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 GRANT HEALTH PARTNERS, et al.,

Plaintiffs,

v.

GOVERNOR WHITMER, et al.,

Defendants.

Supreme Court No. 161492
USDC-WD: 1: 20-cv-414

BRIEF *AMICUS CURIAE* IN DEFENSE OF THE US CONSTITUTION, THE MICHIGAN CONSTITUTION, AND THE RIGHTS OF ALL CITIZENS

SUPPLEMENTAL BRIEF FILED PURSUANT TO SEPTEMBER 9, 2020 ORDER OF THIS COURT

ORAL ARGUMENT REQUESTED, IF BEING HELD (CONTINGENT UPON COURT PERMISSION UNDER MCR 7.312(H)(5))

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Respectfully Submitted: September 16, 2020

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QUESTIONS ADDRESSED

I. 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 COVID19 in particular.

Amicus Curiae's Answer: NO

II. 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.

Amicus Curiae's Answer: YES, A TERM OF ORDINARY MEANING
NO, PUBLIC HEALTH IS NOT INCLUDED

INTRODUCTION AND STATEMENT OF INTEREST[1]

As described in more detail in my prior briefs submitted to this Court, I submit this brief in defense of the United States Constitution, the Michigan Constitution, and the rights of all of my fellow citizens.

ARGUMENT

We here in Michigan have been under Governor Whitmer's declaration of state of emergency for 190 full days, or more than six months! There are now 181 of these orders, which will only continue to grow in number since EO 2020-177 extended the state of emergency again. But whether for 190 days or 5 minutes - even in times of emergency - our state and federal constitutions do *not* contain language allowing the trampling of our constitutionally-protected liberties *or* the government stepping outside of its given authority. Although lawful for the first 51 days, these EOs were undoubtedly unconstitutional from day one.

Thus, *amicus curiae* requests this court to immediately consider these certified questions from the federal district court, and immediately declare the unconstitutional acts of our government void (including, but not necessarily limited to, the enactment of the EPGA and the EMA, and the Governor's 2020 use of EOs).

I. Standard of review

The supplemental briefing directed by this Court's September 9th Order is focused solely on statutory interpretation. Some of the legal experts involved are

[1] Pursuant to MCR 7.312(H)(4), Amicus Curiae states that neither counsel for a party authored this brief in whole or in part, nor did such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief.

focusing so much on the detail of statutory interpretation that they are losing the forest through the trees. Instead, a few key points must be remembered. First, the US Constitution "and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and **the Judges in every State shall be bound thereby**, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[2] Thus, any "law repugnant to the constitution is void, and . . . courts, as well as other departments, are bound by [the US Constitution]."[3] So, to the degree the statutes in question violate any term of the US or Michigan Constitutions, the statutes are void and full discussion on the meaning of certain terms is no longer relevant.

Moreover, "where the language of the statute is plain, we are left no room for judicial construction."[4] Indeed, "to read the law consistently with its language, rather than with its judicial gloss, is not to be 'harsh' or 'crabbed' or 'Dickensian,' but is to give the people at least a fighting chance to comprehend the rules by which they are governed."[5] When employing the tools of judicial construction or interpretation, the Court must ensure the "language must receive such a construction as is most consistent with plain, common sense, unaffected by any passing excitement or

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[2] US Const, art VI.
[3] *Marbury v Madison,* 5 US 137, 180 (1803).
[4] *Dillon v Mr Unknown*, 61 Mich App 588, 591 (1975).
[5] Cf. *Citizens Protecting Michigan's Constitution v Secretary of State,* 503 Mich 42, at n. 63 (2018), criticising the Chief Justice's dissent for looking at what cases in general have said about the relevant constitutional terms, instead engaging in a direct examination of the text of the Constitution itself. The majority opinion also criticizes prior constitutional analysis by this court that "did not review the text of the Constitution . . . instead [creating a judicial gloss appearing] more like a spray-on tan. If it is bad to depart from the plain language of our Constitution on the basis of a judicial gloss that is binding precedent, how much worse it must be to do so on the basis of the spotty and inapposite authority the dissent relies upon in this case." Internal citations omitted (cleaned up).

prejudice."[6] This is necessary because "[t]he rules of law are supposed to be permanent . . . ."[7]

II. The government's authority to act with regard to public health, public safety, and general welfare of the people is quite limited by the text of our constitutions.

In the context of resolving the questions certified to this Court, the definition and interplay of the terms "public health," "public safety," and "general welfare" have come to the forefront of the discussion. So, what do they mean and how do they affect the government's authority to act during COVID19?

A. The source of our government's authority to act

A "state constitution . . . proceeds from the people in their original capacity, as the *source of all power in the government*."[8] Indeed, a constitution's "most basic functions are to *create the form and structure of government*, *define* and limit *the powers of government*, and provide for the protection of rights and liberties."[9] Moreover, a constitution "contains . . . *every thing that relates to the complete organization of a civil government, and the principals on which it shall act*, and by which it shall be bound."[10] In other words, the government, or any branch or department or office thereof, may only act in ways specifically authorized by our constitution. Or to put it simply, regardless of what authority a statute purports to give the state government (or

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[6] *Twitchell v Blodgett,* 13 Mich 127, 141-142 (1865).
[7] *Id.* at 140.
[8] *Id.* at 141-142 (emphasis added).
[9] *Citizens Protecting Michigan's Constitution v Secretary of State,* 503 Mich 42, 80 (2018) (emphasis added).
[10] *Citizens* at n.90 (emphasis added).

any branch, department or office thereof), that authority is nonexistent without it being originally and specifically given in our state constitution.

By the language of article III § 2 of our state constitution, not only are the powers of government distinctly separated into three branches, but there is also a specific prohibition against any "person exercising powers of one branch [also exercising] powers properly belonging to another branch except as expressly provided in this constitution." In addition to the traditional separation of powers clause and the non-delegation clause, our state constitution further defines these distinct and separate powers in article IV § 1, article V § 1, and article VI § 1. Specifically, the "legislative power is the power to determine the interests of the public, to formulate legislative policy, and to create, alter, and repeal laws. The governor has no power to make laws. The executive branch may only apply the [public] policy"[11] determined by the legislature, and "cannot exercise legislative power by creating law or changing the laws enacted by the Legislature."[12] Thus, a governor may not use EOs to create law or change laws enacted by the legislature, which is precisely the thing 170 out of the 181 2020 EOs aim to do.[13]

B. Public health, public safety and general welfare in our constitutions

Now armed with the understanding that all permissible state government action finds its authority in our constitution, and that only the legislature has the authority to

[11] *Taxpayers of Michigan Against Casinos v State of Michigan,* 471 Mich 306, 355 (2004).
[12] *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 98 (2008).
[13] By placing new rules and regulations upon individuals and businesses, and punishing them with various law enforcement tools (jail time, criminal fines, civil fines, and professional licensure revocation), the Governor is attempting to create laws. By setting aside provisions of a plethora of public acts, like the fire code (EO 2020-159), FOIA (EO 2020-38) and OMA (EO 2020-48), the Governor is attempting to change or rescind laws enacted by the legislature.

create law or public policy, we can look more closely at these concepts of public health, public safety and public welfare. Although it is thought by some that our state government is responsible for public health, public safety and public welfare[14], those *general* powers have no basis in our state or federal constitutions.

The term "welfare" appears only twice in the US Constitution. In the Preamble to the US Constitution, it reminds us that we established that Constitution and formed our government to, among other things, *promote* the general welfare. Not to regulate it. Then, in article I § 8, we see that Congress has the "power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." But given the sentence as a whole, it is clear to see that "*provide for* the common defence and general welfare of the United States" refers to that term in the financial sense. This also fits with the meaning that term (provide for) had at the time the Constitution was written. The British Dictionary defines "provide for" as "to supply means of support (to), esp financially."[15]

The term "welfare" only appears three times in our state constitution, namely in article IV §§ 50, 51, and 52. In those sections, we can see that those "welfare" provisions only provide our legislature the authority to "regulate the use of atomic

[14] *See* MCL 333.1111(2) "This code shall be liberally construed for the protection of the health, safety, and welfare of the people of this state;" and MCL 10.81 "'Energy emergency' means a condition of danger to the health, safety, or welfare of the citizens of this state due to an impending or present energy shortage," that deal with all people of this state, and MCL 333.20165(1)(f) "regarding a patient's health, welfare, or safety," or MCL 333.20168(1) that "affects the health, safety, and welfare of individuals receiving care."
[15] British Dictionary, available at https://www.dictionary.com/browse/provide?s=t, last accessed September 16, 2020.

energy and forms of energy developed in the future"[16] and "the protection of the air, water and other natural resources of the state from pollution, impairment and destruction."[17] Indeed, although art IV § 51 tells us "[t]he *public health and general welfare* of the people of the state are hereby declared to be matters of primary public concern,"[18] the section continues to state that "[t]he legislature shall pass suitable laws for the protection and promotion of *the public health*."[19] In other words, although both public health *and* general welfare of the people are primary public concern, the legislature is only permitted to pass laws for the protection and promotion of public health - not general welfare of the people.

The term "public safety," as used in the Michigan and US Constitutions, shows even more limits on our government's authority to act. The term "safety" only appears once in our US Constitution. That instance is found in article I § 9, where it states "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." This provision clearly provides no governmental authority to act, but for the rare need to suspend the privilege of the writ of habeas corpus. Although our Michigan Constitution mentions the word "safety" six total times, only three of those are in the context of "public safety."[20] These three uses of that term only provide our government the authority to suspend the writ of habeas corpus when rebellion or invasion requires it,[21] to provide for "the protection of the air,

[16] Const 1963, art IV § 50.
[17] Const 1963, art IV § 52.
[18] (emphasis added)
[19] (emphasis added)
[20] Const 1963, art I § 27 involves patient safety; art IV § 50 involves safety measures of atomic energy use; and art IX § 40 involves safety education programs for off-road vehicles and snowmobiles.
[21] Const 1963, art I § 12.

water and other natural resources of the state from pollution, impairment and destruction,"[22] and to own real property for the benefit of the "public health and safety."[23]

The term "health" appears nowhere in our US Constitution, thus, there is no Constitutional basis for the government to exercise authority relating to public health. The term "health" appears four total times in our state constitution, but only three of those relate to "public health."[24] As discussed above, two of these term occurrences only give our government the authority to provide for "the protection of the air, water and other natural resources of the state from pollution, impairment and destruction,"[25] and to own real property for the benefit of the "public health and safety."[26] The remaining reference to public health is found in article IV § 51 that requires regulation "for the protection and promotion of the public health" to be "suitable"[27] and done exclusively through the legislature.[28]

Thus, although it is thought by some that our state government is responsible for public health, public safety and public welfare, those *general* powers have no basis in our state or federal constitutions. Moreover, our entire state constitution was established simply because "[w]e, the people of the State of Michigan, [are] grateful to Almighty God for the blessings of freedom, and earnestly desir[e] to secure these

[22] Const 1963, art IV § 52.
[23] Const 1963, art VII § 23.
[24] Const 1963, art IX § 36 tobacco-related tax proceeds to benefit health care does not relate to regulating public health.
[25] Const 1963, art IV § 52.
[26] Const 1963, art VII § 23.
[27] I.e., among other things, respecting of our constitutionally-protected liberties, including those that remain unenumerated. *See* Const 1963, art I § 23 and US Const, Am IX.
[28] As demonstrated by the use of the words "the legislature shall" and the fact that this provision is found in the section of our state constitution specific to the powers and requirements of the legislative branch (article IV).

blessings undiminished to ourselves and our posterity."[29] If we wanted to create a form, structure and set of definitions for governmental power to ensure our public health, public safety and general welfare, we would have so stated. But we did not.[30]

III. The term "public safety" as used in the EPGA is a term of ordinary meaning.

A term in a statute does not, after its passage, develop any specialized legal meanings. For, we must remember that "[o]ur province is not to make or modify the constitution, according to our views of justice or expediency, but to ascertain, as far as we are able, the true intent and purpose of the constitution which the people have deemed it just and expedient to adopt. This we, in common with the people and all departments of the government, are bound to obey in all its provisions, however unwise in our opinion they may be . . . ."[31] This is because "[t]he meaning of our constitution was fixed when it was adopted . . . ."[32] And as described above, the terms "public health," "public safety," and "public welfare" are grounded in our constitutions. Thus, their meanings were fixed at the time they were adopted into those constitutions.

Moreover, "where the language of the statute is plain, we are left no room for judicial construction."[33] Indeed, "to read the law consistently with its language, rather than with its judicial gloss, is not to be 'harsh' or 'crabbed' or 'Dickensian,' but is to give

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[29] Const 1963, Preamble.

[30] And we must remember that "[o]ur province is not to make or modify the constitution, according to our views of justice or expediency, but to ascertain, as far as we are able, the true intent and purpose of the constitution which the people have deemed it just and expedient to adopt. This we, in common with the people and all departments of the government, are bound to obey in all its provisions, however unwise in our opinion they may be . . . ." *Twitchell v Blodgett,* 13 Mich 127, 149-50 (1865). This is because "[t]he meaning of our constitution was fixed when it was adopted . . . ." *Id.* at 138.

[31] *Twitchell v Blodgett*, 13 Mich 127, 149-50 (1865).

[32] *Id.* at 138.

[33] *Dillon v Mr Unknown*, 61 Mich App 588, 591 (1975).

the people at least a fighting chance to comprehend the rules by which they are governed."[34] When employing the tools of judicial construction or interpretation, the Court must ensure the "language must receive such a construction as is most consistent with plain, common sense, unaffected by any passing excitement or prejudice."[35] This is necessary because "[t]he rules of law are supposed to be permanent . . . ."[36] Thus, when you look to the language of the EPGA itself, it mentions "public safety" in the context of "great public crisis, disaster [defined as "calamity" in Black's Law Dictionary, 8th Ed.], rioting [defined as turbulent, disorderly terrorizing of the public in Black's Law Dictionary, 8th Ed.], catastrophe or *similar* public emergency . . . ."[37] This demonstrates its use within the ordinary meaning of "public safety," and not some specialized, legal meaning of the term.

IV. The term "public safety" does not encompass "public health" events.

As discussed above, the starting point for statutory interpretation is looking at the terms of the statute itself. The wording of MCL 10.31 specifically identifies "times of great public crisis, disaster [defined as "calamity" in Black's Law Dictionary, 8th Ed.], rioting [defined as turbulent, disorderly terrorizing of the public in Black's Law Dictionary, 8th Ed.], catastrophe or *similar* public emergency within the state, or reasonable

[34] Cf. *Citizens Protecting Michigan's Constitution v Secretary of State,* 503 Mich 42, at n. 63 (2018), criticising the Chief Justice's dissent for looking at what cases in general have said about the relevant constitutional terms, instead engaging in a direct examination of the text of the Constitution itself. The majority opinion also criticizes prior constitutional analysis by this court that "did not review the text of the Constitution . . . instead [creating a judicial gloss appearing] more like a spray-on tan. If it is bad to depart from the plain language of our Constitution on the basis of a judicial gloss that is binding precedent, how much worse it must be to do so on the basis of the spotty and inapposite authority the dissent relies upon in this case." Internal citations omitted (cleaned up).

[35] *Twitchell v Blodgett,* 13 Mich 127, 141-142 (1865).

[36] *Id.* at 140.

[37] MCL 10.31

apprehension of immediate danger of a public emergency *of that kind*, when public safety is imperiled . . . ." The use of these like terms, reinforced by the use of limiting words like "similar" and "that kind" speak volumes about the types of perils the legislature was addressing here. Tornadoes, terroristic behaviors, widespread electrical fires, and other urgent, dangerous and external threats to our safety are the types of perils the legislature wanted to empower the governor to protect us against. Surely, by that time in history, we knew of plagues, illnesses, diseases and the like, but none of those internal threats were even alluded to here.

"Statutes that relate to the same subject matter or share a common purpose are *in pari materia* and must be read together as one law . . . to effectuate the legislative purpose as found in harmonious statutes."[38] And, "[i]f two statutes lend themselves to a construction that avoids conflict, that construction should control."[39] In fact, "[t]he object of the *in pari materia* rule is to further legislative intent by finding an harmonious construction of related statutes, so that the statutes work together compatibly to realize that legislative purpose."[40] Because of this, "courts will regard all statutes upon the same general subject matter as part of 1 system."[41]

So, if we take a look at that bigger statutory scheme, we will see that "public health" is entirely separate from "public safety." For starters, they are two entirely different departments of the executive branch. MCL 16.525 created the department of

[38] *Parise v Detroit Entertainment,* 295 Mich App 25, 27 (2011), citing *In re Project Cost & Special Assessment Roll for Chappel Dam,* 282 Mich App 142, 148 (2009). *See* also, *Donkers v Kovach*, 745 NW2d 154, 157 (2007), citing *Aspey v Mem. Hosp.,* 477 Mich 120, 129 n. 4 (2007).
[39] *Parise* at 27. *See* also, *People v. Hall*, 499 Mich 446, 454 (2016), citing *People v Webb,* 458 Mich 265, 274 (1998).
[40] *People v Stephan*, 241 Mich App 482, 497-98 (2000).
[41] *People v McKinley,* 496 Mich 410, 421 n11 (2014).

public health, which "[p]ursuant to section 51 of article 4 of the state constitution of 1963, [] shall continually and diligently endeavor to prevent disease, prolong life, and promote the public health," while MCL 29.362(bb) defines "Public safety department" as "a department of a political subdivision providing both law enforcement and fire services either separately or utilizing a combined response force with personnel trained and certified as both firefighters . . . and law enforcement officers . . . under the direction and administration of a single director." Indeed, MCL 70.18(3) makes public safety departments "responsible for the enforcement of law and order, the protection of life and property against fire, and the performance of other public services of an emergency nature." In fact, Act 59 of 1935 was enacted "to provide for the public safety; to create the Michigan state police, and provide for the organization thereof; to transfer thereto the offices, duties and powers of the state fire marshal, the state oil inspector, the department of the Michigan state police as heretofore organized, and the department of public safety . . . ."[42]

V. The EPGA does not apply in the context of public health generally, or epidemics such as COVID19 in particular.

Public health, public safety and general welfare are terms of ordinary meaning that originate in our state and federal constitutions and carry on into our state statutes, like the EPGA. Also, as we've seen here, "public safety" does not encompass "public health" events. Thus, in looking at the ordinary meanings of the terms as used in the EPGA, with the term "public health" appearing nowhere in the EPGA, we must use

[42] MCL 28.1, et. seq.

basic canons of statutory construction to determine if it should nonetheless be read into the EPGA.

In looking at all of our statutes on point as part of one larger statutory scheme, it is abundantly clear that "public health" was never intended on being read into the EPGA. A quick look at Ch 10 of our laws reveals how the legislature intended the emergency statutes to interplay. In Act 191 of 1982, Declaration of State of Energy Emergency, the legislature made it a point to state that "[t]his act shall not limit, modify, or abridge the authority of the governor to proclaim a state of disaster pursuant to . . . 30.401 to 30.420 of the Michigan Compiled Laws, or to exercise any other powers vested in the governor by the state constitution of 1963, state statutes, or the common law of the state."[43] This tells us that, once the EMA was enacted in 1976, the EPGA wasn't meant to be a separate source of authority anymore, especially one into which "public health" could be read. This can be seen by the simple fact that this statute, MCL 10.87, references similar, but distinct emergency powers of the governor found in MCL 30.403, but makes absolutely no mention of the earlier EPGA, MCL 10.31.

Other statutes provide for

- the public health advisory council to be created to advise and consult with the director of the department of public health on public health programs and policies [44];

- local health departments to "continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including prevention and control of environmental health hazards; prevention and control of diseases; prevention and control of health problems of particularly

[43] MCL 10.87.
[44] MCL 333.2210

vulnerable population groups,[45]" etc.;

- local health departments to adopt "regulations to properly safeguard the public health and to prevent the spread of diseases and sources of contamination[46]";

- the department of public health to "continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including prevention and control of environmental health hazards; prevention and control of diseases; prevention and control of health problems of particularly vulnerable population groups,[47]" etc.;

- the department of public health to have "general supervision of the interests of the health and life of the people of this state" and to "make investigations and inquiries as to . . . the causes of morbidity and mortality [and] the causes, prevention, and control of environmental health hazards, nuisances, and sources of illness."[48]

- the department of public health to "[e]xercise authority and promulgate rules to safeguard properly the public health; to prevent the spread of diseases and the existence of sources of contamination;" etc.[49]

- the director of the department of public health, and local health departments to handle "imminent danger to health or lives."[50]

Epidemics are also specifically intended to be handled by individuals *other than* the Governor. This can be seen in statutes where:

- both the local health departments and the department of public health are supposed to "make investigations and inquiries as to: [t]he causes of disease and especially of epidemics;"[51]

[45] MCL 333.2433
[46] MCL 333.2435
[47] MCL 333.2221(1)
[48] MCL 333.2221(2)
[49] MCL 333.2226(d)
[50] MCL 333.2251 and MCL 333.2451
[51] MCL 333.2221(2) and MCL 333.2433

- the director of the department of public health is given authority to control "an epidemic;"[52]

- local health departments are tasked with "prevention and control of health problems in particularly vulnerable population groups,"[53] as we have seen with how COVID19 heavily impacts those who are immunocompromised;

- the department of public health shall "[i]nvestigate cases, epidemics, and unusual occurrences of diseases, infections, and situations with a potential for causing diseases" and "[e]stablish procedures for controlling diseases and infections;"[54] and thus, shall implement "rules for discovering, caring for, and reporting an individual having or suspected of having a communicable disease or a serious communicable disease or infection, and establishing approved tests;"[55]

- the department of public health "shall establish and maintain a pandemic influenza plan."[56]

Thus, with the treatment and handling of epidemics and pandemics being specifically dealt with in numerous other statutes, it is not reasonable for us to read "epidemics" into the application, or language, of the EPGA.

CONCLUSION

As we've seen here, the government's authority to act with regard to public health, public safety, and general welfare of the people is quite limited by the text of our state and federal constitutions. The government has no authority to act unless we, the people, gave them that authority in our very contract of civilization. Public health, public safety, and general welfare are terms of ordinary use, originally found in our US and Michigan Constitutions, but also found throughout our state statutes. "Public safety"

[52] MCL 333.2253
[53] MCL 333.2433(1)
[54] MCL 333.5111
[55] *Id.*
[56] MCL 333.5112

does *not* encompass "public health" events. The EPGA does not apply in the context of public health generally or in epidemics, like COVID19, in particular.

No statute can be enforced if it is in violation of the terms of either the US or Michigan Constitutions. So, while the plain terms of these dozens of statutes demonstrate the aforementioned conclusions, what remains is that the portions of the EMA and EPGA that allow the Governor to infringe upon our constitutionally protected liberties, or that purport to give her (or the government, in general) more power during times of emergency are plainly unconstitutional and, therefore, unenforceable. It is, thus, imperative that all of us who took that US Const Art VI and Const 1963 Art XI § 1 oath must in fact uphold those constitutions, whether we think their provisions are wise or not.

Thus, *amicus curiae* urges this court to issue immediate clarification to the governor, legislature and the public that these unconstitutional executive orders, which have abrogated virtually every right guaranteed to us in the state and federal constitutions, are unenforceable on their face. After all, our liberties are to be exercised by all people unabridged and undiminished, during times of emergency or not.

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