

STATE OF MICHIGAN  
IN THE SUPREME COURT

In re CERTIFIED QUESTIONS FROM THE  
UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF MICHIGAN,  
SOUTHERN DIVISION.

Supreme Court No. 161492

USDC-WD: 1:20-cv-414

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

v.

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

Defendants.

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

**BRIEF OF ELECTION INTEGRITY FUND AS *AMICUS CURIAE***

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... iv

STATEMENT OF QUESTIONS PRESENTED..... 1

INTEREST OF AMICUS..... 1

INTRODUCTION ..... 2

STATEMENT OF FACTS..... 3

*Overview*..... 3

*The Governor’s stay-at-home orders are imposed and then slightly relaxed, but cover constitutionally protected conduct*..... 4

*Summer 2020 brings tightened restrictions on citizen gatherings, including for political speech*..... 6

*Restrictions on, and criminal penalties for, political assembly continue*..... 7

*The governor claims the discretion to decide o a case by case basis whether executive officials should enforce her EO’s against citizens engaging in constitutionally protected speech and assembly*..... 8

*EIF’s planned election integrity events are not benefiting from any enforcement discretion, and it appears that the Eos are being enforced to the letter with no accommodation for constitutional speech and assembly rights*..... 10

ARGUMENT..... 13

    I. The non-delegation clause of the Michigan Constitution requires that the Legislature, when delegating certain functions, establish sufficiently specific standards for state action that guarantee procedural safeguards against arbitrary rule..... 13

    II. EPGA fails the first prong of the test because it provides no intelligible standards, and therefore allows the executive to create policy in place of the legislature..... 15

        A. The “reasonably precise” inquiry requires the legislature to be as specific as necessary, ensuring that legislators and not executive officials set policy..... 15

        B. EPGA is unprecedented because of its broad subject matter, lack of policy, and intrusion into a constitutionally sensitive area..... 17

1.	Subject matter.....	18
2.	Lack of declared policy.....	19
3.	A broad subject of delegation does not justify imprecise standards.....	20
C.	The EPGA’s lack of standards requires the Governor to make policy and allows her to enforce it in whatever way she prefers.....	22
1.	The EPGA lacks any standards for the Governor’s orders.....	22
2.	The Governor’s orders are a reflection of the EPGA’s lack of standards.....	24
III.	The EPGA fails the test’s second, due process prong because it provides no safeguards to protect due process, and is therefore an unconstitutional delegation of authority.....	27
A.	This Court should pay particular attention to due process concerns.....	28
B.	The EPGA is subject to abuse because, as an initial matter, it relies on the delegee—the Governor—to initiate, define, and prolong her own authority.....	29
C.	The EPGA contains no procedural safeguards to protect individuals or entities from arbitrary, one-person rule.....	31
D.	Without built-in procedural safeguards, all Michiganders, including EIF, lack a clear path for asserting their constitutional freedoms.....	33
E.	Defendants offer no viable and available procedural safeguards to protect EIF from one-person, arbitrary rule.....	36
	CONCLUSION.....	38

## TABLE OF AUTHORITIES

**Cases**

<i>Blank v Dep't of Corrections</i> , 462 Mich 103; 611 NW2d 530 (1984).....	14, 32
<i>Blue Cross &amp; Blue Shield of Michigan v Milliken</i> , 422 Mich 1, 51; 367 NW2d 1, 27 (1985).....	20, 27
<i>CH Royal Oak, LLC v Whitmer</i> , No. 1:20-CV-570, 2020 WL 4033315, at *1 (WD Mich July 16, 2020).....	9
<i>Chastleton Corp v Sinclair</i> , 264 US 543, 547–48 (1924).....	26
<i>City of Livonia v Dep't of Social Services</i> , 423 Mich 466, 505; 378 NW2d 402, 421 (1985).....	<i>passim</i>
<i>In re Complaint of Rovas Against SBC Mich</i> , 482 Mich 90, 97-98; 754 NW2d 259 (2008).....	24
<i>Dep't of Natural Resources v Seaman</i> , 396 Mich 299; 240 NW2d 206 (1976).....	<i>passim</i>
<i>Dukesherer Farms Inc v Ball</i> , 405 Mich 1; 273 NW2d 877 (1979).....	15
<i>House of Representatives v Brennan</i> , Opinion of the Court of Appeals, Case No. 353655 (August 21, 2020).....	22
<i>Hoyt Bros, Inc v City of Grand Rapids</i> , 260 Mich 447; 245 NW 509 (1932).....	29, 35
<i>Korematsu v United States</i> , 323 US 214, 231 n.8 (1944).....	26
<i>Lansing Schools Education Ass'n v Lansing Board of Education</i> , 487 Mich 349, 366; 792 NW2d 686 (2010).....	13
<i>Michigan State AFL-CIO v Sec'y of State</i> , 230 Mich App 1, 25; 583 NW2d 701, 712 (1998).....	27
<i>Morrison v Olson</i> , 487 US 654, 697 (1988).....	2

<i>NAACP v Button</i> , 371 US 415, 433 (1963)	26
<i>Nixon v Adm'r of Gen Servs</i> , 433 US 425, 507 (1977)	25
<i>Osius v. St. Clair Shores</i> , 344 Mich 693; 75 NW2d 25 (1956)	<i>passim</i>
<i>Palmer Park Theatre Co v City of Highland Park</i> , 362 Mich 326, 348; 106 NW2d 845, 856 (1961)	26, 27
<i>People v Turmon</i> , 417 Mich 638; 340 NW2d 620 (1983)	14, 16, 32
<i>Plaut v Spendthrift Farm, Inc</i> , 514 US 211, 241 (1995)	25
<i>In re Primus</i> , 436 US 412, 424 (1978)	26
<i>Radtke v Everett</i> , 442 Mich 368, 387-394; 501 NW2d 155, 165-168 (1993)	23
<i>Taylor v Smithkline Beecham Corp</i> , 468 Mich 1, 10; 658 NW2d 127, 132 (2003)	30
<i>United States v Carolene Products Co</i> , 304 US 144, 153 (1938)	26
<i>Westervelt v Nat Res Comm</i> , 402 Mich 412; 263 NW2d 564 (1978)	<i>passim</i>
<i>Youngstown Sheet &amp; Tube Co v Sawyer</i> , 343 US 579, 588 (1952)	24, 25
<b>Constitution</b>	
Const 1963 art 1 § 5	3
Const 1963 art 4 § 1	36
Const 1963 art 3 § 2	13
Const 1963 art 11 § 1	22

**Other Authorities**

MCL 10.31(1).....	3, 18, 23
MCL 10.31(2).....	24
MCL 10.31(3).....	24
MCL 10.32.....	20, 31
MCL 30.403(4).....	3
MCL 600.2946(5).....	30

## QUESTION PRESENTED

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

*Amicus Curiae's Answer: Yes.*

## INTEREST OF AMICUS<sup>1</sup>

The Election Integrity Fund (“EIF”) is a nonprofit membership organization. Its mission is to maintain the integrity of electoral processes, preserve the purity of elections, and guard against the abuse of the elective franchise in the state of Michigan. It advances that mission through grassroots efforts. In order to find and train enthusiastic and effective recruits, EIF is reliant on meetings, trainings, rallies, and physical presence everywhere votes are being cast and counted. For example, EIF members served as election challengers in Michigan’s August 4, 2020 election. EIF desires and has made plans to continue this activity in advance of the November 3 election, but effectively mobilizing its grassroots volunteers would violate the terms of the Governor’s executive orders.

EIF’s activity not only advances an important state constitutional protection, its activity is itself protected under the First Amendment to the United States Constitution. EIF and its members are therefore injured by gubernatorial orders that, in the name of combating a pandemic, criminalize its constitutionally protected just before the general election. That is precisely when EIF’s speech and association is most effective in advancing its mission.

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<sup>1</sup> Pursuant to MCR 7.312(H)(4), Amicus Curiae states that counsel for a party neither authored this brief in whole or in part, nor did such counsel for a party make a monetary contribution intended to fund the preparation or submission of this brief. Thomas More Society made a monetary contribution intended to fund the preparation or submission of the brief.

EIF agrees that different branches of government should coordinate efforts in the midst of emergencies that affect citizens' health, but it opposes the legislature's delegation of lawmaking authority to install one-person rule for months on end without providing any guidance. The inevitable result is orders that criminalize the exercise of First Amendment rights.

## INTRODUCTION

"It is the proud boast of our democracy that we have 'a government of laws and not of men.'" *Morrison v Olson*, 487 US 654, 697 (1988) (Scalia, J., dissenting) (quoting Mass Const 1780, Part the First, art XXX). The Governor's edicts here constitute a dramatic departure from that sacrosanct proposition. The legislature gave her its powers in violation of the Michigan Constitution and the fundamental principles of republican government.

An emergency is a dangerous time for governments like ours. In tranquil times, our liberties are most effectively protected by the structural division of powers, not by enumerations or reservations of rights. A sudden, acute danger threatens that careful structural balance because it calls for vigorous and creative executive action, when there is no time for deliberation. Our democracy has survived such threats because our crises have been comparatively short-term, allowing the legislature and courts to quickly resume their proper roles as soon as it was possible to convene.

Unlike hurricanes, natural disasters and riots, which are finite in duration, the coronavirus and the way it affects our society is a concern of potentially infinite duration. This disease is no longer the type of physical, immediate emergency envisioned by the EPGA. And it has become better understood over time. With this knowledge, any narrow rationale for one-branch (or one-person) government weakens and disappears. The legislature must reclaim its power and duty to set policy and limit the executive's discretion. If it is unable to do so—and six months in, that appears to be the case—then it falls to the courts to restore the proper separation of powers and its

protection of individual liberty. Only restoration of the legislature's power will end the cycle of executive order, arbitrary enforcement, and litigation that has become the *de facto* means of government. Your Amicus, EIF, asks this Court to consider EIF's own struggle with the Governor's one-person rule-by-decree, and to act expeditiously to restore the separation of powers and constitutional government to this state.

## STATEMENT OF FACTS

### *Overview*

On March 10, 2020, Governor Whitmer declared a statewide state of emergency due to the coronavirus, citing three distinct sources of authority:

Section 1 of article 5 of the Michigan Constitution of 1963 vests the executive power of the State of Michigan in the governor.

The Emergency Management Act, 1976 PA 390, as amended, MCL 30.403(4), provides that “[t]he governor shall, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists.”

The Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31(1), provides that “[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, . . . the governor may proclaim a state of emergency and designate the area involved.”

*See* Executive Order No. 2020-04. The first statute the Governor cited is commonly referred to as EMA; the latter (but earlier enacted) is commonly called EPGA.

The Governor “renewed” this declaration multiple times, including on April 2, 2020 (EO 2020-33); April 30 (EO 2020-67; EO 2020-68). The most recent extension of the state of emergency, dated August 7, 2020, is under the EPGA, and it extends the emergency “through September 4, 2020, at 11:59 p.m.” EO 2020-165.

This most recent order outlined the Governor's perception of her response to the coronavirus between March and August 2020. It warned, "Michigan now faces an acute risk of a second wave... Life will not be back to normal for some time." The Governor explained that in her view, the "health, economic, and social harms" of the virus "continue to constitute a statewide emergency and disaster." *Id.* The "statewide disaster and emergency conditions will exist," in her view, "until...recovery is underway, the economic and fiscal harms from this pandemic have been contained, and the threats posed by COVID-19 to life and the public health, safety, and welfare of this state have been neutralized." *Id.*

***The Governor's stay-at-home orders are imposed and then slightly relaxed, but cover constitutionally protected conduct***

On March 23, 2020, Governor Whitmer entered her first stay-at-home order, EO 2020-21 ("Temporary requirement to suspend activities that are not necessary to sustain or protect life.").

The Governor's "stay-at-home" orders generally offered the following rationale:

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, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible.

EO 2020-21.

Subject to certain exceptions, the stay-at-home orders made it a misdemeanor to willfully violate any of the following provisions:

2. Subject to the exceptions in section 7, all individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence. Subject to the same exceptions, all public and private gatherings of any number of people occurring among persons not part of a single household are prohibited.
3. All individuals who leave their home or place of residence must adhere to social distancing measures recommended by the Centers for Disease Control and

Prevention, including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.

4. No person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life or to conduct minimum basic operations.

*Id.*

Section 7's exceptions focused on various necessary activities; they also provided that "a. Individuals may leave their home or place of residence, and travel as necessary:

1. To engage in outdoor recreational activity, consistent with remaining at least six feet from people from outside the individual's household. Outdoor recreational activity includes walking, hiking, running, cycling, boating, golfing, or other similar activity, as well as any comparable activity for those with limited mobility.

*Id.* None of those exceptions permitted political rallies or protests, get-out-the-vote efforts, voter registration, or other "retail politicking" that typically occurs throughout a general election year.

These basic prohibitions remained unchanged in several successive stay-at-home orders. *See* EO 2020-42; 2020-59; 2020-70 (adding a requirement that "Any individual able to medically tolerate a face covering must wear a covering over his or her nose and mouth—such as a homemade mask, scarf, bandana, or handkerchief—when in any enclosed public space"); EO 2020-77 (adding the proviso, "Similarly, nothing in this order shall be taken to abridge protections guaranteed by the state or federal constitution under these emergency circumstances"); EO 2020-92 (on May 18, 2020, retaining constitutional proviso; dividing state into regions, and allowing, in two rural regions, "social gatherings of up to 10 people" and the reopening of retail stores, offices, and restaurants and bars with limited seating); and EO 2020-96 (on May 21, 2020, extending the 10-person allowance on social gatherings statewide).

Eventually, the Governor began to include a constitutional proviso within the executive orders, which changed over time but now states:

Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority. Similarly, nothing in this order shall be taken to abridge protections guaranteed by the state or federal constitution under these emergency circumstances.

The Governor's "Frequently Asked Questions" section of her website further interprets this proviso, but provides little explanation of how the Governor will interpret the critical qualification, "...under these emergency circumstances." One question states as follows:

Q: Does Executive Order 2020-110 prohibit persons from engaging in *outdoor activities* that are protected by the First Amendment to the United States Constitution?

A: No. Persons may engage in expressive activities protected by the First Amendment within the State of Michigan, but must adhere to social distancing measures recommended by the Centers for Disease Control and Prevention, including remaining at least six feet from people from outside the person's household.<sup>2</sup>

The guidance has been in effect since at least EO 2020-42, and by its own terms does not apply to indoor gatherings. The same guidance is provided on the Governor's website related to Executive Order 2020-160.<sup>3</sup>

***Summer 2020 brings tightened restrictions on citizen gatherings, including for political speech***

In June, 2020, Governor Whitmer predicted a "second wave" of the virus. On July 29, 2020, she issued EO 2020-160, her "Amended Safe Start Order". The Governor justified the Order by citing the rise in Michigan's per capita rate of new daily cases of COVID. EO 2020-160. Specifically, the Governor blamed the rise in cases on "large social gatherings, often attended by young people", referencing "a single house Party in Saline; an outbreak at a Lansing bar... and a sandbar party at Torch Lake over the July 4 weekend." *Id.*

<sup>2</sup> See Executive Order 2020-110 FAQs, available online at <[https://www.michigan.gov/coronavirus/0,9753,7-406-98178\\_98455-530654--,00.html](https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-530654--,00.html)> (emphasis added).

<sup>3</sup> See Executive Order 2020-160 FAQs, available online at <[https://www.michigan.gov/coronavirus/0,9753,7-406-98178\\_98455-535202--,00.html](https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-535202--,00.html)>.

Based on this rationale, the Governor ordered that “social gathering[s] or organized event[s] among persons not part of the same household” would be limited to 10 people if indoors and 100 people if outdoors. EO 2020-160(7)(a)(1)-(4). A willful violation of the Executive Order, including the attendance limits on social gatherings and organized events, is a misdemeanor. EO 2020-160(17). The 10-person limit on indoor gatherings applies to all indoor venues, regardless of the size of the venue. The 100-person limit on outdoor gatherings applies regardless of the size of the outdoor venue or the physical space in which the gathering is held, even if the size allows for six-foot social distancing.

In the same order and at the same time the Governor justified these restrictions because of a risk that COVID might spread from “large” public gatherings, she also allowed Detroit casinos to open subject to a 15% capacity limit. *See* EO 2020-160 (“I am taking the occasion, too, to allow for the reopening of the Detroit casinos, subject to a 15% capacity limit and strict workplace safeguards.”). All three casinos in Detroit are permitted to have more than 10 people indoors under the Order.

***Restrictions on, and criminal penalties for, political assembly continue***

EO 2020-160 addresses its constitutional implications in a section titled “Separation of powers”. Specifically, it states: “...[N]othing in this order shall be taken to abridge protections guaranteed by the state or federal constitution under these emergency circumstances.” EO 2020-160(13). The EO does not explain what the Governor believes may qualify as “protections guaranteed by the state or federal constitution **under these emergency circumstances.**” The EO suggests that “these emergency circumstances” impose limits on federally-guaranteed rights, and does not explain what those limits are. Further, under the plain terms of the order, an attendee at an 11-person indoor political rally or a 101-person outdoor rally is subject to criminal penalties.

EO 2020-160(7)(a)(1)-(4). A political rally of more than 100 people is banned throughout the State of Michigan, regardless of venue.

EO 2020-160 has no expiration date. It will govern and restrict speech and association, including organized events, for the foreseeable future, including in the weeks and months leading up to the November 3<sup>rd</sup> election.

***The governor claims the discretion to decide on a case by case basis whether executive officials should enforce her EOs against citizens engaging in constitutionally protected speech and assembly.***

The application of the order to specific individuals or groups depends entirely on the case-by-case discretion of executive officials who decide whether to enforce the Order or whether the constitutional exception applies.

For example, on March 31, 2020, pursuant to the Governor's Stay at Home Order, which contained no accommodations for constitutionally protected activity, police arrested a pro-life protestor engaged in protected speech on a public sidewalk in Detroit. That man sued Governor Whitmer for violating his First Amendment rights. Shortly thereafter, Governor Whitmer entered into a Stipulated Order and settlement with the protestor, acknowledging for the first time that his constitutionally protected activity was not prohibited by the Governor's orders.<sup>4</sup>

Governor Whitmer also banned commercial speech, on April 9, 2020, with her Executive Order 2020-40, which purported to ban large stores from the "advertising or promotion of goods that are not groceries, medical supplies, or items that are necessary to maintain the safety, sanitation, and basic operation of residences". EO 2020-40(11)(d)(3). Willful violation of the order was punishable as a misdemeanor. EO 2020-40(17). The Governor extended this prohibition on advertising under the same terms in EO 2020-42. As with the previous order, a willful violation

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<sup>4</sup> See Ex. A, Stipulated Order and Notice of Settlement in *Belanger, et al., v. Whitmer, et. al.* at ¶3 ("Defendants agree that Executive Order 2020-21 does not prohibit the conduct of Plaintiffs that is alleged in the Complaint.")

was a misdemeanor. EO 2020-42(17). Despite much criticism from retailers, this ban on advertising remained in place until April 24 when the Governor signed EO 2020-59, which rescinded EO 2020-142 and therefore removed the advertising restrictions for large retailers.

On June 18, under the authority of the Governor's executive order, the State Attorney General threatened to prosecute a movie theater that announced its plans to hold a "socially-distanced film festival" to participate in and honor the Juneteenth holiday. *CH Royal Oak, LLC v Whitmer*, No. 1:20-CV-570, 2020 WL 4033315, at \*1 (WD Mich July 16, 2020). Faced with this threat, the theater was forced to cancel its event. *Id.*

On June 22, Governor Whitmer suggested that she would use her asserted power over public gatherings to block an indoor Trump rally, citing the continuing requirements of wearing a face covering and the continuing limits on the size of gatherings.<sup>5</sup> Similarly, during an appearance on "The View," over a month earlier, on May 13, 2020, Whitmer criticized protesters who had gathered to oppose her stay-at-home orders, who she said made it "much more precarious." She also said that the protesters "in a perverse way, make it likelier that we are going to have to stay in a stay-home posture."<sup>6</sup>

Yet in between making these two statements, on Thursday, June 4, Whitmer "stood shoulder to shoulder with some Detroit march participants," activists who marched against perceived racism and police violence, making up a "rolling quarter-mile of humanity."<sup>7</sup> At the time, Governor Whitmer was widely perceived to be vying for the Democratic Vice Presidential nomination. The Governor's office first responded to criticism by claiming that she had

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<sup>5</sup> Collins, *Governor Whitmer Threatens to Block Trump Rallies in Michigan*, WBCK (Jun. 22, 2020), <<https://wbckfm.com/governor-whitmer-threatens-to-block-trump-rallies-in-michigan/>>

<sup>6</sup> Mauger and Dickson, *With little social distancing, Whitmer marches with protestors*, The Detroit News (Jun. 4, 2020) <<https://www.detroitnews.com/story/news/local/michigan/2020/06/04/whitmer-appears-break-social-distance-rules-highland-park-march/3146244001/>>.

<sup>7</sup> *Id.*

maintained social distancing, but numerous pictures show social distancing was not maintained, even though many attendees (and Whitmer) wore masks. Her office then claimed that the Governor did not violate her own order because peaceful protests are protected by the Constitution.<sup>8</sup>

Now, in EO 2020-160, Governor Whitmer has ordered new limits on the number of people that can join together for any common purpose, including retail politics and political speech and assembly. Faced with a cadre of County Sheriffs who questioned the legality of the executive orders (including her mask order) and publicly refused to enforce them, the Governor issued an Executive Directive ordering all state agencies to enforce her executive orders, including event attendance restrictions, even where local officials refuse to do so. *See* Executive Directive 2020-08. The Directive specifically ordered that the Michigan State Police *must* enforce violations of her orders in the same manner as any other violation of a law written by the Legislature. *See* Executive Directive 2020-08(4).

***EIF's planned election integrity events are not benefiting from any enforcement discretion, and it appears that the EOs are being enforced to the letter with no accommodation for constitutional speech and assembly rights.***

Your Amicus EIF and its members desire to exercise their fundamental rights to assemble and speak in furtherance of their shared political and electoral goals. For example, Plaintiff EIF and its members have devoted time and resources to planning specific indoor training and planning events in advance of the November election. These events would necessarily exceed the 10-person limit. The same is true for outdoor events EIF is planning, which would exceed the 100-person limit. In all of its events, participants would socially distance, and EIF would have masks and hand sanitizer available for use by attendees.

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<sup>8</sup> *Id.* (Whitmer spokeswoman Tiffany “Brown said the unity march didn't violate [the Governor's] latest order because it states, ‘Nothing in this order shall be taken to abridge protections guaranteed by the state or federal constitution.’ ‘That includes the right to peaceful protest.’”)

In a recent letter to the Ingham County Prosecutor's Office, EIF explained that it would "bring together like-minded individuals who are concerned about the integrity of the ballot box."<sup>9</sup> This would occur via two events in Ingham County. The first was an August 24 reception and recruitment event to bring together people with interest in EIF's mission and purpose, with an expected attendance of 100-120 people.<sup>10</sup> The second was a September 29 training meeting to train poll challengers for the November election, with an expected attendance of 200-250 people.<sup>11</sup> The letter made clear that both events would provide for social distancing and masks and hand sanitizer would be provided.<sup>12</sup> EIF requested an answer from the Prosecutor as to whether the events were permitted under the Governor's executive orders.<sup>13</sup>

In response, the Ingham County Prosecutor first asked for more information about the planned events, including the size of the rooms in which the events would be held.<sup>14</sup> The Prosecutor noted that "[a] perhaps significant factor that was not mentioned in either of your letters is the capacity of the specific venues you plan to use. Social distancing in a ballroom with a capacity for 500 persons would potentially be a very different issue from using a smaller capacity room, for example."<sup>15</sup> The Prosecutor also communicated to the groups that her office does "enforce the governor's executive orders (EO) via a citation or criminal complaint, but only if that is the last resort to guarantee adherence and public safety."<sup>16</sup>

Before EIF had a chance to respond to these additional queries, the Prosecutor sent a second email informing EIF that none of the events outlined in their letters would comply with the

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<sup>9</sup> See Ex B, Letter from EIF to Ingham County Prosecutor Carol Siemon (Aug 17, 2020).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See Ex. B, First Aug. 18, 2020 Email from Ingham County Prosecutor Carol Siemon to Susan Allen (EIF).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

Governor's executive orders.<sup>17</sup> Hence, the events could not take place without subjecting the attendees to potential criminal prosecution. In this second correspondence, the Prosecutor also forwarded an opinion from "my public health director" with which she said she consulted regarding Plaintiffs' inquiries.<sup>18</sup> The forwarded opinion stated:

The EO only allows 10 indoors. Even in a huge ballroom. Bars and restaurants are 50% capacity. Indoor gatherings are at 10. So these events aren't happening. Lansing Center is not holding any meetings or conferences. Same with Henry Center on campus and so on. I had that one interpreted by the state as well.<sup>19</sup>

This response from the Ingham County Prosecuting Attorney makes clear that the Governor's Executive Orders, although they are subject to First Amendment exceptions for some, like the protests the Governor desires to attend, they are being interpreted strictly and to the letter, with no First Amendment exceptions, with respect to EIF and its pro-election-integrity speech. This is true regardless of the size of the space occupied, even in monstrously large rooms, even outside, and even where participants wear masks and socially distance. No official is applying the Governor's purported exception for constitutionally protected activity to allow in-person, retail politicking of more than 10 people indoors or more than 100 people outdoors, regardless of any other factors or precautions. These prohibitions on political gatherings which have resulted in the Governor saying "yes" to some and "no" to others, will continue indefinitely—certainly well past the November election.

As discussed in the Argument, the question for this Court is whether EPGA validly delegated the power to a single official to exercise personal rule over the entire state by setting and enforcing policies such as these—prohibiting a large swath of political gatherings—for months on end.

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<sup>17</sup> See Ex. C, Second Aug. 18, 2020 email from Ingham County Prosecutor Carol Siemon to Susan Allen (EIF).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

## ARGUMENT

**I. The non-delegation clause of the Michigan Constitution requires that the Legislature, when delegating certain functions, establish sufficiently specific standards for state action that guarantee procedural safeguards against arbitrary rule.**

The Michigan Constitution protects individual liberty both in times of tranquility and in times of crisis. Like our federal constitution, Michigan’s voters approved a constitution which affords its strongest protection within the structure of government itself. The 1963 Constitution, like its predecessors, separates the state’s powers into three branches of government:

The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

Const 1963, art 3, § 2. Within this framework, the legislature may delegate certain functions to the executive, but this Court has long held that in order to preserve the separation of powers, any delegation must meet two basic requirements.<sup>20</sup> Under this two-pronged test, the Court asks: (1) whether the legislature or law-making body set forth sufficiently precise standards with articulated limits on action by a non-legislative body; and (2) whether adequate procedural safeguards exist to permit an affected person to challenge the delegated state action. *Westervelt v Nat Res Comm*, 402 Mich 412; 263 NW2d 564 (1978); *Osius v. St. Clair Shores*, 344 Mich 693; 75 NW2d 25 (1956).

*Westervelt* applied both prongs of the test after surveying the history of this Court’s non-delegation jurisprudence. *Westervelt*, 402 Mich 412, 443; 263 NW2d 564, 578 (recognizing two

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<sup>20</sup> Defendants improperly urge this Court to consider what other states are permitting their Governors to do, and to consider certain cases interpreting the U.S. Constitution; however, years of Michigan jurisprudence provide the appropriate guidance. Indeed, when a party attempted to rely on federal jurisprudence when interpreting the Michigan Constitution, this Court stated that the party “failed to explain...why decades of Michigan...jurisprudence must be sacrificed on the altar of the United States Supreme Court’s interpretation” of the U.S. Constitution. *Lansing Schools Education Ass’n v Lansing Board of Education*, 487 Mich 349, 366; 792 NW2d 686 (2010). Accordingly, reliance on case law outside the State of Michigan to determine the constitutionality of the EPGA is misplaced.

constitutional foundations for the test employed by this Court, including defined legislative limits with ascertained conditions and due process protections). Prior cases had inquired both into the precision of standards within the delegation and the existence of procedural safeguards to protect against arbitrary and capricious rulemaking and enforcement. *See, e.g., Dep't of Natural Resources v Seaman*, 396 Mich 299; 240 NW2d 206 (1976) (“actual development of specific regulations by those charged with the task by the Legislature must be accompanied with due process protection”); *Osius v St. Clair Shores*, 344 Mich 693, 700; 75 NW2d 25, 28 (1956) (striking down a state statute as an unconstitutional delegation where statute failed to provide due process and provided “an open door to favoritism and discrimination”).

*Westervelt* was a plurality opinion with respect to the technical question of whether the “due process” prong is properly part of the nondelegation analysis, or is instead a “separate and distinct issue.” *Westervelt*, 402 Mich at 458; 263 NW2d at 584 (Ryan, J., concurring in the result, agreeing that the due process, “procedural safeguards” issue should be reached and should focus on “the actual, or potential for, abuse of discretion in the agency’s exercise of power,” but arguing that it is analytically distinct from separation of powers). Forty years later, that doctrinal question should not detain this Court, because Michigan courts have in fact considered sufficiency of both the standards and the “procedural safeguards” in almost every post-*Westervelt* nondelegation case. *City of Livonia v Dep’t of Social Services*, 423 Mich 466, 505; 378 NW2d 402, 421 (1985) (even though standards were sufficiently precise, considering due process argument and finding that “the agency cannot act arbitrarily and must provide adequate notice and procedural due process to all parties involved”); *Blank v Dep’t of Corrections*, 462 Mich 103; 611 NW2d 530 (1984) (delegated state action must not be arbitrary or capricious, legislative delegation to a state agency approved thanks to safeguards in the rulemaking process); *People v Turmon*, 417 Mich 638; 340 NW2d 620

(1983) (delegated legislative action met two-prong test because it (1) established precise standards and (2) was subject to procedural safeguards set forth in the Administrative Procedures Act to protect against abuse of power); *Dukesherer Farms Inc v Ball*, 405 Mich 1; 273 NW2d 877 (1979) (upholding delegation that “clearly and sufficiently defines standards. . .and provides safeguards for all involved”). Thus, the Michigan Supreme Court employs this two-prong test when assessing the constitutionality of a legislative delegation.

Additionally, as shown in Point III, Amicus EIF’s experience over the past several months aptly demonstrates why an investigation into the adequacy of procedural safeguards must accompany any nondelegation analysis. Michiganders’ political speech and advocacy—in addition to their daily routines—are subject to a series of orders entered by one person, with no notice and rulemaking. “Exceptions” to these orders consist of vaguely-worded phrases that require either advance communication with an official to determine whether they actually apply, litigation, or running the risk of criminal enforcement. Other exceptions occur due to silent and apparently standard-less non-enforcement. There is no other notice, comment, or due process.

Finally, *Westervelt* and its progeny dealt merely with administrative agencies which had narrow portfolios, but even then, recognized the importance of both precise standards and due process protections. If due process protections are essential to control administrative bodies, how much more do they apply to the chief executive of the state?

**II. EPGA fails the first prong of the test because it provides no intelligible standards, and therefore allows the executive to create policy in place of the legislature.**

**A. The “reasonably precise” inquiry requires the legislature to be as specific as necessary, ensuring that legislators and not executive officials set policy.**

The first prong of the test recognizes that nondelegation doctrine preserves our Republic by serving two goals. It keeps the executive from making policy—a purely legislative power that,

when combined with enforcement power, endangers individual liberty. At the same time, the doctrine makes the legislature's policy effective to handle complex problems by giving administrators some flexibility. Striking the proper balance between these two goals, this Court has held, depends on a quality it calls statutory "precision." That is, statutes "should be 'as reasonably precise as the subject matter requires or permits.'" *Dep't of Natural Resources v Seaman*, 396 Mich 299, 308-309; 240 NW2d 206 (1976). This "reasonably precise" test is prong one of the nondelegation doctrine.

So far, so good—but what is it about the "subject matter" of the delegation that will either "require" or "permit" different levels of precision? This Court has answered this question by identifying certain *properties* of the subject matter that should affect precision: "the complexity and/or the degree to which the subject regulated will require constantly changing regulation." *Id.* Aside from this subject matter-precision analysis, however, this Court has consistently tried to ensure that in all cases, the policy decisions were actually being made by the legislature. These principles resolved all of the cases previously before this Court.

Thus, in *Seaman*, the management of fisheries was a particularly "difficult and complex task." 396 Mich at 311-312; 240 NW2d at 211-212. The Court identified the legislative policy as a nuanced balance between preservation of fisheries while allowing commercial fishing that did not affect that goal. *Id.* This articulation of the policy was specific enough to allow the Conservation Department discretion to fix the number and type of commercial licenses, fishing equipment, and other variables, since setting these would depend on ever-changing biological factors. *Id.*

In *People v Turmon*, 417 Mich 638, 654; 340 NW2d 620, 628 (1983), the policy was even more specific: it required the Board of Pharmacy to categorize controlled substances into one of

five schedules according to various factors, including the potential for abuse. *Id.* at 652. After the federal government had made such a classification with respect to a particular controlled substance, Michigan's Board was required to similarly schedule it unless the Board followed a process to assign it a different classification on the Michigan schedule. *Id.* The Court found the policy clear, and the Board's discretion allowed it to modify the schedule "to insure that it reflect[ed] current developments in the drug industry." *Id.*

Two years later, this Court held that the legislature had specifically set state policy regarding geographic concentration of adult foster care facilities. *City of Livonia v Dep't of Social Services*, 423 Mich 466, 504; 378 NW2d 402, 420 (1985). The legislature not only set a specific maximum density, it provided for a finding of "excessive concentration" below this density, and further cabined the discretion of the Department of Social Services in making that determination. *Id.* at 504. "Any attempt to set forth further criteria...would be impractical" because the level of permissible concentration could change "according to the changing demographic characteristics of a particular community," the determination of which "inherently requires the exercise of some limited discretion." *Id.*

In short, the degree of precision required can vary, but in no case can the making of policy be delegated to the executive branch.

**B. EPGA is unprecedented because of its broad subject matter, lack of policy, and intrusion into a constitutionally sensitive area.**

This Court has never seen anything like EPGA. In all of its prior cases, the state policy in a complicated but narrow "subject matter" was clearly fixed by the legislature, and administrators' discretion was limited to applying scientific or technical factors within the narrow confines of the specifically chosen policy. EPGA is different for at least two reasons: its subject matter is far broader than has ever been seen; and it declares no policy. As shown below, both of these factors

requires greater—not lesser—precision, and may even require a finding that no degree of precision would have been adequate given the EPGA’s vast scope.

### **1. Subject matter**

First, the “subject matter” of the delegation is exceedingly broad and does not compare to any prior case before this Court. The EPGA grants authority “[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled...” MCL 10.31(1). As Plaintiffs have shown, the Governor has construed the EPGA to have no durational limitations and no substantive limitations on her Orders. [Plaintiffs’ Opening Brief at 33-38]. It is broad across three distinct variables: the scope of emergencies covered; the time in which delegation is allowed; and the powers granted.

With respect to the scope, emergencies—all of which are part of the delegation, according to the State—vary widely. Some, such as rioting, are local phenomena requiring a law enforcement response. Perhaps individual riots may occur in many cities across the state based on the same political trigger, but the response will necessarily be to quell lawlessness and violence in each specific locality. A natural disaster or terrorist attack could affect a broader area, but in contrast to riots, the humanitarian response (provision of food, shelter, and health care) could take precedence over law enforcement. Organized military attack would involve the entire state and the likely suspension of most non-military government operations. And finally, a health crisis will have its own unique impact. Different parts of the executive branch, and perhaps different levels of government, would be necessary in each of these disparate problems, all of which could be described as an “emergency.”

Time is the second important variable within the subject, because again, the State's position is that the delegation is not limited in duration, so that EPGA can apply for hours, days, weeks, months, or years, starting when the emergency is only anticipated. Much can change. Measures necessary (or that seem so) in the early hours or days may be discarded, either because of changing conditions or better information. Just as important (if not more), time also affords the engagement of more expertise and of more voices in the decision-making process. Those other voices are the people and their representatives—including the convening of legislatures and local boards. EPGA's delegation covers the entire time period from pre-emergency until the Governor believes it is gone.

Powers are the third important variable. Again, the delegation covers every "reasonable" power the Governor believes is "necessary," across all conceivable subjects and all times. Those powers can be exercised purely by orders, dashed out as quickly and with as little process and foresight on Day 365 as on the first hour of Day 1. In short, the subject of the delegation is the broadest this Court has ever seen: it is for all things that can be considered an emergency, for any duration of time, to do anything reasonable that is subjectively considered "necessary."

## **2. Lack of declared policy**

EPGA differs from prior delegations not only because of its subject, but because it has the least-articulated policy this Court has yet seen. The closest thing to a "policy" in EPGA is the following:

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

MCL 10.32. The only “policy” to which the Governor is directed to use her “broad power” is “to provide adequate control over persons and conditions.” Yet that simply restates the purpose of government. It does not explain the different policies that might be prospectively applied to different kinds of emergencies. For example, there is the raging debate about whether to prioritize “flattening the curve” or eradication of a disease; or who is properly subject to quarantines, or whether and when it is justified to shut down businesses to meet health-related goals. It is possible to declare legislative policy on these matters while leaving the implementation of those rules to administrators. Compare the delegation in *Seaman*, which began with a policy statement that fisheries would first be preserved and protected, and secondarily that economically feasible commercial fishing would be allowed. The delegation then stated the limited, specific tools that could be used to accomplish those goals. *Seaman*, 396 Mich at 310-312; 240 NW2d at 210-211.

### 3. A broad subject of delegation does not justify imprecise standards

The State argues, and the Court of Appeals has recently held, that the broader the delegation, the broader and less precise the standards may be. The State turns the nondelegation doctrine on its head. It is not the breadth of the delegation, but rather, the degree of complexity (and perhaps the constantly changing nature) of the subject being covered, that is supposed to allow less precision. *Blue Cross & Blue Shield of Michigan v Milliken*, 422 Mich 1, 51; 367 NW2d 1, 27 (1985). If the law were the opposite, then the degree of “precision” is not a check on potentially broad delegations, but instead, follows meekly along in the same direction as the delegation itself—blurring into oblivion on broad delegations, where precision is needed most, and becoming stronger on narrow delegations, where precision is least needed.

One might object that this would suggest that broad delegations are impractical, because it would be impossible for the legislature to pack a single enactment with standards covering a

variety of types of emergencies, throughout the many stages of the state's and public's response, and accounting for all of the different powers that could be enacted. The answer to this objection is simple: perhaps the legislature simply cannot pass such a broad delegation in advance. The easy solution is to pass laws that place temporal or subject matter limits on the Governor's powers.

The opposite model—favoring not just the administrative state but the concentration of power in a single person—will lead to one-person government. Suppose the legislature passed a new law covering “acute social crises.” The Governor could declare a social crisis, such as systemic racism, lack of educational attainment, income inequality, the school to prison pipeline, difficulty obtaining conceal and carry permits, lack of nuclear family values, or excessive drug enforcement. The Governor would then have complete power, using EPGA as a model, to take “reasonable measures” that in her view were “necessary” to resolve the social crisis, allowing for the suspension of existing laws and the issuance of executive orders regarding education, taxes, spending, or even abortion. Because the subject matter of these potential crises is so diverse, the time horizon for solving them unknowable, and the causes and solutions so difficult for the legislature to predict, little “precision” would be necessary or even possible in the delegation.

As the mentality and rhetoric of “crisis” and “emergency” spreads, one can imagine other examples. If the legislature were willing to take credit for having proactively “addressed” these potential crises by legislation, and saw a political benefit in avoiding the hard compromises inherent in actually setting policy, much of the power of state and local governments could be channeled through the Governor.

With the Court's blessing that there is no nondelegation problem, EPGA would indeed become a model of state governance. Recently dusted off after decades of relative obscurity, it could readily be adapted to solve the inefficiency of state legislatures in addressing many real or

perceived crises—now, commonly called “emergencies,” in twenty-first century America. But in fact, that is completely inconsistent with our constitutional system of government, and broad delegations do not excuse imprecise standards. As discussed below, this particular delegation is standard-less and cannot pass muster under prong 1.

**C. The EPGA’s lack of standards requires the Governor to make policy and allows her to enforce it in whatever way she prefers**

**1. The EPGA lacks any standards for the Governor’s orders.**

EPGA has been defended as having precise standards primarily based on two provisions: its requirement that gubernatorial orders be “reasonable,” and its requirement that the Governor consider her orders “necessary.” See *House of Representatives v Brennan*, Opinion of the Court of Appeals, issued Aug 21, 2020 (Case No. 353655), p.18-19 and fn. 12-13. Even in combination, these requirements do not pass muster under the nondelegation doctrine.

First, “reasonableness” is not a “reasonably precise” standard that adequately declares Michigan’s policy, setting a clear course so that administrators can fill in the details. In *House of Representatives*, the Court of Appeals just explained that this standard simply means something that is not “arbitrary.” *Id.* at fn. 12. Lack of arbitrariness is not a guideline or policy. It supposed to be a characteristic of all law. It provides no check on the Governor not already included within her oath of office.<sup>21</sup>

Indeed, EPGA’s utter vagueness is apparent even in the way the Court of Appeals tried to describe what standard the word “reasonableness” imposes: according to the Court, EPGA

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<sup>21</sup> “All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of ..... according to the best of my ability.” Const 1963, art 11, § 1.

“interjects an objective component into the statute.” *Id.* at fn. 13. The actual content of that objective “component” is anyone’s guess. The very case cited by the Court of Appeals for the proposition that “reasonable” means “not subjective,” shows that while “reasonable” might be a *characteristic* of a standard, it has no actual content standing alone. *See Radtke v Everett*, 442 Mich 368, 387-394; 501 NW2d 155, 165-168 (1993) (examining at length whether “reasonable” standard in a hostile work environment case was from the perspective of a reasonable “man” or “woman,” and noting that the test involved other content, such as what the person “would have perceived” under the “totality of circumstances”). It took substantial analysis for this Court to reach its conclusion. *Id.* Here, EPGA’s use of the word, “reasonable,” is naked. It provides no guidance and simply invites the Governor to serve the dual roles of creating and enforcing her own policies.

Even less guidance is provided by EPGA’s request that the Governor only enter orders “as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control.” MCL 10.31(1). This standard is subjective because it is based on what the Governor *considers* necessary. In practice, this objective standard allows orders such as EO 2020-160 (“I am taking the occasion, too, to allow for the reopening of the Detroit casinos, subject to a 15% capacity limit and strict workplace safeguards.”). All three casinos in Detroit are permitted to have more than 10 people indoors under the Order, but EIF is not. Thus, if 11 Michiganders hold a socially distanced book club in one of their homes, they would be in violation of Section 7(a)(4) of EO 2020-160 and subject to criminal penalty. If after their lively book discussion, those same 11 Michiganders recruit 90 friends and hold a socially distanced political rally in the public square, they would be in violation of Section 7(a)(4) of EO 2020-160 and subject to criminal penalty. If after the rally, those same 101 Michiganders go to the MGM Grand Detroit,

they are in compliance with EO 2020-160. The only risk they run is a thinner pocketbook, rather than arrest and criminal prosecution. What the Governor “considers” necessary provides no guidance, and is not a legislatively-set policy.

The remainder of EPGA provides no standard apart from the carveout for the taking of firearms. MCL 10.31(3). EPGA’s examples of permissible orders are non-exclusive, and the fact that the Governor’s powers end when the emergency ends is not helpful, as that requires the unguided discretion of the Governor to “declare” the end of the emergency. MCL 10.31(2).

In short, EPGA is standard-less and abdicates the legislature’s duty to set policy.

## **2. The Governor’s orders are a reflection of the EPGA’s lack of standards.**

“Simply put, legislative power is the power to make laws.” *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 97-98; 754 NW2d 259 (2008). Further, “the concept of ‘legislation,’ in its essential sense, is the power to speak on any subject without any specified limitations.” *Westervelt*, 402 Mich 412, 439; 263 NW2d 564, 576. Here, the Governor has issued edicts of unprecedented breadth on a variety of subjects. Her Orders are virtually limitless in their reach. They apply to almost ten million citizens, at all times and in all places within the state. They apply to citizens of all ages, from the very young to the very old. They cover not only social gatherings and events, but virtually every kind of economic activity, both large and small. They may well contain more law, covering and restricting more human activity, than the entire legislature of this State managed to pass in the first century of its existence.

What the Supreme Court observed in finding President Truman’s order directing the seizure of the steel mills in *Youngstown Sheet and Tube* a violation of the separation of powers can be said with equal force about the Governor’s order here: “[t]he [Governor’s] order does not direct that a [legislative] policy be executed in a manner prescribed by [the legislature]—it directs

that a [gubernatorial] policy be executed in a manner prescribed by the [Governor].” *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 588 (1952). The threat of such a seizure of power to our very system of government cannot be gainsaid. We must not let the temporary threat to public health blind us to the long-term damage to the very foundations of our government. “The tendency is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic.” *Id.* at 869 (Jackson, J., concurring); see also *Nixon v Adm’r of Gen Servs*, 433 US 425, 507 (1977) (Burger, C.J., dissenting) (“separation of powers is the base framework of our governmental system and the means by which all our liberties depend”).

Worse still, while the orders encompass almost all segments of society, the Governor reserves the right, in her sole discretion, to hand out exceptions like party favors to those she chooses. At the same time, it is solely within the Governor’s purview to enforce these arbitrary rules. Such a combination of the power both to enact and to enforce the rules violates fundamental separation of powers principles. “[O]ne objective of the separation of powers [is] preventing the same monarch or senate, having enact[ed] tyrannical laws from execut[ing] them in a tyrannical manner.” *Plaut v Spendthrift Farm, Inc.*, 514 US 211, 241 (1995) (Breyer, J., concurring) (quoting 1 Montesquieu, *THE SPIRIT OF LAWS* 174 (T. Nugent transl. 1886) (internal quotation marks omitted)).

Such vaguely-defined exceptions to overbroad rules tell Michiganders that nonenforcement is a real possibility, but that safety is only certain through the Governor’s advance permission. What standards the Governor will apply in granting an exception, or otherwise choosing not to enforce her orders, is unknown. These circumstances chill a variety of otherwise-legal conduct, but most troublingly, they chill election-year speech, association, and criticism of

the government. The Governor's orders implicate "expressive and associational conduct at the core of the First Amendment's protective ambit," and should therefore have been crafted with "narrow specificity." *NAACP v Button*, 371 US 415, 433 (1963); see also *In re Primus*, 436 US 412, 424 (1978) (same). As interpreted and applied by the Governor, the EPGA utterly fails to satisfy these requirements of precision. Here, under the guise of repeatedly declaring an emergency, the Governor has assumed virtually limitless legislative power and the statutes fail to impose adequate controls.

Finally, the Governor's very act of declaring that an emergency continues to exist in order to give herself powers under EPGA—an act that EPGA commits to her sole discretion, rather than to the objective fact or some independent measure of the emergency's continuance—is further evidence that EPGA lacks the requisite standards. The general rule is that where an emergency has abated, even an otherwise constitutional law must be set aside: "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." *Palmer Park Theatre Co v City of Highland Park*, 362 Mich 326, 348; 106 NW2d 845, 856 (1961) (quoting *Chastleton Corp v Sinclair*, 264 US 543, 547–48 (1924) (Holmes, J.)); see also *Korematsu v United States*, 323 US 214, 231 n.8 (1944) (no pronouncement of a government official can "preclude judicial inquiry and determination whether an emergency ever existed and whether, if so, it remained, at the date of the restraint out of which the litigation arose") (Roberts, J., dissenting). That is, "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States v Carolene Products Co*, 304 US 144, 153 (1938).

Here, however, the Governor continues to declare new emergencies month after month, despite the absence of any new originating causes or unforeseen events. In fact, as of the date of filing of this amicus brief it will have been 170 days since the emergency was first declared. *Cf. Palmer Park Theatre*, 362 Mich at 349; 106 NW2d 845, 856-857 (law imposing higher electrical rates on those using non-circulating air conditioners was unconstitutionally “unreasonable and arbitrary” where emergency giving rise to law no longer existed).

Finally, it is at least arguable whether a true emergency continues to exist where, as here, the facts giving rise to the initial declaration occurred months before. It is assuredly within this Court’s prerogative to examine the bases of the claimed emergency. *See, e.g., Michigan State AFL-CIO v Sec’y of State*, 230 Mich App 1, 25; 583 NW2d 701, 712 (1998) (upholding entry of preliminary injunction on basis that government failed to follow proper procedure in declaring emergency). The Governor’s repeated declarations of emergency unsupported by new and unforeseen circumstances do not warrant her depriving the legislature of its rightful role in fashioning laws to deal with the ongoing pandemic.

### **III. The EPGA fails the test’s second, due process prong because it provides no safeguards to protect due process, and is therefore an unconstitutional delegation of authority.**

Even if EPGA had included reasonably precise standards for gubernatorial action, it fails as an unconstitutional delegation because it provides no safeguards to protect the due process rights of your amicus, EIF, and millions of Michigan citizens who also find that their own constitutionally-protected conduct is chilled. *See Blue Cross*, 422 Mich at 52; 367 NW2d at 27 (in addition to reasonably precise standards, “due process requirements must be satisfied for the statute to pass constitutional muster.”). Michiganders are subject to ever-changing criminal penalties for their every-day activities and on speech and association protected by the First Amendment.

EPGA fails the due process inquiry for two reasons. First, as an initial matter, EPGA is missing the most important safeguard of all because it allows the delegee herself—not some independent party which could have no incentive to aggrandize the delegee’s power—to decide whether the conditions for the exercise of her authority have arisen. Importantly here, EPGA also allows the delegee to decide in her sole discretion whether those conditions continue to exist. Second, once the delegee decides to wield “emergency” power and extends it for days, weeks, months, or even over a year, there is no provision for notice, comment, rulemaking, or any form of adjudication to ensure that the procedural due process rights of affected Michiganders (like EIF and its members) are considered.

**A. This Court should pay particular attention to due process concerns**

*Westervelt*’s due process prong works in tandem with the “standards” prong. That is because in some situations, standards alone may insufficiently safeguard the liberty interests which the nondelegation doctrine ultimately was intended to protect. For example, the more flexibly a particular statutory delegation is written, the fewer protections “standards” alone can provide from potential discretionary abuse at the hands of administrative officials. *Westervelt*, 402 Mich. 412, 442; 263 NW2d 564, 577. Thus, looking solely at whether a statute is sufficiently precise, the first prong, “is not in every case an effective means of assuring due process protection.” *Id.*

For the second prong to be met, those affected by the delegation must at minimum have adequate notice, opportunity to be heard, and review of an adverse decision. *City of Livonia v Department of Social Services*, 423 Mich 466, 505; 378 NW2d 402 (1985) (citing *Seaman*, 396 Mich at 313-314, 240 NW2d 206). A statute’s incorporation of the Administrative Procedure Act (or the fact that an agency is subject to it) has therefore been an important factor under this prong ever since *Westervelt*. There, this Court noted that “a sufficient totality of safeguards existed”

because procedural protections of the APA required the agency to adhere to detailed, extensive procedural requirements that provide due process safeguards to those persons affected by the agency's rule making. *Westervelt*, 402 Mich 412, 448; 263 NW2d 564, 580. In fact, absent APA safeguards, the legislation at issue in *Westervelt* would have been an unconstitutional delegation. *Id.*

But perhaps the archetypal due process violation is where the delegation “permits an administrative officer to pick and choose recipients of their favors.” *Westervelt*, 402 Mich. 412, 435; 263 NW2d 564, 574; *see also Osius*, 344 Mich. 693, 700-701; 75 NW2d 25, 28 (striking down an ordinance that violated due process by delegating, with minimal guidance, ultimate authority to a Board of Appeals to make decisions to grant or refuse a permit).

This type of violation is even more serious where the person who receives such a “pick and choose” delegation is not some mere administrative agency, but the chief executive official himself, who can bring to bear a whole host of other enforcement powers. Indeed, *Westervelt* relied on this Court's earlier decision in *Hoyt Bros, Inc v City of Grand Rapids*, 260 Mich 447; 245 NW 509 (1932), in which it struck down a legislative delegation to a single executive authority—a city manager—of the power to grant licenses “for charitable purposes. . .whenever it shall appear to the city manager. . .that the charity is a worthy one and that the person or persons making the application are fit and responsible parties.” In *Hoyt*, this Court declared: “We see no escape from the conclusion that the ordinance attempts to vest the city manager with an arbitrary power in the exercise of which he will say to one applicant, ‘Yes,’ and to another, ‘No.’” 260 Mich 447, 452; 245 NW 509, 511.

**B. The EPGA is subject to abuse because, as an initial matter, it relies on the delegee—the Governor—to initiate, define, and prolong her own authority.**

EPGA is very similar to delegations that have been challenged for requiring that “certain consequences will ensue” “depending on a factual development that is outside the control of the legislative body.” See *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 10; 658 NW2d 127, 132 (2003) (referring to statutes making this type of delegation as “referral” or “reference” statutes). “Referrals” can require that some legal consequence occur as the result of decisions of other state or federal governmental bodies, or even private action. *Id.* at 12-13. Such a referral is only permissible, this Court held in *Taylor*, for “a statute that refers to factual conclusions of independent significance.” *Id.* There, the Court held that MCL 600.2946(5), which instructed Michigan courts to find as a matter of law that a drug manufacturer or seller acted with due care if the FDA had approved the drug “for safety and efficacy.” *Id.* at 13. This was not an unconstitutional delegation to make the FDA the “final arbiter” of Michigan tort law questions because the FDA’s findings were “for its own reasons that are independent of Michigan tort law.” *Id.* at 13-14. The Court stressed that the key to the constitutionality of such a referral as follows:

What is central to grasping this doctrine is that if the fact or finding to which the Legislature refers has significance independent of a legislative enactment, because the agency or outside body making the finding is doing it for purposes independent from the particular statute that refers to it, then there is no delegation.

*Taylor*, 468 Mich at 18; 658 NW2d at 136.

Here, of course, the opposite is true. The legislature has “referred” to the Governor’s decision about when an emergency exists, precisely to allow the Governor to then gain the benefit of new powers under the statute. The same is true of the Governor’s decision that the emergency is continuing, and that she can therefore continue to exercise her extraordinary emergency powers. The Governor’s decision is not made for some other, independent purpose, so that it is simply being used as a reliable measuring stick; instead, it is being made for the very purpose of conferring

special powers on the Governor. Such a decision contains none of the disinterestedness, and therefore reliability, inherent in (for example) FDA decisions about drug safety. The FDA makes its decisions, presumably, on technical criteria based on its own administrative mission, and not with a special eye to what it may mean for Michigan tort law. In contrast, the Governor—and any single official—will necessarily be heavily invested in extending and prolonging their own extraordinary powers—or, perhaps in some cases, in abandoning the political responsibility. At the very least, one cannot rely on an executive official to disinterestedly and scientifically determine whether an emergency exists, with no thought about what that determination will immediately mean for the occupant of the office. Thus, the unchecked “referral” to the very official who will benefit (or suffer) from the decision fails this Court’s test of “independent significance,” and by itself constitutes a complete failure of due process safeguards.

**C. The EPGA contains no procedural safeguards to protect individuals or entities from arbitrary, one-person rule.**

After an emergency has been declared (or continued), the EPGA provides no procedural safeguards for individuals or entities aggrieved by a Governor’s arbitrary decision-making, and it does not incorporate by reference any other source of safeguards such as the Michigan Administrative Procedure Act. Instead, the authority provided to the Governor is broad and essentially unlimited:

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

MCL 10.32.

This Court has previously recognized that statutes such as EPGA, which contained no procedural safeguards whatsoever, could be saved under the second prong by incorporating the protections of the Administrative Procedure Act. The statute at issue in *Westervelt* was sustained against a due process challenge only because it required the Natural Resources Commission to follow the APA when promulgating the “river use rules” being challenged in that case. *Westervelt*, 402 Mich at 448; 263 NW2d at 580.

Ever since *Westervelt*, application of the APA has been critical in meeting the second prong of the test. See *People v Turmon*, 417 Mich 638, 648; 340 NW2d 620, 625 (1983) (delegation to the Board of Pharmacy to designate controlled substances was sustained on the second prong because “inclusion of the [APA] provisions as mandatory procedures to be followed in the board’s rulemaking further insures against possible abuse of the delegated power”); *Blank v Dep’t of Corrections*, 462 Mich 103, 126; 611 NW2d 530, 541 (2000) (examining the delegation of authority to the Department of Corrections “in total” and finding it satisfied due process, because, among other things, “First, the director must abide by the terms of the APA in promulgating new rules).

Unlike any of the statutes discussed in *Westervelt* and later cases, the EPGA stands on its own. It lacks the procedural protections of the APA or any other adequate safeguards. The Governor is free to make her own decisions based on her own view of what is “reasonable” and based on her own opinion about what she “considers necessary.” The EPGA includes no notice and comment process by which affected entities have input into the rulemaking and an opportunity to petition for exceptions prior to enactment of the Governor’s Executive Orders. Compare *Seaman*, 396 Mich at 313-314; 240 NW2d at 212-213 (“[T]his Court would take a dim view of such delegation if adequate opportunity to intervene in the administrative rule-making procedure

were not provided.”). The EPGA also fails to charge a governmental body with reviewing the Governor’s Executive Orders or giving the aggrieved an opportunity to be heard. *City of Livonia v Department of Social Services*, 423 Mich 466, 505; 378 NW2d 402 (1985), (citing *Seaman*, 396 Mich at 313-314 (“[T]his Court must determine whether the parties had adequate notice, opportunity to be heard, and review of an adverse decision.”))).

Indeed, far from ensuring that the Governor’s actions are subject to the APA, EPGA works in reverse: it gives the Governor lawmaking power to declare that the APA *does not apply* to the rest of the bureaucratic apparatus, potentially opening up due process problems in other areas of law not even contemplated by EPGA and not obviously related to an emergency. *See, e.g.*, EO 2020-113 (changing state administrative procedures to allow “remote means” for complying with APA). In short, the EPGA is utterly devoid of the “adequate safeguards” of Due Process this Court has always required.

**D. Without built-in procedural safeguards, all Michiganders, including EIF, lack a clear path for asserting their constitutional freedoms.**

The EPGA’s greatest failing is that its lack of procedural safeguards forces aggrieved parties into costly, inadequate, and highly undesirable means of protecting their rights. Citizens’ first instinct in reacting to the Governor’s blanket orders may be, for example, to seek personalized advance permission. There are no fixed procedures for seeking permission. Nor are there articulated, objective standards for understanding how the “separation of powers” can permit the Governor to rule on the number of people who can gather inside a room to engage in political association. The matter is further confused because citizens can be stopped and issued criminal citations for socially distanced indoor and outdoor protected activity, but not for socially distanced gambling. How is a citizen to identify an intelligible principle in such a scheme and confidently

count on a rational decisionmaker to apply it to the citizen's request for the right to speak or assemble? The citizen cannot do so, and gives up or gives in.

Alternatives to seeking permission are not at all palatable. Citizens can hire lawyers and engage in costly, unpredictable litigation. But that will likely only be resolved after the reason for their planned activity has long since passed. Alternatively, they can simply engage in the activity, suffering a criminal misdemeanor citation for engaging in activity that the Governor bans based on her personal opinions about what is "reasonable" or "necessary," and then hope to mount a constitutional challenge within the criminal proceeding. (cite to EPGA).

Rather than seeking advance bureaucratic approval, hiring lawyers, or hoping to escape detection, most citizens faced with this choice will self-censor or steer well clear of any activity that they assume the Governor (or other enforcing officials) may decide is not sufficiently central to the "separation of powers" or First Amendment. Thus, Michigan citizens and groups like EIF suffer a First Amendment injury.

The effects of such one-person rule are even more severe in an election year, when our democracy counts on free speech, association, and voting to work out the conflicts that in other societies are resolved only through force and violence. EIF wants to use its voice and action to ensure democracy is served in this election. Thus, its activities are time-sensitive: important work must be done to further EIF's mission leading up to the November 2020 presidential election.

Indeed, EIF recently wrote several local officials seeking to hold recruitment and training events for purposes of building up its organization before November 2020. These events would include more than 10 people gathering inside, and more than 100 gathering outside, but would involve social distancing and mask-wearing. "Is this a criminal act under the Governor's orders?" EIF asked. EIF received an unqualified "yes," despite the Governor's supposed "separation of

powers” and constitutional exceptions. No one told EIF why the exception for the exercise of constitutionally protected activity did not apply to their request. No one told EIF what factors were used to evaluate their request or the denial of the exception, or whether the exception was even considered. And no one knows why the orders are enforced against some groups and not others for the same or similar conduct. It is a guessing game that has lasted for months and will likely last for months more. With one-person rule, there is no due process.

That the Governor has such substantial discretion to say “yes” to some and “no” to others makes EPGA similar to the City Manager’s unconstitutional decisions in *Hoyt Bros. Hoyt Bros, Inc v City of Grand Rapids*, 260 Mich 447; 245 NW 509 (1932) (striking down statute that permitted one person to make decisions based on his own whims); *see also Osius v. St. Clair Shores*, 344 Mich 693; 75 NW2d 25 (1956)(striking down statute that permitted Board to deny permits without protective procedural safeguards). These Orders, although they may be subject to First Amendment exceptions for some, are being interpreted strictly and to the letter with respect to EIF and its pro-election-integrity speech. This is true regardless of the size of the space occupied, and where participants wear masks and socially distance. No official is applying the Governor’s purported “constitution in an emergency” proviso to allow in-person, retail politicking of more than 10 people indoors or more than 100 people outdoors, regardless of any other factors or precautions. Instead, they are allowing other gatherings greater than this size for political speech preferred by, and therefore approved by, the Governor. This Court recognized the unconstitutionality of the delegations in *Osius* and *Hoyt Bros.*, which similarly permitted unfettered executive approvals for some and disapprovals for others, and should strike down the EPGA for the same reason.

The EPGA further authorizes the executive branch to issue criminal citations for violations of the Governor’s Executive Orders, no matter how arbitrary, causing EIF to withhold engaging in its constitutionally protected speech and assembly. Accordingly, unlike the APA-protected delegation in *Westervelt*, the EPGA violates the Michigan Constitution’s separation of powers provision and this one-person attack on EIF’s First Amendment rights must be stopped.

**E. Defendants offer no viable and available procedural safeguards to protect EIF from one-person, arbitrary rule.**

Defendants offer no viable and available remedies for aggrieved parties like EIF. Indeed, two of Defendants’ proposed fixes—legislative override, and elections—only confirm that this is a nondelegation problem. Nondelegation doctrine exists because these two proposed fixes, which are always present in our system of government, are insufficient to protect individual rights. By claiming that these are Michiganders’ exclusive remedies, then, what Defendants really seek is abolition of the nondelegation doctrine itself.

For example, Defendants argue, “The Legislature has at all times remained free and empowered to take action as to this pandemic through lawmaking, including through the override of the Governor as that body may see fit.” But this argument—that the delegation could be undone—is entirely consistent with the position that the Legislature improperly abdicated its lawmaking authority by delegating it to the Governor through the EPGA. If the Legislature can “override” the Governor, then clearly the Governor is making laws in place of the Legislature, which is not permitted by Article IV, § 1 of the Michigan Constitution.

Defendants’ reliance on judicial review is also misplaced. Judicial review alone is inadequate to provide meaningful procedural safeguards to parties aggrieved by one-person rule

under the EPGA. By the time review is completed, the affected party has frequently already experienced an irremediable injury. Further, the Governor's orders change from week to week, month to month, with no opportunity for notice and comment from affected citizens. Here, unlike the aggrieved party in *Westervelt*, EIF had absolutely no input on the content of the orders issued by the Governor. EIF was left without the ability to plan activities and events protected by the First Amendment thanks to the broad-based orders. Reliance on the lengthy process of judicial review, which only considers after-the-fact harm instead of giving citizens an opportunity to review and comment on the Governor's proposed orders (like the APA does) fails to provide sufficient safeguards.

Finally, Defendants assert that one of the procedural safeguards applicable to the EPGA is the fact that the Governor "will have to stand for reelection." The promise of the occasional reelection campaign does nothing to protect due process in the here and now, when liberty and property interests are either saved or lost.

More fundamentally, the promise of majority rule has never been thought sufficient to protect minorities; it is precisely because we cannot rely on a popularly elected executive or legislature that we have state and federal constitutions with enumerated rights, to protect minorities against the tyranny of the majority. A reelection might be an incentive to make more than 50% of voters happy, but clearly provides no incentive to the Governor to afford *every person* due process against arbitrary and capricious lawmaking during the remaining portion of her term.

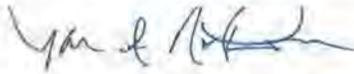
In conclusion, the EPGA fails to provide adequate procedural protections and there are no procedural safeguards in place to shut down arbitrary one-person rule, which clearly violates the

Michigan Constitution. According, this Court should strike down the EPGA's unlawful delegation of power.

**Conclusion**

For the foregoing reasons, this Court should decide that the EPGA makes an unconstitutional delegation of power to the Governor, and therefore cannot form the basis for gubernatorial action.

Respectfully submitted this 27<sup>th</sup> day of August, 2020.



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**EXHIBIT A**

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN

ANDREW BELANGER, JUSTIN PHILLIPS,  
and CALVIN ZASTROW,  
Plaintiffs,

v.

GRETCHEN WHITMER, in her official  
capacity as Governor for the State of Michigan,  
and CITY OF DETROIT,  
Defendants.

Case No. 1:20-cv-291

**STIPULATED ORDER AND  
NOTICE OF SETTLEMENT**

Hon. Janet T. Neff

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*Attorneys for Defendant City of Detroit*

Plaintiffs Andrew Belanger, Justin Phillips, and Calvin Zastrow (collectively referred to as “Plaintiffs”), through counsel, Defendant Gretchen Whitmer, through counsel, and Defendant City of Detroit, through counsel, (collectively the “parties”), pursuant to the Court’s Order directing the parties to “confer and attempt in good faith to negotiate a resolution to this dispute,” hereby stipulate to the following and to the entry of the attached Order:

1. On April 1, 2020, Plaintiffs filed this lawsuit seeking to enjoin Defendants from enforcing Executive Order 2020-21 against them for engaging in peaceful, expressive religious activity on the public sidewalks and other public fora adjacent to abortion centers in the State of Michigan. Plaintiffs contend that this activity is protected by the First and Fourteenth Amendments to the United States Constitution. Plaintiffs further contend that they understand and intend to adhere to the social distancing measures recommended by the Centers for Disease Control and Prevention, specifically including remaining at least six feet from all people from outside the person’s household when engaging in their expressive religious activities.

2. On April 7, 2020, Defendant Whitmer issued the following guidance regarding the application and enforcement of Executive Order 2020-21:

**Q: Does Executive Order 2020-21 prohibit persons from engaging in outdoor activities that are protected by the First Amendment to the United States Constitution?**

A: No. Persons may engage in expressive activities protected by the First Amendment within the State of Michigan, but must adhere to social distancing measures recommended by the Centers for Disease Control and Prevention, including remaining at least six feet from people from outside the person’s household.

(found at [https://www.michigan.gov/coronavirus/0,9753,7-406-98178\\_98455-522631--,00.html](https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-522631--,00.html))

3. Defendants agree that Executive Order 2020-21 does not prohibit the conduct of Plaintiffs that is alleged in the Complaint. The City of Detroit shall dismiss the criminal citation issued to Plaintiff Andrew Belanger and any related criminal charges or proceedings that might

arise from this citation and the incident related to it. A true and correct copy of the citation is attached to the Complaint as Exhibit 2 (Doc. No. 1-2).

4. On April 9, 2020, Defendant Whitmer issued Executive Order 2020-42, in which she stated, in relevant part, “[W]ith this order, I find it reasonable and necessary to reaffirm the measures set forth in Executive Order 2020-21, clarify them, and extend their duration to April 30, 2020. This order takes effect on April 9, 2020 at 11:59 pm. When this order takes effect, Executive Order 2020-21 is rescinded.”

5. Defendants agree that the guidance regarding the application and enforcement of Executive Order 2020-21 set forth in paragraph 2 above applies with equal force to Executive Order 2020-42. Defendants further agree that Executive Order 2020-42 does not prohibit the conduct of Plaintiffs that is alleged in the Complaint.

6. Plaintiffs hereby release the City of Detroit and each of its employees, agents, departments, officers and representatives from any and all liabilities, damages, or claims, arising out of the incident underlying Plaintiffs’ complaint. Plaintiffs stipulate that their release is voluntary, that there is no prosecutorial misconduct involved in this matter and that enforcement of their release would not adversely affect the public interest. Plaintiffs agree to execute a release of liability as described above.

7. The parties agree that the above-captioned lawsuit shall be dismissed with prejudice as the provisions of this stipulation resolve Plaintiffs’ claims, and each party shall be responsible for his or her own costs and attorneys’ fees.

So stipulated this 13th day of April 2020.

AMERICAN FREEDOM LAW CENTER

By: Robert J. Muise

Robert J. Muise, Esq. (P62849)

*Attorneys for Plaintiff*

MICHIGAN DEPARTMENT OF ATTORNEY  
GENERAL

By: Joseph T. Froehlich

Joseph T. Froehlich

*Attorneys for Defendant Gretchen Whitmer*

CITY OF DETROIT LAW DEPARTMENT

By: Patrick M. Cunningham

*Attorneys for Defendant City of Detroit*

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\* \* \*

**ORDER**

Pursuant to the stipulation of the parties as set forth above, the provisions of this stipulation are hereby Ordered by the Court, and this case is dismissed with prejudice and without costs or attorneys' fees to any party.

This is a final order that resolves all pending claims and closes the case.

So Ordered this 14th day of April 2020.

/s/ Janet T. Neff  
Janet T. Neff  
United States District Court Judge

**EXHIBIT B**

The Honorable Carol A. Siemon  
Ingham County Prosecuting Attorney  
303 W. Kalamazoo St., Floor 4R  
Lansing, MI 48933

Dear Ms. Siemon:

As the lead enforcement officer in the county, we are seeking clarity and permission on what the law is regarding upcoming events that we are planning. *Election Integrity Fund (EIF)* is a Michigan 501(c)(4) dedicated to promoting integrity and safety in the administration of elections and the counting of ballots. We must have events to recruit future poll watchers/challengers so they may be educated on the opportunities for fraud, and vulnerabilities in the system. With the most contested election in decades upon us, the mission of *EIF* is more vital than ever. We are planning on doing the following indoor events, each in a single large room. Our intent is to provide masks, hand sanitizer, and the opportunity for social distancing:

- Monday, August 24 – 5:00 PM reception/recruitment event in Ingham County, MI. The purpose of this event is to bring together like-minded individuals who are concerned about the integrity of the ballot box. This will be an indoor event where we plan to have 100-120 in attendance.
- Monday, August 31 – 7:00 PM Debrief event in Rochester Hills, MI. This event will bring together people who worked as poll watchers and poll challengers in the August primary and in previous years. We plan to hear testimonials of past years, and strategies for the future and to form a policy to combat voter fraud in November. This event will be subject to the earlier recruitment event, but we anticipate hosting 50-75.
- Tuesday, September 29 – 6:00 PM – Official training meeting, in Ingham County, MI. This will be our first meeting where we are focused on training poll challengers for the November election,. We expect to have 200-250 people in attendance.
- Tuesday, October 27 – 6:00 PM – Final meeting event in Rochester Hills, MI to rally, provide answers to last-minute questions, provide materials to poll watchers/challengers, and assign final precinct posts. We expect to have 200-250 people in attendance.

We are notifying you of our intention to move forward. Therefore, are we permitted to hold these events? In order to finalize these plans, we are asking for a response no later than 5:00 PM, Friday, August 21, 2020. Please respond by mail or email. [Sallen@wowway.com](mailto:Sallen@wowway.com); 2300 Niagara Drive, Troy, MI 48083.

Sincerely,

Sharon Allen  
Secretary, *EIF*

**EXHIBIT C**

From: **Carol Siemon** <[CSiemon@ingham.org](mailto:CSiemon@ingham.org)>  
Date: Tue, Aug 18, 2020, 4:24 PM  
Subject: your requests for input about planned election-related activities  
To: [Sallen@wowway.com](mailto:Sallen@wowway.com) <[Sallen@wowway.com](mailto:Sallen@wowway.com)>, [lindaleetarver@gmail.com](mailto:lindaleetarver@gmail.com)  
<[lindaleetarver@gmail.com](mailto:lindaleetarver@gmail.com)>  
Cc: Linda Vail <[LVail@ingham.org](mailto:LVail@ingham.org)>, Benjamin Hall <[BHall@ingham.org](mailto:BHall@ingham.org)>, Michael  
Cheltenham <[MCheltenham@ingham.org](mailto:MCheltenham@ingham.org)>

Thank you for your letters I received today concerning important election-related events. I consider voting to be one of the fundamental rights of all citizens and encourage efforts to support voter registration and election-related activities. We share your concern about how to plan for important events for the future when Covid 19 has created such a changing landscape.

We will provide you a response to your inquiries ASAP. The simple, but incomplete, answer is that we do enforce the governor's executive orders (EO) via a citation or criminal complaint, but only if that is the last resort to guarantee adherence and public safety. I have asked for guidance from our county Health Officer and the assistant prosecutor I've assigned as our point person on EOs. While I can never promise in advance if we will or will not charge someone in a specific future situation, we do attempt to provide as much guidance as we can about the kinds of factors we would evaluate before authorizing a warrant.

A perhaps significant factor that was not mentioned in either of your letters is the capacity of the specific venues you plan to use. Social distancing in a ballroom with a capacity for 500 persons would potentially be a very different issue from using a smaller capacity room, for example.

Carol A. Siemon

Ingham County Prosecutor

303 W. Kalamazoo Street 4R

Lansing, MI 48933

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(517) 483-6272

[csiemon@ingham.org](mailto:csiemon@ingham.org)

# EXHIBIT "D"

From: **Carol Siemon** <[CSiemon@ingham.org](mailto:CSiemon@ingham.org)>  
Date: Tue, Aug 18, 2020, 5:11 PM  
Subject: RE: your requests for input about planned election-related activities  
To: [Sallen@wowway.com](mailto:Sallen@wowway.com) <[Sallen@wowway.com](mailto:Sallen@wowway.com)>, [lindaleetarver@gmail.com](mailto:lindaleetarver@gmail.com)  
<[lindaleetarver@gmail.com](mailto:lindaleetarver@gmail.com)>

I have had an opportunity to consult with our county health director and consider the various EOs and how they interplay. I am sorry to report that your events, as planned, do not comply with the EOs. More importantly, it is simply unsafe to have that many people together even if it were a vast room. I understand that Zoom is imperfect but that might be the only option that follows the EOs. I will suggest that I have recently been a part of a large national zoom meeting where individual breakouts were created throughout the full day event and those were very effective for breaking out for discussions, etc and then reconvening as a large group. These are very challenging times and while I wish I could say "but for a good cause like this the rules can be broken," that is simply not safe or fair for others.

This is what my public health director reported:

"The EO only allows 10 indoors. Even in a huge ballroom. Bars and restaurants are 50% capacity. Indoor gatherings are at 10. So these events aren't happening. Lansing Center is not holding any meetings or conferences. Same with Henry Center on campus and so on. I had that one interpreted by the state as well."

Carol A. Siemon  
Ingham County Prosecutor  
303 W. Kalamazoo Street 4R  
Lansing, MI 48933  
(517) 483-6272  
[csiemon@ingham.org](mailto:csiemon@ingham.org)

---

**From:** Carol Siemon  
**Sent:** Tuesday, August 18, 2020 4:25 PM  
**To:** 'Sallen@wowway.com' <Sallen@wowway.com>; 'lindaleetarver@gmail.com' <lindaleetarver@gmail.com>  
**Cc:** Linda Vail <LVail@ingham.org>; Benjamin Hall <BHall@ingham.org>; Michael Cheltenham <MCheltenham@ingham.org>  
**Subject:** your requests for input about planned election-related activities

Thank you for your letters I received today concerning important election-related events. I consider voting to be one of the fundamental rights of all citizens and encourage efforts to support voter registration and election-related activities. We share your concern about how to plan for important events for the future when Covid 19 has created such a changing landscape.

We will provide you a response to your inquiries ASAP. The simple, but incomplete, answer is that we do enforce the governor's executive orders (EO) via a citation or criminal complaint, but only if that is the last resort to guarantee adherence and public safety. I have asked for guidance from our county Health Officer and the assistant prosecutor I've assigned as our point person on EOs. While I can never promise in advance if we will or will not charge someone in a specific future situation, we do attempt to provide as much guidance as we can about the kinds of factors we would evaluate before authorizing a warrant.

A perhaps significant factor that was not mentioned in either of your letters is the capacity of the specific venues you plan to use. Social distancing in a ballroom with a capacity for 500 persons would potentially be a very different issue from using a smaller capacity room, for example.

Carol A. Siemon

Ingham County Prosecutor

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Lansing, MI 48933

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