic and require area quarantine as a procedure to be followed during the epidemic.

e. What are the penalties for violating movement restrictions?

Violation of the order of MDCH's director is a misdemeanor, punishable by six months imprisonment, $200 fine, or both.

2. *Provide any due process measures for a person whose movement is restricted.*

Both the U.S. and the Michigan Constitution prohibit depriving a person of liberty without due process of law. Const 1963, Art I, § 17. Due process is flexible; what process is due depends on the nature of the proceedings, the risks and costs involved, and the private and governmental interests affected. *By Lo Oil Co v Dept of Treasury*, 267 Mich App 19 (2005).

There are no statutory provisions, rules, or procedures with regard to the process for review of imminent danger orders or orders to control an epidemic. Fundamental fairness requires that orders directed toward individuals must be served on the individuals and orders directed toward groups or the general public must be sufficiently publicized to provide notice to individuals of required or prohibited conduct.

Violation of an order by MDCH's director is a criminal offense. Thus, all due process measures attendant to a deprivation of liberty attach to a person who violates an order of the director that restricts movement. In addition, any person who can demonstrate the requisite standing could bring a civil action to challenge the propriety of the director's order or the application of the order to the petitioner.

The Public Health Code sets out procedures for enforcement of a warning notice issued by MDCH's director or a local health officer against a carrier who is a health threat to others. The individual has the right to an evidentiary hearing and the health department must prove the allegations by clear and convincing evidence. Before committing an individual to a facility, the court must consider the recommendation of a commitment panel, and the commitment order must be reviewed periodically. An individual who is the subject of either emergency proceedings or a petition on a warning notice has the right to counsel at all stages of proceedings. An indigent individual is entitled to appointed counsel. The

individual also has the right to appeal and review by the Michigan Court of Appeals within 30 days. MCL 333.2453(2), MCL 333.5201 – 333.5207

3. *Relate to how long such measures can last, whether and how they can be renewed, and the authority/process/notice requirements for ending the measures.*

   There is no time limit on any of the state or local health officers' orders; nor is there a renewal requirement. The health officer who issued an emergency order would be responsible for monitoring the conditions that warranted the order, and respond as appropriate by modifying or rescinding the order as conditions change. Notice of any modifications, or rescission, would need to be sufficient to reasonably notify individuals or groups who are subject to the order.

4. *May create liability for ordering the restriction of movement of persons.*

   MDCH and its employees and volunteers have governmental immunity from tort damages when engaged in a governmental function, absent "gross negligence" that is the proximate cause of the injury or damage. MCL 691.1407. Note: this section does not apply with respect to providing medical care or treatment to a patient with some exceptions. However, if an emergency were declared, the Emergency Management Act, MCL 30.411, would provide protection from liability. Additionally, MDCH's director, or an employee or representative of MDCH is not personally liable for damages sustained in the performance of departmental functions, except for wanton and willful misconduct. MCL 333.2228. The same provision applies to local public health. MCL 333.2465(2).

5. *Would otherwise tend to limit the legal basis of the jurisdiction.*

   None known.

F. *Sufficiency of powers/authorities – Discuss the sufficiency of the authorities and powers to restrict the movement of persons <u>in the absence</u> of a declared emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

   Staff from MDCH and local health departments have participated in several activities to evaluate the sufficiency of the authorities and powers to restrict the movement of persons in the absence of a declared emergency. These activities include participation in the Turning Point Collaborative[2], table top and other facilitated exercises, and a roundtable discussion by a group of public health and legal experts on Michigan law. For the most part, the consensus of both state and local public health is that the Public Health Code provides broad and flexible powers that are sufficient for prompt and effective response to a public health emergency. While it is tempting to seek legislation that authorizes specific measures that might be imposed, there is a risk that public health's authority

[2] The Michigan Association for Local Public Health obtained an assessment of Michigan laws through the Turning Point Collaborative.

would be narrowed by too much specificity and detail under the principle *expressio unius est exclusio alterius* (the express mention of one thing implies the exclusion of all others).

As discussed above, one gap in enforcing restrictions of movement is the lack of a criminal penalty for violation of an emergency order of a local health officer. Another potential gap is the absence of provisions for due process where orders issued by MDCH or local health officers deprive individuals of liberty. This could be addressed either through legislation or by MDCH promulgating rules consistent with Michigan's Administrative Procedures Act. MCL 24.231 *et seq*. However, care is essential in establishing procedures to avoid binding the state and local health departments to a process or procedures beyond legal requirements that unnecessarily restrict their ability to act promptly and effectively to protect the public health.

While MDCH has addressed most social distancing measures in its Pandemic Influenza Plan, it has not addressed mass transit usage limits. MDCH needs to review this for inclusion as a potential social distancing measure to reduce spread of disease from close proximity of individuals typical of crowded mass transit.

2. *Uncertainties?*

   Under Michigan's Constitution, Michigan's public universities constitute a "branch" of state government, autonomous within their own spheres of authority. Const 1963, Art VIII, §§ 5, 6, *National Pride at Work, Inc v Governor*, 274 Mich App 147 (2007), and cases cited therein. University governing boards might question whether the state health department has authority to issue orders that affect the operation of the university, such as orders to quarantine dorm students or prohibit class attendance. However, universities are not exempt from all regulation. MDCH needs to obtain advice from the Department of Attorney General regarding the parameters of its authority over university campuses, and the authority (if any) of local health departments. MDCH should engage the universities to develop memoranda of understanding and procedures for coordinating an effective response to pandemic influenza or other disease outbreaks.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's legal basis to restrict the movement of persons? (Examples: state administrative practice acts, specific provisions in law related to movement restrictions.)*

   While MDCH is authorized to implement its police and statutory powers, there are limits on the exercise of these powers. These limitations include constitutional rights to substantive and procedural due process and equal protection under the laws. MDCH must act in good faith, and must not abuse its discretion in restricting the movement of individuals.

In *Rock v Carney*, *supra*, the Michigan Supreme Court upheld the authority of public health boards to determine what constitutes a dangerous communicable disease and take measures to prevent the spread. However,

> the method adopted or exercised to prevent the spread thereof must bear some true relation to the real danger, and be reasonable, having in mind the end to be attained, and must not transgress the security of the person beyond public necessity.

216 Mich 280, 296.

In the *Rock* case, the Supreme Court held that the health officer abused his discretion by refusing home isolation and placard notice for a young woman with venereal disease, and instead removed the woman from her home and committed her to a hospital for twelve weeks.

Other limitations on exercising authority to restrict movement of persons:

Tribal boundaries, tribal entities. MDCH is in the process of drafting provisions for its pandemic influenza plan that address limitations on the exercise of authority on Indian land or concerning federally recognized tribes. Its All Hazards and Pandemic Influenza Plans currently provide:

- **State-Tribal Borders:** Public health emergencies occurring on tribal land are the responsibility of the tribal organization. Some Mutual Aid Agreements (MAAs) have been developed between local or state health or emergency agencies and tribes. In instances where pre-arranged MAAs have not been developed, Local or State Health organizations may provide services on tribal land *upon the invitation of the tribe.* (Emphasis in original).

Foreign Diplomats: In Attachment 18 of its Pandemic Influenza Plan, MDCH addresses its limitations to impose quarantine or other restrictions on foreign diplomats and their families and honorary counsels, and procedures to be followed in the event of a disease outbreak. Attachment 18 is attached to this assessment as Appendix 2.

Federal land, including military bases and V.A. hospitals. MDCH needs to research and address limits on its jurisdiction over federal lands. MDCH needs to coordinate with federal authorities to develop procedures and emergency communications protocol in the event of a pandemic influenza or other disease outbreak.

II. Curfew

A. Legal powers/authorities for curfew during a declared public health emergency – What legal power, authorities, or procedures exist that that could enable, support, authorize, or otherwise provide a legal basis for curfew during pandemics, when a public health emergency has been declared?

1. What are the powers and authorities to institute curfews? Can local governments institute their own curfews under state and/or local law?

The governor is specifically empowered to proclaim a state of emergency and designate the area involved "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled." After making the proclamation or declaration, the governor may promulgate reasonable orders, rules, and regulations necessary to protect life and property or bring the emergency situation with the affected area under control. The orders, rules, and regulations, may include curfew, as well as other measures. MCL 10.31.

Additionally, under the Emergency Management Act the governor has broad power to take any action that is necessary and appropriate during a declared emergency or disaster and may issue a curfew order. Local governmental units may declare a local state of emergency and take action to "provide for the health and safety of persons and property…." Notice is required. The Emergency Management Act provides that the order shall be" disseminated promptly by means calculated to bring its contents to the attention of the general public." MCL 30.403. The order must also be filed with the secretary of state.

2. Who can order curfew, and, if different, who makes the decision to institute curfew?

Under the Emergency Management Act, the governor would issue the order. The chief executive official of the county or municipality would issue local orders. MCL 30.410.

3. What is the process for mobilizing public health/law enforcement of curfew?

There is no process set out in the Emergency Management Act for mobilizing public health/law enforcement of curfew. The director of the State Police is charged with implementing the orders and directives of the governor. MCL 30.407.

4. Who can enforce curfew?

Again, because violations of the governor's emergency orders are misdemeanors, any law enforcement officer may enforce the order.

5. *Penalties for violating curfew?*

   Penalties are 90 days imprisonment, or $500, or both. MCL 10.33, MCL 30.405(2), MCL 750.504.

6. *How long can a curfew last?*

   The curfew order could remain in effect for 28 days unless extended by joint resolution of the legislature.

7. *How can it be renewed?*

   A curfew order can be renewed only by joint resolution of the legislature.

8. *Describe the authority/process/notice requirements for ending a curfew.*

   The governor may rescind the order at any time. This can be done through issuance of an executive order in which case prompt public notice is required.

B. *Sufficiency of powers/authorities – Discuss the sufficiency of the authorities and powers to institute or maintain curfew during a declared emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

   None known.

2. *Uncertainties?*

   None known

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's legal basis to institute or maintain curfew? (Examples: state administrative practice acts, specific provisions in law related to curfew.)*

   None known.

C. *Legal powers/authorities for curfew in the absence of declared public health emergency – What legal power, authorities, or procedures exist that that could enable, support, authorize, or otherwise provide a legal basis for curfew during pandemics, in the absence of a declared public health emergency?*

1. *What are the powers and authorities to institute curfews? Can local governments institute their own curfews under state and/or local law?*

   MDCH's Director, or local health officers within their jurisdictions, could order curfew under their broad authority, provided curfew is a reasonable measure to address an imminent health danger or to control an epidemic. MCL 333.2251, 333.2253, 333.2451, 333.2453. However, a state or local health officer's authority does not include issuing orders (such as curfew) as general safety measures to manage disturbances or protect property.

2. *Who can order curfew, and, if different, who makes the decision to institute curfew?*

   MDCH's director would make the decision to institute curfew, and would issue an order imposing curfew that could cover all or any area of the state. The local health officer would make the decision and issue an order imposing curfew for the local health department's jurisdiction.

3. *What is the process for implementing curfew?*

   The Public Health Code does not set out a process, and one has not been developed by MDCH.

4. *What is the process for mobilizing public health/law enforcement of curfew?*

   The Public Health Code does not set out a process, and one has not been developed by MDCH.

5. *Who can enforce curfew?*

   Any law enforcement officer could enforce curfew imposed by an order of MDCH's director since it is a misdemeanor to violate an order of MDCH. MCL 333.2261. There is no parallel provision for violation of a local health officer's order, so enforcement would most likely depend on local regulations.

6. *Penalties for violating curfew?*

   Violation of an order of MDCH is a misdemeanor punishable by six months in jail, a fine of $200, or both.

7. *How long can a curfew last?*

   There is no time limit on any of the state or local health officers' orders.

8. *How can it be renewed?*

   There is no renewal requirement.

9. *Describe the authority/process/notice requirements for ending a curfew.*

   If the state or a local health officer has the authority to impose curfew, then they have the authority to modify or end curfew. The health officer who issued an emergency order would be responsible for monitoring the conditions that warranted the order, and respond as appropriate by modifying or rescinding the order as conditions change. Notice of any modifications, or rescission, would need to be sufficient to reasonably notify individuals or groups who are subject to the curfew.

D. Sufficiency of powers/authorities – Discuss the sufficiency of the authorities and powers to institute or maintain curfew <u>in the absence</u> of a declared emergency, and any potential gaps or uncertainties in those powers and authorities.

1. *Potential gaps?*

   No known gaps in powers or authorities. However, MDCH does not address the use of curfew as a public health measure in its All Hazards Response Plan or any of its other plans. MDCH's response plans should be reviewed for possible inclusion of curfew.

2. *Uncertainties?*

   None known.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's legal basis to institute or maintain curfew? (Examples: state administrative practice acts, specific provisions in law related to curfew.)*

   As discussed in I above, exercise of state and local health authority must be in good faith, reasonable, and consistent with constitutional rights to substantive and procedural due process and guarantees of equal protection.

III. Inter-jurisdictional Cooperation and Restricting Movement of Persons

A. Legal provisions/procedures for inter-jurisdictional cooperation on restricting the movement of persons during a <u>declared</u> public health emergency – What provisions or procedures under law apply to giving and receiving assistance and otherwise working with other jurisdictions regarding restrictions of movement of persons during a declared public health emergency?

1. *Provisions or procedures governing the relationships among superior jurisdictions? Among inferior jurisdictions?*

   The Michigan Emergency Management Act, and plans thereunder, contain provisions requiring or authorizing inter-jurisdictional cooperation among superior jurisdictions and inferior jurisdictions.

   The Emergency Management Act authorizes the governor to enter into a reciprocal aid agreement or compact with another state, the federal government, or a neighboring state or province of a foreign country, with the following limitations:

   > A reciprocal aid agreement shall be limited to the furnishing or exchange of food, clothing, medicine, and other supplies; engineering services; emergency housing; police services; the services of the national guard when not mobilized for federal

> service or state defense force as authorized by the Michigan military act, … MCL 32.501 to 32.851 … and subject to federal limitations on the crossing of national boundaries by organized military forces; health, medical, and related services; fire fighting, rescue, transportation, and construction services and equipment; personnel necessary to provide or conduct these services; and other necessary equipment, facilities, and services. A reciprocal aid agreement shall specify terms for the reimbursement of costs and expenses and conditions necessary for activating the agreement. The legislature shall appropriate funds to implement a reciprocal aid agreement.

MCL 30.404(3).

The Emergency Management Act requires the emergency management division of the state police to prepare and maintain a comprehensive emergency management plan that covers mitigation, preparedness, response, and recovery for the state. MCL 30.407a. The Emergency Management Act further requires the director of each department of state government to participate in emergency planning for the state, serve as emergency management coordinator for his or her respective department, and provide an annex to the Michigan emergency management plan providing for the delivery of suitable emergency management activities. MCL 30.408. The Michigan emergency management plan describes the roles, responsibilities, and assignments of state departments, and provides the framework for state and local entities to work together under an incident command structure to address various types of emergencies. Under the emergency management plan, MDCH is the lead agency responsible for public health and mental health issues. Assigned responsibilities include:

- Coordinate the investigation and control of communicable disease and provide laboratory support for communicable disease diagnostics.
- Coordinate the allocation of medications essential to public health, including acquisition of medications from federal pharmaceutical stockpiles.
- Issue health advisories and protective action guides to the public.
- Coordinate appropriate medical services, providing support to hospitals, pre-hospital and alternate care settings in the medical management of mass casualty incidents.
- Provide technical assistance in the coordination of emergency medical services.
- Coordinate with local health departments, community mental health agencies, and state operated inpatient facilities.
- Provide liaison to federal emergency health and medical programs and services.
- Coordinate with the National Disaster Medical System.
- Ensure health facilities have emergency procedures.

As required by the Emergency Management Act, MDCH has provided and continuously updates response plans and annexes related to protecting the public's health. With regard to communicable disease, these include the Strategic National Stockpile Support Plan, Mass Fatality Plan, MDCH's All Hazards Response Plan, Communicable Disease Annex, and the Pandemic Influenza Plan. Module IX of the MDCH All Hazards Response Plan, Communicable Disease Annex, and Pandemic Influenza Response Plan address International and Border Travel Issues. Of note, many of the actual actions would be federal, although the MDCH director could implement orders to control intra-state movement, or recommend to the governor various actions. Public health procedures included in the plans include communicable disease surveillance at borders and travel alerts, warnings or bans.

The Emergency Management Act also promotes assistance during a disaster or emergency among local units of government. It provides that municipalities and counties may enter into mutual aid or reciprocal aid agreements or compacts with other counties, municipalities, public agencies, federally recognized tribal nations, or private sector agencies, or all of these entities. A compact entered into under this provision is limited to the exchange of personnel, equipment, and other resources in times of emergency, disaster, or other serious threats to public health and safety. The arrangements shall be consistent with the Michigan emergency management plan. MCL 30.410(2).

There are no provisions or procedures for inter-jurisdictional cooperation that specifically cover restrictions on the movement of persons during a public health emergency. However, there are numerous agreements for mutual aid or assistance that facilitate response to a public health emergency and could provide resources to implement social distancing measures if needed. These include provisions for sharing personnel, equipment, data, providing notification of disease threats, and providing facilities for treatment or mass prophylaxis.

These agreements include:

- **Emergency Management Assistance Compact (EMAC).** In 2001, Michigan adopted EMAC, which allows Michigan to operate as a part of the Interstate Mutual Aid Compact. See MCL 3.1001 (covering personnel) and MCL 3.991 (covering equipment). Consequently, once an emergency has been declared, Michigan has the authority to assist other states in an emergency and seek assistance from other states. This is of particular importance because the Interstate Mutual Aid Compact gives the state providing assistance a right to seek compensation for the services/assistance that it provides to the requesting state.

- **Michigan Emergency Management Assistance Compact (MEMAC).** Under the Emergency Management Act, MCL 30.410(2), Michigan has developed a mutual aid agreement for adoption by local units of governments

known as the Michigan Emergency Management Assistance Compact that may be found at http://www.michigan.gov/documents/MEMACFINAL7-3-03_69499_7.pdf MEMAC is entered into between the Michigan State Police Emergency Management and Homeland Security Division on behalf of the State of Michigan, and by and among each county, municipality, township, federally recognized tribal nation and interlocal public agency that executes the agreement and adopts its terms and conditions. MEMAC is designed to help Michigan's local governments share vital public safety services and resources more effectively and efficiently. MEMAC covers serious threats to public health and safety of sufficient magnitude that the necessary public safety response threatens to overwhelm local resources and requires mutual aid or other assistance. Typically, there would be a local, state or federal declaration of emergency or disaster; however, a declaration is not required.

- There are 1,858 local governments in the State of Michigan.[3] This includes 83 counties, 1,242 townships, 272 cities, and 261 villages. As of July 25, 2007, the number of local governments that have adopted resolutions to participate in MEMAC is 104, including:

  - Counties – 25 (30%)
  - Townships – 41 (3%)
  - Cities – 32 (18%)
  - Villages – 6 (2%)

See Appendix 3 for a list of local jurisdictions within Michigan that participate in MEMAC.

- **Mutual Aid Agreements within Regional Medical Biodefense Networks**. The State of Michigan has organized eight (8) regional medical biodefense networks that include hospitals, medical control authorities, life support agencies, and other health care facilities. As part of their disaster planning objectives, the regions have been working to develop mutual aid agreements. To date, regions 1, 5 and 8 have adopted agreements. The other five regions continue to work on this.

- **Mutual Aid Agreements among Local Health Departments.** There are 45 local health departments in the State of Michigan, including:

  - 30 single-county health departments
  - 14 multi-county, district health departments
  - 1 city health department

In addition to their participation in MEMAC, by virtue of their governing entity's participation, some local health departments have also executed mutual aid

[3] This number excludes school districts, intermediate school districts, planning and development regions and special districts and authorities. This information is from the *Michigan Manual*, p. 711.

agreements with neighboring local health departments. These agreements vary widely in terms of their scope and content. For example, the Southeast Michigan Local Health Department Mutual Aid Consortium Agreement is a relatively comprehensive mutual aid agreement. It was designed for participation by seven single-county health departments and one city health department.

- **Mutual Aid for Police Assistance.** Under MCL 123.811 *et seq*.**,** two or more counties, cities, villages, or townships, whether adjacent to each other or not, may enter into agreements to provide mutual police assistance to one another in case of emergencies. (Individuals preparing this report do not know the extent of agreements between law enforcement agencies under this law).

2. *Provisions or procedures governing the relationships between superior and inferior jurisdictions? (Include relationships among all levels of government and the federal government. See also section I-C above specifically related to quarantine orders.)*

   The Emergency Management Act requires that the Department of State Police establish an emergency management division for the purpose of coordinating within the state the emergency management activities of county, municipal, state, and federal governments. The division is responsible for the Michigan emergency management plan, shall propose and administer statewide mutual aid compacts and agreements, and shall cooperate with the federal government and any public or private agency or entity in achieving emergency management activities. MCL 30.407a.

3. *What is the legal authority of the jurisdiction to accept, utilize, or make use of federal assistance?*

   The Emergency Management Act provides that "upon declaring a state of disaster or emergency, the governor may seek and accept assistance, either financial or otherwise, from the federal government, pursuant to federal law or regulation." MCL 30.404(2). Further, the emergency management division of the State Police "shall receive available state and federal emergency management and disaster related grants-in-aid and shall administer and apportion the grants according to appropriately established guidelines to the agencies of this state and local political subdivisions." MCL 30.407a.

   The Emergency Management Act also states that the governor may enter into a reciprocal aid agreement or compact with the federal government, subject to the limitations described in 1, above (page 20). MCL 30.404(3).

B. *Sufficiency of powers/authorities to cooperate with other jurisdictions during a declared public health emergency – Discuss the sufficiency of the authorities and powers to cooperate with other jurisdictions during a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

   There are liability, workers compensation, and reimbursement questions outstanding. Current emergency response plans for communicable disease do not include provisions for limiting the usage of mass transit.

2. *Uncertainties?*

   Liability, workers compensation, and reimbursement questions.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's legal basis to cooperate with other jurisdictions? (Examples: state administrative practice acts, specific provisions in law related to inter-jurisdictional cooperation.)*

   The approval of the state administrative board is required for the governor to enter into a reciprocal aid agreement or compact under the Emergency Management Act, MCL 30.404(3).

C. *Legal provisions/procedures for inter-jurisdictional cooperation on restricting the movement of persons in the absence of a declared public health emergency – What provisions or procedures under law apply to giving and receiving assistance and otherwise working with other jurisdictions regarding restrictions of movement of persons in the absence of a declared public health emergency?*

1. *Provisions or procedures governing the relationships among superior jurisdictions? Among inferior jurisdictions?*

   Subject to provisions of general law, the Michigan Constitution authorizes the state, any political subdivision, any governmental authority, or any combination thereof to enter into agreements for the performance, financing or execution of their respective functions, with any one or more of the other states, the United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in Michigan's Constitution. Const 1963, Art III, § 5. Additionally, any unit of government is authorized to enter into an interlocal agreement under Michigan's Urban Cooperation Act, MCL 124.501 *et seq*., to exercise jointly with any other public agency of this state, another state, a public agency of Canada, or with any public agency of the U.S. government any power, privilege, or authority that the agencies share in common and that each might exercise separately. MCL 124.504.

   The Public Health Code authorizes both the state and local health departments to "[e]nter into an agreement, contract, or arrangement with governmental entities or other persons necessary or appropriate to assist the department in carrying out its duties and functions." MCL 333.2226(c), MCL 333.2435(c)(e).

Under PA 89 of 1935, MCL 798.101 *et seq*., the governor has the power to enter into interstate compacts with other states to address criminal behavior. The governor is authorized to enter into agreements or compacts with other states, for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of the penal laws and policies of the contracting states and to establish agencies, joint or otherwise, as may be deemed desirable for making effective such agreements and compacts. MCL 798.103. The intent and purpose of this act is to grant to the governor administrative power and authority if and when conditions of crime make it necessary to bind the state in a cooperative effort to reduce crime and to make the enforcement of the criminal laws of agreeing states more effective. Any interstate compact must not be inconsistent with the laws of Michigan, the agreeing states, or of the United States.

Agreements may be developed and implemented under these laws, whether or not an emergency has been declared. Additionally, with the exception of EMAC, all of the agreements described in Section III on inter-jurisdictional cooperation may be implemented in the absence of a declared public health emergency, as well as during a declared emergency. With regard to state and local health departments, declaration of an emergency or disaster does not relieve any state or local official, department head, or agency of its normal responsibilities. Nor does declaration limit or abridge the power, duty, or responsibility of the chief executive official of a county or municipality to act in the event of a disaster or emergency except as expressly set forth in the Michigan Emergency Management Act. MCL 30.417(e),(f). However, if the governor has declared an emergency or disaster, each state department and agency must cooperate with the state's emergency management coordinator and perform the services that it is suited to perform in the prevention mitigation, response to, or recovery from the emergency or disaster, consistent with the state emergency management plan. MCL 30.408.

Current agreements among superior or inferior jurisdictions include:

- **Great Lakes Border Health Initiative (GLBHI).** MDCH is a member of the GLBHI, along with the state health departments of Minnesota, New York, Ohio, Pennsylvania, and Wisconsin, and the Ontario Ministry of Health and Long-Term Care. GLBHI is funded by the Centers for Disease Control and Prevention's Early Warning Infectious Disease Surveillance (EWIDS) project, and aims to formalize relationships between U.S. and Canadian public health and emergency preparedness agencies responsible for communicable disease tracking, control and response. The member jurisdictions of Michigan, Minnesota, New York, Wisconsin, and Ontario have entered into a data sharing agreement, which is intended to improve early warning and infectious disease surveillance by facilitating the sharing of infectious disease information and establishing a protocol for communications. Ohio and Pennsylvania are expected to join the agreement once outstanding questions

have been answered. Mutual assistance agreements for equipment, specialized personnel, and services may be developed in the future.

- **Agreements with Indian Tribes.** A Memoranda of Understanding has been signed between one of Michigan's local health departments and a federally-recognized tribe to use a tribal facility as a Strategic National Stockpile dispensing facility. Two of Michigan's federally recognized tribes (Sault St. Marie Chippewa and Bay Mills Indian Community) have entered into mutual assistance agreements with the Chippewa County Health Department regarding notification of an occurrence of disease that may cause widespread illness. The Chippewa County Health Department and the Sault Ste. Marie Tribe of Chippewa Indians have also signed a mutual aid agreement regarding use of tribal property to provide mass health care in an emergency.

2. *Provisions or procedures governing the relationships between superior and inferior jurisdictions? (Include relationships among all levels of government and the federal government. See also section I-C above specifically related to quarantine orders.)*

   Under the Public Health Code, MDCH and local health departments have concurrent authority over the prevention and control of diseases within the local health department's jurisdiction. Both have powers to issue emergency orders and take other action as appropriate to address an imminent danger, epidemic, or other public health emergency. In exercising their authority, the state and local health departments must cooperate and coordinate their responses. MDCH has jurisdiction statewide. If MDCH's director determines that conditions anywhere in the state constitute a menace to the public health, she has the authority to take full charge of the administration of applicable state and local health laws, rules, regulations, and ordinances. MCL 333.2251(3). Further, while disease prevention and control programs are primarily the responsibility of local public health, MDCH's director can take primary responsibility as warranted by circumstances. MCL 333.2235(2).

3. *What is the legal authority of the jurisdiction to accept, utilize, or make use of federal assistance?*

   MDCH and local health departments are authorized to receive grants from the federal government, in accordance with the law, rules and procedures of the state (and local governing unit with regard to local health departments). MCL 333.2226(e), 333.2435(e). As discussed above, the Public Health Code authorizes both the state and local health departments to enter into an agreement, contract, or arrangement with other governmental entities, which would include the federal government.

D. *Sufficiency of powers/authorities to cooperate with other jurisdictions <u>in the absence</u> of a declared public health emergency – Discuss the sufficiency of the authorities and powers to cooperate with other jurisdictions in the absence of a declared public*

health emergency, and any potential gaps or uncertainties in those powers and authorities.

1. *Potential gaps?*

   None

2. *Uncertainties?*

   With the exception of EMAC, individuals preparing this report do not know whether Congress has given its consent to the state entering into agreements with other states or provinces. Further, it is not always clear when Congressional consent is required.

   Individuals preparing this report do not know the extent of inter-jurisdictional agreements that concern law enforcement and the existence of other agreements not discussed in this report that are relevant to inter-jurisdictional cooperation regarding a serious communicable disease outbreak.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's legal basis to cooperate with other jurisdictions? (Examples: state administrative practice acts, specific provisions in law related to inter-jurisdictional cooperation.)*

   None known.

E. *Interagency/inter-jurisdictional agreements on restricting movement of persons – Where available, identify and provide copies of all interagency and inter-jurisdictional agreements (both interstate and intrastate) relating to restrictions on the movement of persons during public health emergencies and the enforcement of such restrictions*

As discussed above, there are no provisions or procedures for inter-jurisdictional cooperation that specifically cover restrictions on the movement of persons during a public health emergency. However, the laws and agreements discussed above would facilitate response to a public health emergency and could provide resources to support social distancing measures if needed.

IV. Closure of Public Places

A. Legal powers/authorities to order closure of public places during a declared public health emergency – What are the powers, authorities, or procedures to enable, support, authorize, or otherwise provide a legal basis for closure by state or local officials of public places (e.g., public facilities, private facilities, and business) during a declared public health emergency? For each of the jurisdiction's legal powers, authorities, and procedures including, but not limited to, umbrella, general public health, or emergency powers or authorities, that could be used to authorize, prohibit, or limit closure, please address the following issues:

1. *What are the powers and authorities authorizing closure?*

   The governor is empowered to declare a disaster or emergency under circumstances where there is the threat or occurrence of widespread loss of life or injury. If the declaration involves a health emergency, an important component of mitigation would be limiting the exposure of well persons to those carrying the disease. Inasmuch as people may be infectious before they are symptomatic, closing places where large numbers of people gather in close proximity to one another may be the single most effective mitigation measure to be undertaken by the department. Accordingly, the governor, under the authority of the Emergency Management Act to direct such action "which are necessary and appropriate under the circumstances," may order the closure of public places and cancellation of public gatherings if the closures and cancellations are needed to protect the public health from spread of pandemic influenza.

2. *What are the powers and authorities prohibiting closure?*

   None known. But, there may be compensation issues.

3. *Who can declare or establish closure?*

   Under the Emergency Management Act, such orders are issued by the governor.

4. *Who makes the decision to close a public place?*

   Same as above.

5. *What is the process for initiating and implementing closure?*

   No specific process is provided in the Emergency Management Act once a declaration is made.

6. *What is the process for enforcing closure and who enforces it?*

   Violations of executive orders are crimes and may be enforced by any law enforcement officer.

7. *What are the penalties for violating closure?*

   Violation is a misdemeanor punishable by 90 days jail, a $500 fine, or both.

8. *What are the procedural and due process requirements for closure?*

   The requirements depend on whether an order requiring closure is considered a "taking" of property, requiring due process and compensation. See D.1. below (pages 32-33).

9. *Is compensation available for closure? If so, what is it?*

   Not specifically provided. But some question exists. See MCL 30.406, which addresses compensation for property and services, providing "compensation for property shall be paid only if the property is taken or otherwise used in coping with a disaster or emergency and its use or destruction is ordered by the governor or the director. A record of all property taken or otherwise used under this act shall be made and promptly transmitted to the office of the governor."

10. *How long can a closure last?*

    28 days unless extended by joint resolution of the legislature.

11. *How can it be renewed?*

    By joint resolution of the legislature.

12. *Describe the authority/process/notice requirements for ending a closure.*

    If ended by executive order, notice of termination is same as order of closure; by such means calculated to bring it to the attention of the general public.

B. *Sufficiency of powers/authorities to authorize closure of public places during a <u>declared</u> public health emergency – Discuss the sufficiency of the authorities and powers to authorize closure of public places during a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

   Compensation is the main question.

2. *Uncertainties?*

   Same as above.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's authority to close public places? (Examples: state administrative practice acts, specific provisions in law related to closure.)*

   None known.

C. *Legal powers/authorities to order closure of public places <u>in the absence</u> of a declared public health emergency – What are the powers, authorities, or procedures to enable, support, authorize, or otherwise provide a legal basis for closure by state or local officials of public places (e.g., public facilities, private facilities, and business) in the absence of a declared public health emergency? For each of the jurisdiction's legal powers, authorities, and procedures that could be used to authorize, prohibit, or limit closure, please address the following issues: What are the powers and authorities authorizing closure?*

1. *What are the powers and authorities prohibiting closure?*

   None known. There may be compensation issues.

2. *Who can declare or establish closure?*

   MDCH's director and local health officers have the authority to issue an imminent danger order, and require closure of public places as action required to avoid, correct, or remove the imminent danger. Alternatively, the director or local health officer could issue an emergency order to control an epidemic and require closure of public places as a procedure to be followed during the epidemic.

3. *Who makes the decision to close a public place?*

   MDCH's director or the local health officers for their own jurisdictions.

   The MDCH Pandemic Plan as well as the Michigan Pandemic Influenza State Operational Plan addresses the potential closure of public places in a moderate (1957-like) or severe pandemic:

   - School dismissals or closures (including daycares and colleges and universities
   - Faith-based organizations
   - Closure of public and private facilities
   - Dismissal of entertainment activities/sports venues, etc
   - Canceling of public gatherings

4. *What is the process for initiating and implementing closure?*

   No specific process is set out in the Public Health Code. The process is the same as for issuing any other emergency order.

5. *What is the process for enforcing closure and who enforces it?*

   Violation of the orders of MDCH's director is a misdemeanor, enforceable by any law enforcement officer. Additionally, MDCH (and local health officers) can go to court to seek enforcement of its orders. MCL 333.2251(2), MCL 333.2451(2). The court could punish civilly or criminally via contempt. MDCH (and local health officers) may also maintain injunctive action "to restrain, prevent, or correct a violation of a law, rule, or order which the department [local health

officer] has the duty to enforce or to restrain, prevent, or correct an activity or condition which the department believes adversely affects the public health." MCL 333.2255, MCL 333.2465.

6. *What are the penalties for violating closure?*

   Violation of an order of MDCH's director is a misdemeanor, punishable by six months in jail or $200, or both. MCL 333.2261. Enforcement and penalties for violation of a local health officer's order depends on local law.

7. *What are the procedural and due process requirements for closure?*

   As discussed under "gaps" below (pages 32-33), MDCH needs to consult with the Department of Attorney General on constitutional parameters.

8. *Is compensation available for closure? If so, what is it?*

   No. This issue needs to be reviewed and addressed as a legal and a policy issue.

9. *How long can a closure last?*

   There is no time limit on any of the state or local health officers' orders; nor is there a renewal requirement. The health officer who issued an emergency order would be responsible for monitoring the conditions that warranted the order, and respond as appropriate by modifying or rescinding the order as conditions change. Notice of any modifications, or rescission, would need to be sufficient to reasonably notify individuals or groups who are subject to the order.

10. *How can it be renewed?*

    See answer to 9 above. There is no renewal requirement.

11. *Describe the authority/process/notice requirements for ending a closure.*

    Closure is ended the same way it is commenced. An order is issued terminating the prior order closing public places, with notice sufficient to reasonably notify the public.

D. *Sufficiency of powers/authorities to authorize closure of public places <u>in the absence</u> of a declared public health emergency – Discuss the sufficiency of the authorities and powers to authorize closure of public places in the absence of a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

   Closing public places, and related prohibitions on gatherings, raise several issues under the United States and Michigan Constitutions. Under the Michigan Constitution, these include:

- No person shall be deprived of liberty or property without due process of law. Const 1963, Art I, §17.
- Freedom of assembly, free speech, and religion. Art I §§3, 4, 5.
- Eminent domain; private property shall not be taken for public use without just compensation. Const 1963, Art X, §2

MDCH will need to obtain legal advice from the Department of Attorney General on constitutional parameters for closing public places, prohibiting gatherings, and measures to restrict movement. Procedures and process need developed based both on legal and policy considerations.

2. *Uncertainties?*

   See answer above.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's authority to close public places? (Examples: state administrative practice acts, specific provisions in law related to closure.)*

   Only those already noted.

V. Mass Prophylaxis Readiness

A. *Legal powers/authorities for issuance of blanket prescriptions and use of other mass prophylaxis measures during a declared public health emergency – If it became necessary during a declared public health emergency to issue blanket prescriptions or order the use of other mass prophylaxis measures to enable emergency mass distribution of medical countermeasures (e.g., antivirals, vaccines), what legal powers, authorities, and procedures could enable, support, authorize or otherwise provide a legal basis for doing so? List all legal powers and authorities, policies, and procedures that could be used to authorize blanket prescriptions or other mass prophylaxis measures. For each of the powers and authorities listed, please address:*

1. *Who would make the decision to issue the blanket prescriptions or use other mass prophylaxis measures?*

   In a declared state of emergency the governor can suspend the regulatory statutes and regulations that would in any way hinder or delay necessary action in coping with the emergency or disaster. MCL 30.405(1)(a). The governor is further authorized to utilize all available resources of the state government and each political subdivision of the state as reasonably necessary to cope with the emergency or disaster. MCL 30.405(1)(b). Under a declared state of disaster or emergency the governor could authorize a suspension of the statutory and regulatory requirements for prescriptions. The governor could directly authorize for mass prescribing and dispensing of vaccines, antivirals and other medications by others such as nurses, dentists, veterinarians and Emergency Medical Technicians (EMT).

2. *Who has the authority to issue the blanket prescriptions or order the use other mass prophylaxis measures?*

   Under the Emergency Management Act, the power to order the use of mass prophylaxis is given to the governor. Since the governor does not meet the licensing requirements for a "prescriber," she cannot issue blanket prescriptions unless she suspends the statutory and regulatory requirements for prescriptions. The Director of MDCH also has the legal authority to order the use of mass prophylaxis, and the Chief Medical Executive for MDCH has the authority to issue blanket prescriptions. Under the Michigan Emergency Management Plan (MEMP), which is consistent with the National Response Plan, MDCH is the lead agency for Emergency Support Function (ESF) #8. ESF #8 concerns the public health and mental health needs of the community, and includes coordinating the allocation of medications essential to public health and appropriate medical services. Thus, decisions regarding mass prophylaxis will most likely be made by the MDCH Director, with advice from the Chief Medical Executive, in addition consultation from the OPHP Director, the State Epidemiologist, and other Executive Staff or subject matter experts.

3. *How would the countermeasures be distributed?*

   The Emergency Management Act does not specifically address distribution of countermeasures. However, detailed distribution plans for countermeasures for each federal stage/WHO phase are part of the MDCH Pandemic Influenza Plan and the MDCH Strategic National Stockpile Plan. Response includes:

   - Receipt, storage and distribution of Strategic National Stockpile to local jurisdictions (carried out by MDCH's Office of Public Health Preparedness, as set out in the SNS Plan)
   - Coordinating local health department mass vaccination clinics
     Monitoring of antiviral or vaccine administration with the Michigan Care Improvement Registry (MCIR)[4]
     Monitoring of vaccine administration with MCIR
     Monitoring of adverse effects (VAERS, AERS)
   - Dispensing of antibiotics for post-exposure prophylaxis (CME's Standing Orders/ local medical directors Standing Orders) from bioterror or communicable disease agent
   - Dispensing of KI in a nuclear emergency
   - Dispensing chemical or biological agent remedies
     MEDDRUN is a state resource
     Chempack is a federal resource for chemical response

   Distribution will depend upon the event. Mobilization of the SNS requires a

[4] Effective April 4, 2006, Michigan amended its law that created the Michigan Child Immunization Registry to expand it to a "care improvement registry" that could include immunization information on adults and be used during in an emergency to monitor antiviral or vaccine administration. MCL 333.9207.

Governor's Order, but local and state resources have to be depleted first. Before that MEDDRUN and CHEMPACK can be mobilized emergently within the first 24-48hours of an event. SNS Plans and the MEPPP address the procedures for such counter measures. Mass Dispensing Plans and Mass Vaccination Plans are outlined for every Local Health Department. Vaccine and antiviral countermeasure distribution plans are in place within the SNS Plan for Pandemic influenza, and distribution will occur pre-event; that is, in WHO Phases 4 and 5, so as to pre-position resources.

B. *Sufficiency of authorities/procedures to issue blanket prescriptions or order the use of other mass prophylaxis measures during a declared public health emergency – Discuss the sufficiency of the authorities and powers to issue blanket prescriptions or order the use of other mass prophylaxis measures during a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

   None known.

2. *Uncertainties?*

   None known.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's authority to issue blanket prescriptions or order the use of other mass prophylaxis measures? (Examples: state administrative practice acts, specific provisions in law related to blanket prescriptions/mass prophylaxis.)*

   None known.

C. *Legal powers/authorities for issuance of blanket prescriptions and use of other mass prophylaxis measures in the absence of a declared public health emergency – If it became necessary in the absence of a declared public health emergency to issue blanket prescriptions or order the use of other mass prophylaxis measures to enable emergency mass distribution of medical countermeasures (e.g., antivirals, vaccines), what legal powers, authorities, and procedures could enable, support, authorize or otherwise provide a legal basis for doing so? List all legal powers and authorities, policies, and procedures that could be used to authorize such blanket prescriptions or order the use of other mass prophylaxis measures. For each of the powers and authorities listed, please address:*

1. *Who would make the decision to issue the blanket prescriptions or use other mass prophylaxis measures?*

   State and local public health would operate under the authority of the Public Health Code. The director of MDCH, and the local health officers, would make the decision whether to use mass prophylaxis measures, in consultation with the chief medical executive or medical director. If MDCH's director is not a physician, the director must designate a physician as chief medical executive who

is responsible to the director for the medical content of policies and programs. MCL 333.2202(2). Similarly, if a local health officer is not a physician, a physician must be appointed as medical director "responsible for developing and carrying out medical policies, procedures, and standing orders and for advising the administrative health officer on matters related to medical specialty judgments. R 325.13001.

2. *Who has the authority to issue the blanket prescriptions or order the use other mass prophylaxis measures?*

   The director of MDCH, and the local health officer for his or her jurisdiction, have the authority to order the use of mass prophylaxis measures. Most likely, this would be done as an emergency order to respond to an imminent threat or danger to the public health or as an emergency order to address an epidemic. MCL 333.2251, 333.2253, 333.2451, 333.2453. If the state or local health officer is not a physician, blanket prescriptions would need to be issued by the chief medical executive or medical director. Standing orders for prescriptions and protocols for administering are already in place for pandemic influenza for mass dispensing sites. When MDCH approves a mass immunization program to be administered in the state, health personnel employed by a governmental entity who are required to participate in the program, or any other individual authorized by the director or a local health officer to participate in the program without compensation, are not liable to any person for civil damages as a result of an act or omission causing illness, reaction, or adverse effect from the use of a drug or vaccine in the program, except for gross negligence or willful and wanton misconduct. MCL 333.9203(3)

3. *How would the countermeasures be distributed?*

   Mass vaccination clinics, Points of Distribution sites- see local and State Mass Dispensing/ Vaccination and the SNS plans

D. *Sufficiency of authorities/procedures to issue blanket prescriptions or order the use of other mass prophylaxis measures <u>in the absence of</u> a declared public health emergency – Discuss the sufficiency of the authorities and powers to issue blanket prescriptions or order the use of other mass prophylaxis measures in the absence of a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

   None known.

2. *Uncertainties?*

   None known.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's authority to issue blanket prescriptions or order the use of other mass prophylaxis measures?*

(Examples: state administrative practice acts, specific provisions in law related to blanket prescriptions mass prophylaxis.)

The Public Health Code recognizes the right of individuals to refuse medical treatment, testing, or examination based on religious beliefs. MCL 333.5113. This right is not absolute, however, and a court may impose certain conditions on a carrier of a serious communicable disease who is a health threat to others under Part 52 of the Public Health Code, MCL 333.5201 *et seq.*

Conclusion

Michigan has many laws, response plans, and agreements in place for effective response to pandemic influenza, including pharmaceutical and social distancing measures. Completing this assessment has been valuable to identify areas of law that require further research, discussion, and development of process and procedures. This is especially true for social distancing measures that implicate constitutional rights of due process, freedom of religion, freedom of speech and assembly, and compensation for private property taken for the common good. Participating in this project has also emphasized the importance of policy and ethical considerations, as well as legal issues, in planning/implementing response measures to pandemic influenza. For example, the closure of businesses results in loss of income to the business owner. This raises legal - as well as policy and ethical questions - about the burden on the business owner for the common good. Similarly, the single mother without sick leave bears the burden of loss of income by home quarantine because she happened to be on a plane with sick passengers.

Completing this assessment has also helped identify potential gaps in response plans involving particular measures (such as mass transit limitations and curfew) and highlighted some logistical challenges (such as enforcement of measures). From this assessment it appears that several areas need to be pursued further with other government partners, namely implementation of social distancing measures involving Michigan's constitutionally created universities, on federal lands, and on Indian land.

VI. Other Issues

A. Other resources (legal powers and authorities, plans, policies or procedures, etc.) that your state might employ or rely upon to assist in pandemic response and the implementation of social distancing measures and/or mass prophylaxis readiness?

In addition to resources described above, the Attorney General's Office is completing a bench book covering public health emergencies.

MDCH's Director issued a memorandum in July 2004 explaining to health care providers that the HIPAA privacy rule does not impact state law requiring that identifiable patient information be provided to public health staff related to the prevention and control of serious communicable disease. This memorandum is in both hard copy and electronic form and widely available to assist public health staff address concerns or refusal to provide requested health information based on HIPAA.

B. Other such resources (e.g., laws, regulations, or policies; money, personnel, research, training) you do not currently have but would like to have? If so, what are they?

It appears that all levels of government have concerns about the source(s) of funding to implement restrictions on movement and social distancing measures.

C. Anything unique to your state in terms of pandemic preparedness and response measures related to social distancing or mass prophylaxis?

Michigan has the second highest person volume crossing (after New York) from Ontario to the United States, including three bridges and one tunnel. In addition to entry through the U.S./Canadian border, Michigan has four international airports.

VII. Table of Authorities

Attach a Table of Authorities as an appendix to the report, listing citations for all relevant legal authorities or procedures, including statutes, regulations, case law, Attorney General opinions, etc. Please list the code section or citation, followed by the text and a hyperlink, if available.

A Table of Authorities is provided as Appendix 1.

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions