STATE OF MICHIGAN

IN THE SUPREME COURT

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

Supreme Court No. 161492

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USDC-WD: 1:20-cv-414

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

Plaintiffs,

v

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

Defendants

BRIEF OF AMERICAN LEGISLATIVE EXCHANGE COUNCIL, *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS

C. Thomas Ludden (P45481)
LIPSON NEILSON P.C.
Attorneys for *Amicus Curiae*
American Legislative Exchange Council
3910 Telegraph Road, Suite 200
Bloomfield Hills, Michigan 48302
(248) 593-5000
tludden@lipsonneilson.com

Jonathon Paul Hauenschild, Esq.
Bartlett D. Cleland, Esq.
American Legislative Exchange Council
2900 Crystal Dr., Ste. 600
Arlington, Viginia 22202
Main – (703) 373-0933
jhauenschild@alec.org
bcleland@alec.org

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I. Introduction and Statement Of Interest[1]

The American Legislative Exchange Council (ALEC) is the nation's largest, nonpartisan, voluntary membership association for state legislators. Nearly one-quarter of all state legislators, representing all 50 states, are members. True to its name, ALEC serves as a forum where legislators from one state may exchange policy ideas with legislators from other states.

As a membership and policy organization for state legislators, ALEC is keenly interested in the exercise of executive authority during times of emergency. Because of the usually exigent nature of emergencies, legislatures across the country have delegated certain authorities to executives for limited time periods. During the COVID-19 crisis, though, many governors have exercised this authority for longer periods than legislatures ever intended.

Executive overreach has had a corrosive effect on rule of law and separation of powers across the country. During the pandemic, governors have circumvented legislatures, passing laws with criminal consequences without the permission, or input, of state legislators. Even worse, governors have invaded rights secured both by the federal and state constitutions in restricting religious gatherings, shutting non-essential businesses, and condemning protests remonstrating against their actions.

Several state legislatures have tried to reclaim their law-making authority. More than this, state legislators are hearing from their constituents about the

[1] Pursuant to MCR 7.212(H)(3) this brief was not authored in whole or in part by a counsel for either party nor did any counsel or party make a monetary contribution to fund the preparation or submission of this brief.

hardships they are enduring, pending bankruptcies, inabilities to pay rent, increasing substance abuse, suicide ideation, and domestic violence. State legislators are hearing that people understand the risks associated with COVID-19 and want to safely reopen their communities.

At seemingly every turn, though, governors rebuff legislators and their constituents. As legislatures seek to reclaim their lawmaking authority, governors are either challenging the legislatures in court or are forcing legislatures into court. As a membership organization for state legislators, ALEC cares about separation of powers, the need to represent the interests of society, and the imperative that governors and legislators work together safely to reopen society.

As a response to executive overreach across the country, ALEC members adopted model policy to help guide them as they debate reforming emergency management acts. The model, entitled a Statement of Principles to Inform Emergency Management Act Reform[2] lays out eight (8) principles legislators should consider in response to executive overreach. These principles include recognizing that governors have an important role to play, making gubernatorial authorities in times of emergency clear, protecting individual and constitutional liberties, and limiting the duration of gubernatorial emergency powers to as much time as necessary to secure legislative approval for the response.

[2] American Legislative Exchange Council, *Statement of Principles to Inform Emergency Management Act Reform*, adopted August 9, 2020 <https://www.alec.org/model-policy/statement-of-principles-to-inform-emergency-management-act-reform/> (accessed August 25, 2020).

II. Summary of the Argument

The COVID-19 health crisis has become a constitutional crisis in Michigan and in many states across the country. Governors have realized new powers—the ability to govern without the input or oversight of the elected, legislative branch. A number of legislatures, such as those in Michigan, North Carolina,[3] Pennsylvania,[4] are left trying to figure out ways to reclaim their constitutional authorities. In many instances, this means involving government's third branch: the judiciary.

In several states, legislatures or citizens have asked courts to interpret statutes or resolve constitutional claims. In a number of cases, the questions courts have been asked to confront are like those certified to this Court, a mix of statutory and constitutional issues including the construction of laws granting the governor emergency powers and constitutional separation of powers and non-delegation.

A long-term emergency demands a whole of government response. This type of response means governors working together with legislatures to identify the nature of the emergency, the threatened populations, the best possible protections for vulnerable communities, and the balancing of risks. A long-term, unlike a short-

[3]Jason Schaumburg, *North Carolina Legislature unable to override Cooper's COVID-19 vetoes*, The Center Square, July 8, 2020. <https://www.thecentersquare.com/north_carolina/north-carolina-legislature-unable-to-override-coopers-covid-19-vetoes/article_4069f4d8-c144-11ea-971d-d73cc89e598e.html> (accessed August 20, 2020).

[4] Christen Smith, *Pennsylvania Senate approves constitutional amendments to limit governor's emergency powers*, Washington Examiner, July 17, 2020. <https://www.washingtonexaminer.com/politics/pennsylvania-senate-approves-constitutional-amendments-to-limit-governors-emergency-powers> (accessed August 20, 2020).

term, emergency demands weighing critical policies for which the legislature, not the executive, is both best suited and constitutionally responsible.

Most emergencies are of a much shorter duration than the current COVID-19 crisis, have defined geographical limits, and the citizenry understands when the crisis passes. During short-term emergencies, legislatures do not have time to meet. When a flood or snowstorm strike, the area impacted is obvious, often to the naked eye; the people understand any restrictions on civil liberties; the emergency's end is clearly understood; and the emergency ends before the Legislature can convene to debate policy.

The COVID-19 crisis and related restrictions, which started as "15 days to flatten the curve," have turned into a many months-long battle with governors, with some health activists now claiming the emergency should not end until there is a vaccine.[5]

The instant case, and related actions by the Legislature, has placed this Court in an uncomfortable position. The judiciary is neither well-suited for, nor charged with, responding to emergencies. As mentioned, those decisions are proper with the state legislature and governor working together. Despite this, this Court must weigh critical policy decisions, interpret statutes, and determine whether the Governor overstepped her statutory and constitutional authorities.

[5] Craig Mauger, *Michigan epidemiologists in power fight: "Health emergency" only ends with vaccine*, The Detroit News, Aug. 19, 2020. <https://www.detroitnews.com/story/news/local/michigan/2020/08/20/mich-epidemiologists-court-fight-emergency-ends-vaccine/5609489002/> (accessed August 20, 2020).

This Court can restore the constitutional *structures* of government laid out in the State Constitution and discussed by this country's Founding Fathers. Restoring the constitutional *structures* of government does not mean stripping the Governor of any authority or even questioning her judgment. Instead, it means giving full weight to the policy decisions the Legislature made when crafting the Emergency Powers of the Governor Act and the Emergency Management Act and requiring both the Legislature and the Governor to abide by the law.

The rules of statutory interpretation and construction mean that both Acts can be applied simultaneously without inconsistency. The Emergency Powers of the Governor Act, under which the Governor claims authority, was enacted in 1945. The Legislature enacted the Emergency Management Act in 1976. The legislative history and plain language of the 1945 and 1976 Acts reveal that while the Legislature had different concerns for both and intended the Acts to apply in very different circumstances, the authorities provided to the governor are nearly identical.

State emergency management acts and other laws empowering the executive to act during emergencies are enacted pursuant to a state's police power. Understanding the nature of this power, where it is vested, and its limits, are necessary foundations when answering both questions of statutory interpretation and constitutional separation of powers. As to the former, police powers are vested in the legislative branch, not the executive. As such, only the legislature may determine the appropriate policies to apply during a state of emergency, and when potentially conflicting statutes exist, the courts must step in and resolve disputes between the two branches of government. As to the latter, the State Constitution

clearly separates the legislative and executive authorities and prohibits one branch from exercising the authorities of the other. While there are, of course, exceptions, those exceptions are narrow.

Very few state supreme courts have contemplated the interaction between executive and legislative authorities during an extended emergency. Three have dismissed concerns or claims for reasons inapposite here. One has ruled in favor of the legislature on a structural, statutory issue that is partially relevant. At the same time, federal courts have been granting relief to a number of plaintiffs on freedom of religion and First Amendment claims, while the Supreme Court has denied similar requests. This brief will examine all four of the state cases.

Through this brief, ALEC would respectfully suggest to this Court that the Emergency Management Act of 1976 applies to gubernatorial emergency authorities related to pandemics. The 1976 Act sunsets the Governor's emergency powers after 28 days, unless extended by the Legislature and can be applied consistently with the 1945 Emergency Powers of the Governor Act. Further, State constitutional Separation of Powers provisions and non-delegation jurisprudence prohibit the Legislature from delegating to the Governor, and the Governor from exercising, certain law-making functions.

III. Argument

A. The Police Powers of a State Belong to the Legislature

State emergency management and power provisions are enacted pursuant to the states' police powers. Broadly defined, police powers are the authority to protect "the public morals, the public health, or public safety." *Mugler v Kansas*, 123

US 623, 661; 8 S Ct 273, 297; 31 L Ed 205 (1887); see also, *Jacobson v Massachusetts*, 197 US 11; 25 S Ct 358; 49 L Ed 643 (1905);[6] *Rogowski v City of Detroit*, 374 Mich 408; 132 NW2d 16 (1965); and *People ex rel. Hill v Board of Ed. Of City of Lansing*, 224 Mich 388; 195 NW 95 (1923) (citing *Jacobson* extensively).

The power is not just vested in the state generally, though, or even in the executive. Police power is an authority reserved exclusively to the legislature. In *Jacobson*, the Supreme Court opined that it is the legislature's function to "guard the public health and safety." *Jacobson*, 197 U.S. at 30. In *Mugler*, the Supreme Court stated,

> [police] power is lodged with the legislative branch of the Government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

Mugler, 123 U.S. at 661.

In Michigan, the courts have long recognized that the state's police power belongs to the Legislature. In *Hill*, when this Court was confronted with the question of mandatory smallpox vaccines, it cited extensively from *Jacobson* and referred multiple times to the authority of the *Legislature*. In the opinion, this Court noted that the Massachusetts Legislature determined the public health required mandatory vaccines and the Michigan Legislature, after establishing a policy to prevent the spread of smallpox, properly delegated certain authorities to public school officials. *Hill*, 224 Mich at 389-392; see also, *People v Piasecki*, 333 Mich 122;

[6] Explaining that police power "embrace[s]… such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." 197 U.S. at 25.

52 NW2d 626 (1952) ("The exercise of the inherent police power of the State is vested in the legislative department.").[7]

According to the United States Supreme Court, only a handful of limitations exist on the state legislature's exercise of police power. Courts have explored very few of these limits, but during the COVID-19 restrictions, more courts are recognizing these limits. As noted in *Jacobson*, the exercise of police power (1) cannot cross the border; (2) must have a "real or substantial relation" to the protection of public health and safety; and (3) must not be a "palpable invasion of rights secured by the fundamental law," which in context means the Constitution. See *Jacobson*, 197 US at 31.[8]

This Court has approvingly cited *Jacobson* several times. Though the Court has cited the case, it has not yet had the opportunity to address any limits to the exercise of police power. This case presents the Court an opportunity to opine on the third limitation the United States Supreme Court established—just how may the state constitution limit the legislature's exercise of police power, which ALEC

[7] 333 Mich at 143. See also OAG, 2007, No. 7205 (September 14, 2007) (Discussing comprehensive vaccination requirements established by the Legislature to protect the public health and the delegation of that authority to local school districts).

[8] *Jacobson* predated the wide-scale adoption of the Incorporation Doctrine, which started to take root in the mid-1920s and gained steam in the 1940s-1960s. *See*, *e.g.*, *Gitlow v New York*, 268 US 652; 45 S Ct, 69 L Ed 1138 (1925); Constitutional Rights Foundation, *Bill of Rights in Action: The 14th Amendment and the 'Second Bill of Rights,'* Constitutional Rights Foundation <https://www.crf-usa.org/bill-of-rights-in-action/bria-7-4-b-the-14th-amendment-and-the-second-bill-of-rights> (accessed August 18, 2020); Bill of Rights Institute, *Incorporation*, <https://billofrightsinstitute.org/educate/educator-resources/landmark-cases/incorporation/> (accessed August 18, 2020). Because *Jacobson* predated the Incorporation Doctrine, the Supreme Court has not had opportunity to opine on the impact—specifically, which (if any) "rights secured by the Constitution" a state's emergency management laws may invade.

respectfully suggests relates to the constitutional structures of government. Before delving into that topic, though, it is necessary to discuss the essential text of the relevant statutes and determine, using the rules of statutory construction, which may apply in this case.

The Legislature's authority to protect the public safety is uncontested in the instant case. The dispute really is twofold: the nature and duration of the authorities delegated by the Legislature and a question of whether the Legislature can constitutionally delegate certain law-making functions.

B. The History and Text of the Acts Reveal that the Legislature Intended for Gubernatorial Emergency Authority Related to Pandemics to End After 28 Days

Michigan is unique compared to other states. The Legislature vested the Governor with emergency authorities in two different sections of Michigan Law. Because of the dispute between the parties in the instant case and the ongoing dispute between the Governor and Legislature, it is necessary to examine the pertinent text and legislative history of both provisions.

The Emergency Powers of the Governor Act of 1945, MCL §§ 10.31-10.33 contemplates different types of emergencies compared to the Emergency Management Act of 1976, MCL §§ 30.401, *et seq*. The former envisions gubernatorial powers related to "public disaster or unrest," specifically those akin to riots, while the latter "disasters," including epidemics. The legislative history and the definitions provided in the Emergency Management Act clearly establish that the Governor's

authority to issue a declaration of emergency related to pandemics, such as COVID-19, is limited by the 1976 Act.

In ordinary cases where statutory construction is an issue, Michigan courts, like the federal courts, ought to "ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute." *G.C. Timmis & Co. v Guardian Alarm Co*., 468 Mich 416, 420; 662 NW2d 710, 713 (2003). Interpretation requires context. Thus, courts will apply "the principle of *noscitur a sociis*. A court does not 'construe the meaning of statutory terms in a vacuum.' 'Rather, we interpret the words in their context and with a view to their place in the overall statutory scheme." *Manuel v Gill*, 481 Mich 637, 650; 753 NW2d 48, 56 (2008) (citations omitted). Similarly, when there are two statues relating to the same topic, courts will apply *in pari materia* rules of construction. *People v Mazur*, 497 Mich 302, 313; 872 NW2d 201 (2015); *Apsey v Memorial Hospital*, 477 Mich 120, 129 n4; 730 NW2d 695 (2007).[9]

There is no reason to differ from this approach with the two emergency powers statutes. In this case, the words of the statute plus the legislative history provide sufficient grounds for this Court determine that the Governor lacks the authority to issue or renew executive orders related to the COVID-19 pandemic.

[9] "Statutes *in pari materia* are those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose. It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times." *Apsey*, 477 Mich at 120 n4 (citations omitted).

Some context is helpful. While the Emergency Management Act of 1976 provides a definition of emergency, as discussed below, the lay definition is just as important. The temporary authorities granted to the Governor under the Emergency Management Act worked, allowing the governor to respond to what started as the need for an urgent response, but as COVID-19 has become an enduring health concern," the Legislature has had the time to meet. For enduring health concerns the Legislature intended on reclaiming any temporary authority ceded to the Governor, working with the Governor to balance essential policies to respond the danger, and protecting the health and safety of Michigan's residents.

Merriam-Webster defines an "emergency" as "1: an unforeseen combination of circumstances or the resulting state that calls for immediate action; 2: an urgent need for assistance or relief."[10]

As state officials' knowledge of the virus increased, their stories and policies changed. For example, in early March, Michigan's chief medical executive expected "more cases in Michigan… and for there to be community spread."[11] The medical executive continued to say that "most individuals who get the illness should see 'very mild symptoms."[12]

[10] Merriam-Webster, "emergency," available at <https://www.merriam-webster.com/dictionary/emergency> (accessed August 15, 2020).
[11] Eric D. Lawrence, *Michigan health official: More coronavirus cases expected, most symptoms should be mild*, Detroit Free Press, Mar. 11, 2020, <https://www.freep.com/story/news/local/michigan/2020/03/11/whitmer-state-emergency-michigan-coronavirus-covid-19/5024357002/> (accessed August 15, 2020) (hereafter "Eric D. Lawrence: 'Michigan health official'").
[12] *Id.*

According to emergency officials, the declaration of emergency "allows state agencies to respond appropriately and get resources where they are needed… 'It just puts the state in a heightened state of awareness to respond to the coronavirus'… [allowing] for resources to be deployed as needed."[13] Within a few days, health officials warned of surges of COVID-19 patients in hospitals. They feared that hospitals would be overwhelmed. This fear led governors, including Governor Whitmer, to require people to stay home, ban gatherings of unrelated people, and close schools.[14]

The threat posed by COVID-19 does not impact Michigan's residents or counties in the same way. Since the Governor's initial declaration of emergency, over 2,630,847 Michigan residents have been tested for COVID-19 and only 103,403, or 3.93 percent, have returned positive as of August 17.[15] Of those 103,403 cases, 6,608, or 6.39 percent, of confirmed cases, have died.[16] Long-term care (LTC) facilities in Michigan account for a disproportional share of COVID-19 cases and deaths. Again, as of August 17, there have been 8,044 resident confirmed cases of

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[13] *Id*.
[14] See, for example Executive Order ("EO") No. 2020-21 (COVID-19), *Temporary requirement to suspend activities that are not necessary to sustain or protect life* (rescinded); and EO No. 2020-100 (COVID-19), *Amending certain previously issued executive orders to clarify their duration*. See also, Jay Greene, *Hospitals prepare for potential surge of patients from coronavirus*, Crain's Detroit Business, March 14, 2020. <https://www.crainsdetroit.com/health-care/hospitals-prepare-potential-surge-patients-coronavirus> (accessed August 15, 2020).
[15] Michigan Coronavirus, *Michigan Data*, *Total Testing*, <https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html> (accessed August 19, 2020).
[16] *Id*.

the virus and 4,178 confirmed staff cases.[17] This means that LTC facility residents represent 7.78 percent and when staff are added, LTC facilities account for 11.82 percent of all positive cases. Of those 8,044 confirmed cases among LTC facility residents, 2,083 or 31.52 percent, have died.[18] When staff deaths are added to resident deaths, the percentage of deaths attributable to LTC facilities jumps slightly to 31.84 percent. Since the State does not report the number of tests at LTC facilities, it is impossible to determine what the positive rate is excluding these facilities. However, it is possible to ascertain the percentage of non-LTC facility deaths. Subtracting the LTC cases and deaths, there have been 91,181 confirmed cases and 4,504 deaths in Michigan, which is 4.94 percent of confirmed cases.

Similarly, some counties are harder hit than other counties. For example, Oakland County, as of August 17, had 16,641 cases and 1,144 deaths from 301,242 tests.[19] This means that Oakland County represents 11.45 percent of tests statewide, with 5.52 percent of cases testing positive and 6.87 percent of confirmed cases in the county dying. Incidentally, Oakland represents 16.09 percent of cases and 17.31 percent of deaths statewide.

Compare Oakland County to nearby Sanilac County. Sanilac represents 117 total cases, 6 deaths, and 7,969 tests; its positive rate is 1.47 percent and death rate

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[17] Michigan Coronavirus, *Long Term Care Data*, <https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173-526911--,00.html> (accessed August 19, 2020).
[18] *Id*.
[19] Michigan Coronavirus, *Michigan Data: COVID-19 Cases by County*, *Oakland County*, <https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html> (accessed August 19, 2020).

among confirmed cases is 5.13 percent.[20] Overall, this means that Sanilac represents only 0.3 percent of total statewide tests, 0.11 percent of cases and .09 percent of deaths statewide. This trend continues across Michigan, with some counties experiencing more cases and others fewer.

Despite the differing trends, Governor Whitmer decided to treat all age groups and counties the same. Treating all age groups and counties the same may be proper in the first days or weeks of a pandemic, but as officials gather data and understand the virus more, the justification to treat all people and counties the same disappears.

In 1945, the Legislature enacted the Emergency Powers of the Governor Act. This Act provided the Governor the authority to proclaim a state of emergency "[d]uring times of *great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state*, or reasonable apprehension of immediate danger of a public emergency of that kind…" MCL § 10.31 (emphasis added).

The Legislature did not define what it meant by "times of great public crisis, disaster, rioting, catastrophe, or similar public emergency." Though it failed to define the terms, the legislative history, court decisions interpreting the law, and later legislative action provide a clear picture. At the time of enactment, the Legislature intended to provide the governor broad authority to deal with crises such as riots. Note, *Judicial Control of the Riot Curfew*, 77 Yale L J 1560 (1968) ("All statutes provide governors with powers to act in various emergencies, although the

[20] Michigan Coronavirus, *Michigan Data: COVID-19 Cases by County*, *Sanilac County*, <https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html> (accessed August 19, 2020).

provisions vary greatly in degree of specificity. Michigan's statute, for example, specifically refers to riots and the use of a curfew." *Id*. at 1569, n. 42).

The Legislature enacted the Emergency Powers of the Governor Act during World War II in response to "the wartime Detroit race riot of June 21-22, 1943." Janice Selberg, *Powers of the Governor: Sources*, 99-Jul Mich B J 52 (July 2020). As Ms. Selberg continued, "*The Detroit News* cited 'legal complications' and reported on sponsors' perception of the need in cases of 'public disaster or unrest' to 'control public activities without the declaration of martial law.'"

Prior to 1945, Michigan's Governor had very little authority to deal with exigent public crises short of declaring martial law. Through the Emergency Powers of the Governor Act, the Legislature empowered the Governor to deal with public crises without declaring martial law. See generally, F. David Trickey, *Constitutional and Statutory Bases of Governors' Emergency Powers*, 64 Mich L Rev 290 (1965);[21] and Note, *Judicial Control of the Riot Curfew*.[22]

There are only two cases where Michigan courts opined on the Emergency Powers of the Governor Act. Both support the proposition that the Legislature empowered the Governor to respond to riots and similar crises. See *Walsh v City of River Rouge*, 385 Mich 623; 189 NW 2d 318 (1971); *People v Smith*, 87 Mich App 730; 276 NW2d 481 (1979).

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[21] Available at <https://repository.law.umich.edu/mlr/vol64/iss2/7/> ("The governors of Michigan, Florida, Georgia, and South Carolina are granted special statutory emergency powers supplementary to their military and civil defense powers…" 64 Mich. L. Rev. at 299.)

[22] Noting that curfews to control riots is akin to martial law, but is something less than martial law and is more likely a "precondition[ ] for martial law." 77 Yale L J at 1569.

In the former case, this Court determined that MCL §§ 10.31-10.33 preempted local authority to declare a state of emergency related to riots and civil unrest. At the time, this Court noted that the Legislature passed the law "to delineate lines of authority and to place in the hands of the Governor extraordinary powers which he might deem it necessary to invoke to deal with 'great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger thereof, when public safety is imperiled.'" *Walsh*, 385 Mich 640. Ultimately, though, the Court determined that the 1945 Act preempted most local authority to declare emergencies.

In the latter case, the Court of Appeals upheld the defendant's conviction for carrying a concealed weapon. The defendant was arrested for violating Detroit's curfew imposed in response to wide scale civil unrest. As part of his appeal, the defendant challenged the city's authority to declare an emergency arguing that MCL § 10.31 preempted local authority, as interpreted by *Walsh*. The court rejected the argument, opining that the ordinance did "not provide for the declaration of a state of emergency with all the attendant consequences as envisioned by [MCL §] 10.31." *People v Smith*, 87 Mich App at 738. Stated more succinctly, the type of authority claimed by the local government was within its statutory authority and did not conflict with the Emergency Powers of the Governor Act.

Compared to the Emergency Powers of the Governor Act, the Emergency Management Act is much more robust. It acknowledges that the "governor is responsible for coping with dangers to this state or the people presented by a disaster or emergency." MCL § 30.403. The Emergency Management Act provides

the Governor with the authority "by executive order or proclamation, declare a state of disaster… exists" and limits the duration of such an order or proclamation to 28 days unless a extension is "approved by resolution of both houses of the legislature." MCL § 30.403.

The Emergency Management Act is very similar to other states' acts roughly bearing the same name.[23] This is no accident; in the mid-1970s most states "updated their laws, largely based on the Council of State Governments model law which allows [governors] wide discretionary power in times of declared emergencies." Hilary Whittaker, *Final Report of the Emergency Preparedness Project*, National Governor's Association, December 31, 1978, 78 <https://babel.hathitrust.org/cgi/pt?id=umn.31951d00678253a&view=1up&seq=78> (accessed August 16, 2020); accord, Department of State Police, *Executive Analysis: HB 5314*, (July 29, 1975) <https://lmdigital.libraryofmichigan.org/collections/p16110coll6/items/148498> (accessed August 16, 2020).[24]

> In the Emergency Management Act, the Legislature defined "disaster" as
>
> an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to, fire, flood, snowstorm, ice storm, tornado, windstorm, wave action, oil spill, water contamination, utility failure, hazardous peacetime

[23] *See*, *e.g.*, Alaska, Alaska Stat § 26.23.900; Colorado, Colo Rev Stat §§ 24-33.5-701, *et seq.*; Florida, Fla Stat §§ 252.31, *et seq.*; Illinois, 20 Ill Comp Stat 3305/7; Indiana, Ind Code § 10-14-3-12; Kansas, Kan Stat Ann § 48-925; Maryland, Md Code Ann, Public Safety §§ 14-101, *et seq.*; Minnesota, Minn Stat §§ 12.21, *et seq.*; Pennsylvania, 35 Pa C S §§ 7301, *et seq.*; Virginia, Va Code Ann §§ 44-146.13, *et seq*.

[24] ("House Bill No. 5314 is essentially the same as a nationally recommended bill which was drafted after careful consideration was given to the legislative needs to effectively prepare for and respond to disasters.") House Bill No. 5314 became MCL §§ 30.401, *et. seq*. See also, n. 23, *ante*.

> 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(e) (Emphasis added.)

Similarly, the Legislature defined "emergency" 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).

Throughout the Emergency Management Act, the Legislature used the terms "disaster" and "emergency" either interchangeably or simultaneously. The term "emergency" is broader than "disaster." As used by the Legislature in the Emergency Management Act, "emergency" provides the Governor with an idea of the considerations necessary for issuing an order or proclamation. The term "disaster" lays out more specific events that qualify as emergencies, including floods, snowstorms, fires, and epidemics. Also important is the Legislature's use of parallel terms in the two definitions: An emergency is "an occasion or instance" where the governor acts "to save lives, protect property" and a disaster is "an occurrence or threat of widespread or severe damage, injury, or loss of life or property."

When contemplating the emergency powers delegated to the executive, the Legislature clearly intended to include epidemics (and thus pandemics) in the Emergency Management Act. The Emergency Management Act limits executive authority during a time of emergency to 28 days, unless extended by the Legislature. A crisis, such as COVID-19, does not provide the Governor unlimited, unchecked

authority. Nor did the Legislature intend on granting the Governor such power. Both the Legislature and the Governor are constrained by the nature of police power and statutory grants of authority.

Through the Emergency Management Act, the Legislature neither reduced nor curtailed the scope of authorities it provided the Governor through the Emergency Powers of the Governor Act. Specifically, the Emergency Powers of the Governor Act permits the governor, upon 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. 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*."

MCL § 10.31 (Emphasis added).

Similarly, the Emergency Management Act, in pertinent parts, permits the governor, upon declaring a state of emergency or disaster to

> (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.
> (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.

MCL § 30.405 (Emphasis added).

The scope of gubernatorial authorities under both provisions are virtually identical, with only one slight difference. The Emergency Management Act limits declarations to 28 days, unless renewed by the Legislature. Since the authorities granted to the Governor are nearly identical, this Court can apply both provisions, giving full weight to legislative intent, and determine that the Legislature intended, through the Emergency Management Act, to limit the duration of the Governor's emergency powers related to epidemics to 28 days, unless renewed by the Legislature.

C. The Governor's Exercise of Authorities Under The Emergency Powers of the Governor Act and the Emergency Management Act Violate the Separation of Powers and Threaten the Structure of Government

Separation of powers is a unique, *structural* aspect of liberalized western governments, acting as a safeguard of liberty and limiting governmental authority.[25] Our country's Framers found the concept so essential to ensconce it in the

[25] See *The Federalist No. 47* (Madison) (John C. Hamilton, ed., 1998). ("One of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct. In the *structure* of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty.")(Emphasis added.)

Constitution. At the time they drafted the Constitution, the Framers followed models established by the states; states that joined the Union after the Constitution's adoption have copied the divided structure of government.

In the structure of the federal and state governments, the legislature is the most powerful branch of government. It is also the closest to the people and often has the shortest elected terms. As the most powerful branch and closest to the people, the Legislature is the branch best able to establish policy, and sufficient standards and guidelines for executive agencies. *Blue Cross and Blue Shield of Michigan v Milliken*, 422 Mich 1, 51-52; 367 NW2d 1, 27 (1985). Any effort by the Governor unilaterally to extend emergency authority to establish critical policies leads to an imbalance and deprives the Legislature of its constitutionally established responsibilities.

The non-delegation doctrine is closely related to separation of powers. *Taylor v Smithkline Beecham Corp*., 468 Mich 1, 7-8; 658 NW2d 127, 131 (2003).[26] In one decision, in fact, this Court stated that it believed "the constitutional 'separation of powers' foundation of the 'delegation doctrine.'" *Westervelt v Natural Resources Commission*, 402 Mich 412, 441; 263 NW2d 564, 577 (1978). Michigan courts will uphold legislation or agency actions if the Legislature provided sufficient guidelines and standards. Courts evaluate claims utilizing four criteria:

> (1) the act must be read as a whole; (2) the act carries a presumption of constitutionality; (3) the standards must be as reasonably precise as the subject matter requires or permits. The preciseness required of the

[26] Sometimes entitled *Taylor v. Gate Pharmaceuticals*. See, for example, *McNeil v Charlevoix County*, 484 Mich 69, 102; 772 NW2d 18, 36 (2009) (MARKAM, J., concurring in part and dissenting in part).

> standards will depend on the complexity of the subject. (4) Additionally, due process requirements must be satisfied for the statute to pass muster.

Id. (citations omitted). When the Legislature's delegation of authority is open-ended, where no policy has been articulated, or it has failed to provide sufficiently detailed criteria for policy-setting, law-making authority has been improperly delegated.

There are additional limitations for delegating authority. The Legislature, for example, may not delegate to the Governor the authority to create crimes. *People v Turmon*, 417 Mich 638, 650; 340 NW2d 620, 626 (1983) ("[T]he creation of crimes is an inherently legislative task").[27]

The Michigan Constitution includes an express separation of powers provision, which states that "[t]he powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963 art 3, § 2.

Because of the state Constitution, Michigan has a very robust separation of powers case law. At heart, Michigan's separation of powers theory is simple:

> The doctrine of separation of powers is a shield for each of the branches of government to use for the protection of our form of government and for the people it serves; it is not a sword to be used by one branch against another. Security for the balance of powers "consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."

[27] The Court, in this case, though recognized that regulatory agencies have the authority to create certain crimes "[p]rovided sufficient standards and safeguards are included in the statutory scheme." *Turmon*, 417 Mich at 652. As will be discussed *post*, neither the Emergency Powers of the Governor Act nor the Emergency Management Act include standards or safeguards in the statutory schemes.

Judicial Attorneys Association v State, 459 Mich 291, 304; 586 N.W.2d 894, 899 (1998); citing, *The Federalist No. 51* (Hamilton); see also, *Makowski v Governor*, 495 Mich 465, 482-483; 852 NW2d 61, 71 (2014).[28]

When evaluating separation of powers, Michigan courts tend to follow the same type of analysis utilized by the federal courts. See *id*. and *Taylor*. This means looking at specific constitutional provisions, comparing the authorities delegated by those documents to the challenged acts or statutes. If a statute or act is consistent with the powers delegated to "coequal branches" and "respect[s] the limits" the authority of the appropriate branch, the statute or act is likely constitutional. If, though, the statute or act fails to recognize those limits or the boundaries of its authority, the act or statute is likely unconstitutional. See *U.S. v Will*, 449 US 200, 227-228; 101 S Ct 471; 66 L Ed2d 392 (1980) (cited by *Judicial Attorneys Association*, 459 Mich at 305).

The Michigan Constitution vests "the legislative power of the State of Michigan… in a senate and a house of representatives." Const 1963 art 4 § 1. It also vests "executive power… in the governor." Const 1963 art 5 § 1.

When opining on the need for separation of powers and the role each branch has checking the authority of the other branches, the Framers asked the question of "what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men,

[28] "In designing the *structure* of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence." *Makowski*, 495 Mich at 482 (emphasis added).

neither external nor internal controls on government would be necessary." *The Federalist No. 51* (Hamilton) (John C. Hamilton, ed. 1998).

Men are not angels, and angels do not rule men. Despite the most robust safeguards, man's nature will eventually creep into the administration of government. This nature means that one branch, or even official, will seek to accumulate and exercise governmental power. The problem the Framers sought to address is how to fight against man's nature through the *structure* of government. As Hamilton continued, "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." *Id*.

The Framers saw the system and structure of government proposed by the Constitution as a great protection for liberty. Not only would the federal government be divided into three co-equal branches of government, it would possess only limited, enumerated powers. The states would continue to exercise authority in a system of dual sovereignty. Each state, as well, divided its power among several branches of government.

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Id.

John Locke and Montesquieu provided the Framers inspiration for the structure of government, including separation of powers. In his *Second Treatise of Government*, Locke postulated that legislative authority is the "supreme power" of

government and discussed a few limitations on the exercise of this power. First, the legislative branch "cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice and decide the rights of the subject by promulgated standing laws."[29] According to Locke, "arbitrary power" is "governing without settled standing laws" because governing apart from settled law is not consistent "with the ends of society and government." Further, by "the ends of society and government," Locke meant the preservation of "lives, liberties, and fortunes." *Id*. Locke's limitation, then, on the exercise of the supreme power in government, is to ask whether the exercise of that power would put men "into a worse condition than the state of Nature." *Id.*

Second, Locke explains that the legislative branch lacks the authority to delegate its supreme power to another branch. The supreme power is vested both by nature and the people in the legislature. Because the power is vested by the people and they "alone can appoint the form of the commonwealth" the legislative branch is powerless to delegate most law-making authorities to the executive. *Id*. at 84-85.

State and federal constitutions embody this principle. Through the constitutions, the people reserved for legislatures the authority to make law and for executives the authority to enforce the law. Constitutions, as adopted by the people rather than enacted as laws, act as a buttress protecting the people from an overzealous government. And as adopted by the people, rather than a legislature,

[29] John Locke, *Second Treatise of Government*, 81 (Barnes & Noble 2004).

the dictates of a constitution—especially those related to the structure of government—may not be violated, [30] even in an emergency.

The Framers were very concerned about the executive branch exercising legislative functions. Referring to Montesquieu, Madison stated in *The Federalist No. 47*. "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates."[31] Indeed, when executive and legislative powers are united in one person, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner." *Id.* (Emphasis original.), see also *Soap and Detergent Association v Natural Resources Commission*, 415 Mich 728, 751-752; 330 NW2d 346, 357 (1982) (*quoting* extensively from *The Federalist No*. 47).[32]

An emergency, whether short or long-term, is no excuse to cast aside Separation of Powers. Even in a temporary setting, regardless of length, an executive exercising legislative functions can lead both to tyranny and a policy imbalance, where one branch of government starts making judgments best reserved for the Legislature.

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[30] Compare certain constitutional rights belonging to the individual versus the structure of government. There is very little doubt that in certain, short-term, emergencies some individual rights may be constrained. The freedom to assemble or even the freedom to worship may be temporarily constrained in the event of a flood, snowstorm, or the like. Yet, even in such short-term emergencies, the structure of government must remain the same—The powers of government remain divided among the coequal branches, with each branch limited to exercising its constitutionally prescribed duties.

[31] *The Federalist No. 47* (Madison) (John C. Hamilton, ed. 1998)

[32] Stating that "[t]hese principles have been adopted in Michigan" and sustaining the Governor's authority transfer legislatively granted authorities from one agency to another during a reorganization of executive agencies. 415 Mich at 752.

The months-long duration of COVID-19 means that it is unlike other emergencies states have experienced. From the plain text of most emergency statutes, most state legislatures did not contemplate the months-long emergency[33] with unchecked gubernatorial authorities. Even in the case of COVID-19, what officials originally portrayed as short-term solutions for a crisis[34] has morphed into an excuse for governors across the country to exercise unprecedented authority over the course of nearly six months.

> Since March, the separation of powers has been off-kilter, shifted disproportionately to state executives, who are ruling outside the boundaries of their proper authority. In a moment of national panic, Americans permitted their state and local executives to take power—to declare states of emergency and to implement lockdowns—and now those executives won't give that power back.[35]

Emergency management legislation exists because legislators realize that they often do not have the time to meet and determine critical policies in response to disasters. Floods, snowstorms, fires, tornados, or similar disasters arise suddenly and end before legislatures can meet. Legislatures have provided governors certain, temporary authorities, as makes sense.

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[33] Though, one could say that legislatures, such as the Michigan Legislature, feared executive overreach during emergencies and, thus, restricted the Governor's exercise of emergency powers to 28-days.

[34] See ABC News, '*This Week' Transcript 3-22-20: FEMA Administrator Pete Gaynor, Gov. Phil Murphy, Gov. Gretchen Whitmer*, March 22, 2020, <https://abcnews.go.com/Politics/week-transcript-22-20-fema-administrator-pete-gaynor/story?id=69733494> (accessed August 17, 2020) ("15 days to flatten the curve".)

[35] Molly McCann, *Governors Can't Use Coronavirus To Indefinitely Declare A State Of Emergency*, The Federalist, Aug. 11, 2020, <https://thefederalist.com/2020/08/11/governors-cant-use-coronavirus-to-indefinitely-declare-a-state-of-emergency/> (accessed August 17, 2020).

The purpose for emergency management acts, though, is not to cede legislative authority indefinitely to the executive branch. When an emergency of a longer duration occurs, legislatures have time and the duty to meet, work with governors to balance interests, and establish policies for the emergency's duration. When governors and legislatures work together, the policies enacted are wiser and enjoy an added legitimacy.[36]

Yet, many governors, including in this case, claim something akin to unlimited, unchecked power over a long time, bypassing legislatures and establishing statewide, critical policy. By claiming this authority over a long period, governors are challenging state separation of powers provisions and the delegation of authority. Because of the challenges, the legislative and judicial branches must respond to preserve constitutional *structures* of government.[37]

The Legislature may choose to delegate some its police power, for a limited time, to the Governor provided it includes adequate standards and safeguards. A state's police power—the authority to enact laws for the public health and safety—belongs to the Legislature. *Piasecki*, 333 Mich at 143. Without adequate standards and safeguards, any delegation of authority to the governor contravenes state

[36] See *Statement of Principles to Inform Emergency Management Act Reform*, *ante* n. 2.
[37] "[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place." Federalist No. 51 (Hamilton or Madison)

constitutional provisions and upsets the structure of government the people adopted. *Blue Cross and Blue Shield*, 422 Mich at 51-52 and *Turmon*, 417 Mich at 652.

In this case, the Governor claims authority pursuant to the Emergency Powers of the Governor and Emergency Management Acts to regulate enormous portions of everyday life and society, the state's economy, and criminalize conduct that prior to the crisis was perfectly legal.[38] In many of her Executive Orders, Governor Whitmer cites MCL §§ 10.31-10.33, and 30.406. Those laws allow the Governor to issue orders, established rules having the force and weight of law, and provide that the violation of such orders or rules is a crime:

> 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.

MCL § 10.33

> 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 § 30.405(3)

The laws, thus, allow the Governor to define criminal laws and regulate the everyday conduct of Michigan residents without input from the Legislature. Other than placing a time limit on the duration of the Governor's emergency authority, the Legislature provides no standards or guidelines sufficient that would "protect the

[38] *E.g.* EO No. 2020-100 (COVID-19), *Temporary requirement to suspend activities that are not necessary to sustain or protect life* (making willful violations a misdemeanor pursuant to MCL §§ 10.33 and 30.405(3)); EO No. 2020-153, *Masks* (requiring use of facemasks, making willful violations a misdemeanor pursuant to MCL §§ 10.33 and 30.405(3)), and EO No. 2020-160, *Amended Safe Start Order* (setting out standards for re-opening of society and making willful violations of the Order a misdemeanor pursuant to MCL §§ 10.33 and 30.405(3)).

public from arbitrary and capricious abuses of delegated discretion." *Turmon*, 417 Mich at 650 and *Blue Cross and Blue Shield*, 422 Mich at 51.[39]

The dynamics between the legislative and executive branches created by COVID-19 highlight what happens when the Legislature fails to provide adequate standards and safeguards. Governors have made decisions about critical policies impacting society without input from legislatures. By going it alone, governors have made value judgments best reserved for the legislative branch. Governors have distinguished between "essential" and "non-essential" businesses, with often little justification[40] and fined individuals and "non-essential" small businesses, which have decided to stand up to certain executive orders. [41] Governors have decided to

[39] It is worth noting that the emergency laws at issue here delegate lawmaking authority directly to the Governor, not to an administrative agency. That fact alone can distinguish the instant case from nearly every case where this Court sustained an agency's rulemaking authority. E.g., *Taylor* (Michigan laws deferring to U.S. FDA for determining product liability actions is constitutional); *Turmon*, (laws delegating to the Board of Pharmacy the authority to classify controlled substances is constitutional within legislatively established schedules); *Bloomfield Township v Kane*, 302 Mich App 170; 839 NW2d 505 (2013) (same as *Turmon*).

[40] See, for example, EO No. 2020-21 (defining "critical infrastructure workers" and ordering businesses that are not "necessary to sustain or protect life" to limit themselves to "minimum basic operations."); Fox 2 Detroit, *Whitmer clarifies essential order: 'if businesses are not sure if they're life-sustaining, assume they are not*, March 26, 2020, <https://www.fox2detroit.com/news/whitmer-clarifies-essential-order-if-businesses-are-not-sure-if-theyre-life-sustaining-assume-they-are-not> (accessed August 22, 2020); Laura Benshoff, Ryan Briggs, *Just insanity: Closed Pa. businesses cry foul as competitors snag waivers to reopen*, WHYY PBS, April 2, 2020, <https://whyy.org/articles/just-insanity-closed-pa-businesses-cry-foul-as-competitors-snag-waivers-to-reopen/> (accessed August 22, 2020); Amy Marcinkiewicz, *Confidential agreement uncovered allowed Pa. car show to happen despite COVID-19 restrictions*, WPXI, August 19, 2020, <https://www.wpxi.com/news/investigates/confidential-agreement-uncovered-allowed-car-show-happen-despite-covid-19-restrictions/BUN43H7C3ZDCJJ2MIIEYXRN6AU/> (accessed August 22, 2020).

[41] See Fox 2 Detroit, *Whitmer clarifies essential order*, *ante* (Gov. Whitmer warning that "some businesses that are violating the order could risk losing their licenses and fines"); Derick Hutchinson, *6 Michigan businesses fined for 'serious violations' of COVID-19*

approve of certain political protests, while criticizing or moving to quash others.[42] While any death is tragic, governors have essentially decided that the risk of deaths attributable to COVID-19 are of greater value than people who are struggling with depression or suicide because of the lockdowns.[43] Governors have decided that

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safety protocols, Local 4, Click on Detroit, August 21, 2020, <https://www.clickondetroit.com/news/local/2020/08/21/6-michigan-businesses-fined-for-serious-violations-of-covid-19-safety-protocols/> (accessed August 22, 2020); Samantha Chang, *Colorado restaurant serving Mother's Day brunch has license suspended for defying lockdown*, BizPac Review, May 12, 2020, <https://www.bizpacreview.com/2020/05/12/colorado-restaurant-serving-mothers-day-brunch-has-license-suspended-by-health-department-919860> (accessed August 22, 2020); and Shelly Stallsmith, *Pennsylvania Gov. Wolf threatens consequences for counties, businesses that reopen too soon*, USA Today, May 12, 2020, <https://www.usatoday.com/story/news/politics/2020/05/12/pa-gov-wolf-punches-back-consequences-reopening-too-soon/3115731001/> (accessed August 22, 2020).

[42] E.g. Craig Mauger and James David Dickson, *With little social distancing, Whitmer marches with protesters*, The Detroit News, June 4, 2020, <https://www.detroitnews.com/story/news/local/michigan/2020/06/04/whitmer-appears-break-social-distance-rules-highland-park-march/3146244001/> (accessed August 22, 2020); compare Lauren Gibbons, *Thousands converge at Michigan Capitol to protest coronavirus stay-at-home order, Whitmer warns it will 'put more people at risk,'* MLive, April 15, 2020 (Criticizing protests against her executive order), <https://www.mlive.com/public-interest/2020/04/thousands-converge-at-michigan-capitol-to-protest-coronavirus-stay-at-home-order-whitmer-warns-it-will-put-more-people-at-risk.html> (accessed August 22, 2020); Greg Pickel, *Why did Pa. Gov. Tom Wolf join a protest with hundreds of people, breaking the rules in a yellow-phase county?* PennLive, June 5, 2020, <https://www.pennlive.com/coronavirus/2020/06/why-did-pa-gov-tom-wolf-join-a-protest-with-thousands-of-people-breaking-the-rules-in-a-yellow-phase-county.html> (accessed August 22, 2020); Sophia Chang, *Federal Judge Rules New York Cannot Limit Religious Gatherings With BLM Protests and Businesses Reopening*, Gothamist, June 27, 2020 (noting that Cuomo attended a George Floyd protest without a mask and sought to enforce his rules against religious gatherings at the same time), <https://gothamist.com/news/federal-judge-rules-new-york-cannot-limit-religious-gatherings-blm-protests-and-businesses-reopening> (accessed August 22, 2020)

[43] See, e.g., Mark E. Czeisler, Rashon I. Lane, MA, Emiko Petrosky, et al. *Mental Health, Substance Use, and Suicidal Ideation During the COVID-19 Pandemic – United States, June 24-30, 2020*, Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report (MMWR), August 14, 2020, <https://www.cdc.gov/mmwr/volumes/69/wr/mm6932a1.htm> (accessed August 22, 2020) ("Elevated levels of adverse mental health conditions, substance use, and suicidal ideation were reported by adults in the United States in June 2020. The prevalence of

stopping the spread of COVID-19 is more important that the women and children suffering from domestic violence during the lockdown.[44]

None of this discussion about separation of powers and delegation is to say that those provisions are absolute. The Framers, Montesquieu, federal courts, and Michigan Courts realized that complete separation of powers and non-delegation are near impossible. From time-to-time the executive exercises legislative authority, the legislative branch sets some guidance for the judicial, and so on. Courts must draw the line, therefore, if "the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department" lest the constitutional structure of the government be subverted. See *The Federalist No. 47*, *ante* (emphasis original), see also, *Makowski*, 495 Mich at 482-483, quoting *Local*

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symptoms of anxiety disorder was approximately three times those reported in the second quarter of 2019 (25.5% versus 8.1%), and prevalence of depressive disorder was approximately four times that reported in the second quarter of 2019 (24.3% versus 6.5%)") and Leo Sher, *The impact of the COVID-19 pandemic on suicide rates*, QJM An International Journal of Medicine, June 30, 2020, <https://academic.oup.com/qjmed/advance-article/doi/10.1093/qjmed/hcaa202/5857612> (accessed August 22, 2020) (Discussing how social isolation contributes to psychiatric disorders and suicidal behavior across cultures and populations).

[44] See, e.g., Melissa Healy, *Domestic violence rose during lockdown – and injuries are dramatically more severe, study finds*, Los Angeles Times, Aug. 18, 2020, <https://www.latimes.com/science/story/2020-08-18/intimate-partner-violence-spiked-80-after-pandemic-lockdown-began> (accessed August 24, 2020) (Explaining that a study in Massachusetts saw a "near-doubling of the proportion of domestic abuse cases that resulted in physical injury in comparison with previous years") and Eva Valera, Ph.D., Harvard Health Publishing, Harvard Health Blog, *When lockdown is not actually safer: Intimate partner violence during COVID-19*, July 7, 2020, <https://www.health.harvard.edu/blog/when-lockdown-is-not-actually-safer-intimate-partner-violence-during-covid-19-2020070720529> (July 7, 2020)(accessed August 24, 2020).

321, State, Co. & Muni. Workers of America v City of Dearborn, 311 Mich 674; 19 NW2d 140 (1945).[45]

The continued exercise of executive authority beyond 28-days (plus the time extended by the Legislature) and the attachment of criminal penalties to "willful violations" of the orders subverts the constitutional structure of government. With the cited executive orders, Governor Whitmer—as the representative of Michigan's executive branch—is exercising the whole power of the legislature. The Legislature, after agreeing to extend the Governor's authority for several weeks, decided not to renew it. To preserve legislative intent, separation of powers, delegation, and the constitutional structure of government, ALEC respectfully suggests that this Court determine that, at least, the portions of the Emergency Powers of the Governor and Emergency Management Acts delegating to the Governor the authority to create crimes violates the State's Separation of Powers jurisprudence.

D. Four Other State Supreme Courts Have Weighed Gubernatorial Emergency Authorities With Differing Results

Michigan is not the only state to wrestle with gubernatorial authority during the COVID-19 pandemic. The highest courts in at least four state courts have opined on emergency management acts and the interaction between the executive and legislative branches.[46] One state, Wisconsin, ruled that the Governor failed to follow

[45] Statutes violate separation of powers if "the whole power of one of these departments [is] exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution."

[46] For purposes of this analysis, actions by private citizens or businesses as well as suits related to the timing or administration of state elections are mostly omitted.

legislatively prescribed procedures. Two states, Pennsylvania and Oregon,[47] have largely ignored provisions empowering the legislature to check gubernatorial authorities. The fourth state, Kansas, has prescribed duties and responsibilities for a state Legislative Coordinating Council ("LCC"). The Kansas Supreme Court determined that the LCC failed to act within its lawful capacity when it revoked the Governor's executive order.

1. Wisconsin – *Wisconsin Legislature v Palm*, 391 Wis2d 497; 942 NW2d 900 (2020)

Wisconsin has unique protections for the structure of government during an emergency. One provision requires an agency to follow certain procedures, when proposing "a rule as an emergency rule." Wis Stat § 227.24. This provision allows for the waiver of some notice and hearing standards, but still requires compliance with other procedures. The state's Department of Health Services Secretary-designee claimed that her Order at issue in the case "criminalize[d] conduct pursuant to Wis Stat § 252.25." *Palm*, 391 Wis2d at 523. Courts in Wisconsin require any rule proposing criminal penalties be "promulgated as a rule," providing "fair notice" at a minimum. *Id*. The Wisconsin Supreme Court ultimately determined that the Secretary-designee's order closing non-essential businesses and ordering healthy people to stay at home was a rule of general applicability, was not properly promulgated, and thus could not be enforced.

[47] The challenge to Oregon's executive authorities was initiated by a church, but is included in this discussion since the Oregon Supreme Court extensively discussed legislative and constitutional intent.

Relevant for this case, the Wisconsin Legislature did not challenge "the Governor's emergency powers." *Id*. at 525. The Wisconsin Supreme Court recognized that "Constitutional law has generally permitted the Governor to respond to emergencies without the need for legislative approval," but that this need is predicated both upon the need for immediate response and the Legislature's inability to provide legislative approval before the emergency has passed. *Id*. "But in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely." *Id*.

The structure of government also played a large role in the Wisconsin Court's decision. Referring to the State Constitution, the Court opined that

> [t]he people consent to the Legislature making laws because they have faith that the procedural hurdles required to pass legislation limit the ability of the Legislature to infringe on their rights… We have allowed the Legislature to delegate its authority to make law to administrative agencies. But… such a delegation is allowed only if there are "adequate standards for conducting the allocated power."

Id. at 521-522 (Citations omitted).

The purpose for those standards is to act as "procedural safeguards to prevent the 'arbitrary, unreasonable or oppressive conduct of the agency.'" *Id.* at 522 (Citations omitted.) And when the Secretary-designee could not point to any safeguards, the court struck down her actions.

Here Michigan's jurisprudence is very similar to Wisconsin. As discussed above, a delegation of authority is proper only if there are appropriate standards to safeguard the people. The Legislature failed to articulate any standard when it provided the Governor *carte blanche* authority to create new legal and criminal standards. Now, this Court must determine whether the Governor may rely on

emergency authorities indefinitely to enact rules and criminal standards impacting nearly every aspect of Michigan society. ALEC respectfully posits that the answer to this question is "no"

2. Kansas – *Kelly v Legislative Coordinating Council*, 460 P3d 832 (Kan 2020)

Kansas law, like Michigan, provides broad emergency authority to the governor. The authority lasts only lasts fifteen (15) days if the legislature is in session. If the Legislature is not in session, the "state finance council" must approve any extension. See Kan Stat Ann § 48-924(b)(3). The Legislature extended the Governor's authority once, but required her to apply to the State Finance Council for another extension before the LCC could exercise its authority to revoke the Governor's orders. The Supreme Court of Kansas found simply that the LCC acted before the State Finance Council had the opportunity to act. As with Pennsylvania, the Kansas Supreme Court did not address whether the underlying emergency management acts violated the state's separation of powers or non-delegation jurisprudence.

3. Pennsylvania – *Wolf v Scarnati*, ___ A.3d ___; 2020 WL 3567269 (Pa 2020)

Emergency declarations in Pennsylvania last for ninety (90) days and may be renewed indefinitely by the Governor. The law permits the Legislature to end the emergency through a joint resolution. 35 Pa C S § 7301(c). The principle question presented to the Pennsylvania Supreme Court is whether any joint resolution passed by the Legislature must be presented to the Governor for his signature. In deciding the answer in the affirmative, the Court held that the Legislature may not effectively veto the governor's actions after it delegated authority to him or her.

Scarnati. Despite holding so, there is no discussion in the case regarding separation of powers of non-delegation. Instead, the court presumed the delegation of legislative, rule making authority to be appropriate.

4. Oregon – *Elkhorn Baptist Church v Brown*, 366 Or 506; 466 P3d 30 (2020)

The Oregon Constitution limits any gubernatorial declaration of "catastrophic disaster" which includes "public health emergencies" to thirty (30) days. Or Const art X-A, § 1. Similarly, the state's emergency management law limits any declaration of emergency to a maximum of twenty-eight (28) days. Or Rev Stat § 433.441(5). The posture of the case in Oregon was slightly different than the instant case. The plaintiffs sought a preliminary injunction, preventing the enforcement of some of the Governor's emergency orders. Despite the near identical language between the state's public health emergency act and the state Constitution, the Oregon Supreme Court determined that the Legislature could not limit the Governor's emergency powers.

IV. Conclusion

The most robust and wisest emergency responses occur when the Legislative and Executive branches work together. Both branches of government can properly balance critical policies, protect the liberties of Michigan residents, and ensure the proper functioning of society while seeking to mitigate the threats posed by the emergency.

Michigan's Emergency Powers of the Governor and Emergency Management Acts are consistent. They provide the Governor substantially similar, if not the same, authorities during times of public crises. As evidenced, though, by a plain reading of

the text, the Governor's emergency authorities are not indefinite. Any other conclusion would fail to protect the state government's constitutional structures established by the people.

The structure of government envisioned by the Framers and established by the people of Michigan guarantee that the police powers of a state along with the lawmaking functions belong to the State Legislature. While separation of powers and non-delegation are not absolute promises, they are promises that the Legislature cannot delegate some authorities and the Executive cannot assume other authorities.

Exigent circumstances may require, for a time, the Executive protrude onto legislative functions. But the Executive's protruding authority is limited in duration and diminishes as the circumstances persist. Recognizing the potential for exigent circumstances, the Legislature established a twenty-eight (28) day limit for the exercise of emergency authority before the executive must work with it to coordinate responses and authority.

As to the first question, ALEC respectfully suggests that the answer is that the two acts should be interpreted as *in pari materia*, consistent with each other, and the Emergency Management Act provides an ultimate end to the exercise of the Governor's emergency authorities, especially related to epidemics or pandemics, unless the Legislature agrees to extend them. This does not change the nature of the Governor's authority under either statute, just the duration.

As to the second question, ALEC respectfully suggests that the Governor's Orders, especially those establishing criminal penalties for failing to remain at

home, keeping non-essential businesses closed, and similar, violate Michigan's separation of powers and non-delegation jurisprudence.

Respectfully submitted,

LIPSON NEILSON P.C.

/s/ C. Thomas Ludden
C. THOMAS LUDDEN (P45481)
Attorneys for *Amicus Curiae*
American Legislative Exchange Council
3910 Telegraph Road, Suite 200
Bloomfield Hills, Michigan 48302
tludden@lipsonnneilson.com

Jonathon Paul Hauenschild, Esq.
Bartlett D. Cleland, Esq.
American Legislative Exchange Council
2900 Crystal Dr., Suite 600
Arlington, Virginia 22202
Main – (703) 373-0933
jhauenschild@alec.org
bcleland@alec.org

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