STATE OF MICHIGAN
IN THE SUPREME COURT

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

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

Plaintiffs,

v

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

Defendants.
_____/

Supreme Court No. 161492

USDC-WD: 1:20-cv-414

Filed Under AO 2019-6

SUPPLEMENTAL BRIEF OF HOUSE DEMOCRATIC LEADER CHRISTINE GREIG AND THE HOUSE DEMOCRATIC CAUCUS AS *AMICI CURIAE* IN RESPONSE TO THE COURT'S SEPTEMBER 9 ORDER

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QUESTIONS PRESENTED

This Court's September 9 order directed the parties, and invited the *amici*, to address the following questions:

1. Whether the Emergency Powers of the Governor Act (EPGA), MCL 10.31 *et seq.*, applies in the context of public health generally or to an epidemic such as COVID-19 in particular.

   Amici answer: Yes.

2. Whether "public safety," as that term is used in the EPGA, is a term of ordinary meaning or has developed a specialized legal meaning as an object of the state's police power, and whether "public safety" encompasses "public health" events such as epidemics.

   Amici answer: Regardless of whether "public safety" is understood as a term of ordinary meaning or as a specialized legal term, it encompasses "public health" events such as epidemics.

INTRODUCTION[1]

This Court's September 9 order requesting additional briefing focuses on the interpretation of "public safety" in the Emergency Powers of the Governor Act. See MCL 10.31(1) (authorizing emergency orders "when public safety is imperiled"). The definitions of the term (and its component, "safety") used in both lay and legal dictionaries are essentially the same. "[B]ecause the terms in the phrase are similarly defined in both a lay dictionary and a legal dictionary," this Court "need not determine whether the statutory phrase … is a common phrase or a legal term of art." *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207, 211 (2008). Under the widely adopted definitions of the relevant terms, the COVID-19 pandemic "imperil[s]" the "public safety." It did so when the Governor first issued emergency orders under the EPGA; it continued to do so after April 30; and it does so today. The Governor thus had—and still has—authority to issue the challenged orders under the EPGA's plain text.

Nor does anything in the standard legal formulation of the police power imply that "safety" and "health" denote separate categories, such that using the word "safety" could be understood to exclude health-based threats. This Court has commonly described the police power as encompassing the authority to regulate for the "public health, safety, morals or the general welfare." *Mooney v Vill of Orchard Lake*, 333 Mich 389, 393; 53 NW2d 308, 309 (1952). But it has treated the component words of this formulation as describing overlapping, not separate, aspects of the State's authority. The words in the standard formulation of the police power derive from the maxim *salus populi suprema lex*—a Latin phrase that has been variously translated as stating that the health, the safety, or the welfare of the people is the highest law. In line with that common derivation, the law of this State and across the Nation has not drawn sharp lines between the categories of "health" and

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[1] Pursuant to MCR 7.212(H)(3), *Amici* state that no counsel for a party authored this brief in whole or in part, nor did anyone, other than *Amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of the brief.

"safety" in the police-power formulation. And, indeed, it has frequently used "public safety" language in describing threats caused by infectious diseases. The application of the EPGA to a deadly pandemic like COVID-19 fits perfectly with that longstanding usage.

Throughout this litigation, and the companion *House v Governor* litigation, the plaintiffs have cast about for interpretations of the EPGA that would deny the Governor the power to issue emergency orders responding to the COVID-19 pandemic. They have suggested engrafting onto the statute the time limits the Legislature imposed on the Emergency Management Act, a law that (as we showed in our earlier brief) does not in any way limit the Governor's power under the EPGA. They have suggested limiting the EPGA to purely local emergencies or riots—a reading that (as we showed in our *amicus* brief in the companion *House v. Governor* case) has no basis in the text. In the middle of the oral argument in this matter, they adopted a new theory—that the statutory phrase "public safety" excludes health threats. As we show in this brief, that theory is inconsistent with the plain meaning of the EPGA as well.

Plaintiffs have been candid that they are offering these varying, inconsistent readings in the interest of constitutional avoidance—that they believe some additional limits beyond the statutory text are necessary to keep the EPGA from violating the nondelegation doctrine. But there is simply no nondelegation problem here. This Court's jurisprudence establishes that legislation complies with the nondelegation doctrine so long as it provides standards that are "as reasonably precise as the subject-matter requires or permits." *Westervelt v Nat Res Comm'n*, 402 Mich 412, 435; 263 NW2d 564, 574 (1978) (internal quotation marks omitted). The EPGA's standards, which impose meaningful limitations on the Governor's authority, fully satisfy this test—particularly in light of the "difficult and complex task" the Governor must discharge by responding to a pandemic emergency in a "constantly changing environment." *State Conservation Dep't v. Seaman*, 396 Mich 299, 311; 240 NW2d 206, 211 (1976). And to the extent that procedural limitations might sometimes be necessary to ensure accountability, it bears emphasis that the EPGA does not grant

authority to a faceless administrator in the bowels of the bureaucracy. Rather, the statute grants authority to the Governor herself—the most prominent state official, who exercises that authority in full view of the electorate. As this Court has explained, such "proximity to the elective process" is itself an important procedural check on the delegation—"an additional, substantial factor assuring that the public is not left unprotected from uncontrolled, arbitrary power in the hands of remote administrative officials." *Westervelt*, 402 Mich at 449; 263 NW2d at 580. There is simply no constitutional problem that requires wrenching the statute from its text.

To vindicate the power of the Legislature under the scheme of separated powers adopted in the Michigan Constitution by the People, this Court must faithfully follow the plain meaning of the statutory text enacted by the Legislature itself. This Court should decline plaintiffs' invitation to insert the judiciary into the center of a policy dispute between the political branches and leave that debate to the ordinary legislative process set forth in our Constitution. It should apply the EPGA as written, and not invalidate it (explicitly or *sub silentio*) by applying a novel and expansive nondelegation doctrine. If a party with standing wishes to challenge a *particular* COVID order as exceeding the Governor's powers under the statute, this Court can entertain that challenge. But Plaintiffs' *facial* challenge to the Governor's authority post-April 30 must fail.

ARGUMENT

A. Under Both the Ordinary and the Legal Meaning of "Public Safety," the Emergency Powers of the Governor Act Applies to the COVID-19 Pandemic

The EPGA authorizes the Governor to issue emergency orders "[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). This Court's September 9 order for supplemental briefing focuses on the construction of the phrase "public safety" in the last clause quoted above—"when public safety is

imperiled." Whether that phrase is considered "a term of ordinary meaning" or instead as one that "has developed a specialized legal meaning" (Sept 9 Order, Question 2), the answer is the same—it "applies … to an epidemic such as COVID-19 in particular" (Sept 9 Order, Question 1). The Governor thus had authority to issue emergency orders in response to that pandemic; she retained that authority after April 30; and she continues to have that authority today.

The Legislature has provided, as a general rule of statutory interpretation, that "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language." MCL 8.3a. It has made an exception to this rule when a statute uses "technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law." *Id.* Those words and phrases "shall be construed and understood according to such peculiar and appropriate meaning." *Id.* Applying that directive, this Court has said that "[a] lay dictionary may be consulted to define a common word or phrase that lacks a unique legal meaning." *Brackett*, 482 Mich at 276; 753 NW2d at 211. But a "legal term of art" must "be construed in accordance with its peculiar and appropriate legal meaning" as found in a legal dictionary. *Id.*

As in *Brackett*, the Court "need not determine whether the statutory phrase"—here, "public safety"—"is a common phrase or a legal term of art because the terms in the phrase are similarly defined in both a lay dictionary and a legal dictionary." *Id.* See also *Sanford v State*, No. 159636, 2020 WL 4248722, at *6 n 23 (Mich, July 23, 2020) ("If the definitions of a phrase are the same in both a lay dictionary and legal dictionary, it is unnecessary to determine whether the phrase is a term of art, and it does not matter to which type of dictionary this Court resorts."); *Hecht v Natl Heritage Acads., Inc*, 499 Mich 586, 621 n 62; 886 NW2d 135, 154 n 62 (2016) (same). The definitions of "safety" and "public safety" consistently refer to freedom from or protection against harm or danger. But they do not limit that danger to any particular source. Most notably, they do not exclude health-based risks.

Lay dictionaries define "safety" as "the condition of being safe: freedom from exposure to danger: exemption from hurt, injury, or loss,"

Merriam-Webster Unabridged (online ed 2020); "[t]he condition of being safe; freedom from danger, risk, or injury," Am Heritage Dictionary (online 5th ed 2020); or "[t]he state of being protected from or guarded against hurt or injury; freedom from danger," Oxford Engl Dictionary (3d ed 2011). One legal dictionary similarly states that "[t]o be safe is to be in a condition of safety, a condition in which no harm or threat of harm to a person or other object of concern exists or will arise in the foreseeable future." Bouvier Legal Dictionary (desk ed 2012) (definition of "safe"). None of these dictionaries defines the phrase "public safety." But Black's Law Dictionary defines the phrase as "[t]he welfare and protection of the general public." Black's Law Dictionary (11th ed 2019).

At the time the Legislature enacted the EPGA in 1945, neither Black's (then in its third edition, dated 1933), nor Bouvier's (then in its 1940 edition), nor the Cyclopedic Law Dictionary (then in its third edition, dated 1940) appear to have contained definitions of "safety" or "public safety" (which suggests that the latter phrase was not a legal term of art). Lay dictionaries at the time defined "safety" in essentially the same way they do today. See Webster's Collegiate Dictionary 875 (1945) ("1. Condition of being safe; freedom from danger or hazard. 2. Quality of being devoid of whatever exposes one to danger or harm; safeness."); Pocket Oxford Dictionary of Current English 722 (4th ed 1942) ("[b]eing safe, freedom from danger or risk").

The common thread that connects these definitions is protection from harm, risk, or danger. And there is nothing in them that excludes health-based harm, risk, or danger.

At oral argument, a Justice of this Court suggested that construing the EPGA to reach health threats would deprive the "when public safety is imperiled" language of limiting effect. Not so. That language imposes significant limits on the Governor's authority. It is the "public safety," rather than a lesser interest, that must be imperiled. See *Attorney Gen v Pere Marquette Ry Co*, 263 Mich 431, 435-36; 248 NW 860, 861 (1933) (drilling for oil on "wild and unoccupied land" did not "endanger the public safety"). The threat must be to the "public," not to a particular individual or narrow class. See Howard Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police

Powers Jurisprudence 93 (1993) (noting courts in the first part of the Twentieth Century sought "to differentiate illegitimate class legislation from legitimate promotion of the general welfare"). The public safety must be "imperiled," which suggests both proximity and a high degree of likelihood. See, *e.g.*, Am Heritage Dictionary, *supra* (first definition of "peril": "[i]mminent danger"). For example, a collapse in grain prices might set in motion a causal chain that increases the risk of suicide among farmers, and the government might appropriately respond to that risk. But the risk would be too contingent, and the causal chain too attenuated, for the public safety to be "imperiled" in a way that would justify an emergency order under the EPGA. Finally, the word "when" imposes a temporal limitation. Once public safety is no longer imperiled, the emergency must end.

Not all threats to the public health would imperil the public safety. Consider, in this regard, an infectious disease that causes nothing more than a mild skin rash (which would not create a significant enough harm), or a risk factor such as the lack of availability of healthy foods in certain locations (which would not be sufficiently proximate to the harm). But when a health threat such as a deadly pandemic *does* imperil the public safety, there is nothing in the plain text of the statute that would exclude it. To treat the failure to expressly use the word "health" as carving such health threats out of the plain statutory text would be to break faith with the Legislature's choice to use broad triggering language in the EPGA. See Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* § 9 (2012) ("[T]he presumed point of using general words is to produce general coverage—not to leave room for courts to recognize ad hoc exceptions."). Cf. *People v Feeley*, 499 Mich 429, 439; 885 NW2d 223, 228 (2016) ("While MCL 750.81d(7)(b) does not expressly mention reserve police officers in its enumerated list of '[p]erson[s],' the plainly stated breadth of the definition of 'police officer' in MCL 750.81d(7)(b)(i) eliminates any need to do so or any implication that this omission should be read as an intended exclusion.").

The current pandemic is plainly a situation in which the "public safety" remains "imperiled." The COVID-19 virus is highly contagious

and deadly. Even with aggressive mitigation measures, it has already killed close to 200,000 people in the United States and over 6,000 people in the State of Michigan. Spread of the virus is not yet under control, there is not yet an approved vaccine, nor are there yet any proven effective therapeutics. Just this past Friday, the State of Michigan "reported 1,313 new confirmed cases of COVID-19," which represents "the highest single-day count since April 24 during the initial height of the state's spring coronavirus outbreak." Chad Livengood, *Michigan Reports 1,313 New Cases of COVID-19, Highest Single-Day Count Since April 24*, Crain's Detroit Business, Sept 11, 2020, https://perma.cc/5F7X-AS2J. "Michigan's positivity rate from COVID-19 testing was 4.25 percent, above the 3 percent threshold public health experts have been striving to keep the rate under." *Id.* And just this week, officials were forced to respond to "a major COVID-19 outbreak" in East Lansing. Ken Palmer & Mark Johnson, *Residents Of 30 East Lansing Properties, Including MSU Greek Houses, Ordered to Quarantine*, Lansing St J, Sept 14, 2020, https://perma.cc/R3QP-S68F.

The pandemic continues to rage across the country, and it threatens to spike once again in Michigan—putting the life and health of the people of this State in extreme danger. This remains a "time[] of great public crisis … when public safety is imperiled." MCL 10.31(1). By the plain language of the EPGA, Governor Whitmer had and continues to have a valid basis for issuing her emergency orders.

B. The Plain Meaning of "Public Safety" in the EPGA Encompasses Protection from Imminent Health Threats to the Public

1. Traditional Formulations of the Police Power Treat "Public Safety" and "Public Health" as Overlapping Categories

This Court's jurisprudence commonly describes the state's police power as encompassing the authority to regulate for the "public health, safety, morals or the general welfare." *Mooney*, 333 Mich at 393; 53 NW2d at 309. See also *Todd v Hull*, 288 Mich 521, 528; 285 NW 46, 48 (1939) ("The police power is the power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health,

morals, and general welfare of society."). At oral argument, a Justice of this Court suggested that the EPGA's "public safety" language was adopted against the backdrop of that jurisprudence, and that the failure to include the word "health" alongside the word "safety" thus implied a legislative decision to exclude health risks from the statute. That suggestion is inconsistent with the way this Court, along with other courts and legislatures throughout the country, has defined the scope of the police power.

As we showed above, the COVID-19 pandemic plainly "imperil[s]" the "public safety." That is true whether one uses the ordinary-language definition of "public safety" or the definition employed by legal dictionaries. See pp. 3-5, *supra*.

To establish otherwise, Plaintiffs must do more than note that the Legislature sometimes uses the phrase "public health" alone and sometimes uses the phrases "public health" and "public safety" together, or that the law often uses the phrase "public safety" to refer to harms that come from non-health threats. Cf. Pltf Supp Br 8-10. Rather, they must show that the terms "public health" and "public safety" are generally understood in the law as denoting opposing, mutually exclusive spheres. They must show that the term "which is expressed [in the statute] is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment." *Ford v United States*, 273 US 593, 611 (1927). Only then would it be "fair to suppose that" by using the term *public safety* the Legislature "considered the unnamed possibility ["public health"] and meant to say no to it." *Marx v Gen Revenue Corp*, 568 US 371, 381 (2013) (internal quotation marks omitted). See also *NLRB v SW Gen, Inc*, 137 S Ct 929, 940 (2017) ("The *expressio unius* canon applies only when circumstances support[] a sensible inference that the term left out must have been meant to be excluded.") (internal quotation marks omitted). Absent such a showing, a decision to carve health threats out of the EPGA would impermissibly "allow the canon of *expressio unius* to overcome the plain meaning of the words." *People v Garrison*, 495 Mich 362, 372; 852 NW2d 45, 50 (2014).

Plaintiffs cannot make the required showing. Health and safety "are not, in the natural reading of the words, set over against each other." *Ford*, 273 US at 611. Nor are they poised against each other in any "settled, definite, and well known meaning at common law." *Iliades v Dieffenbacher N Am Inc*, 501 Mich 326, 337; 915 NW2d 338, 343 (2018) (internal quotation marks omitted). To the contrary, "public safety" and "public health" have long been used in the law as overlapping phrases. Of particular note here, the law has consistently referred to deadly infectious diseases as threats to public safety, not just to public health. Longstanding interpretations of the police power—in this State and in general—offer no basis for concluding that the EPGA's specification of "public safety" was meant to exclude health threats such as COVID-19.

The traditional formulation of the police power—to protect public health, safety, morals, or welfare—derives from the maxim *salus populi suprema lex*. See, *e.g.*, *Southfield Tp v Main*, 357 Mich 59, 80; 97 NW2d 821, 832 (1959); *Davock v Moore*, 105 Mich 120, 133; 63 NW 424, 429 (1895). That Latin phrase has been variously translated:

- "the ***health*** of the people is the supreme law," Derek T. Muller, *"As Much Upon Tradition as Upon Principle": A Critique of the Privilege of Necessity Destruction Under the Fifth Amendment*, 82 Notre Dame L Rev 481, 485–86 (2006) (emphasis added);
- "the ***safety*** of the public shall be the first law," Richard Lowell Nygaard, *The Myth of Punishment: Is American Penology Ready for the 21st Century?*, 5 Regent UL Rev 1, 3 (1995) (emphasis added);
- "the ***welfare*** of the people is the supreme law," Paul Raffield, *Contract, Classicism, and the Common-Weal: Coke's Reports & The Foundations of the Modern English Constitution*, 17 Law & Literature 69, 90 (2005) (emphasis added).

These various interpretations reflect the breadth of the core term "salus." See Pocket Oxford Latin Dictionary: Latin-English (3d ed 2005, pub'd online 2012) (defining "salus" as, among other things, "health, well-being, safety"). See also Joseph R. Grodin, *Rediscovering the State*

Constitutional Right to Happiness and Safety, 25 Hastings Const LQ 1, 12 (1997) ("The Latin 'salus' embraced physical safety, but also more," including "health, welfare, and property preservation as well.").

Given the common derivation of these terms, it is not surprising that the law elaborating the police power has not drawn sharp lines between "health," "safety," and so forth. From the beginning, interpretations of *salus populi* and the police power have used "public safety" language to justify and uphold measures responding to diseases that threaten life and health. Historian William Novak lists "epidemic" along with "invasion or insurrection" and "fire" as the three "hazards to ***public safety***" that "were particularly threatening to population, social order, and civil government" and spurred the development of the police power. William J. Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America 53 (1996) (emphasis added). Nineteenth Century courts "upheld state public health laws by noting that '*salus populi suprema lex*'—the safety of the people is the supreme law." Wendy E. Parmet & Christopher Banthin, *Public Health Protection and the Commerce Clause: Controlling Tobacco in the Internet Age*, 35 NML Rev 81, 85–86 (2005). And early treatises on the police power describe measures responding to health threats as protecting the "public safety." See, *e.g.*, W. P. Prentice, Police Powers Arising under the Law of Overruling Necessity 105 (1993, orig. published 1894) (stating that "[q]uarantine, as a means of assuring the ***public safety***, is one of the most ancient and formidable prescriptions of government of every form") (emphasis added); *id.* at 429 (describing "the great object of all quarantine measures" as being "that of securing the ***safety of the population*** of the country or the district threatened by danger from pestilence or disease").[2]

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[2] Plaintiffs assert that Black's Law Dictionary defines "'health, welfare, morals, and safety'" as "separate 'state interests'" underlying the police power. Pltf Supp Br 3 (quoting Black's Law Dictionary (11th ed 2019) (definition of "state police power")). But the full definition from Black's neither uses the word "separate" nor does anything more than parrot the standard formulation: "The power of a state to enforce laws for the

As our counsel observed at oral argument, the Supreme Court's leading decision in *Jacobson v Commonwealth of Massachusetts*, 197 US 11 (1905), is to similar effect. Much of the *Jacobson* opinion treats "the public health and the public safety" as a single, conjoined, concept. *E.g.*, *id.* at 25. But—of especial relevance here—Justice Harlan's opinion for the Court also speaks specifically of the smallpox epidemic, and contagious disease generally, as a threat to the public "safety" full stop. Thus, the Court noted the "acknowledged power of a local community to protect itself against an epidemic threatening the ***safety of all***." *Id.* at 28 (emphasis added). And it held that "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the ***safety of its members***." *Id.* at 27 (emphasis added).

Modern commentators agree that the "public health, safety, morals, and welfare" phrase does not denote a series of separate government powers. Professor Krislov describes the list as a "redundant legal formulation of state authority." Samuel Krislov, *Governance*, in Oxford Companion to American Law (Kermit L. Hall, ed., online ed. 2004). Professors Rotunda and Novak say that the description of the police power "does not relate to any specialized power of government" but instead "encompasses the inherent right of state and local governments to enact legislation protecting the health, safety, morals or general welfare of the people within their jurisdiction." 2 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law—Substance & Procedure § 15.1(c) (5th ed 2012). There is no general tradition of treating the constituent words of the police power formulation as defining hermetically separate categories of authority.

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health, welfare, morals, and safety of its citizens, if enacted so that the means are reasonably calculated to protect those legitimate state interests."

2. The Cases and Statutes of This State Treat "Public Safety" and "Public Health" as Overlapping Categories

In accord with that widespread understanding, the statutes and judicial decisions of this State have not treated "public health" and "public safety" as describing exclusive spheres. Thus, in *Clements v McCabe*, 210 Mich 207; 177 NW 722 (1920), superseded by statute on other grounds as stated in *Adams Outdoor Adver, Inc v City of Holland*, 463 Mich 675, 683; 625 NW2d 377, 381 (2001), this Court described "the protection of ***health***, person, and property" as part of the police power's "conceded sphere relating to ***public safety***, order, and morals." *Id.* at 215; 177 NW at 725 (emphasis added). In *People v Hall*, 290 Mich 15; 287 NW 361 (1939), this Court quoted with approval a New Jersey decision stating that "[t]he ***safety and general welfare of the community*** require that certain businesses and occupations, because of their dangerous tendencies to injure the safety, ***health***, or general welfare of the public, require regulation." *Id.* at 21; 287 NW at 363 (internal quotation marks omitted; emphasis added).

Of particular note, this Court has often used the language of public ***safety*** to describe measures designed to protect against ***health*** threats. For example, in *Wilkinson v Long Rapids Township*, 74 Mich 63, 65; 41 NW 861, 862 (1889), this Court discussed an order quarantining individuals with scarlet fever for "as long as it is necessary for the ***public safety***" (emphasis added). In *People v Smith*, 108 Mich 527, 530; 66 NW 382, 383 (1896), the Court described laws "aimed at acts or conditions which threaten contagion" as being "necessary to the ***safety of the public***" (emphasis added). In *Bishop v Board of Supervisors of Ottawa County*, 140 Mich 177, 183; 103 NW 585, 588 (1905), the Court noted that a smallpox quarantine statute had been "liberally construed" because "the ***public safety*** demands the greatest diligence on the part of public officers to prevent public calamity" (emphasis added). And in *Summit Township v City of Jackson*, 154 Mich 37, 38; 117 NW 545, 546 (1908), the Court quoted the provision of a local charter directing that "persons having such malignant, infectious or contagious disease may be removed to such hospital, and there detained

and treated, when the ***public safety*** may so require" (internal quotation marks omitted; emphasis added).

Similar language even appears in *People ex rel Hill v Board of Education of City of Lansing*, 224 Mich 388, 394–95; 195 NW 95, 97 (1923)—a case cited at oral argument for the proposition that "public safety" did ***not*** include health risks. In *Hill*, the Court relied on a 1915 statute providing that "[w]hen the smallpox, or any other disease dangerous to the public health, is found to exist in any township, the board of health shall use all possible care to prevent the spreading of the infection, and to give public notice of infected places to travelers, by such means as in their judgment shall be most effectual for the ***common safety***." *Id.* (internal quotation marks omitted; emphasis added). And this Court's cases repeatedly refer to statutes that require public officials responding to infectious disease outbreaks to "take such measures as they may deem necessary for the ***safety of the inhabitants***." *Highland v Schulte*, 123 Mich 360, 361–62; 82 NW 62, 63 (1900) (internal quotation marks omitted; emphasis added). Accord *Baar v Bd of Sup'rs of Ottawa Co*, 151 Mich 505, 506; 115 NW 415 (1908); *Rohn v Osmun*, 143 Mich 68, 69–70; 106 NW 697 (1906); *Cedar Creek Tp v Bd of Sup'rs of Wexford Co*, 135 Mich 124, 126–27; 97 NW 409, 410–11 (1903). One of these statutes using "***safety of the inhabitants***" language to refer to "infect[ion] with a dangerous communicable disease" was enacted by the Legislature in 1897 and included in the 1915 statutory compilation, see *Rock v Carney*, 216 Mich 280, 286; 185 NW 798, 801 (1921)—well after Plaintiffs say the Legislature decided that "public safety" excluded health threats. Cf. Pltf Br 5 & n2 (referring to statute enacted in 1885).

Modern Michigan law similarly treats health threats as encompassed by the term "public safety." In 1977, the Court of Appeals said that "the unlawful practice of medicine" is "harmful to ***public safety***." *Michigan State Chiropractic Ass'n v Kelley*, 79 Mich App 789, 791; 262 NW2d 676, 677 (1977) (emphasis added). Numerous statutes treat public health and medical matters under the public safety rubric. For example, MCL 125.402(19) (emphasis added) recognizes that a local "'commissioner of ***public safety***'" may be "committed the charge of

safeguarding the ***public health***." And many statutes describe emergency medical services as an aspect of "public safety" services. See, *e.g.*, MCL 28.632(j) ("[p]ublic safety officer" includes member of an "ambulance crew"); MCL 333.5927(2) ("public safety officer" includes "emergency medical services personnel"); MCL 484.1102(ee) ("[p]ublic safety agency" includes agency that provides "ambulance, medical, or other emergency services"); MCL 484.2102(y) ("[p]ublic safety system" includes communication system operated to provide emergency "medical" services). There is simply no basis in Michigan law for treating the phrases "public safety" and "public health" as denoting distinct, opposing categories.

3. The Cases and Statutes of Other States Treat "Public Safety" and "Public Health" as Overlapping Categories

The statutes and judicial decisions of other states, too, repeatedly treat infectious diseases as threats to the public "safety." For example, the West Virginia Supreme Court of Appeals in 1937 described "quarantines against infectious diseases of animal and plant life" as "guarding the ***public safety***." *Nulter v State Rd Comm of W Virginia*, 119 W Va 312; 193 SE 549, 553 (1937) (emphasis added). In 1940, the Supreme Court of Appeals in neighboring Virginia explained that "[t]he owner of an infected animal has no right to hold his property against the ***safety*** and welfare of the general public." *Stickley v Given*s, 176 Va 548, 562; 11 SE2d 631, 638 (1940) (emphasis added). In 1926, the Iowa Supreme Court quoted a case describing "[c]attle afflicted with a dangerous and contagious disease" as "invad[ing] the peace and ***safety of the people***." *Fevold v Bd of Sup'rs of Webster Co*, 202 Iowa 1019; 210 NW 139, 144 (1926) (internal quotation marks omitted; emphasis added).[3] Far more recently, a Missouri appellate court, addressing a

[3] See also *Koppala v State*, 15 Wyo 398; 89 P 576, 579 (1907) ("It is in the nature of quarantine or health laws, where the health officer determines certain questions of fact, and upon which he is authorized, if necessary for the ***public safety***, to establish a quarantine.") (emphasis added); *Dodge Co v Diers*, 69 Neb 361; 95 NW 602, 603 (1903) (describing individuals as "quarantined for the ***public safety***" due to

case involving the condemnation of bacterially contaminated cheese, stated that "[w]hen probable cause exists to believe there is an immediate threat to the ***safety of the general public***, the State's action in the absence of proof is a valid exercise of police power." *State ex rel Koster v Morningland of the Ozarks, LLC*, 384 SW3d 346, 353 (Mo Ct App 2012) (emphasis added).

It is also common for the law of other states to discuss "public health" and "public safety" as mutually constitutive. For example, Professors Gostin, Burris, and Lazzarini quote "New Jersey's basic communicable disease law," which authorizes state and local officials to take certain actions when "'the ***safety of the public health*** requires it.'" Lawrence O. Gostin, Scott Burris & Zita Lazzarini, *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 Colum L Rev 59, 107 (1999) (emphasis added; quoting NJ Stat Ann 26:4-2(g)). A 1911 Kentucky case involving smallpox similarly

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smallpox) (emphasis added); *Henderson Co Bd of Health v Ward*, 107 Ky 477; 54 SW 725 (1900) (board of health alleged "that ***public safety*** required the board to have control of the measures adopted for stamping out the epidemic") (emphasis added); *Raymond v Fish*, 51 Conn 80, 97 (1883) (board of health "may order any vessel into quarantine whenever they deem it expedient for the ***public safety***") (emphasis added); *Jones v De Soto Co Sup'rs*, 60 Miss 409, 418 (1882) (describing smallpox quarantine as "for the ***public safety***") (emphasis added); *Haverty v Bass*, 66 Me 71, 71–72 (1876) (describing smallpox quarantine: "the mayor and aldermen, in ordering the removal, acted in good faith, and for what they thought best for the ***safety of the inhabitants*** of Bangor") (emphasis added); *Seavey v Preble*, 64 Me 120, 121 (1874) (describing cases involving "the small-pox or any other contagious disease": "*Salus populi suprema lex*—the ***safety of the people*** is the supreme law—is the governing principle in such cases.") (emphasis added); *Moore v State*, 48 Miss 147, 171 (1873) ("Quarantine laws, although for a time suspending commerce and intercourse with certain ports or countries, are necessary to the ***public safety***.") (emphasis added), writ dismissed, 88 US 636 (1874).

declared that "boards of health are invested by law with broad powers for the protection and ***safety of the public health***." *Allison v Cash*, 143 Ky 679; 137 SW 245, 247 (1911) (emphasis added). In 1919, an Ohio court stated that "[b]oards of health may, if they think best for the ***safety of the inhabitants***, remove persons who have dangerous diseases to a separate house or confine them to their own"—and then went on in the next sentence to find it "unquestionable that the legislature can confer police powers upon public officers for the protection of the ***public health***." *Ex parte Mason*, 30 Ohio Dec 139, 143 (Ohio Com Pl 1919) (internal quotation marks omitted; emphasis added). A 1927 New York case described a response to bovine tuberculosis—a disease the court recognized "may be communicated to human beings"—as being "in aid of good ***health***, and consequently tend[ing] to the welfare and ***safety of the people***." *People v Teuscher*, 129 Misc 94, 102; 221 NYS 20, 28 (1927) (internal quotation marks omitted; emphasis added).[4]

"Public safety" and "public health" simply are not opposing phrases in the law. From the earliest formulations of the police power until today, those terms have been understood as encompassing overlapping categories. And health threats have frequently been understood as imperiling the "public safety." The Legislature's use of the phrase "public safety" in the EPGA thus cannot fairly be understood as implicitly excluding threats like COVID-19. Because the current pandemic "imperil[s]" the "public safety" under the plain meaning of those terms, the Governor had power to respond with emergency orders

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[4] See also *In re Smith*, 146 NY 68, 75; 40 NE 497 (1895) (law authorizing health commissioner to "take such measures as he declares the ***public safety*** demands" in the face of an "impending pestilence" is sufficient to enable the commissioner "to preserve the ***public health*** from being affected") (emphasis added); *Mitchell v City of Rockland*, 45 Me 496, 498 (1858) (describing quarantine law providing that "when any person coming from abroad, &c., shall be infected with any disease dangerous to the ***public health***, the committee shall provide for the ***safety of the inhabitants*** in the manner they shall judge best") (emphasis added).

under MCL 10.31(1); she continued to have that power after April 30; and she has that power today.

CONCLUSION

For the foregoing reasons, and those set forth in our initial *amicus* briefs in this matter and the *House v Governor* case, the Court should affirm the legality of the Governor's emergency orders.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 5,888 countable words. The document is set in Century Schoolbook. The text is in 12-point type with 18-point line spacing and 6 points of additional spacing between paragraphs.

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