STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE CERTIFIED QUESTION FROM THE U.S. DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN.

Supreme Court No. 161492

USDC-WD: 1:20-cv-414

MIDWEST INSTITUTE OF HEALTH, PLLC, D/B/A GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, and JEFFREY GULICK,

Plaintiffs,

v

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

Defendants.
_____/

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

BRIEF OF GOVERNOR AND DIRECTOR OF DEPARTMENT OF HEALTH AND HUMAN SERVICES

ORAL ARGUMENT REQUESTED

B. Eric Restuccia
Deputy Solicitor General

Christopher M. Allen (P75329)
Assistant Solicitor General

Joseph T. Froehlich (P71887)
Joshua Booth (P53847)
John Fedynsky (P65232)
Kyla Barranco (P81082)
Assistant Attorneys General
Department of Attorney General
Attorney for the Governor and Director
P.O. Box 30212
Lansing, Michigan 48909
(517) 335-7656

Dated: August 6, 2020

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF JURISDICTION

The federal district court for the Western District of Michigan certified two questions to this Court on June 16, 2020. This Court has jurisdiction over this case under MCR 7.308(A)(2).

STATEMENT OF QUESTIONS PRESENTED

The federal district court certified two questions to this Court: (1) whether, under the Emergency Powers of the Governor Act, MCL § 10.31, et seq., or the Emergency Management Act, MCL § 30.401, *et seq*., Governor Whitmer has the authority after April 30, 2020 to issue or renew any executive orders related to the COVID-19 pandemic; and (2) whether the Emergency Powers of the Governor Act and/or the Emergency Management Act violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution.

The Plaintiffs separated the matter into four headings, and this brief shall do the same, except it shall first address the issue whether this Court should answer the certified question as an initial matter. The questions presented therefore are as follows:

I. By court rule, this Court has discretion on whether to answer a question that has been certified by a federal court. The executive orders at issue here – governing non-essential medical procedures – were rescinded more than 60 days ago. In light of the serious questions of mootness and sovereign immunity in the underlying case, should this Court resolve these state law claims as a certified question in these circumstances?

The Governor and Director answer: No.

Plaintiffs answer: Yes.

II. Under the Emergency Management Act, the Governor is duty-bound to declare a state of disaster or emergency where the circumstances, such as here, warrant it. By law, that declaration terminates after 28 days unless extended by "resolution of both houses of the legislature" but does not prohibit the Governor from issuing a new declaration. Where emergency and disaster conditions remained, did the Governor have the authority to issue a new declaration under the EMA?

The Governor and Director answer: Yes.

Plaintiffs answer: No.

III. Under the Emergency Powers of the Governor Act, the Governor may declare an emergency where, as here, the circumstances warrant it. The Plaintiffs assert that that the Governor can only exercise the authority under the EPGA for "time limited" emergencies. Where the EPGA provides for no such predetermined time limitations on the duration of the emergency, did the Governor have the authority to issue a declaration under the EPGA during this ongoing emergency?

The Governor and Director answer: Yes.

Plaintiffs answer: No.

IV. The EPGA authorizes the Governor, in times of emergency, to promulgate "reasonable" orders that are "necessary" to protect life and property or to bring the emergency under control. Any legislative enactment must respect the Separation of Powers and corresponding constitutional principles of non-delegation. Where such standards provide guidance appropriate to the context of emergency response and are ubiquitous in the law, does Michigan law violate these constitutional principles?

The Governor and Director answer: No.

Plaintiffs answer: Yes.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

Const 1963, art 3, § 2 provides, in pertinent part:

> 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.

Const 1963, art 4, § 1 provides, in pertinent part:

> Except to the extent limited or abrogated by article IV, section 6 or article V, section 2, the legislative power of the State of Michigan is vested in a senate and a house of representatives.

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

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

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

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

Constitutional Provisions

Const 1963, art 5, § 1:

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

Pertinent Provisions of the Emergency Powers of the Governor Act

MCL 10.31:

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

MCL 10.32:

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

MCL 10.33

The violation of any such orders, rules and regulations made in conformity with this act shall be punishable as a misdemeanor, where such order, rule or regulation states that the violation thereof shall constitute a misdemeanor.

Pertinent Provisions of the Emergency Management Act

MCL 30.402(e):

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

MCL 30.402(h):

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

MCL 30.402(p):

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

MCL 30.402(q):

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

MCL 30.403:

(1) The governor is responsible for coping with dangers to this state or the people of this state presented by a disaster or emergency.

(2) The governor may issue executive orders, proclamations, and directives having the force and effect of law to implement this act. Except as provided in section 7(2), an executive order, proclamation, or directive may be amended or rescinded by the governor.

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

(4) The governor shall, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists. The state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency has been in effect for 28 days. After 28 days, the governor shall issue an

executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature. An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the emergency, the area or areas threatened, the conditions causing the emergency, and the conditions permitting the termination of the state of emergency. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and shall be promptly filed with the emergency management division of the department and the secretary of state, unless circumstances attendant upon the emergency prevent or impede its prompt filing.

MCL 30.404:

(1) An executive order or proclamation of a state of disaster or a state of emergency shall serve to authorize the deployment and use of any forces to which the plan or plans apply and the use or distribution of supplies, equipment, materials, or facilities assembled or stockpiled pursuant to this act.

(2) Upon declaring a state of disaster or a state of emergency, the governor may seek and accept assistance, either financial or otherwise, from the federal government, pursuant to federal law or regulation.

(3) The governor may, with the approval of the state administrative board, enter into a reciprocal aid agreement or compact with another state, the federal government, or a neighboring state or province of a foreign country. 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, Act No. 150 of the Public Acts of 1967, as amended, being sections 32.501 to 32.851 of the Michigan Compiled Laws, 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 30.405:

(1) In addition to the general authority granted to the governor by this act, the governor may, upon the declaration of a state of disaster or a state of emergency do 1 or more of the following:

(a) 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. This power does not extend to the suspension of criminal process and procedures.

(b) 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.

(c) Transfer the direction, personnel, or functions of state departments, agencies, or units thereof for the purpose of performing or facilitating emergency management.

(d) Subject to appropriate compensation, as authorized by the legislature, commandeer or utilize private property necessary to cope with the disaster or emergency.

(e) Direct and compel the evacuation of all or part of the population from a stricken or threatened area within the state if necessary for the preservation of life or other mitigation, response, or recovery activities.

(f) Prescribe routes, modes, and destination of transportation in connection with an evacuation.

(g) Control ingress and egress to and from a stricken or threatened area, removal of persons within the area, and the occupancy of premises within the area.

(h) Suspend or limit the sale, dispensing, or transportation of alcoholic beverages, explosives, and combustibles.

(i) Provide for the availability and use of temporary emergency housing.

(j) Direct all other actions which are necessary and appropriate under the circumstances.

(2) Subsection (1) does not authorize the seizure, taking, or confiscation of lawfully possessed firearms or ammunition.

(3) A person who willfully disobeys or interferes with the implementation of a rule, order, or directive issued by the governor pursuant to this section is guilty of a misdemeanor.

MCL 30.417 provides, in pertinent part:

This act shall not be construed to do any of the following:

(a) Interfere with the course or conduct of a labor dispute. However, actions otherwise authorized by this act or other laws may be taken when necessary to forestall or mitigate imminent or existing danger to public health or safety.

(b) Interfere with the dissemination of news or comment on public affairs. However, any communications facility or organization, including radio and television stations, wire services, and newspapers, may be requested to transmit or print public service messages furnishing information or instructions in connection with a disaster or emergency.

(c) Affect the jurisdiction or responsibilities of law enforcement agencies, fire fighting forces, and units or personnel of the armed forces of the United States when on active duty. However, state, local, and interjurisdictional emergency operations plans shall place reliance upon the forces available for performance of functions related to disasters or emergencies.

(d) Limit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of the Michigan Compiled Laws, or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of this state independent of, or in conjunction with, this act.

INTRODUCTION

The novel coronavirus menacing this State and country is a public health emergency. It has infected millions, killed hundreds of thousands, and continues to spread in our communities and across state lines. It is the gravest health crisis this country has faced in more than a century. In response, every Governor in the country declared a state of emergency. As of July 30, every state still had one.

The questions presented here ask whether Michigan's Governor had the authority to declare and reissue the states of emergency. They are basic ones, important to the principles of democracy, and the answers are critical to the protection of Michigan's residents as they face the most dangerous threat to their health in generations. Michigan has more than 60,000 cases of this disease, and more than 6,000 have died. Many more would have died had not the Governor taken immediate and effective action. The evidence is unmistakable that the threat remains imminent, as the country has seen on average more than 50,000 new cases and more than 1,000 deaths a day recently for the first time since early June.

But as this Court knows well, that a question may be important does not mean that it is well presented. The Plaintiffs as health providers filed a complaint in federal district court challenging temporary limitations on non-essential medical procedures, limitations that were lifted two months ago. The Plaintiffs' claims are thus moot. Furthermore, the state-law questions they present are barred from consideration in federal court by the Eleventh Amendment. The federal district court found sovereign immunity waived and mootness not an issue, but settled law indicates otherwise, and the immunity ruling is now pending on appeal.

The certification process is a good one, and the Governor and Director value it. But not in this case. Not with claims that should have been dismissed on two separate justiciability grounds. With serious issues of mootness and immunity pervading the case, this Court should refrain from taking up significant legal questions in what could be little more than an advisory opinion, and when other pending cases already raise these issues. The questions are too important to be answered in this setting.

If this Court disagrees, then the Governor and Director ask this Court to reject the statutory and constitutional challenges the Plaintiffs have raised and confirm the validity of the Governor's declarations of disaster and emergency under the Emergency Powers of the Governor Act (EPGA) and the Emergency Management Act (EMA).

First, under the EMA, the Governor has the authority, in fact the duty, to declare a state of disaster and a state of emergency because that is exactly what Michigan is facing. The EMA's language, and the experience of the entire country, support the declaration. Yet, the legal issue is a narrow one: did the Governor properly issue a new declaration under the EMA after the Legislature refused to extend the original one? The answer is yes. The statutory text and common-sense lead to this conclusion. A plain reading of the EMA shows that it does not bar a new declaration, but instead compels one whenever the conditions on the ground warrant it, as one would expect from a grant of emergency powers designed to protect and assist the people of this State in times of crisis.

Second, the Governor has properly exercised her authority under the EPGA. The statutory language is clear. The pandemic presents an "emergency," one that is an immediate threat to the public. The EPGA is not, as the Plaintiffs contend, "time limited." And wisely so. The reality – as confirmed by the universal efforts to respond to this public health threat – is that an emergency can be ongoing. The EPGA duly reflects this and equips the Governor to respond accordingly. And the Plaintiffs' effort to read into the EPGA the 28-day limit from the EMA contradicts both the EPGA's and EMA's text in multiple respects, as confirmed most plainly in the EMA's express statement of scope in § 17 that it does not "[l]imit, modify, or abridge" the EPGA or any other statutory power conferred on the Governor.

Third, the EPGA does not violate the doctrines of Separation of Powers or of non-delegation. Many states have emergency statutes granting their governors authority to take the kind of actions that the Governor has taken here. Under the EPGA, those actions must be "reasonable" and "necessary," they must be directed at "protect[ing] life and property" or "bring[ing] the emergency situation . . . under control," and they may only be taken during a time of "public emergency" or "reasonable apprehension of immediate danger." These are real limitations. This is not a grant of unlimited executive power, as there is much that the Governor cannot do. The EPGA standards are not meaningless, just as the concepts of Equal Protection or Due Process are not meaningless. This Court has upheld similar frameworks, like "good cause" as a standard. The Legislature created reasonably precise standards for the Governor given the nature of the laws at issue here.

And the Governor is not acting under an improper delegation of legislative authority. She is executing emergency response, as authorized, constrained, and guided by law. The nature of governance, and of emergencies, requires it.

Throughout, democracy remains secure. The Legislature may override the Governor. Her decisions are subject to judicial review. And she must stand for reelection. That is how our democracy works. Legitimate governmental power is derived from the consent of the governed, which is a bedrock principle animating both our founding and the present day. In a representative democracy, it is expressed through executive action taken under valid, duly enacted statutes. Under both the EMA and EPGA, the Governor has done just that.

STATEMENT OF FACTS AND PROCEEDINGS

The coronavirus spreads easily and can cause extended hospitalization.

The facts surrounding the COVID-19 pandemic are well-established. SARS-CoV-2 is similar to other coronaviruses (a large family of viruses that cause respiratory illnesses), but the strain is novel. There is no general or natural immunity built up in the population (meaning everyone is susceptible), no vaccine, and no known treatment to combat the virus itself (as opposed to treatment to mitigate its symptoms).

It is widely known and accepted that COVID-19, the disease that results from the virus, is highly contagious, spreading easily from person to person via

"respiratory droplets."[1] Experts agree that being anywhere within six feet of an infected person puts you at a high risk of contracting the disease.[2] But even following that advice is not a sure-fire way to prevent infection. The respiratory droplets from an infected person can land on surfaces and be transferred many hours later to the eyes, mouth, or nose of others who touch the surface. Moreover, since many of those infected experience only mild symptoms, a person could spread the disease before he even realizes he is sick.[3] Most alarmingly, a person with COVID-19 could display no symptoms, but still spread the disease.[4]

The severity of the disease varies from person to person. While some exhibit only mild or no symptoms, nearly 19% of those infected—particularly those with other underlying medical conditions or advanced age—may require extended hospitalization or intensive care.[5]

---

[1] World Health Organization, *Transmission of SARS-CoV-2: implications for infection prevention precautions*, https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions .

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

[3] Centers for Disease Control and Prevention, *Evidence Supporting Transmission of Severe acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic*, https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article (explaining that "[o]ne report suggested that up to 13% of infections may be transmitted during the presymptomatic period of illness").

[4] *Id.*

[5] Centers for Disease Control and Prevention, *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html

The Governor declares states of emergency and disaster.

On March 10, 2020, in response to the growing pandemic in Michigan, Governor Whitmer declared a state of emergency and invoked the emergency powers available to the Governor under Michigan law—pursuant to her authority under the Emergency Powers of the Governor Act (EPGA), the Emergency Management Act (EMA), and Article 5, § 1. (Executive Order 2020-4, Pls' App'x 83a.) Governor Whitmer was not alone. Every state in the country declared a similar state of emergency or disaster under their state laws during the month of March.[6]

With this authority invoked, the Governor began to issue substantive executive orders to stem the tide of COVID-19 infections. These included caps on large assemblages of people,[7] closures of premises of certain places of public accommodation,[8] and various iterations of the now-rescinded Stay Home, Stay Safe Order, which was frequently adjusted in light of the ever-changing challenges presented by this pandemic.[9]

---

[6] National Governors Association, *Status of State COVID-19 executive orders*, https://www.nga.org/state-covid-19-emergency-orders/

[7] See, e.g., Executive Order 2020-5, available at http://www.legislature.mi.gov/(S(ojwjgvr1bgsajzswprgsjcnd))/mileg.aspx?page=executiveorders

[8] See, e.g., Executive Order 2020-9, available at http://www.legislature.mi.gov/(S(ojwjgvr1bgsajzswprgsjcnd))/mileg.aspx?page=executiveorders

[9] See generally Executive Orders 2020-21, 2020-42, 2020-59, 2020-70, 2020-77, and 2020-92, available at http://www.legislature.mi.gov/(S(ojwjgvr1bgsajzswprgsjcnd))/mileg.aspx?page=executiveorders

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

Relevant here, on March 20, 2020, the Governor issued Executive Order 2020-17, entitled "Temporary restrictions on non-essential medical and dental procedures." (Pls' App'x 85a.) It required "all hospitals, freestanding surgical outpatient facilities, and dental facilities, and all state-operated outpatient facilities . . . must implement a plan to temporarily postpone . . . all non-essential procedures." (Pls' App'x 86a, ¶ 1.) As the order signaled in its preamble, this postponement-plan requirement was imposed "[t]o mitigate the spread of COVID-19, protect the public health, provide essential protections to Michiganders, and ensure the availability of health care resources," such as personal protective equipment, hospital beds, and other resources – which were in high and immediate demand as a result of this aggressively spreading pandemic, but in troublingly short supply. (Pls' App'x 85a.) The Governor's Stay Home orders correspondingly incorporated these postponement requirements into their provisions regarding authorized travel. See, e.g., EO 2020-77(7)(a)(6) (permitting individuals to travel for necessary medical care, including medical procedures that had not been postponed pursuant to EO 2020-17).

The Governor terminates the states of emergency and disaster under the EMA after the Legislature refuses to extend them.

On April 1, the Governor issued Executive Order 2020-33, which expanded upon the prior declaration of a state of emergency and, consistent with the virus's aggressive and destructive spread, declared states of emergency and disaster across

the State of Michigan. (Pls' App'x 88a.) Under the EMA (though not the EPGA), the declarations must be terminated after 28 days absent resolution by both houses of the Legislature. MCL 30.403(3), (4). On April 7, the Michigan House and Senate approved an extension of the declaration until April 30, 2020.

Prior to April 30, the Governor again asked the Legislature to extend the states of disaster and emergency under the EMA pursuant to MCL 30.403(3) and (4), but the Legislature did not do so.

On April 30, 2020, then, the Governor issued a series of three executive orders. First, Executive Order 2020-66 (Pls' App'x 101a) declared the previously issued states of emergency and disaster under the EMA terminated as required by MCL 30.403(3) and (4) because the Legislature refused to extend them. Although noting that "the threat and danger posed to Michigan by the COVID-19 pandemic has by no means passed, and the disaster and emergency conditions it has created very much exist," the Governor recognized that the Legislature – "despite the clear and ongoing emergency and disaster conditions afflicting our state – has refused to extend [the states of emergency and disaster] beyond today." (Pls' App'x 104a.) Accordingly, she was required by the EMA's plain language to issue an order "terminat[ing]" the states of emergency and disaster. (*Id.*)

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

After terminating the prior declarations, the Governor again declared a state of emergency and a state of disaster under the EMA. (Executive Order 2020-68, Pls'

App'x 109a.) Although the measures issued pursuant to her emergency authority had been working, "the need for them—like the unprecedented crisis posed by this global pandemic—is far from over." (Pls' App'x 110a.) COVID-19, she said,

> remains present and pervasive in Michigan, and it stands ready to quickly undo our recent progress in slowing its spread. Indeed, while COVID-19 initially hit Southeast Michigan hardest, the disease is now increasing more quickly in other parts of the state. [*Id.*]

The Governor also found, "[t]he health, economic, and social harms of the COVID-19 pandemic thus remain widespread and severe, and they continue to constitute a statewide emergency and disaster." (Pls' App'x 111a.) Thus, she stated: "I now declare a state of emergency and a state of disaster across the State of Michigan under the Emergency Management Act." (Pls' App'x 112a.) And she ordered "[a]ll previous orders that rested on Executive Order 2020-33 now rest on this order." (*Id.*)

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

In the third Executive Order of the series, the Governor reaffirmed the state of emergency under the EPGA, ordering that "[a] state of emergency remains declared across the State of Michigan under the Emergency Powers of the Governor Act of 1945." (Pls' App'x 105a, Executive Order 2020-67.) And like in Executive Order 2020-68, she ordered, "Executive Order 2020-33 is rescinded and replaced. All previous orders that rested on Executive Order 2020-33 now rest on this order." (Pls' App'x 107a–108a.)

The Governor rescinds the executive orders affecting the Plaintiffs, yet the Plaintiffs maintain suit in federal court.

On May 12, 2020, Plaintiffs filed suit in the District Court for the Western District of Michigan, raising challenges both to the Governor's authority to issue Executive Orders 2020-17 and 2020-77, and the propriety of those orders under the state and federal constitutions. Pertinent here, the Plaintiffs alleged that the Governor's emergency authority under both the EMA and the EPGA terminated on April 30 (Pls' App'x 23a,¶ 92), and also claimed that the EPGA and the EMA violate the Separation of Powers of the Michigan Constitution. (Pls' App'x 25a, ¶ 100–111.)

Nine days after the Plaintiffs filed their complaint, on May 21, 2020, the Governor issued Executive Order 2020-96, which rescinded Executive Order 2020-17 effective May 28, 2020 at 11:59 p.m, and also lifted its corresponding travel limitation. (Pls' App'x 125a.) As that order's preamble explained, the urgent concerns that had required the imposition of those requirements had shown sufficiently reliable signs of abatement: "our health-care capacity has improved with respect to personal protective equipment, available beds, personnel, ventilators, and necessary supplies." (Pls' App'x 114a.)

The federal district court certifies questions to this Court.

The district court sua sponte ordered briefing on whether the Court should certify the Plaintiffs' state law claims and held a hearing to consider the question. After the hearing, the State Defendants filed a joint motion for reconsideration raising the Eleventh Amendment as a bar to the district court's exercise of any jurisdiction over the state law claims, adding it to the other jurisdictional

challenges to the court's consideration of these claims (such as mootness, qualified immunity, and abstention) that they had raised in prior filings and that were then also pending before the court.

Despite the rescission of the challenged restrictions, on June 16, 2020, the court determined the case was not moot (Pls' App'x 65a), and certified two questions to this Court:

> (1) Whether, under the Emergency Powers of the Governor Act, MCL § 10.31, *et seq*., or the Emergency Management Act, MCL § 30.401, et seq., Governor Whitmer has the authority after April 30, 2020 to issue or renew any executive orders related to the COVID-19 pandemic; and
>
> (2) Whether the Emergency Powers of the Governor Act and/or the Emergency Management Act violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution. [Pls' App'x 60a.]

In a separate ruling issued that same day, the court also refused to dismiss the state law claims on the basis of sovereign immunity. As the court recognized, "[S]tate officials enjoy Eleventh Amendment immunity for all lawsuits that bring state-law claims against state officials in federal court, whether the claims are monetary or injunctive in nature." (Pls' App'x 54a.) Yet, the court found that the State Defendants waived their Eleventh Amendment immunity by not raising it in the principal briefs of their motions to dismiss or in initial response to the court's invitation to brief the propriety of certification to this Court. (Pls' App'x 58a.) The State Defendants have appealed that ruling; the case remains pending in the Sixth Circuit. (CA 6, Docket No. 20-1611.)

The virus rages on.

In recent months, as Michigan began to flatten the curve of the virus's spread, other States began voluntarily reopening. Several of those states have seen dramatic increases in cases over the past several weeks, stressing hospital capacity.[10] Texas, for example, saw its hospital bed usage explode in July, more than quintupling the number of COVID-19 patients requiring hospitalization since April and May.[11] Nearly every day of July, Florida saw over 9,000 confirmed infections and several days with over 100 deaths.[12] On the whole, the United States' daily case count registered new records throughout July, and the death toll to surpassed 150,000.[13]

Given the ongoing threat in Michigan throughout this spring and summer, the Governor has extended the states of emergency and disaster under the EPGA and EMA, which remain in place today.[14] And like all 50 States, the District of

---

[10] The Texas Tribune, *Texas hospitals are running out of drugs, beds, ventilators and even staff*, https://www.texastribune.org/2020/07/14/texas-hospitals-coronavirus/

[11] Texas Department of State Health Services Dashboard, available at https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429

[12] Florida Department of Health, Florida's COVID-19 Data and Surveillance Dashboard, https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429

[13] Centers for Disease Control, *United States COVID-19 Cases and Deaths by State*, https://www.cdc.gov/covid-data-tracker/#cases

[14] See Executive Order 2020-99 (extending through June 19, 2020) (Pls' App'x 142a); Executive Order 2020-127 (extending through July 16, 2020) (Pls' App'x 146a); Executive Order 2020-151 (extending through August 11, 2020) (Pls' App'x 150a).

Columbia, and four territories, Michigan remains subject to major disaster declarations under federal law making federal funding available to combat the disease.[15] The Governor's actions under state law are also consistent with the nation as a whole – as of this filing, all 50 states (and several territories and the District of Columbia) have in place declared emergencies.[16]

STANDARD OF REVIEW

This Court's review of certified questions is discretionary. See MCR 7.303(B)(4).

In each of these executive orders, the Governor noted that Executive Orders 2020-67 and 2020-68 were subject to challenge in *Michigan House of Representatives and Michigan Senate v Whitmer* (see, e.g., Pls' App'x 140a), and that

> This order constitutes a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. Subject to the ongoing litigation, and the possibility that current rulings may be overturned or otherwise altered on appeal, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act of 1976 when emergency and disaster conditions exist yet the legislature has not granted an extension request, this order constitutes a state of emergency and state of disaster declaration under that act." [See, e.g., Pls' App'x 140a, 142a.]

[15] FEMA, *COVID-19 Disaster Declarations*, https://www.fema.gov/disasters/coronavirus/disaster-declarations

[16] National Governors Association, *Status of State COVID-19 executive orders*, https://www.nga.org/state-covid-19-emergency-orders/ (noting that as of July 30, 2020 that all 50 states were under an "active" state of "emergency," "disaster," or "public health emergency") (last accessed on August 6, 2020).

ARGUMENT

I. This Court should decline to review the merits of the questions.

It is a basic point that the Michigan courts are the masters of Michigan law, and that this Court is the final authority in interpreting it. That is the reason that the certified-question process, see MCR 7.308(A), is a good one. But the process is also a discretionary one, and there are occasions in which this Court should refrain from answering questions certified to it. This is such an occasion.

The State Defendants opposed the federal district court's decision to certify these questions, noting that the executive orders challenged in the complaint were rescinded in May and that other cases are pending in Michigan courts raising the same questions, including the legislative suit challenging the Governor's authority, *House & Senate v Governor,* No. 353655. Moreover, the State Defendants invoked their immunity under the Eleventh Amendment. The federal district court rejected these arguments and pushed forward with its sua sponte certification request.

While mootness and Eleventh Amendment immunity are issues that will be ultimately be resolved by the federal courts, this Court should bear them in mind when deciding whether to exercise its discretion to use this request as the chosen vehicle to resolve core and fundamental questions of Michigan law. These questions are by no means unique to this case and settled law casts serious doubt over the federal district court's jurisdiction to consider the claims that present them. Indeed, one potentially dispositive challenge to that jurisdiction is presently pending before the Sixth Circuit. These are not the circumstances under which this Court's certification authority is well exercised.

A. The decision whether to answer certified questions is a matter of this Court's discretion.

This Court has authority to entertain certified questions from the federal courts. See MCR 7.308(A)(2). The rules governing certification confer "discretion" on this Court as to whether it should grant review on certified questions. See MCR 7.303(B) (identifying as "discretionary review" the circumstance in which the Court may "(4) respond to a certified question (see MCR 7.308(A)").

But the rules do not require the Court to exercise this discretion to provide an answer even though it entertains briefing on the merits of the questions. This Court has declined to answer certified questions in the past from the federal courts. See, e.g., *In re Certified Question from U.S. Dist. Court for E Dist of Michigan*, 490 Mich 922 (2011); *In re Certified Question from United States Court of Appeals for Ninth Circuit*, 474 Mich 1228 (2006). It should do the same here.

B. The claims from the Plaintiffs' complaint are moot.

The Plaintiffs' complaint in federal court is predicated on two executive orders, EOs 2020-17 and 2020-77, which required certain medical facilities to adopt temporary postponement plans for non-essential medical procedures and imposed corresponding limitations on travel. The Plaintiffs have alleged they "are suffering immeasurable and irreparable harm from" the presence of these restrictions, and they seek relief from them. (Pls' App'x 5a, Complaint, ¶18.) But these executive orders, including the challenged restrictions, have been rescinded for over two months now, and the Plaintiffs, like all other medical providers and patients, may perform and undergo all manner of medical procedures in the proper conditions.

Under U.S. Supreme Court case law, a case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Chafin v Chafin*, 568 US 165, 172 (2013). An "advisory opinion[] on abstract propositions of law" must be avoided. *Hall v Beals*, 396 US 45, 48 (1969) (per curiam). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp v Cuno*, 547 US 332, 341 (2006).

As here, where an executive order places only "temporary restrictions" that "expire[ ] before . . . [a] [c]ourt [takes] any action," the action is rendered moot. See *Trump v Hawaii*, 138 S Ct 2392, 2404 (2018), citing *Trump v IRAP*, 138 S Ct 353 (2017), and *Trump v Hawaii*, 138 S Ct 377 (2017).

Months ago, the Governor rescinded EO 2020-17 and its accompanying travel limitation, the focus of the Plaintiffs' complaint. In response to this change in circumstances, the Plaintiffs – echoing the federal district court's rationale – now contend that they "are still subject to various restrictions on their provision of medical services under EO 2020-145." (Pls' Brief, p 45.) But this has all the earmarks of an amended complaint, raising new allegations wholly absent from their operative complaint.

Indeed, their new contentions are inconsistent with that complaint, which expressly alleges that the Plaintiffs seek only the opportunity to reopen with precautionary safeguards in place. (Pls' App'x 5a, Complaint, ¶32, 36.)[17]

While the Plaintiffs' point is well taken that mootness is a question for the federal court, *id.* at 46,[18] that argument misses the point. This Court is the gatekeeper about when it shall answer certified questions, and it should consider whether it wishes to exercise this authority to answer questions raised from a complaint that challenges restrictions that had been lifted even before the certification request was made. Stated differently, should this Court answer a certified question that should be, and may very well ultimately be, deemed moot? The Governor and Director suggest that it should not.

---

[17] Similarly, the federal district court noted that, while the prior travel restriction for postponed procedures had been rescinded, other aspects of the Stay Home order still generally remained in place. But again, the Plaintiffs have not sought relief from any other such restrictions, and regardless, they too have been lifted for over two months now. See EO 2020-110 (lifting the prior "stay home" requirement).

[18] It *is* a matter for the federal court, and one that a Michigan federal court has already found to be meritorious. See *Martinko v Whitmer*, Case No. 20-cv-10931, Opinion and Order granting Defendant's motion to dismiss (ED Mich June 5, 2020) (dismissing challenges to rescinded executive orders as moot and barred by the Eleventh Amendment).

Other federal courts have likewise routinely deemed moot challenges to rescinded or expired COVID-19 emergency response measures. See, e.g., *Cameron v. Beshear*, No. 3:20-CV-00023-GFVT, 2020 WL 2573463, at *2 (E.D. Ky. May 21, 2020); *Krach v. Holcomb*, No. 1:20-CV-184-HAB, 2020 WL 2197855, at *2 (N.D. Ind. May 6, 2020); *Spell v. Edwards*, 962 F.3d 175 (June 18, 2020) (preliminary-injunction context); *Ministries v. Newsom*, No. 20-CV-683-BAS-AHG, 2020 WL 2991467, at *3 (S.D. Cal. June 4, 2020) (same); *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at *4 (N.D. Ill. May 3, 2020) (same).

C. This point applies with equal force regarding the Eleventh Amendment immunity defense.

The State Defendants also argued that the federal court should have dismissed the state law claims there because they were barred from consideration in that forum by the Eleventh Amendment. As the U.S. Supreme Court has explained, "[t]he ultimate guarantee of the Eleventh Amendment is that non-consenting States may not be sued by private individuals in federal court." *Bd of Trustees of the Univ of Alabama v Garrett*, 531 US 356, 363 (2001). That applies here where the Plaintiffs to seek to enjoin state officials on the basis of state law. See *Pennhurst State Sch & Hosp v Halderman*, 465 US 89, 121 (1984). The federal district court did not determine that Eleventh Amendment immunity was inapplicable, but instead held that the State Defendants waived the argument and had acceded to federal jurisdiction.

This ruling is erroneous. Waiver requires a clear intent; litigation conduct does not betray that intent unless it reflects an inconsistent and unfair invocation of immunity "to achieve litigation advantages," such as by acting to remove a case to federal court, and then later seeking dismissal from that court under the Eleventh Amendment. *Lapides v Bd of Regents of Univ Sys of Georgia*, 535 US 613, 620 (2002). Correspondingly, the Sixth Circuit has only found such a waiver where the State waited *until after a final adverse judgment* to raise it. *Ku v State of Tennessee*, 322 F3d 431, 435 (CA 6, 2003); see also *Barachkov v Davis*, 580 F Appx 288, 300 (CA 6, 2014) (rejecting the notion that immunity had been waived because it had not been raised in an opening summary judgment brief).

The State Defendants' conduct reflected no such intent or gamesmanship. This case is still young; at the time of the certification request, the parties had filed briefs regarding the Plaintiffs' motion for a preliminary injunction that was withdrawn before decision, and the State Defendants had filed opening briefs on their motions to dismiss. Throughout these preliminary filings, the State Defendants had urged the federal district court not to exercise jurisdiction over the Plaintiffs' state law claims, and the Defendants added their claim under the Eleventh Amendment to this mix as soon as they realized it was missing. These are not the circumstances by which a State affirmatively waives its right to sovereign immunity under the Eleventh Amendment, and the State Defendants have taken an appeal to correct this threshold error of law.[19] If the State Defendants prevail on appeal, the district court's act of certifying the questions was outside of its jurisdiction, as the State Defendants were not properly before it.

The questions at issue are legitimate ones in the abstract, and important to all of Michigan's residents. But that does not make them well presented here. The Plaintiffs lack live claims, and the federal district court lacks jurisdiction. These are no small things; they are significant jurisdictional concerns, and they counsel against this Court granting the instant certification request and providing guidance not ultimately needed for the disposition of this case.

[19] Contrary to the Plaintiffs' argument (see p 46), this appeal is not challenging the certification decision, but rather the refusal to dismiss the state law claims based on sovereign immunity. See Sixth Circuit Case No. 20-1581.

II. The Governor has properly exercised her authority under the Emergency Management Act.

The EMA requires the Governor to issue a declaration of disaster and one of emergency where the circumstances warrant it. On April 30, 2020, Michigan was facing a disaster and an emergency. Indeed, it still is. Nonetheless, despite the ongoing emergency and disaster, the Plaintiffs claim that, as of April 30, the Governor cannot issue a new declaration under the EMA because the Legislature refused to extend her prior declaration. But the EMA does not say that. It does not create that limit. To the contrary, it mandates the opposite: if emergency or disaster conditions exist, the Governor is duty-bound by the EMA to issue a declaration and activate that statute's emergency-response powers and resources to protect this State and its residents. That corresponds with the plain text of the EMA, and it makes eminent practical sense.

A. The Governor properly declared a disaster and an emergency under the EMA.

First enacted in 1976, the EMA sets forth several independent, related obligations regarding state and local responses to emergencies and disasters in the State. For the Governor, the EMA grants her the important responsibility to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency." MCL 30.403(1). This broad charge places the Governor at the forefront of emergency and disaster responsiveness and serves as a baseline for the latitude given to her by the Legislature in times of crisis. To that end, she possesses the authority to "issue executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(2).

This broad statement of authority is confirmed throughout the EMA. For example, MCL 30.414(3) makes clear that the EMA "shall not be construed to restrain the governor from exercising on his own initiative any of the powers set forth in this act." The Act also emphasizes it is intended to supplement the Governor's preexisting emergency response authority, stating that it does not "[l]imit, modify, or abridge" the authority of the Governor to proclaim a state of emergency under the EPGA "or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of the state independent of, or in conjunction with, this act." MCL 30.417(d).[20]

Consistent with the EMA's broad authority, the Governor has the obligation to declare states of disaster and emergency if the pertinent conditions exist. She "*shall*, by executive order or proclamation, declare a state of disaster if he or she finds a disaster has occurred or the threat of a disaster exists." MCL 30.403(3) (emphasis added). Similarly, she "*shall*, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists." MCL 30.403(4) (emphasis added). These provisions mirror one another.

Upon that order or proclamation, the law grants the Governor authority to marshal both state and federal resources to adequately deal with the danger facing

[20] The EPGA confers emergency response authority on the Governor without mention of legislative involvement, a characteristic the EMA protects in § 17(d) by expressly disclaiming that it creates any limitations on other laws.

the State.[21] The executive order or proclamation also authorizes the Governor to exercise additional broad powers, including "[s]uspending a regulatory statute, order, or rule prescribing the procedures for conduct of state business" in certain circumstances, "[c]ontrol[ling] ingress and egress to and from a stricken or threatened area," and "[d]irect[ing] all other actions which are necessary and appropriate under the circumstances." MCL 30.405(1)(a), (g), (j). And the EMA expressly defines "state of disaster" and "state of emergency" independently from "disaster" and "emergency." "[D]isaster" and "emergency" refer to conditions that the Governor may find to exist in the State.[22]

Distinctly, "state of emergency" and "state of disaster" – both of which were declared in Executive Order 2020-68 – are defined as types of executive orders or proclamations that the Governor must issue upon finding certain conditions exist. " '[S]tate of disaster [or emergency]' means *an executive order or proclamation* that activates the disaster [or emergency] response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected." MCL 30.402(p), (q) (emphasis added.)

---

[21] See, e.g., MCL 30.404(1) (deployment of forces and distribution of supplies); MCL 30.404(2) (federal assistance); MCL 30.408(1) (cooperation among state agencies).

[22] The EMA defines both "disaster" and "emergency."

Under MCL 30.402(e), " '[d]isaster' means an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to, . . . epidemic . . . "

"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).

In short, "state of emergency" and "state of disaster" are *species of executive orders* that activate certain response efforts and resource and may – indeed, must – be issued when "emergency" or "disaster" conditions are found to exist. This plainly stated distinction is important to properly understanding the interplay between the Governor's termination of her prior declarations and her issuance of a new declaration.

As the EMA makes clear, "if [the Governor] finds that an emergency [or disaster] has occurred or that the threat of an emergency [or disaster] exists," the Governor "*shall*" declare so. MCL 30.403(3), (4). Under longstanding Michigan precedent, "the word 'shall' is ordinarily construed in its imperative sense, excluding the idea of discretion." *State Bd of Ed v Houghton Lake Cmty Sch*, 430 Mich 658, 670 (1988); see also *Sauder v Dist Bd of Sch Dist No 10*, 271 Mich 413, 418 (1935) (a statute that uses "shall" "is imperative" when "the public are interested"). The Governor thus has a *duty* to declare a state of emergency or disaster if one is occurring.

And just as the Governor is required to *declare* a state of disaster or emergency, i.e., issue such an executive order, if the conditions merit it, she also has the duty to "terminate" that order if the conditions cease or the Legislature refuses to extend it by resolution. MCL 30.403(3), (4). That termination, however, expressly extends only to the order itself. What does not terminate under the EMA is the Governor's duty to issue declarations, and activate the statute's emergency response mechanism, whenever the conditions on the ground warrant it.

B. Under the EMA's mandates, the Governor terminated her earlier declarations and issued new ones because there was a "disaster" and "emergency" in Michigan.

On April 30, 2020, the Legislature declined to extend the Governor's executive orders declaring states of emergency and disaster under the EMA, despite the fact that the State continued to face emergency and disaster conditions as a result of the pandemic. On April 30, then, in accordance with the mandate that the Governor "terminate" the state of emergency and disaster declarations under the EMA absent legislative extension, MCL 30.403(3), (4), the Governor so terminated. (Pls' App'x 101a, EO 2020-66.)

But the conditions on the ground remained dire. On that day alone, more than 100 Michigan residents died from the virus and over 1,100 were confirmed infected.[23] Thus, the Governor rightly found "that an emergency [or disaster] has occurred or that the threat of an emergency [or disaster] exists," triggering her duty under the EMA to declare as such. MCL 30.403(3), (4); (Pls' App'x 109a, EO 2020-68.) In carrying out her statutory duty, the Governor acknowledged that the measures implemented based on her authority under the EMA and the EPGA "have been effective, but the need for them – like the unprecedented crisis posed by this global pandemic – is far from over." (*Id.* at 110a.) She emphasized the continued lack of treatment for the virus, the ease of transmission, and the "lack [of] adequate means to fully test for it and trace its spread." (*Id.*)

[23] MLive, *Thursday, April 30: Latest developments on coronavirus in Michigan*, available at https://www.mlive.com/public-interest/2020/04/thursday-april-30-latest-developments-on-coronavirus-in-michigan.html

Ultimately, the Governor found that "the threat and danger posed to Michigan by the COVID-19 pandemic has by no means passed, and the disaster and emergency conditions it has created still very much exist." (*Id.*) Given her findings and the immediate danger that this pandemic continued to present to Michigan residents, the Governor was obligated to issue the declaration.

C. The Plaintiffs' construction of the EMA conflicts with the plain text of the EMA and is unworkable.

The text of the EMA is unambiguous. It requires the Governor to terminate the order declaring a disaster or emergency declaration after 28 days if the Legislature does not extend the order's duration. See MCL 30.403(3), (4) ("After 28 days, the governor shall issue an executive order or proclamation declaring the state of disaster [emergency] 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."). But the EMA is silent about the termination of one order foreclosing the issuance of a subsequent one. Nothing in the EMA bars that action.

This silence, coupled with the EMA's ongoing emergency-response mandate to the Governor, compels only one result. The EMA does not impose a limit on the Governor to declare a disaster or emergency anew if the circumstances warrant it. This Court does not have the authority to engraft limitations where the Legislature has not created them.

Rather, the Court applies the statute as written where the statutory language is clear. *Hamed v Wayne Co,* 490 Mich 1, 8 (2011). No construction is permitted. *Id.*[24] This is a principle with a long history. See, e.g., *Voorhies v Judge of Recorder's Court*, 220 Mich 155, 157–158 (1922) (the judiciary does not have the authority "to add a condition or restriction thereto found in the earlier statute and left out of the later one . . . . [t]he contention made, if allowed, would go beyond the construction of the statute, and ingraft upon its provisions a restriction which the Legislature might have added but left out.").

The Plaintiffs' construction of the EMA as barring a "new" declaration only creates questions that are unanswered in the statute:

- Does an intensification of the original threat constitute grounds for a new declaration?
- What part of the danger has to arise from the original threat and how much has to arise from the changed conditions?
- How much time has to pass before it becomes a "new" emergency, and would it bind a subsequent Governor?

The EMA provides no answer, and no guidance to a court as to how it might derive one. And unsurprisingly so. These are questions the EMA never intended to be asked, let alone to control whether the Governor can discharge her duty.

---

[24] For that reason, any reliance on legislative analyses is unwarranted, see Pls' Brief, p 12 (citing House Fiscal Agency Bill Analysis, H.B. 5496, Pls' App'x 48a–49a) where the statute's language is unambiguous. *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 497 Mich 337, 355 n 50 (2015) ("[T]he language of the [statute] is unambiguous and, as a result, the examination of legislative history 'of any form' is not proper . . . ."). Even if the statute were ambiguous, this Court has questioned the interpretive value of this kind of legislative history, indicating that it is entitled to "little judicial consideration." *Id.* And the Fiscal Analysis offered by the Plaintiffs here does not address the question of what, if any, limitation the EMA imposes on issuing a new declaration.

These are not just academic questions. The pandemic at issue here illustrates the point. The end of July has seen a substantial increase in cases in Michigan, with more new cases here than the state has encountered since the early weeks of the pandemic. And other parts of the country, notably in the south and west, have seen a greater number of new cases and deaths than at any previous time of this crisis.

According to the Plaintiffs' construction, even if the Legislature now wished for the Governor to issue a new declaration after an initial refusal to extend the duration, that action would be barred because the EMA does not state that the Governor may issue a new declaration. That is unworkable. It turns the authorization upside down. The Governor is not directed to issue a declaration only when she has not previously done so, but is obliged when the circumstances warrant it. The universal experience of this country demonstrates that this coronavirus presents an immediate threat to our residents. The Michigan Governor stands with virtually every other executive official in this country.

If, in enacting the EMA, the Legislature had intended to try to retain ultimate control over the Governor's issuance of declarations, it could have written the statute accordingly. The Plaintiffs' list of other state laws investing their executives with emergency powers, (see Pls' Br, pp 40–41, n 10), is filled with statutes that purport to do this. (See *id.*, listing 16 state statutes that enable the Legislature to terminate an emergency, such as Ark. Code Ann. § 12-75-107(c)(1) ("The General Assembly by concurrent resolution may terminate a state of disaster

emergency at any time.").) But the Legislature here did not attempt to reserve this authority. Instead, it gave the Governor an ongoing duty to declare a state of emergency or disaster whenever one exists, with a periodic obligation to terminate, re-evaluate, and re-declare if warranted. And so the Governor has done.

This understanding is consistent with the principles of proper delegation. The Legislature may delegate authority to the Governor provided it prescribes standards for guidance that are reasonably precise in light of the subject matter of the delegation. But once the Legislature does so, it may not retain what amounts to a legislative veto. See *Blank v Dep't of Corrections*, 462 Mich 103, 113 (2000) (Kelly, J., lead opinion). The suggestion here is that the Legislature may delegate certain actions, but then effectively retain the "right to approve or disapprove" the Governor's later exercise of that authority.

The concept of an improper legislative veto was outlined by the U.S. Supreme Court in *INS v Chadha*, 462 US 919, 959 (1983). In *Blank*, this Court applied *Chadha* in considering the constitutionality of a 1977 amendment to the Administrative Procedures Act, which required an administrative agency to "obtain the approval of a joint committee of the Legislature or the Legislature itself before enacting new administrative rules." 462 Mich at 108 (Kelly, J.). The lead opinion framed the issue as "whether the Legislature, upon delegating [rulemaking authority to an executive-branch agency], may retain the right to approve or disapprove rules proposed by [the agency]." *Id.* at 113. It reasoned that the Legislature's approval or disapproval of an executive-agency rule is "inherently

legislative" and "subject to the enactment and presentment requirements." *Id.* at 115–116. See also *Wolf v Scarnati,* ___ Pa ___ 2020 WL 3567269, *19 (July 1, 2020) ("[B]ecause the General Assembly intended that H.R. 836 terminate the Governor's declaration of disaster emergency without the necessity of presenting that resolution to the Governor for his approval or veto, we hold, pursuant to our power . . . that H.R. 836 is a legal nullity . . . .").

So too here. On April 30, the Governor had the power and duty to terminate her declared states of emergency and disaster under the EMA, and to declare new ones if emergency or disaster conditions existed. They existed, so she declared. The Legislature could bar her from doing this, but only through legislative enactment. See *Blank*, 462 Mich at 119 ("When the Legislature engages in 'legislative action' it must do so by enacting legislation," and "the Legislature cannot circumvent the enactment and presentment requirements."). There was no such enactment, and no bar to the Governor re-declaring as authorized and required under the EMA.

D. The requirement that the Governor issue a new declaration is a true limitation on her authority and does not create a circumvention of the Legislature's role in the EMA.

The Plaintiffs contend that this plain reading renders the Legislature's authority to extend the duration of the disaster or emergency "meaningless," as it constitutes a "end run" around the Legislature's role in helping the State address a disaster or an emergency. (Pls' Br, pp 13, 14). The Governor and Director disagree.

The requirement that the Governor must issue a new declaration under the EMA, rather than extend the duration of a prior one, gives rise to three distinct limitations on her authority.

First, while a Governor's factual finding of an emergency is entitled to great deference, it is not beyond judicial review. *Straus v Governor*, 459 Mich 526, 533 (1999), quoting *People ex rel Johnson v Coffey,* 237 Mich 591, 602 (1927) ("The Governor holds an exalted office. To him, and to him alone, a sovereign people has committed the power and the right to determine the facts in the proceeding before us. His decision of disputed question of fact is final. His finding of fact*, if it has evidence to support it*, is conclusive on this court.") (emphasis added). Accordingly, any declaration under the EMA is subject to judicial review on the question whether the definition of "disaster" or "emergency," MCL 30.402(e), (h), was satisfied. The fact that the Governor is forced to issue a new declaration has a direct effect on when any review would occur. Namely, it would ensure that the review is of the emergency not when declared on Day 1, but as it is on the day of the re-declaration which would occur at least 28 days later. While the threat here has not dissipated, in most circumstances, the threat will become less immediate as time passes, making it more difficult to support the finding of an emergency if challenged.

Second, any declaration under the EMA may be subject to a legislative override, Const 1963, art 4, § 33 (two-thirds vote), by repeal or amending of the EMA to bar the Governor from issuing a new declaration. Cf. *Dodak v State Admin Bd,* 441 Mich 547, 558 (1993) ("If the Legislature disagrees with [the executive's view of the law], it can work a political resolution of the disagreement by expressly repealing [it]"). This is the way the legislative process works.

Third, the Governor is accountable not only to the co-equal branches of government, but also directly to the People, before whom she must stand for reelection. With a re-declaration comes renewed public scrutiny of the Governor's actions. This crisis well illustrates the point. It has been, among other things, one of the most significant political events in generations in Michigan, placing the Governor's executive actions front and center. The fact that the Legislature has chosen not to extend her original declaration beyond 28 days under the EMA has real consequences to the political process.

Finally, the Plaintiffs raise the specter of an "indefinite" emergency by the series of re-declarations by the Governor of the same emergency after the 28 days have transpired. (Pls' Br, p 12.). But that overlooks the plain language of the EMA, which expressly defines what "emergency" or "disaster" conditions must exist for the Governor to issue a declaration, and the fact that any such declaration may be subject to judicial challenge or legislative override at any time. She is not above the law, nothing that has occurred in the course of this pandemic suggests otherwise. Indeed, it is no coincidence that Michigan is one of apparently 50 states in which there is still currently a declared emergency. See n 16 above. Michigan is not an outlier. The Governor has not acted unreasonably in redeclaring a disaster and an emergency under the EMA on April 30, 2020 in response to the coronavirus. It continues to present a threat of widespread loss of life and it is essential that the Governor take action to save lives and protect the public health of Michigan's residents – just as the EMA charges her to do. MCL 30.402(e) & (h), MCL 30.403.

III. The Governor has properly exercised her authority under the Emergency Powers of the Governor Act.

The EPGA invests the Governor with extraordinary – but not unlimited – power to respond to emergencies. The states have conferred emergency powers on their Governors. This is an essential aspect of good governance. On the basis of her emergency powers, the Michigan Governor – like Governors elsewhere – declared an emergency. And like every other state, Michigan continues to face an emergency.

The arguments of the plaintiffs otherwise are unavailing. Nothing in the EPGA creates a time limitation. Contrary to Plaintiffs' assertion, there can be an ongoing emergency, as confirmed by this very pandemic, which in some parts of the country has only now become its most dangerous. The Plaintiffs' effort to incorporate the 28-day durational limit from the EMA finds no support in the EPGA and is expressly forbidden by the EMA. And while the Legislature has created two sources of emergency power, this does not make the EMA mere surplusage. The EMA provides for additional structure for emergency responses, but has its own restrictions, while the EPGA may be narrower in other respects. Finally, the Governor has not conceded that the emergency is over.

A. The EPGA's broad, but not unlimited, grant of authority supports the Governor's declared state of emergency.

The EPGA, enacted in 1945, provides the Governor with broad powers "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state." MCL 10.31(1). This Court has termed this grant of power to be "extraordinary." *Walsh v City of River Rouge,* 385 Mich 623, 640 (1971).

The Governor "may proclaim a state of emergency" during these times, or upon "reasonable apprehension of immediate danger" of such an emergency, "when public safety is imperiled." *Id.* Upon the proclamation of a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." *Id.* Any "orders, rules, and regulations promulgated . . . are effective from the date and in the manner prescribed in the orders, rules, and regulations." MCL 10.31(2). And they "may be amended, modified, or rescinded . . . by the governor" and "shall cease to be in effect upon declaration by the governor that the emergency no longer exists." *Id.* As a whole, the EPGA must "be broadly construed to effectuate [its] purpose," which is to "invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster." MCL 10.32.

As of April 30, the State faced such a "time[ ] of great public crisis," "disaster," or "similar public emergency." MCL 10.31(1). Indeed, in April, the virus killed more Michigan residents than heart disease and cancer combined.[25] As of this filing, over 6,000 have died here, and over 150,000 have died in the United States.[26] And, as Michigan and other states have seen, this threat remains real.

---

[25] Michigan Department of Community Health, Number of Deaths by Select Causes of Death by Month, available at https://www.mdch.state.mi.us/osr/Provisional/MontlyDxCounts.asp

[26] See n 13.

These facts form the basis of the Governor's finding of a state of emergency under the EPGA, and well justify the "reasonable" and "necessary" measures she has taken "to protect life" throughout the State or bring this pandemic "under control." MCL 10.31(1). The fact that the State of Michigan remains in a state of emergency is because the State and its residents still face an emergency.

B. The Plaintiffs' argument that the EPGA is "time-limited" is contradicted by the EPGA's plain language, and their effort to insert the EMA's 28-day limit conflicts with the EPGA's text.

The Plaintiffs' overarching error is their misunderstanding of the meaning and nature of an emergency. Nothing in the EPGA – or in the reality of an emergency – provides that an emergency can only last a certain amount of time. Thus, they misread the EPGA itself when they say that emergency is "time limited," when they argue that emergency refers to a "limited period of time," and when they seek to limit the EPGA with the EMA's 28-day limit. (Pls' Br, pp 17, 19–22, 26.)

The EPGA explains that the Governor may proclaim a state of emergency "[d]uring times of great public crisis, disaster, rioting, catastrophe," or "reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled." MCL 10.31(1). Nothing in these terms suggest that an "immediate danger" will only be short-lived. Indeed, it is a matter of common sense that a threat does not automatically become less "immediate" and "dangerous" simply because some predetermined amount of time has elapsed. This pandemic bears out that proposition because it continues to present that very kind of threat. The experience of other states confirms this, and it explains why – as of July 30, 2020 – every state apparently is in a state of emergency. See n 16 above.

The ordinary dictionary-definitions of "emergency" make the same point. Take the Plaintiffs' definition from the 1942 (2d ed.) *Webster's New International* dictionary: "[a]n unforeseen combination of circumstances which calls for immediate action; also, less properly, exigency." (Pls' Brief, pp 18, 20). This is a good definition. The pandemic was unforeseen. The point, however, is that it remains an emergency in that the danger it presents is ongoing, and thus it remains an "immediate" threat. The Plaintiffs' error is their focus on the timing of whether the pandemic is still "unforeseen." (*Id.* at 20). But the immediacy of the danger is the key. Five minutes after a fire engulfs a city, it is no longer "unforeseen," but the idea that the dangers it presents have passed misunderstands the meaning of emergency, and likewise the meaning of the EPGA. The language from § 2, MCL 10.32 ("broadly construed" and "legislative intent to invest the governor with sufficiently broad power of action"), provides further support, but frankly the Court need not even consider it because the EPGA's text is clear.

Sensing perhaps that this may not be dispositive, the Plaintiffs further assert that the EMA's 28-day limit may be imported into the EPGA. (Pls' Brief, pp 26–29). But again, the plain text of the EMA forecloses this argument.

In the section of the EMA governing the construction of the Act, the EMA expressly states that its terms do not "[l]imit, modify, or abridge the authority of the governor to proclaim a state of emergency" under the EPGA. MCL 30.417(d). In response, the Plaintiffs emphasize that the EMA's time limits may be imported without limiting the Governor's power of proclaiming an emergency. (Pls' Br, p 28).

While that argument is strained, this Court need not even examine the point because the rest of § 17(d) answers the question clearly when it further states that it does not limit, modify, or abridge the "*exercise any other powers vested in him or her* under the state constitution of 1963, *statutes*, or common law of this state independent of, or in conjunction with, this act." MCL 30.417(d). The EPGA is a statute. Thus, the Plaintiffs' effort to constrain the powers of the Governor under the EPGA by its reading of the EMA is expressly rejected.

C. The Plaintiffs' other arguments are also unavailing.

The Plaintiffs' other arguments fare no better. Reading the EMA according to its plain text does not render it mere surplusage, and the Governor has not concluded that the emergency has resolved. Her declarations remain in place.

As an initial matter, the Legislature clearly intended the grant of authority to the Governor under the EMA be in addition to, and separate from, the authority it conferred under the EPGA. Section 17(d)'s text is clear on that point.

That does not mean that the scope of each ends up being the same in all instances, or that one Act is subsumed by the other. The Acts are distinct, with each providing their own terms and processes for invoking and exercising their respective grants of authority.[27]

[27] For instance, the EMA contains express limitations (see, e.g., MCL 30.417(a)-(c), regarding interference with labor disputes, news media, and jurisdiction of law enforcement agencies) and authorizations (see, e.g., MCL 30.411, regarding the provision of civil immunity), while the EPGA does not include these express limitations and authorizations.

And the Plaintiffs overlook the comprehensive infrastructure of actors and resources that is provided by the EMA, which includes coordination with the federal government and other states, MCL 30.404, a state emergency management apparatus, MCL 30.407, 407a, 408, the coordination with local authorities, MCL 30.409, 410, 411, 413, and contingency funds, MCL 30. 418, 419. But ultimately, Section 17(d) of the EMA makes clear that the EPGA operates separately and is not limited by the EMA.

Moreover, the Plaintiffs argue the Governor terminated this emergency on April 30, 2020 in EO 2020-66. (Pls' Brief, pp 24–28). But the Governor did not terminate the emergency – she terminated the emergency declaration. As explained above, there is no question that the facts supporting the emergency endured. Also, this elides the point that she declared an emergency under the EPGA. The real issue is whether there was and is an emergency – yes, there was and is.

IV. The Emergency Powers of the Governor Act is constitutional and does not reflect an improper delegation by the Legislature and does not violate the Michigan Constitution's Separation of Powers.

Just as in the vast majority of states, the Legislature here has properly delegated emergency response authority to the Governor to take reasonable and necessary action to protect Michigan residents in times of crisis. The Plaintiffs argue that the EPGA is an improper delegation and violates the separation of powers because it lacks sufficient standards to guide the Governor. Not so.

A. The branches of government are not barred from working together, and sharing their authority is permitted so long as adequate guidance is given.

The Michigan Constitution provides for the separation of powers among the three branches of state government. In particular, the Constitution provides:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch. [Const 1963, art 3, § 1.]

But Michigan courts have never interpreted the separation of powers doctrine as meaning there can never be any overlapping of functions between branches. See *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 752 (1982) ("while art. 3, § 2, of the constitution provides for strict separation of power, this has not been interpreted to mean that the branches must be kept wholly separate."), citing *People v Piasecki*, 333 Mich 122, 146 (1952); *In re Southard*, 298 Mich 75, 83 (1941).

The separation of powers doctrine "ha[s] led to the constitutional discipline that is described as the nondelegation doctrine." *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8 (2003). While the legislative power – the power "to make, alter, and amend laws" – sits with the Legislature, *Harsha v City of Detroit*, 261 Mich 586, 590 (1933), both the U.S. Supreme Court and this Court "ha[ve] recognized that the separation of powers principle, and the nondelegation doctrine in particular, do not prevent Congress [or our Legislature] from obtaining the assistance of the coordinate Branches." *Taylor*, 468 Mich at 8 (internal quotes omitted).

The Michigan doctrine of non-delegation has been expressed in terms of a "standards test." *Westervelt v Natural Resources Comm*, 402 Mich 412, 437 (1978). Under this test, "legislation which contains a delegation of power to . . . [another branch] must contain either explicitly or by reference . . . standards prescribed for guidance." *Id*. at 437–438. While it is clear that "a legislative body may not delegate to another its lawmaking powers," that does not prevent an official from being "clothed with the authority to say when the law shall operate . . . provided, however, that the standards prescribed for guidance are as reasonably precise as the subject-matter requires or permits." *Osius v City of St Clair Shores*, 344 Mich 693, 698 (1956). And the statute carries a presumption of constitutionality; it "must be construed in such a way as to render it valid." *Westervelt,* 402 Mich at 438.

In Michigan, like the federal system, successful nondelegation claims are exceedingly rare. See *Taylor*, 468 Mich at 9 ("In the federal courts these improper delegation challenges to the power of federal regulatory agencies have been uniformly unsuccessful.")

While the doctrinal language in the state and federal systems are nominally different, this Court has treated them as twins. See *Taylor*, 468 Mich at 7–9, 10 ("[W]e have rejected [nondelegation] claims on a basis similar to the federally developed rationale."). The first and last year that the U.S. Supreme Court struck down one statute on that ground was 1935, in two cases. See *Panama Refining Co v Ryan*, 293 US 388 (1935); *ALA Schechter Poultry Corp v United States*, 295 US 495 (1935). None has been successful since.

In *Panama Refining*, there was simply no purported guidance whatsoever to guide the President's discretion. 293 US at 430 ("[T]he Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."); see also *Mistretta v United States*, 488 US 361, 373 n 7 (1989) (describing its conclusions in *Panama Refining* and *ALA Schecter* "that Congress had failed to articulate *any* policy or standard") (emphasis added). Such is not the case here.

B. The Legislature's delegation of emergency powers, requiring "reasonable" action "necessary to protect life and property or to bring the emergency situation . . . under control," is constitutional.

As noted, this case presents no exception to the general rule. The standards set forth in the EPGA are as reasonably precise as the subject matter requires or permits. See *Westervelt*, 402 Mich at 439. The Legislature did not grant the Governor a blank check. The EPGA provides the Governor the authority, after declaring a state of emergency, to "promulgate *reasonable* orders, rules, and regulations as he or she considers *necessary* to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1) (emphasis added). Thus, there are several limits on the Governor's authority. Her orders may come only upon a "public emergency" and the orders must not only be reasonable *and* necessary, they must be directed at protection of "life and property" or "bring[ing] the emergency situation . . . under control" in the "affected area." *Id.*

Michigan courts have consistently upheld similar language as sufficiently precise to avoid any nondelegation problem. In *Klammer v Department of Transportation*, 141 Mich App 253, 262 (1985), the Court of Appeals considered that the word "necessary" was a sufficiently precise standard for the retirement board in considering the length of time a certain state worker could continue after reaching the mandatory retirement age. See also *GF Redmond & Co v Michigan Sec Comm'n*, 222 Mich 1, 7 (1923) ("[T]he term 'good cause' for revocation of the license, relating, as it does, to the conduct of the business regulated by the policy declared in the statute, is sufficiently definite."); *Smith v Behrendt*, 278 Mich 91, 97–98 (1936) (holding that allowing the executive to grant oversize loads for freeway travel in "special cases" was a proper delegation of legislative authority).

These examples suffice to reveal that the courts are hesitant to invalidate laws on the basis of an allegedly improper delegation where the Legislature provides even general direction to the executive branch.

The Plaintiffs rely on two Michigan cases to support their claim, see Pls' Brief, pp 31–32, both of which are distinguishable. In *Blue Cross & Blue Shield of Michigan v Milliken*, this Court determined that "the power delegated to the Insurance Commissioner" regarding approval of actuarial risk factors "is completely open ended." 422 Mich 1, 53 (1985). And for good reason. The commissioner's authority was not guided at all. Instead, the commissioner was granted complete authority to " 'approve' or 'disapprove' the proposed risk factors; the basis of the evaluation is not addressed." *Id.* *Blue Cross* is a poor comparison.

The second is *Oshtemo Charter Twp v Kalamazoo Cty Rd Comm'n*, 302 Mich App 574 (2013). The case likewise provides no help to the Plaintiffs, and if anything, supports the constitutionality of the EPGA. As the *Oshtemo* court explained, "[t]his case is extremely similar to *Blue Cross & Blue Shield*" in that the statute at issue provided for a "complete lack of standards," not even "in the form of a generalized statement of public policy." *Id.* at 591, 592. The Court of Appeals did not ultimately reach the merits of the improper delegation claim, but noted that if the "road commission's decision to 'approve or void' an ordinance *were not limited to voiding those ordinances that are* ***unreasonable***, *the complete lack of standards contained in* the statute would very likely render it a constitutionally deficient delegation of authority." *Id.* at 591 (emphasis added). That is, a reasonableness standard would cure any constitutional concern. This analysis supports the EPGA's constitutionality.

And of course, the standards imposed on the Governor's authority under the EPGA are not read in a vacuum, the "subject matter" of the delegation guides how strictly or narrowly drawn the standards must be. *Westervelt*, 402 Mich at 439. The context of a developing "crisis, disaster, rioting, catastrophe, or similar public emergency," MCL 10.31(1), counsels granting substantial leeway to the decisionmaker. Public emergencies are not static events, nor do they unfold predictably. Response to such crises warrant – indeed require – nimbleness coupled with judgment to meet the needs of the moment. There is no specific one-size-fits-all response to a complex and ongoing emergency.

The subject matter here requires the broadest level of leeway permissible under the nondelegation doctrine. If "the management of natural resources is a difficult and complex task," *DNR v Seaman*, 396 Mich 299, 311 (1976), the response to a rapidly developing and ever-changing public health crisis is even more so.

Likewise, under a substantially similar standard, the U.S. Supreme Court has "over and over upheld even very broad delegations." *Gundy v United States*, 139 S Ct 2116, 2129 (2019). *Gundy* highlighted the consistency with which the Court had granted deference to Congress, mentioning cases upholding Congressional delegations to regulate in the "public interest," or for agencies to "set 'fair and equitable' prices and 'just and reasonable' rates." *Id.* at 2129. Recently, the Court turned away a delegation challenge to an agency's charge to promulgate air quality standards that are "*requisite* to protect the public health." *Id.*, citing *Whitman v Am Trucking Associations*, 531 US 457, 473 (2001). Thus, the "practical understanding" that we live in an "increasingly complex society, replete with ever changing and more technical problems," drives the hesitance to upend laws that "delegate power under broad general directives." *Mistretta v United States*, 488 US 361, 372 (1989). That principle holds here, and with even greater force.

The EPGA provides the Governor substantial discretion, but limits her ability to act upon a finding of an emergency, and even then the Governor may only exercise her discretion to issue "reasonable" orders "necessary" to protect "life and property" or to bring the emergency "under control." MCL 10.31(1). These guideposts are more than sufficient to pass constitutional muster.

C. The claims of the Plaintiffs that the Governor's authority is without limits under the EPGA, that she is exercising legislative authority, and that the structure of government has been compromised are mistaken.

Perhaps the most critical flaw in the Plaintiffs' position is their failure to recognize that the limits of "reasonable" and "necessary" are not just sufficient constitutionally, but they constitute true limits. The Governor has not become a law unto herself, nor has the Legislature abdicated its "core function to the executive branch" (Pls' Br p 30) by providing the Governor with a set of tools commensurate to the task of emergency response.

As noted, any declaration of an "emergency" in the first instance, or the failure to rescind that emergency because the conditions have subsided, are subject to judicial review. The claim that "they are no limit at all" (p 37) is not well taken.

Michigan jurisprudence is filled with general standards that have real meaning, that control and limit the actions of government, and ensure the liberty of all Americans. Such general principles as Equal Protection and Due Process are the bedrock of liberty in the U.S. Constitution, to say nothing of the Necessary and Proper Clause. Standards like reasonableness and necessity are not meaningless phrases, or just eloquent statements that have no jurisprudential significance. They are true standards of law that guide and restrain conduct and that enable meaningful challenge and review of that conduct. And they are the standards that the Michigan Governor has taken care to follow in responding to this emergency under the EPGA.

Plaintiffs warn of unending "unilateral rule" by the executive (Pls' Brief, p 36), but of course nothing in the EPGA's delegation of authority purports to provide for that. The EPGA requires at all times the presence of a public emergency or reasonable apprehension of immediate danger, which is subject to judicial review. Plaintiffs fail to explain where the Constitution demands the Legislature impose some predetermined, categorical time limit on the duration of emergencies.

Nor do the Plaintiffs explain how the presence of any such time limit might bear on whether the Governor is exercising legislative authority. Indeed, while Plaintiffs stress that "[t]he Michigan Constitution cannot simply be put on the shelf for several years" (Pls' Brief, p 36), how would the Constitution no longer be offended if only placed on the shelf for 28 days? In short, the Plaintiffs' argument proves too much.[28] The Legislature has not shelved the Constitution or forfeited its institutional role by enabling executive response to emergencies through the EPGA. The states have generally conferred such emergency powers on their executive, and Michigan stands among them.

In a similar vein, even though included in the certified questions, it is telling that the Plaintiffs do not challenge the constitutionality of the EMA on this ground, see Pls' Brief, pp 29–44, where the standards under which the Governor may act ultimately rest on same general principles that guide the EPGA.

[28] As a result, the Plaintiffs' citation of more than 30 states with clauses that enable state legislatures to terminate their emergencies, see Pls' Br, pp 40–41, n 10, really only confirms that the Governor is exercising executive authority. The Legislature cannot alienate its legislative authority for even a single day.

Indeed, under § 3 of the EMA, the Governor may "issue executive orders, proclamations, and directives having the force and effect of law to implement this act." MCL 30.403(2). This general statement is given form in § 5, that provide for suspension of regulatory statutes where "necessary" to cope with the disaster or emergency, MCL 30.405(1)(a), and for the provision of state resources where "reasonably necessary" to cope with the disaster or emergency, MCL 30.405(1)(b). Yes, the same language, or the same kinds of standards, as the EPGA.

On this point, the essential fact is that the executive authority the Governor is wielding is just that, executive authority. She is not enacting laws. None of the Governors are. She is using the tools the Legislature gave her to carry out the task it entrusted to her.

It is a little like the Michigan statute that enables police officers to issue lawful orders in traffic, which if violated, are misdemeanors. See MCL 257.602.[29] In that setting, it is necessary for the police to exercise executive authority. They are not acting like a legislature, and they are not creating laws. But the police officer's orders have the force and effect of law. The same is true here, but on a broader scale.

And, as noted, many states have granted their governors similarly broad authority to meet the moment of an emergency circumstance. See the following examples from a range of states:

[29] MCL 257.602 provides: "A person shall not refuse to comply with a lawful order or direction of a police officer when that officer, for public interest and safety, is guiding, directing, controlling, or regulating traffic on the highways of this state."

- Ariz Rev Stat § 26-303(E)(1) (during a state of emergency . . . [t]he governor shall have complete authority over all agencies of the state government and the right to exercise, within the area designated, all police power vested in the state by the constitution and laws of this state in order to effectuate the purposes of this chapter.");

- Ky Rev Stat Ann § 39A.100(1)(j) (granting governor broad powers "to perform and exercise other functions, powers, and duties deemed necessary to promote and secure the safety and protection of the [state]");

- Miss Code Ann § 33-15-11(c)(4) (the governor may "perform and exercise such other functions, powers and duties as may be necessary to promote and secure the safety and protection of the civilian population in coping with a disaster or emergency");

- Haw Rev Stat § 127A-13(3); 14(c) (granting the governor – who "shall be the sole judge of the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency" – the power to suspend laws that "impede[] or tend[] to impede or be detrimental to the expeditious and efficient execution of, or to conflict with, emergency functions");

- 20 Ill Comp Stat 3305/7 (giving the Illinois Governor the power to "utilize all available resources of the State government as reasonably necessary to cope with the disaster").[30]

---

[30] According to *Health Security,* Vol 17, No. 2, 2019, "An Assessment of State Laws Providing Gubernatorial Authority to Remove Legal Barriers to Emergency Response," p 3, Michigan's emergency powers laws are like to the majority of states:

> A majority of states have broad statutes enabling the governor to temporarily change statutes or regulations during a declared emergency. In total, 42 states explicitly permit the governor to change statutes or regulations during an emergency. In 35 states, governors are explicitly permitted to suspend or amend both statutes and regulations that interfere with an efficient, effective response to an emergency to an emergency. In 7 states (listed) governors are permitted to amend regulations during a declared emergency but are not explicitly authorized to modify or remove statutory requirements. [Figures and footnotes omitted.]

https://www.nga.org/wp-content/uploads/2019/06/An-Assessment-of-State-Laws-Providing-Gubernatorial-Authority-to-Remove-Legal-Barriers-to-Emergency-Response.pdf

Yet the Plaintiffs have cited no cases in which a court has apparently stepped in to nullify these grants.[31]

It is easy to understand why this is so. The Governor is best equipped to address the exigencies of an emergency, not the Legislature. While legislative deliberation ordinarily is valuable, a fast-moving, contagious disease requires an agile and flexible response, not Robert's Rules of Order.

The Legislature knows that to meet the moment, proper delegation to the executive is the wisest course, which is why it granted the authorities it did to the Governor. This pandemic has only confirmed the prescience of that judgment.

And throughout, Michigan's democracy has remained fully intact and vibrant. Of course, some officials and residents have disagreed with some actions of the Governor. That is what happens in a democracy. And the avenues that democracy duly provides to voice and act upon such disagreement have been, and continue to be, open. The Legislature has at all times remained free and empowered to take action as to this pandemic through lawmaking, including through the override of the Governor as that body may see fit. The Governor's actions are likewise subject to challenge by private parties and to review by the courts, and she will, in the end, have to stand for reelection.

---

[31] Insofar as the Plaintiffs rely on the decision in Wisconsin, *Wisconsin Legislature v Palm*, 942 NW2d 900 (WI 2020), that case is distinguishable. See *id.* at 914 ("[T]he Governor's emergency powers are not challenged by the Legislature, and [the agency official] does not rely on the Governor's emergency powers. Constitutional law has generally permitted the Governor to respond to emergencies without the need for legislative approval.").

While many things about this pandemic have been "sobering" (Pls' Brief, p 39), the proper operation of these democratic processes is not among them. Through the EPGA and the EMA, the Legislature duly delegated to the Governor the critical task and necessary tools of emergency response. This was a constitutional choice, and as the past few months have vividly illustrated, a wise and necessary one. There is no basis for this Court to disrupt it here.

CONCLUSION AND RELIEF REQUESTED

This Court should decline to review these questions, but if it does, this Court should affirm the Governor's exercise of her authority under both the Emergency Powers of the Governor Act and the Emergency Management Act.

Respectfully submitted,

s/ B. Eric Restuccia

B. Eric Restuccia (P49550)
Deputy Solicitor General

Christopher M. Allen (P75329)
Assistant Solicitor General

Joseph T. Froehlich (P71887)
Joshua Booth (P53847)
John Fedynsky (P65232)
Kyla Barranco (P81082)
Assistant Attorneys General
Attorney for the Governor and Director
P.O. Box 30212
Lansing, Michigan 48909
(517) 335-7656

Dated: August 6, 2020