

STATE OF MICHIGAN
IN THE SUPREME COURT

In re CERTIFIED QUESTIONS FROM THE
UNITED STATES 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.

***AMICUS CURIAE* BRIEF OF MICHIGAN NURSES ASSOCIATION**

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INTEREST OF AMICUS CURIAE

Amicus curiae is the Michigan Nurses Association, which represents more than 13,000 nurses and healthcare professionals working in hospitals, public health departments, and nursing homes across the State of Michigan. *Amicus curiae* submits this brief to explain how the Governor's Executive Orders have supported its members in their fight against COVID-19, and why the Governor should be permitted to continue to exercise the authority granted to her to protect progress that has been made, contain the spread of the virus, and prevent unnecessary illnesses and deaths.¹

¹ This brief was not authored in whole or in part by counsel representing a party in this case, nor did such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief. Other than *amicus curiae* and its counsel, no person made a monetary contribution to assist in preparation of this brief.

INTRODUCTION AND BACKGROUND

On March 9, 2020, there were no confirmed cases of COVID-19 in Michigan. Fourteen days later, there were nearly 10,000. Two weeks after that more than 25,000 cases had been confirmed. The State's hospital beds filled with patients. Nurses and other healthcare workers placed their own lives at risk when supplies of personal protective equipment ("PPE") ran out. Colleagues fell ill. Projections showed the healthcare system was about to be overwhelmed.

On March 10, 2020, the same day the State's first COVID-19 case was confirmed, Governor Gretchen Whitmer, exercising the authority granted to her by statute, began to issue a series of Executive Orders to protect the State of Michigan from the pandemic. Following the guidance of State health agencies and other subject matter experts, the Executive Orders enforced social distancing measures and restricted certain activities of businesses, healthcare providers, and citizens, culminating in a March 23, 2020 Stay Home, Stay Safe Order. Under the Governor's Orders, medical providers were required, *inter alia*, to temporarily postpone all non-essential medical procedures in order to "mitigate the spread of COVID-19, protect the public health, provide essential protections to Michiganders, and ensure the availability of health care resources" to treat the exploding number of new COVID-19 cases. Executive Order 2020-17.

The Governor's exercise of emergency powers worked. Since the Orders were issued, the number of new COVID-19 cases has decreased. The State's healthcare system, which had been on the brink of disaster, continues to function and save lives. As a result of these successes, many of the restrictions imposed by the Orders—including Executive Order 2020-17 and the Stay Home, Stay Safe Order—have been lifted, allowing medical providers to once again offer non-essential medical care, subject to social distancing requirements designed to prevent a second wave of COVID-19 cases.

On May 12, 2020, Plaintiffs—which are healthcare providers and patients—filed this lawsuit in the United States District Court for the Western District of Michigan challenging the delegation of emergency authority to the Governor that allowed the State to protect the integrity of its healthcare system and combat the first wave of COVID-19. In order to resolve this challenge, the district court certified to this Court the following two questions of Michigan law:

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

Plaintiffs argue with respect to the first certified question that neither the EMA nor the EPGA authorizes the Governor’s Executive Orders issued after April 30, 2020, when the Legislature declined to extend the states of emergency and disaster that were previously declared. More specifically, Plaintiffs contend that “[t]he EMA unambiguously states that, unless both houses of the Michigan Legislature approve the Governor’s request for an extension . . . , ‘the governor shall issue an executive order or proclamation declaring the state of disaster [or emergency] terminated,’” and that “[t]he Governor may not circumvent [these provisions] by indefinitely re-declaring the same emergency.”² Plaintiffs also argue that the EPGA applies “only during ‘emergencies’” that are “temporary, time-limited crises,” and that “[a] years-long pandemic—no matter how serious of a policy matter it is—is not an ‘emergency’ within the meaning of the EPGA.”³ With respect to the second certified question, Plaintiffs argue that “[t]o the extent that the EPGA gives Governor Whitmer discretion to declare an emergency across the

² Plaintiffs’ Opening Br. at 12-17 (quoting MCL 30.403(3)-(4)).

³ *Id.* at 17-29 (quoting MCL 10.31(1)).

entire State for an indefinite period of time, it violates the Separation of Powers and Non-Delegation Clauses” because it “contains no standards guiding the Governor’s exercise of her emergency powers.”⁴

Around the same time this case was filed, a second case was filed in the Michigan Court of Claims also challenging the delegation of emergency authority to the Governor under the EPGA and the EMA on the same or similar grounds. The challengers in that case are the entities that delegated the authority in the first place: the Michigan House of Representatives and Michigan Senate (collectively, the “Legislature” and the “Legislature Case”). With respect to the EPGA, the Legislature argued in the alternative that either (1) the power delegated to the Governor is narrowly drawn to only “local” emergency responses limited to one “area within the state,”⁵ and, (2) if it is not so limited, the EPGA violates the separation of powers because it “contains insufficient standards to guide its use.”⁶ With respect to the EMA, the Legislature contended that the Governor’s Executive Orders exceeded the powers delegated to her because the EMA only “allows the Governor to declare a statewide state of disaster or emergency for up to 28 days,” and does not permit the Governor to “redeclare states of emergency and disaster—based on the exact same underlying facts” after prior states of emergency and disaster have expired.⁷

The Court of Claims ruled that the Governor’s Executive Orders were lawful exercises of authority under the EPGA⁸ and rejected the Legislature’s contention that the EPGA violates the

⁴ *Id.* at 29-44. Plaintiffs do not contend that the EMA violates the separation of powers or non-delegation clauses. *See, e.g.*, Plaintiff’s Reply at

⁵ Ct of Claims, Mot. For Immediate Declaratory Judgment at 27-38.

⁶ *Id.* at 52-60.

⁷ *Id.* at 18-27.

⁸ Ct of Claims, Op. and Order at 10-15 (App. 201a-206a).

separation of powers,⁹ but found that the EMA does not provide an additional, independent basis to uphold the Executive Orders.¹⁰ The Legislature appealed, and on August 21, 2020 the Court of Appeals affirmed. The Court of Appeals rejected the Legislature’s argument that the EPGA does not apply to “an indefinite statewide emergency” such as COVID-19 because the “the plain and unambiguous language of the EPGA and the EMA does not support the Legislature’s position.”¹¹ The Court held (1) that the EPGA applies to any emergency “‘within the state,’” which “can patently encompass not only a local emergency but also a statewide emergency” such as a “pandemic,”¹² (2) that “a declared statewide emergency [under the EPGA] only ends upon the governor’s declaration that the emergency no longer exists,” which “has yet to occur in the instant case,”¹³ and (3) that the EMA does not limit the scope of the Governor’s authority because “the EMA expressly provides that it shall not be construed to ‘[l]imit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to . . .’ the EPGA.”¹⁴

The Court of Appeals also rejected the Legislature’s argument that “the EPGA violates the separation of powers and attendant nondelegation doctrine.”¹⁵ The Court ruled that “the EPGA contains standards that are as reasonably precise as the subject matter—public

⁹ *Id.* at 15-19 (App. 206a-210a).

¹⁰ *Id.* at 19-25 (App. 210a-216a).

¹¹ Ct. of Appeals, Op. at 10-16.

¹² *Id.* at 10-12, 14 (quoting MCL 10.31(1)) (“It hardly sounds as if the Legislature were focused solely on local emergencies when speaking in terms of a great public crisis, disaster, catastrophe, or similar emergency that imperils public safety. Indeed, its use of the adjective ‘great’ instead suggests legislative contemplation of an emergency that is expansive or substantial Contrary to the Legislature’s strained interpretation, an emergency ‘within’ our state can patently encompass not only a local emergency but also a statewide emergency affecting all of Michigan. . . . [T]he EPGA would also cover a statewide emergency involving a contagious disease such as COVID-19” (citation omitted)).

¹³ *Id.* at 12-13.

¹⁴ *Id.* at 13-16 (quoting MCL 30.417(d)).

¹⁵ *Id.* at 16-19.

emergencies—requires or permits” because it provides that the Governor’s emergency management orders “must be ‘reasonable’ and . . . ‘necessary to protect life and property or to bring the emergency situation . . . under control.’”¹⁶ “Reasonableness and necessity . . . constitute appropriate limits or standards that prohibit and can prevent the exercise of uncontrolled and arbitrary power, yet are sufficiently broad to permit a governor to carry out the legislative policy of protecting life and property during an emergency” such as COVID-19.¹⁷

Finally, the Court of Appeals declined to decide whether the EMA separately authorizes the Governor’s Executive Orders, finding this issue to be “moot” in view of its ruling that “the Governor had the authority to continue the very same state of emergency and issue the very same EOs under the EPGA.”¹⁸

While the appeal of the Legislature Case was pending, this Court issued Orders (1) setting an expedited briefing schedule in this case and scheduling oral argument for September 2, 2020, (2) directing the Court of Appeals to issue its decision in the Legislature Case by no later than August 21, 2020, and (3) inviting the Legislature to submit an *amicus curie* brief in this matter.¹⁹ As a result of these Orders, this Court will be in a position to decide the overlapping challenges to the Governor’s COVID-19 Executive Orders presented in this case and the Legislature Case on a record that includes briefs filed by the parties in both cases and the decision on those issues by the Court of Appeals.

¹⁶ *Id.* at 18 (quoting MCL 10.31(1)).

¹⁷ *Id.* at 18-19.

¹⁸ *Id.* at 19 (“If this panel, as urged by the Legislature, were to rule that the Governor violated the EMA and lacked authority to utilize the EMA to extend the state of emergency and issue EOs on and after April 30, 2020, it would be entirely pointless because the Governor had the authority to continue the very same state of emergency and issue the very same EOs under the EPGA. . . . Therefore, given our holding in regard to the EPGA, we can only conclude that any issues concerning the Governor’s powers under the EMA are now moot.”).

¹⁹ *See* June 30, 2020 Order at 1-2.

Should this Court exercise its discretion and answer the questions certified in this case and decided in the Legislature Case, *amicus curiae* respectfully submits that the Court should rule (1) that the Governor has authority under both the EPGA and EMA to issue and renew Executive Orders related to the COVID-19 pandemic, and (2) that the statutes do not violate the separation of powers and/or the non-delegation clauses of the Michigan Constitution.

Amicus curiae is the Michigan Nurses Association (“MNA”), which represents over 13,000 nurses and healthcare professionals in the State of Michigan. Nurses and other front-line healthcare workers, such as the MNA’s members, face a significantly higher risk of contracting COVID-19 as compared to the general population, with some studies showing that they account for up to 19% of COVID-19 cases.²⁰ In April 2020, during the height of the pandemic in Michigan, Beaumont Health System reported that 1,500 healthcare workers (including 500 nurses) were unable to work due to COVID-19 symptoms, and Henry Ford Hospital disclosed that approximately 700 of its staff had tested positive for the virus.²¹ If Plaintiffs and the Legislature are successful in their challenges to the Governor’s Executive Orders, the risk of a second wave of COVID-19 cases will increase, potentially placing MNA members, other Michigan healthcare providers, their patients, their respective families, and all other Michiganders, in harm’s way.

The MNA and its members recognize that the Governor’s Executive Orders necessarily have come with certain undesirable economic and other consequences, including for healthcare

²⁰ Centers for Disease Control, Characteristics of Health Care Personnel with COVID-19 — United States, February 12–April 9, 2020. *MMWR Morb Mortal Wkly Rep* 2020;69:477–481, (April 17, 2020), DOI: available at <http://dx.doi.org/10.15585/mmwr.mm6915e6>external icon (last visited Aug. 25, 2020).

²¹ Robin Erb, *Beaumont Has 1500 Workers with Coronavirus Symptoms, Including 500 Nurses*, Bridge (April 6, 2020), available at <https://www.bridgemi.com/michigan-health-watch/beauont-has-1500-workers-coronavirus-symptoms-including-500-nurses>, (last visited Aug. 25, 2020).

providers and patients such as Plaintiffs. MNA members themselves have been subjected to furloughs and layoffs after Michigan hospitals and other healthcare providers began experiencing economic difficulties due to losses in revenue for non-essential care and procedures.²² Despite this direct economic impact, the MNA supports the Governor's actions and strongly believes that the people and healthcare institutions of Michigan would be exponentially worse off had the Executive Orders not been in place. Moreover, as frontline healthcare professionals, the MNA and its members are all too aware that the pandemic is far from over, and will continue to pose a grave threat if the ongoing risks are not properly managed. Stripping the Governor of authority to deal with COVID-19's continuing effects could lead to disastrous consequences.

I. The Governor Has Broad Powers to Address Public-Health Emergencies, Such as the COVID-19 Pandemic

One quintessential and universally recognized power delegated to the executive branch of government is the power to respond in an emergency. State legislatures throughout the nation have enacted statutes granting governors broad powers to protect the public from an epidemic or other public-health crisis. *See, e.g.*, Jim Rossi, *Institutional Design and The Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand. L. Rev. 1167, 1230 (1999).²³

²² *See, e.g.*, Sara Sidner, *Why nurses are being furloughed during the pandemic*, CNN (July 3, 2020), available at <https://www.cnn.com/videos/health/2020/07/03/hospitals-losing-money-during-coronavirus-pandemic-nr-vpx.cnn> (last visited Aug. 25, 2020). The economic losses suffered by hospitals and other healthcare providers are not solely due to the Governor's Executive Orders. Many patients appear to have voluntarily decided to forego medical treatment due to fears of contracting COVID-19. Detroit hospitals, for example, saw a 50% reduction in non-COVID 19 emergency room visits during the first surge of the pandemic. *See* Tresa Baldas, *ER visits plummet amid pandemic: 'More people are dying at home'*, Detroit Free Press (May 4, 2020), available at <https://www.michiganradio.org/post/er-visits-plummet-amid-pandemic-more-people-are-dying-home> (last visited Aug. 25, 2020).

²³ *See also, e.g.*, Ala. Code § 31-9-2 (1989); Cal. Gov't Code § 8558 (West 1992 & Supp. 1999); Ky. Rev. Stat. Ann. § 39A.020; La. Rev. Stat. Ann. § 29:723; Me. Rev. Stat. Ann. tit. 37-B, § 703 (West 1989 & Supp. 1998); Minn Stat. Ann. § 12.03; N.Y. Exec. Law § 20; N.D. Cent. Code § 37-17.1-04; Ohio Rev. Code Ann. § 5502.21; R.I. Gen. Laws § 30-15-3 (1994).

Michigan is no different. In 1945, the Legislature enacted the EPGA, which authorizes the Governor to act in a “great public crisis, disaster, rioting, catastrophe, or similar public emergency” by “proclaim[ing] a state of emergency” and “promulgat[ing] reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation . . . under control.” MCL 10.31(1). Several decades later, the Legislature enacted the EMA, which further expanded the scope of the Governor’s authority. The EMA confirms that the Governor, not the Legislature, “is responsible for coping with dangers . . . presented by a disaster or emergency.” MCL 30.403(1). It provides that the Governor “shall . . . declare a state of emergency [or disaster] if he or she finds that an emergency [or disaster] has occurred,” and authorizes her to “issue executive orders, proclamations, and directives having the force and effect of law to implement this act.” MCL 30.403(2)-(4).

As the Court of Claims and the Court of Appeals recognized when they upheld the Governor’s COVID-19 Executive Orders in the Legislature Case, the EPGA confers “broad authority on the Governor to declare a state of emergency and to act to bring the emergency under control”²⁴ and “does not provide any active role for the Legislature,”²⁵ while the EMA

²⁴ Ct. of Appeals, Op. at 2-3, 8, 10-14 (“The Court of Claims next examined the EPGA, explaining that it bestowed broad authority on the Governor to declare a state of emergency and to act to bring the emergency under control. The Court of Claims rejected the Legislature’s attempt to restrict the scope of the EPGA to only local or regional emergencies, stating that that argument was inconsistent with the EPGA’s plain language, which casts a much wider net. . . . The Legislature argues that the Governor cannot use the EPGA to justify an indefinite statewide emergency. . . . We hold that the plain and unambiguous language of the EPGA and the EMA does not support the Legislature’s position. . . . Indeed, [the EPGA’s] use of the adjective ‘great’ instead suggests legislative contemplation of an emergency that is expansive or substantial, not merely a local emergency. . . . [T]he Legislature specifically declared that its intent was ‘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 (emphasis added). Our conclusion regarding the breadth of the EPGA and that it pertains to statewide emergencies is entirely consistent with the expressed legislative purpose of the EPGA.”); *see also* Ct. of Claims, Op. and Order at 10-11 (App. 201a-202a).

grants the Governor “awesome” and “sweeping powers to cope with ‘dangers to this state or the people of this state presented by a disaster or emergency.’”²⁶ Unless and until a new law is enacted, the power to respond to a public-health emergency remains squarely and exclusively with the Governor.

There are many sound reasons why legislative bodies in Michigan and elsewhere have chosen to delegate the authority to act in a public-health crisis. Because the executive branch answers to a single authority—the Governor—it can act quickly and decisively in an emergency. The Governor also oversees administrative agencies, such as the Michigan Department of Health and Human Services, which employ scientists, doctors, public-health officials, and other experts trained to diagnose threats to public health, identify countermeasures, and ensure that they are correctly implemented. Those agencies also have laboratories, testing equipment, working relationships with healthcare professionals and institutions, and scientific expertise that allow them to collect data and conduct an ongoing, fact-specific, and adaptive analysis of whether additional or different countermeasures are needed.

²⁵ Ct. of Appeals, Op. at 2-3 (“Notably, MCL 10.31 does not provide any active role for the Legislature during a public emergency, let alone the power to directly act as a check against a governor’s exercise of authority under the EPGA. Our Supreme Court has recognized that ‘the emergency powers granted to the Governor by Act 302 are exclusive.’ *Walsh v City of River Rouge*, 385 Mich 623, 640; 189 NW2d 318 (1971).”).

²⁶ Ct. of Claims, Op. and Order at 20, 25 (App. 211a, 216a) (quoting MCL 30.403(1)) (“Enacted in 1976, the EMA grants the Governor sweeping powers to cope with ‘dangers to this state or the people of this state presented by a disaster or emergency.’ ... These powers include the authority to issue executive orders and directives that have the force and effect of law. MCL 30.403(2). The Governor may also, by executive order, ‘Suspend a regulatory statute, order, or rule prescribing the procedures for conduct of state business, when strict compliance with the statute, order, or rule would prevent, hinder, or delay necessary action in coping with the disaster or emergency.’ MCL 30.405(1)(a). Additionally, the Governor may issue orders regarding the utilization of resources; may transfer functions of state government; may seize private property—with the payment of ‘appropriate compensation’—evacuate certain areas; control ingress and egress; and take ‘all other actions which are which are necessary and appropriate under the circumstances.’ See, e.g., MCL 30.405(1)(b)-(j). This power is indeed awesome.”).

The Legislature is, by design, a very different institution. It speaks with many voices representing many views, not the single voice of the Governor. It consists of elected politicians from various backgrounds, not subject-matter experts. And it acts through the legislative process, which is designed to collect information from numerous stakeholders with multiple viewpoints, and gradually build consensus through deliberation and compromise.

In a pandemic or other public-health emergency, the ability to act flexibly and decisively based on scientific, medical, and other expertise is essential. Courts have, accordingly, long upheld statutory schemes delegating emergency powers to the executive branch in a public-health crisis. *See, e.g., Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27-28 (1905) (“The authority to determine for all what ought to be done in such [a public-health] emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a board of health composed of persons residing in the locality affected, and appointed, presumably, because of their fitness to determine such questions.”); *Ex parte McGee*, 105 Kan. 574, 185 P. 14, 16 (1919) (“[I]t is indispensable to preservation of the public health that some administrative officer or board should be clothed with authority to make adequate rules which have the force of law, and generally the public welfare is best promoted by delegating power to make administrative regulations to fulfill the expressed intention of the Legislature.”); *People ex rel. Barmore v. Robertson*, 302 Ill. 422, 431-32, 134 N.E. 815, 819 (1922) (“The necessity of delegating to an administrative body the power to determine what is a contagious and infectious disease and giving the body authority to take necessary steps to restrict and suppress such disease is apparent to everyone who has followed recent events.”).

Such statutory schemes—and governors’ exercise of emergency authority under them—have continued to be upheld during the COVID-19 pandemic. *See, e.g., S. Bay United Pentecostal Church v Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring) (“The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. . . . When [elected] officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad. Where those broad limits are not exceeded, they should not be subject to second-guessing by an unelected federal judiciary” (internal quotations, alterations, and citations omitted)); *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 886, 889 (Pa. 2020) (“Upon the declaration of a disaster emergency, the Emergency Code vests with the Governor expansive emergency management powers The COVID-19 pandemic is, by all definitions, a natural disaster and a catastrophe of massive proportions. Its presence in and movement through Pennsylvania triggered the Governor’s authority under the Emergency Code.”); *Abramson v. DeSantis*, No. SC20-646, 2020 WL 3464376, at *1 (Fla. June 25, 2020) (“the Governor has the authority to issue executive orders to address a pandemic”); *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, No. 20-1581, 2020 WL 3468281, at *1, *4 (6th Cir. June 24, 2020) (“In addressing the COVID-19 outbreak, executives at the national, state, and local levels have had difficult decisions to make in honoring public health concerns while respecting individual liberties. Those decisions have now been the subject of numerous legal challenges, from coast to coast. . . . And almost without exception, courts in those instances have appropriately deferred to the judgments of the executive in question.”).

II. The Governor’s Executive Orders Contained the First Wave of COVID-19

To date, the Legislature’s delegation of power to respond in a public-health crisis has worked as it was intended: the Governor responded swiftly to the crisis by drawing upon the

expertise of the State's administrative agencies and issuing a series of Executive Orders that slowed the spread of the virus, protected the integrity of the healthcare system, and saved the lives of Michiganders.

A. The COVID-19 Pandemic Poses a Unique Challenge to Public Health

COVID-19 presents a unique, once-in-a-generation threat to public health. The first cases of the disease were reported in Wuhan Province, China in late 2019.²⁷ As such, it is a “novel” coronavirus whose behavior and impact were not well known. While the medical and scientific communities have since learned a great deal about the disease, many questions remain unanswered.²⁸

COVID-19 also has proven to be highly contagious. It appears to spread person-to-person through aerosols or respiratory droplets produced when an infected person coughs, sneezes, or talks.²⁹ It may also be spread by touching the mouth, nose or eyes after coming into contact with a contaminated surface.³⁰ COVID-19 is notably more contagious than the similar

²⁷ World Health Organization (“WHO”), *Pneumonia of unknown cause – China* (Jan. 5 2020), available at <https://www.who.int/csr/don/05-january-2020-pneumonia-of-unkown-cause-china/en/> (last visited Aug. 25, 2020).

²⁸ See Kate Wells, *These Michigan doctors treated coronavirus: Here's what they learned*, Bridge (May 5, 2020), <https://www.bridgemi.com/michigan-health-watch/these-michigan-doctors-treated-coronavirus-heres-what-they-learned> (last visited Aug. 25, 2020).

²⁹ Centers for Disease Control, *What you should know about COVID-19 to protect yourself and others* (Apr. 15, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf> (last visited Aug. 25, 2020); World Health Organization, *Modes of transmission of virus causing COVID-19: implications for IPC precaution recommendations* (Mar. 29, 2020), available at <https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations> (last visited Aug. 25, 2020); State of Michigan, *How does COVID-19 spread?* (Apr. 2, 2020), available at <https://www.michigan.gov/coronavirus-/0,9753,7-406-98810-524151--,00.html> (last visited Aug. 25, 2020).

³⁰ Centers for Disease Control, *What you should know about COVID-19 to protect yourself and others* (Apr. 15, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf> (last visited Aug. 25, 2020).

SARS virus that caused an outbreak in 2003, because infected persons have high concentrations of the virus in the upper respiratory tract, and a peak viral load that occurs early, often before there are any symptoms, which allows for asymptomatic transmission.³¹ Further, because this is a new disease, the population has no known preexisting immunity. There is no vaccine, and no cure. These factors have contributed to the rapid spread of COVID-19 across the globe. Since it was first reported, the virus has infected more than 23 million people worldwide,³² including over 97,000 Michiganders and many Michigan nurses and other healthcare personnel.³³

Although many cases are mild, COVID-19 can severely impact patient health. Symptoms such as coughing, difficulty breathing, fever, and loss of taste or smell typically appear within two to 14 days.³⁴ Approximately 19% of patients have severe or critical respiratory issues.³⁵ Common complications include pneumonia, acute respiratory distress, and sepsis.³⁶ COVID-19 can also cause blood clots, sometimes leading to pulmonary embolism and

³¹ Monica Gandhi, M.D., M.P.H., Deborah S. Yokoe, M.D., M.P.H., and Diane V. Havlir, M.D., Editorial, *Asymptomatic Transmission, the Achilles' Heel of Current Strategies to Control Covid-19*, N.E.J.M. (May 28, 2020), available at <https://www.nejm.org/doi/full/10.1056/NEJMe2009758> (last visited Aug. 25, 2020); CDC, *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)* (June 30, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html> (last visited Aug. 25, 2020).

³² COVID-19 Dashboard by the Center for Systems Science and Engineering (“CSSE”) at Johns Hopkins University (“JHU”), <https://coronavirus.jhu.edu/map.html> (last visited Aug. 25, 2020).

³³ Executive Order 2020-4 (Mar. 10, 2020); State of Michigan, Coronavirus, <https://www.michigan.gov/coronavirus/> (last visited Aug. 25, 2020).

³⁴ CDC, *Symptoms of Coronavirus* (May 13, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last visited Aug. 25, 2020).

³⁵ CDC, *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)* (June 30, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html> (last visited Aug. 25, 2020).

³⁶ *Id.*

stroke in otherwise healthy patients.³⁷ The virus also has been linked to a dangerous inflammatory syndrome affecting children.³⁸ To date, more than 814,000 people have died from COVID-19, with over 176,000 deaths in the United States, and more than 6,300 in Michigan.³⁹ Older patients, as well as those with underlying conditions, have a higher risk of death.⁴⁰

The novelty of the virus, the speed at which it spreads, the lack of an effective treatment, and the severity of symptoms and outcomes all require a response that is fast, flexible, and driven by data to prevent new infections.

B. The Governor's Executive Orders Prevented COVID-19 from Overwhelming the Healthcare System, and Allowed the State to Reopen

During the crucial early period of the COVID-19 outbreak in Michigan, Governor Whitmer issued a series of Executive Orders that slowed the surge of new hospital patients and prevented the healthcare system from being overwhelmed. On March 10, 2020—the same day the first state case was confirmed—Governor Whitmer issued Executive Order 2020-4, which declared a state of emergency pursuant to the powers delegated to her. Over the next two weeks,

³⁷ Cassandra Willyard, *Coronavirus blood-clot mystery intensifies*, *Nature* (May 8, 2020, Correction May 13, 2020), available at <https://www.nature.com/articles/d41586-020-01403-8#ref-CR1> (last visited Aug. 25, 2020); Mary Van Beusekom, Center for Infection Disease Research and Policy, *Autopsies of COVID-19 patients reveal clotting concerns* (May 7, 2020); available at <https://www.cidrap.umn.edu/news-perspective/2020/05/autopsies-covid-19-patients-reveal-clotting-concerns> (last visited Aug. 25, 2020).

³⁸ Maria Godoy, *Mystery inflammatory syndrome in kids and teens likely linked to COVID-19*, *Minnesota Public Radio* (May 8, 2020), available at <https://www.mprnews.org/story/2020/05/07/npr-mystery-inflammatory-syndrome-in-kids-and-teens-likely-linked-to-covid-19> (last visited Aug. 25, 2020).

³⁹ COVID-19 Dashboard by CSSE at JHU, <https://coronavirus.jhu.edu/map.html> (last visited Aug. 25, 2020); CDC, *Cases in the U.S.* (as of August 25, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited Aug. 25, 2020); State of Michigan, *Coronavirus* (as of August 24, 2020), <https://www.michigan.gov/coronavirus/> (last visited Aug. 25, 2020).

⁴⁰ CDC, *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)* (June 30, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html> (last visited Aug. 25, 2020).

as additional data began to emerge, the Governor issued further Executive Orders to conserve medical resources and enforce social distancing through increasingly restrictive measures.⁴¹

During this period, the number of confirmed cases of COVID-19 in Michigan increased from approximately 509 to 8,760, with 1,188 new cases on March 23, 2020 alone.⁴² Projections showed that hospitals and other healthcare systems were at risk of being overwhelmed. Beaumont Health's internal models predicted that its hospital capacity could be exhausted by the first week of April.⁴³ Henry Ford Health System warned that it might have to ration care due to shortages of medical supplies.⁴⁴

Recognizing these specific and grave threats, on March 23, 2020, the Governor issued her first Stay Home, Stay Safe Order to "suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, and to avoid needless deaths." See Executive

⁴¹ Among other things, the Governor's Executive Orders limited the number of people who could assemble in one place and closed schools (Executive Orders 2020-5 (Mar. 13, 2020) and 2020-11 (Mar. 16, 2020)); restricted visitors to health care facilities and limited non-essential medical procedures (Executive Orders 2020-6 (Mar. 13, 2020), 2020-7 (Mar. 14, 2020), 2020-17 (Mar. 20, 2020)); closed public gathering places such as restaurants, bars, and movie theaters (Executive Orders 2020-9 (Mar. 16, 2020) and 2020-20 (Mar. 21, 2020)); restricted visitors to health care facilities and limited non-essential medical procedures (Executive Orders 2020-6 (Mar. 13, 2020), 2020-7 (Mar. 14, 2020), 2020-17 (Mar. 20, 2020)); and took steps to assist health care providers treating COVID-19 patients, for example by waiving licensing requirements and expanding hospital facilities (Executive Order 2020-13 (Mar. 17, 2020)).

⁴² State of Michigan, Daily Counts (as of May 13, 2020), available at https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html (last visited Aug. 25, 2020).

⁴³ John Fox, Detroit Free Press, *Beaumont CEO: Whitmer's stay-home order saved lives in Michigan* (May 8, 2020), available at <https://www.freep.com/story/opinion/contributors-2020/05/08/beamont-ceo-whitmer-stay-home-order-michigan/3096036001/> (last visited Aug. 25, 2020).

⁴⁴ Jay Greene, Crain's Detroit Business, *Henry Ford Health says document leaked on rationing ventilators is 'worst-case scenario'* (Mar. 27, 2020), available at <https://www.crainsdetroit.com/health-care/henry-ford-health-says-document-leaked-rationing-ventilators-worst-case-scenario> (last visited Aug. 25, 2020).

Order 2020-21. In March and April, the Governor continued to issue additional Executive Orders modifying or extending her prior actions in order to “flatten the curve” and ensure that a surge of COVID-19 infections did not overwhelm the healthcare system.⁴⁵

On May 7, 2020, the Governor announced a six-phase reopening plan, based on the number of new cases, to avoid a second wave of COVID-19: (1) uncontrolled growth, (2) persistent spread, (3) flattening, (4) improving, (5) containing, and (6) post-pandemic.⁴⁶ She further noted that Michigan was now in the third phase: flattening. *Id.* In line with this strategy, the Governor lifted the Stay Home, Stay Safe Order for the entire state on June 1, 2020. *See* Executive Order 2020-110. In late May and early June, medical providers were authorized to resume non-essential medical care, and other businesses were permitted to resume operations. *See id.*; Executive Order 2020-115.

To date, the Governor has issued more than 150 Executive Orders relating to the COVID-19 pandemic. This exercise of emergency powers has worked. The number of new COVID-19 cases in Michigan peaked on April 1, 2020. Since then, new cases have generally trended down, remained flat, or increased only modestly.⁴⁷ Some areas of the State were able to avoid a substantial outbreak altogether because of social distancing—the counties in the Upper Peninsula

⁴⁵ *See, e.g.*, Executive Order 2020-37 (Apr. 5, 2020) (modifying and extending restrictions on entry to healthcare facilities in Executive Order 2020-7); Executive Order 2020-43 (Apr. 13, 2020) (modifying and extending restrictions on entering public accommodations in Executive Order 2020-20); Executive Order 2020-49 (Apr. 14, 2020) (modifying and extending healthcare licensing and operational capacity measures of Executive Order 2020-13).

⁴⁶ Justin Hicks, MLive, *Michigan is in Phase 3 of 6 in coronavirus response and recovery, governor says* (May 8, 2020) available at <https://www.mlive.com/public-interest/2020/05/michigan-is-in-phase-3-of-6-in-coronavirus-response-and-recovery-governor-says.html> (Last visited Aug. 25, 2020).

⁴⁷ State of Michigan, *Michigan Data* (as of August 20, 2020), available at https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html (last visited Aug. 25, 2020).

have recorded approximately 850 confirmed COVID-19 cases and 18 deaths to date.⁴⁸ The worst-case scenarios that were predicted in March did not come to pass. As John Fox, CEO of Beaumont Health explained in an editorial in May 2020, “[i]f the Governor had not taken or delayed the action she took on March 24 with respect to the Stay Home, Stay Safe Order, I believe it would have had disastrous consequences for our patients at Beaumont Health and many other health systems across Michigan.”⁴⁹

The impact of the Governor’s policies stands in stark contrast to other states that did not take decisive measures to contain the virus and implement cautious reopening plans. At the time the Governor issued the Stay Home, Stay Safe Order, each person in Michigan infected with COVID-19 spread the virus, on average, to three other people. By April, that number had dropped to 0.8.⁵⁰ Meanwhile, other states that failed to adopt similar measures have seen large spikes in COVID-19 cases over the summer. For example, Arizona, California, Florida, and Texas each saw more than 8,000 weekly new COVID-19 cases from June 10, 2020 to June 23, 2020, whereas Michigan recorded only 826 new cases during the same period.⁵¹

⁴⁸ State of Michigan, Daily Counts (as of August 20, 2020) (Healthcare Coalition Region 8 data), available at https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html (last visited Aug. 25, 2020).

⁴⁹ John Fox, Detroit Free Press, *Beaumont CEO: Whitmer’s stay-home order saved lives in Michigan* (May 8, 2020), available at <https://www.freep.com/story/opinion/contributors/2020/05/08/beaumont-ceo-whitmer-stay-home-order-michigan/3096036001/> (last visited Aug. 25, 2020).

⁵⁰ WWJ News Radio, *Whitmer: Data Shows Michigan’s Aggressive Coronavirus Restrictions Saved Lives* (June 12, 2020) available at <https://wwjnewsradio.radio.com/articles/news/whitmer-data-shows-coronavirus-restrictions-saved-lives> (last visited Aug. 25, 2020).

⁵¹ Brad Gowland and Emma Winowiecki, Michigan Radio NPR, *Here’s how Michigan’s COVID-19 case rate compares to other states* (June 24, 2020) available at <https://www.michiganradio.org/post/heres-how-michigans-covid-19-case-rate-compares-other-states> (last visited Aug. 25, 2020).

III. The Powers Delegated to the Governor Are Necessary to Continue to Contain COVID-19 and Keep the State Open

Although the spread of COVID-19 in Michigan has slowed, it has not stopped. More than 1,100 new cases were diagnosed in the past week.⁵² Dr. Anthony S. Fauci, the nation's top infectious-diseases expert, has cautioned that the United States could see up to 100,000 new cases per day if measures are not taken to curb the recent surge of infections.⁵³ Indeed, on July 18, 2020, Bronson Methodist Hospital said that "there was a concern of the second wave of COVID-19 occurring during the flu season" and that "health systems would need to be prepared to determine if a patient had the flu or COVID-19 quickly."⁵⁴ Michigan's citizens, healthcare system, and economy remain at serious risk of a second wave.

The MNA takes no position on what specific measures will be necessary to contain the pandemic going forward. The MNA contends, however, that if this Court decides to answer the certified questions, it should hold that the Governor has ongoing authority to exercise the emergency powers granted to her by statute to contain the COVID-19 pandemic, like the Court of Claims and the Court of Appeals did in the Legislature Case. The Governor, not the Legislature, is best positioned to manage the containment and reopening process. Now, as before, it is essential that the State act flexibly, quickly, and decisively, based on real-time data

⁵² State of Michigan, Daily Counts (as of August 20, 2020), *available at* https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html (last visited Aug. 25, 2020).

⁵³Maureen Groppe, Detroit Free Press, *Anthony Fauci tells Congress new coronavirus cases could reach 100,000 a day without changes* (June 30, 2020) *available at* <https://www.freep.com/story/news/politics/2020/06/30/coronavirus-dr-anthony-fauci-update-senate-state-pandemic/3279369001/> (last visited Aug. 25, 2020).

⁵⁴ Callie Rainey, WWMT West Michigan, *West Michigan hospital prepares for potential second wave of COVID-19 during flu season* (July 18, 2020) *available at* <https://wwmt.com/news/local/west-michigan-hospital-prepares-for-potential-second-wave-of-covid-19-during-flu-season> (last visited Aug. 25, 2020).

and input from scientists, doctors and public-health officials, to prevent a resurgence of COVID-19. Adopting Plaintiffs' proffered reading of the EGPA or the EMA would undermine the State's ability to keep COVID-19 in check, place the lives of MNA members and other healthcare professionals at risk, and make it harder (not easier) to keep Michigan open.

A. The COVID-19 Pandemic Will Require a Flexible Response as More Is Learned About the Virus and How to Contain It

As described above (*see supra* Section I), one reason states like Michigan have delegated broad powers to the executive branch to respond to a public-health or other emergency is to ensure the State can respond flexibly in an unprecedented crisis. The COVID-19 pandemic illustrates the wisdom of this approach. Since the first cases were reported in late 2019,⁵⁵ our understanding of the virus, and how best to treat or contain it, has been continuously in flux.

For example, in the early stages of the outbreak, it was reported that direct, human-to-human transmission was unlikely to occur.⁵⁶ As a result of this guidance, officials did not implement travel or trade restrictions until it was too late to contain the spread of the virus.⁵⁷ Later, a consensus emerged that COVID-19 spreads primarily via respiratory droplets expelled within a six-foot radius that fall quickly to the ground without remaining airborne.⁵⁸ Based on this updated guidance, officials implemented social-distancing policies designed to avoid

⁵⁵ World Health Organization ("WHO"), *Pneumonia of unknown cause – China* (Jan. 5 2020), available at <https://www.who.int/csr/don/05-january-2020-pneumonia-of-unkown-cause-china/en/> (last visited Aug. 25, 2020).

⁵⁶ World Health Organization, *Novel Coronavirus – China* (January 12, 2020) available at <https://www.who.int/csr/don/12-january-2020-novel-coronavirus-china/en/> (last visited Aug. 25, 2020).

⁵⁷ *Id.*

⁵⁸ World Health Organization, *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)* (February 16-24, 2020), available at <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf> (last visited Aug. 25, 2020).

prolonged exposure to others in a crowded space.⁵⁹ When reports began to suggest that people with mild symptoms (or no symptoms at all) were capable of transmitting the disease, officials began to recommend that people wear non-medical face masks that protect others from infection by capturing exhaled respiratory droplets.⁶⁰ In July, reports began to circulate showing that the virus is, in fact, capable of infecting others after lingering in the air for a much longer period of time,⁶¹ which may require still different countermeasures (such as limiting public access to enclosed spaces, requiring more effective building ventilation systems, or promoting use of “N-95” medical-grade ventilator masks).⁶² After many months of uncertainty as to whether recovered patients would be immune from the virus, on August 24, 2020 researchers reported

⁵⁹ Keith Matheny, Detroit Free Press, *Public gathering rules tighten as Michigan coronavirus cases grow* (March 16, 2020), available at <https://www.freep.com/story/news/local/michigan/2020/03/16/michigan-coronavirus-tracking-covid-19-public-gathering-rules/5055447002/> (last visited Aug. 25, 2020); Kelly Malcom, Michigan Health Blog (February 28, 2020), available at <https://healthblog.uofmhealth.org/wellness-prevention/updated-information-on-covid-19-what-can-you-do-to-protect-against-coronavirus> (last visited Aug. 25, 2020).

⁶⁰ Adam Taylor et al., The Washington Post, *People should wear cloth face coverings in public, CDC recommends, to reduce spread of coronavirus* (April 3, 2020), available at <https://www.washingtonpost.com/world/2020/04/03/coronavirus-latest-news/> (last visited Aug. 25, 2020).

⁶¹ Apoorva Mandavilli, The New York Times, *239 Experts With One Big Claim: The Coronavirus Is Airborne* (July 7, 2020), available at <https://www.nytimes.com/2020/07/04/health/239-experts-with-one-big-claim-the-coronavirus-is-airborne.html> (last visited Aug. 25, 2020); Adriana Rodriguez, USA Today, *Nearly 240 experts urge WHO, CDC to acknowledge airborne transmission COVID-19* (July 6, 2020), available at <https://www.usatoday.com/story/news/health/2020/07/06/covid-19-coronavirus-spreads-airborne-transmission-experts-say/5383598002/> (last visited Aug. 25, 2020).

⁶² Apoorva Mandavilli, The New York Times, *239 Experts With One Big Claim: The Coronavirus Is Airborne* (July 7, 2020), available at <https://www.nytimes.com/2020/07/04/health/239-experts-with-one-big-claim-the-coronavirus-is-airborne.html> (last visited Aug. 25, 2020).

what appeared to be the first confirmed case of a patient being reinfected a second time with COVID-19.⁶³

The preferred methods for treating COVID-19 patients also continue to evolve. Initially, many assumed that ventilators would be essential,⁶⁴ and bidding wars broke out for the limited supplies available at the time.⁶⁵ More recently, studies have suggested that less invasive oxygen treatments may be preferable.⁶⁶ Moreover, as one would expect for a “novel” coronavirus, no medications were known to provide an effective treatment in the early days of the pandemic. In April, however, the National Institute of Health announced the results of a clinical trial showing that patients with advanced COVID-19 who received the antiviral medication Remdesivir recovered more quickly from the disease.⁶⁷ In June, researchers from Oxford University

⁶³ Adam Taylor and Ariana Eunjung Cha, The Washington Post, *First covid-19 reinfection documented in Hong Kong, researchers say* (August 24, 2020), available at <https://www.washingtonpost.com/health/2020/08/24/coronavirus-reinfection-hong-kong/> (last visited Aug. 25, 2020).

⁶⁴ Jason Gale, The New York Times, *Coronavirus Patients' Long Ventilator Stays Put Strain on Hospitals*, (February 23, 2020), available at <https://www.bloomberg.com/news/articles/2020-02-23/coronavirus-patients-long-ventilator-stays-strain-hospitals> (last visited Aug. 25, 2020).

⁶⁵ Andrew O'Reilly, Fox News, *Michigan's Whitmer says states are in bidding war for medical supplies amid coronavirus pandemic* (March 29, 2020), available at <https://www.foxnews.com/politics/michigans-whitmer-says-states-are-in-bidding-war-for-medical-supplies-amid-coronavirus-pandemic> (last visited Aug. 25, 2020); <https://www.nytimes.com/2020/03/31/us/governors-trump-coronavirus.html>; Sarah Mervosh and Kate Rogers, The New York Times, *Governors Fight Back Against Coronavirus Chaos: 'It's Like Being on ebay With 50 Other States'*, (March 31, 2020), available at <https://www.nytimes.com/2020/03/31/us/governors-trump-coronavirus.html> (last visited Aug. 25, 2020).

⁶⁶ Sharon Begley, STAT, *New analysis recommends less reliance on ventilators to treat coronavirus patients*, (April 21, 2020), available at <https://www.statnews.com/2020/04/21/coronavirus-analysis-recommends-less-reliance-on-ventilators/> (last visited Aug. 25, 2020).

⁶⁷ National Institutes of Health (“NIH”) *NIH clinical trial shows Remdesivir accelerates recovery from advanced COVID-19*, (April 29, 2020), available at <https://www.nih.gov/news-events/news-releases/nih-clinical-trial-shows-remdesivir-accelerates-recovery-advanced-covid-19> (last visited Aug. 25, 2020); Gina Kolata, (last visited Aug. 25, 2020), *How Remdesivir, New*

announced the results of a trial showing that Dexamethasone, an inexpensive and widely available steroid treatment, reduced mortality in seriously ill COVID-19 patients.⁶⁸ Just this week, the FDA authorized the use of a new, convalescent plasma treatment, though some have questioned how effective this treatment will be, and the FDA's chief scientist has cautioned that it should not be considered a new standard of care.⁶⁹ In addition, there are more than 250 COVID-19 vaccine candidates globally, more than 50 of which are expected to enter human trials this year.⁷⁰ If one or more of these vaccines or treatments prove to be successful, the demand for them will be overwhelming, and public officials will face difficult decisions about their allocation and cost.⁷¹

Hope for Covid-19 Patients, Was Resurrected, (May 7, 2020), available at <https://www.nytimes.com/2020/05/01/health/coronavirus-remdesivir.html> (last visited Aug. 25, 2020).

⁶⁸ Michelle Roberts, BBC News, *Coronavirus: Dexamethasone proves first life-saving drug*, (June 16, 2020), available at <https://www.bbc.com/news/health-53061281> (last visited Aug. 25, 2020).

⁶⁹ Catherine Garcia, Yahoo! News, *FDA issues emergency use authorization of convalescent plasma for COVID-19* (August 23, 2020), available at <https://news.yahoo.com/fda-issues-emergency-authorization-convalescent-234800410.html> (last visited Aug. 25, 2020).

⁷⁰Gaurav Agrawal, McKinsey & Company, *On pins and needles: Will COVID-19 vaccines 'save the world'?* (July 29, 2020), available at <https://www.mckinsey.com/industries/pharmaceuticals-and-medical-products/our-insights/on-pins-and-needles-will-covid-19-vaccines-save-the-world#> (last visited Aug. 25, 2020).

⁷¹ For example, because Remdesivir is a new medication, supplies are limited, prices are high (up to \$3,120 per treatment course), and scarce supplies are (for now) being allocated to hospitals by the Department of Health and Human Services (HHS). <https://www.nytimes.com/2020/06/29/health/coronavirus-remdesivir-gilead.html>. In contrast, Dexamethasone is off-patent, widely available, and inexpensive (less than \$1/day). <https://www.ajmc.com/newsroom/gilead-sciences-sets-us-price-for-covid19-drug-at-2340-to-3120-based-on-insurance>. When a vaccine eventually becomes available, there will be unprecedented global demand for it, which is likely to far exceed initial supplies. <https://www.politico.com/news/2020/05/11/coronavirus-vaccine-supply-shortages-245450>.

As these experiences illustrate, there is no playbook that can be written in advance for a public-health emergency such as COVID-19. The State must be capable of responding flexibly to keep pace with the current scientific and medical data.

B. The COVID-19 Pandemic Will Require Fast, Decisive Action to Contain Outbreaks Before They Spread

A second reason for delegating broad powers to the Governor is to ensure that the State's response is fast and decisive based on the best data available at the time. *See supra* Section I. Once again, the COVID-19 pandemic illustrates why this is so.

It can take as long as 14 days for a person infected with COVID-19 to begin to show symptoms.⁷² Many patients do not develop serious respiratory difficulties or pneumonia until one to two weeks after that.⁷³ The sickest patients die up to six weeks after they were infected.⁷⁴ Because of these delays, the death rate attributable to COVID-19 on a given day is a direct reflection of the emergency response measures that were put into place more than a month earlier.⁷⁵ To continue to contain the pandemic, the State must monitor the data that exists today, anticipate the conditions that are likely to exist in the future, and implement containment measures before the number of hospitalizations and deaths rise.

⁷² Centers for Disease Control, *Clinical Care Guidance* (June 30, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html>. (last visited Aug. 25, 2020).

⁷³ Advisory Board, *What's behind Covid-19's mysterious 'second-week crash'?* (May 4, 2020), available at <https://www.advisory.com/daily-briefing/2020/05/04/covid-crash>. (last visited Aug. 25, 2020).

⁷⁴ Dylan Scott, Vox, *Covid-19 cases are rising, but deaths are falling. What's going on?* (July 6, 2020), available at <https://www.vox.com/2020/7/6/21314472/covid-19-coronavirus-us-cases-deaths-trends-wtf> (last visited Aug. 25, 2020); Tara Law, TIME, *Yes, COVID-19 Deaths Are Down. But There Are Worrying Signs of a Major Spike Ahead* (July 7, 2020), available at <https://time.com/5863522/covid-19-deaths/> (last visited Aug. 25, 2020).

⁷⁵ Dylan Scott, Vox, *Covid-19 cases are rising, but deaths are falling. What's going on?* (July 6, 2020), available at <https://www.vox.com/2020/7/6/21314472/covid-19-coronavirus-us-cases-deaths-trends-wtf> (last visited Aug. 25, 2020).

Moreover, because the virus is highly contagious, a delay of even a few days in putting those measures into place can have a profound impact. With no vaccine or proven cure, the most effective way to slow the spread of COVID-19 is to prevent new infections. To keep Michigan open, the State will need to conduct comprehensive testing to identify when and where new outbreaks occur. When they do, the State will have to employ contact tracers to identify and isolate individuals who may have been exposed. If an outbreak spreads, the State will have to consider whether additional targeted social-distancing or mitigation efforts are required in a particular area, workplace, population, or time period. As the situation changes on a day-to-day basis, the State may have to obtain or reallocate scarce resources to the hardest-hit areas. These decisions all must be driven by data, guided by experts, and made quickly and decisively. For example, models have predicted that if the social-distancing measures put into place throughout the United States were implemented only one week earlier, 62% of reported infections, and 55% of reported deaths, could have been averted.⁷⁶ Dr. Thomas R. Frieden, the former head of the Centers for Disease Control and Prevention, has explained that, to contain the spread of COVID-19, “[y]ou have to move really fast. Hours and days. Not weeks. Once it gets a head of steam, there is no way to stop it.”⁷⁷

⁷⁶ Sen Pei, Sasikiran Kandula, Jeffrey Shaman, Medrxiv, *Differential Effects of Intervention Timing on COVID-19 Spread in the United States*, (May 20, 2020), available at <https://www.medrxiv.org/content/10.1101/2020.05.15.20103655v1.full.pdf> (last visited Aug. 25, 2020).

⁷⁷ Jonah Markowitz, The New York Times, *How Delays and Unheeded Warnings Hindered New York's Virus Fight* (April 9, 2020), available at <https://www.nytimes.com/2020/04/08/nyregion/new-york-coronavirus-response-delays.html> (last visited Aug. 25, 2020).

C. Plaintiffs' Interpretations of the EPGA and EMA Would Limit the Governor's Powers When They Are Needed Most, and Undermine the State's Response to the Pandemic

As the Court of Claims and the Court of Appeals recognized in the Legislature Case, when the Legislature enacted the EPGA and EMA, it granted the Governor “broad” and “sweeping” powers to respond flexibly, quickly, and decisively in a public-health emergency. *See supra* Section I & pages 8-9, nn. 24-26 (quoting Ct. of Appeals, Op. at 2-3, 8, 10-14 and Ct. of Claims, Op. and Order at 10-11, 20, 25 (App. 201a-202a, 211a, 216a)). The Governor exercised those powers during the pandemic by issuing Executive Orders that implemented a cascading series of measures based on the specific threats posed by COVID-19. The Governor's Executive Orders contained the spread of the virus, protected the integrity of Michigan's healthcare system, and eventually began to reopen the State. *See supra* Section II. As described below, the interpretations of the EPGA and EMA advanced by Plaintiffs could undermine the State's continued response to the pandemic by constraining the Governor's emergency response powers and returning them to the Legislature, which is ill-suited to managing a public-health emergency.

1. The Governor's Powers Under the EPGA are Flexible and Broad, and Not Limited to a Short-Term or Regional Emergency

For example, the Plaintiffs in this case argue with respect to the first certified question that the EPGA does not authorize the Governor's Executive Orders because it applies only to “short-term emergencies” that exist for “a relatively limited period of time” (Plaintiffs' Br. at 17, 19-22, 26), while the Legislature argues that the EPGA restricts the Governor to acting only in a “localized crises” in one “area,” “zone,” or “section” of the State (Legislature Case, Legislature's Br. in the Ct. of Appeals at 33-36). The Court of Appeals correctly rejected these interpretations

and recognized that the language of the EPGA is broad enough to apply to “an indefinite statewide emergency” like a pandemic.⁷⁸

Construing the EPGA in the manner proposed by either the Plaintiffs or the Legislature would limit the State’s ability to respond in an emergency like COVID-19. As the Plaintiffs see it, the Governor could declare a state of emergency under the EPGA only if the outbreak of a virus is likely to last for a short period of time. As the Legislature sees it, the Governor could declare a state of emergency only in one city, county, or region where an outbreak of the virus occurs. If the virus fails to go away or spreads beyond the initial affected area, the Governor would be powerless to act.

The EPGA has no such arbitrary bounds. The statute authorizes the Governor to act in an emergency occurring anywhere “*within the state.*” MCL 10.31(1) (emphasis added). It states that the Governor may craft a flexible response to the emergency by issuing any “*reasonable*” and “*necessary*” orders “to protect life and property or to bring the emergency situation within the affected area under control.” MCL 10.31(1) (emphasis added). It confirms that those orders shall remain in effect until “*the emergency no longer exists.*” MCL 10.31(2). And it expressly provides that “the legislative intent [is] to invest the governor with sufficiently *broad power of action* . . . to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster,” and directs that “[t]he provisions of this act *shall be broadly construed* to effectuate this purpose.” MCL 10.32 (emphasis added); *see also Walsh*, 385 Mich at 634–35.

⁷⁸ *See* Ct. of Appeals, Op. at 2-3, 8, 10-14 (“The Legislature argues that the Governor cannot use the EPGA to justify an indefinite statewide emergency. . . . We hold that the plain and unambiguous language of the EPGA and the EMA does not support the Legislature’s position.”).

The “internal and external clues” that Plaintiffs rely on as the basis for their construction (such as a dictionary definition of the term “emergency”), do not in fact “suggest” that the broad grant of authority under the EPGA is limited to short-term emergencies.⁷⁹ For example, the cited dictionary definition merely defines an “emergency” as “[a]n *unforeseen* combination of circumstances which *calls for immediate action*.” See Plaintiffs’ Br. at 18, 20 (emphasis added). The outbreak of a “novel” and previously unknown virus like COVID-19 is by definition “unforeseen.” And the need for “immediate action” to continue to limit the spread of the virus remains just as important today as it was when the virus first emerged.

Likewise, the language cited by the Legislature in support of its narrow construction merely states, by way of example, that the Governor *may* take specific actions in the “affected area” as a whole, *or* “any section of the area,” *or* “specific zones within the area,” as she sees fit. See MCL 10.31(1). This language reflects the broad and flexible power of the Governor to craft whatever response is required at the time. See *id.*

Finally, there is no support for both challengers’ attempts to construe the EPGA narrowly based on the later enactment of the EMA. See, e.g., Plaintiffs’ Br. at 26-29; Legislature Case, Legislature’s Br. in the Ct. of Appeals at 30-33. 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. See MCL 30.417(d). As the Court of Appeals reasoned, “[t]he purpose of this

⁷⁹ See Plaintiffs’ Br. at 18-20 (“Unlike the EMA, the EPGA provides that the Governor may proclaim only a state of ‘emergency’ MCL § 10.31(1). The term ‘emergency’ as used when the EPGA was enacted in 1945 referred only to exigencies that exist for a relatively limited period of time. The 1942 edition of Webster’s New International Dictionary, for example, defines ‘emergency’ as ‘[a]n unforeseen combination of circumstances which calls for immediate action; also, less properly, exigency.’ Webster’s New International Dictionary 837 (2d ed. 1942). The fact that the EPGA applies only in ‘emergency’ circumstances means that the Governor’s powers under the EPGA are limited to circumstances that are time-sensitive, rather than to long-term public health challenges.”).

provision is evident on its face and undeniable—the Legislature sought to arm a governor with a full legal arsenal to combat a public emergency, not just the EMA, but also the EPGA, other pertinent statutes, the Michigan Constitution, and even the common law, in conjunction with or independent of the EMA.” Ct. of Appeals, Op. at 13-14. This Court should rule, as did the Court of Appeals, that “MCL 30.417(d) does not permit [the Court] to use language in the EMA to diminish the reach and scope of the EPGA.” *See id.*

2. The EMA States That the Governor “Shall” Lead the Response to an Emergency, and Does Not Permit the Legislature to Take Over

The Plaintiffs’ and the Legislature both advance a narrow construction of the EMA, under which the EMA does not authorize the Governor’s Executive Orders issued after April 30, 2020, because the Governor has no authority to re-declare states of emergency and disaster where prior, 28-day declarations were not extended by the Legislature. The Court of Claims agreed and held that allowing the Governor to renew a declaration in these circumstances “would render nugatory the express 28-day limit.” *See Ct of Claims, Op. and Order at 19-25 (App. 210a-216a).*

The construction of the EMA adopted by the Court of Claims improperly strips the Governor of her emergency response powers in a durable, long-lasting emergency such as the current pandemic. For all of the reasons discussed above, the Governor is uniquely positioned to successfully oversee the response to an emergency such as COVID-19, as she did in the first phase of the crisis. *See supra* Section II. The interpretation proposed by the Plaintiffs and the Legislature and adopted by the Court of Claims is inconsistent with this longstanding and well-reasoned practice. *See supra* Section I. Affirming that interpretation could undermine the State’s response to the COVID-19 pandemic—and future public health emergencies—by placing

responsibility in the hands of a body that is not designed to act quickly and decisively in response to an unfolding crisis.

For example, unlike the Governor, the Legislature does not oversee institutions with the scientific, medical, and public-health expertise required to manage a pandemic. The Legislature also is not capable of acting unilaterally and immediately to contain an outbreak. The process by which a law is enacted is purposefully designed to be slow and deliberate, not fast and decisive. For example, the Michigan Constitution explicitly requires that before a bill can be passed into law, it must first be “read three times in each house” and kept “in the possession of each house for at least five days.” Mich. Const. art. IV, § 26. Once these threshold requirements have been met, the bill must be approved by “a majority of the members elected to and serving in each house,” and then “presented to the governor,” who “shall have 14 days . . . in which to consider it.” *Id.* §§ 26, 33. In other words, unlike the Governor, who can issue an Executive Order immediately based on data provided by subject-matter experts, the Legislature can act only through the legislative process by considering multiple viewpoints, and gradually building consensus through deliberation and compromise.

These traits serve the Legislature well in its ordinary capacity. But they are not suited to managing an ongoing public-health emergency, as illustrated by the Legislature’s actions during the COVID-19 pandemic. For example, when the Governor asked the Legislature on April 1, 2020 and April 27, 2020 to extend the existing states of emergency and disaster under the EMA, the Legislature both times engaged in days of partisan deliberations before rendering its decisions.⁸⁰ The Legislature eventually declined to renew the states of emergency and disaster,

⁸⁰ See Paul Egan, *Whitmer declares disaster and seeks 70-day extension of emergency*, Detroit Free Press (Apr. 1, 2020), available at <https://www.freep.com/story/news/local/michigan/2020/04/01/coronavirus-covid-19-gov-whitmer-declares-disaster-emergency-70-days/5107599002/> (last visited Aug. 25, 2020); Fox 2 Detroit, *Michigan Senate*

despite conceding that an emergency still existed, when its members were unable to resolve political disputes.⁸¹ The Legislature also tried to repeal the EPGA and amend the EMA to limit the Governor's authority.⁸² A few days after that effort failed, the Legislature filed a lawsuit seeking to accomplish by judicial decree what it was not able to achieve by legislative process. *See House of Representatives et al. v. Whitmer*, No. 20-000079-MZ (Mich. Ct. Cl. May 6, 2020).

The Plaintiffs and the Legislature assert (and the Court of Claims found) that the Governor exceeded her authority under the EMA when she declared new states of emergency and disaster after the prior states of emergency and disaster were not extended. However, they do not and cannot dispute that the threat posed by the COVID-19 pandemic continued to exist when the Legislature refused to extend the Governor's prior emergency declarations. There is no provision in the EMA that expressly prohibits the Governor from declaring new states of emergency and disaster in these circumstances. To the contrary, the statute prescribes that the Governor "*shall*" declare a state of emergency or disaster whenever one exists. MCL 30.403(3)-(4). The Governor would have violated the statute had she refused to declare a new state of emergency simply because the Legislature could not agree on a path forward.

and House approve extension of governor's emergency declaration by 23 days (April 7, 2020), available at <https://www.fox2detroit.com/news/michigan-senate-and-house-approve-extension-of-governors-emergency-declaration-by-23-days> (last visited Aug. 25, 2020); Lauren Gibbons, *Showdown brewing between Whitmer, Michigan Republicans over coronavirus state of emergency*, MLive (Apr. 29, 2020), available at <https://www.mlive.com/public-interest/2020/04/showdown-brewing-between-whitmer-michigan-republicans-over-coronavirus-state-of-emergency.html> (last visited Aug. 25, 2020).

⁸¹ See Lauren Gibbons, *Michigan House adjourns without extending coronavirus state of emergency*, MLive (Apr. 30, 2020), available at <https://www.mlive.com/public-interest/2020/04/michigan-house-adjourns-without-extending-coronavirus-state-of-emergency.html> (last visited Aug. 25, 2020).

⁸² See Carol Thompson, *Michigan legislature creates committee to review Whitmer's coronavirus response*, Lansing State Journal (Apr. 24, 2020), available at <https://www.lansingstatejournal.com/story/news/2020/04/24/michigan-legislature-committee-oversee-limit-whitmers-power-during-coronavirus/3015696001/> (last visited Aug. 25, 2020).

Other provisions of the EMA corroborate this interpretation. The EMA states without qualification that “[t]he *governor* [not the Legislature] is responsible for coping with dangers . . . presented by a disaster or emergency,” and that “[t]he *governor* [not the Legislature] may issue executive orders, proclamations, and directives having the force and effect of law to implement this act.” MCL 30.403(1)-(2) (emphases added). No provision requires the Legislature to take over control of the State’s response to an emergency that lasts for more than 28 days, such as the COVID-19 pandemic. The Legislature’s only role is to grant an extension of a state of emergency or disaster when one continues to exist (or deny an extension when one does not). MCL 30.403(3)-(4). By refusing to play that role here, the Legislature is undermining the purpose of its own statute, and attempting to wrest from the Governor authority that it does not have and is not designed to wield.

Because the Governor can declare a state of emergency or disaster only when one exists (*see* MCL 30.403(3)-(4)), there is no merit to the contention that, under the Governor’s interpretation of the EMA the Governor can exercise extraordinary, unilateral, and indefinite powers. There may someday be a Governor who wrongly seeks to seize emergency power by declaring a state of emergency or disaster when there is no such crisis. Here, however, the COVID-19 pandemic continues to pose a grave threat to the State of Michigan. As such, the Governor, not the Legislature, must continue to manage the State’s emergency response.

3. The EPGA Provides Standards That Recognize the Need to Respond to Unforeseeable Emergencies in Unforeseen Ways

Finally, Plaintiffs and the Legislature contend that the EPGA violates the separation of powers and non-delegation doctrine under the Michigan Constitution. *See* Plaintiffs’ Br. at 29-45. The Court of Appeals correctly rejected this argument, holding that the EPGA limits the Governor to issuing orders that are “‘reasonable’ and . . . ‘necessary to protect life and property

or to bring the emergency situation . . . under control,” which “constitute appropriate limits or standards” that guide the Governor’s exercise of authority. Ct. of Appeals, Op. at 18-19.

The inherent unpredictability of an emergency, and the need to respond flexibly to bring one under control, underscores why this Court should answer the second certified question by ruling that the EPGA does not violate the separation of powers or the non-delegation doctrine. Under the Michigan Constitution, powers can be delegated to the Governor so long as the statute doing so contains “either explicitly or by reference . . . standards prescribed for guidance.” *Westervelt v Natural Res. Comm’n.*, 402 Mich 412, 437-38 (1978) (citing *Osius v City of St Clair Shores*, 344 Mich 693, 698 (1956)). “The preciseness of the standard will vary with the complexity and/or the degree to which subject regulated will require constantly changing regulation.” *Dep’t of Natural Res. v. Seaman*, 396 Mich 299, 309 (1976).

It is impossible to anticipate in advance what responses may be required in an unprecedented emergency such as the COVID-19 pandemic. The specific responses required may also change over time as our understanding of the emergency changes or our ability to respond to it improves. Recognizing this uncertainty, the Legislature 75 years ago authorized the Governor to respond flexibly by taking whatever actions are both “*reasonable*” and “*necessary*” to *protect life and property* or to *bring the emergency situation within the affected area under control.*” MCL 10.31(1) (emphasis added). Because emergencies and the necessary responses to them are varied and unpredictable, the Court of Appeals was correct to rule that these provisions “constitute appropriate limits or standards that prohibit and can prevent the exercise of uncontrolled and arbitrary power, yet are sufficiently broad to permit a governor to carry out the legislative policy of protecting life and property during an emergency” such as the COVID-19 pandemic. *See* Ct. of Appeals, Op. at 18-19.

CONCLUSION

The existing delegation of emergency powers to the Governor is sound (Section I), effective (Section II), and necessary to respond to the ongoing crisis (Section III). *Amicus curiae* accordingly respectfully requests that the Court answer the certified questions by holding that both the EPGA and the EMA authorize the Governor's COVID-19 Executive Orders, and that neither statute violates the separation of powers or non-delegation doctrine.

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Respectfully submitted,

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