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.

The appeal involves a ruling that State governmental action is invalid.

THE MICHIGAN HOUSE OF REPRESENTATIVES AND THE MICHIGAN SENATE'S RESPONSE TO THE GOVERNOR AND DIRECTOR'S MOTION TO WITHHOLD ANY "PRECEDENTIAL VALUE [FROM] THE COURT'S OCTOBER 2 DECISION … UNTIL OCTOBER 30"

For over five months now, the Governor has used the Emergency Powers of the Governor Act ("EPGA") to commandeer the Legislature's power and use it to infringe on citizens' rights. As a one-person legislative body, the Governor has issued dozens of executive orders, all with the purported force of law and many with the bite of criminal sanctions. These orders limited and regulated most every aspect of daily life

in this state. All the while, the Governor rebuffed most every attempt from the Legislature to work with her to address the real challenges that COVID-19 presents. She mocked litigation like this case as political pageantry, and she derided citizen initiatives that were thought to question her power. Now the Governor wants to enlist this Court's help in continuing to assert broad and unconstitutional lawmaking power even *after* the Court has said her actions "lack any basis under Michigan law." *In re Certified Questions*, ___ Mich ___, ____; ____ NW3d ___ (2020) (Docket No. 161492); slip op at 2-3. But what was unconstitutional yesterday is no less so today.

The Governor asks that this Court hit the pause button on Michigan's constitutional scheme by giving her an additional 28 days to control an "orderly transition" back into a normal system of governance. See *Walsh v City of River Rouge*, 385 Mich 623, 639; 189 NW2d 318 (1971) (noting that acts taken under the EPGA have the effect of "suspend[ing] normal civil government"). This step back came after she caused widespread confusion with her announcement just a few minutes after the decision entered that her orders *would* "retain the force of law" for "at least 21 days."[1] See Office of Governor Gretchen Whitmer, *Statement from Governor Whitmer on Michigan Supreme Court Ruling on Emergency Powers* <https://www.michigan.gov/whitmer/0, 9309,7-387-90499-541283--,00.html> (accessed October 6, 2020).

[1] The Attorney General says she won't be enforcing the orders, though. See Department of Attorney General, *AG Press Secretary Issues Statement Regarding Michigan Supreme Court's Recent Decision* <https://www.michigan.gov/ag/0,4534,7-359-92297_47203-541288--,00.html> (accessed October 6, 2020) ("In light of the Supreme Court's decision on Friday, the Attorney General will no longer enforce the Governor's Executive Orders through criminal prosecution.").

Whatever the reason for the Governor's request, this Court should not indulge it. Our system does not contemplate some kind of constitutional twilight, where a state actor might be permitted to act in an unconstitutional way for some period because it's just too inconvenient to conform with what the constitution demands with any real haste. This idea that courts should turn away from a problem of constitutional magnitude—particularly a problem as vast as this one—runs contrary to the basic role of courts. After all, when an act is unconstitutional, "it is the duty of the courts to so declare, and to hold it void." *Sackrider v Saginaw Cty Sup'rs*, 79 Mich 59, 66; 44 NW 165 (1889). And the Governor herself has "taken [an] oath[] of fealty to the constitution identical to that taken by the judiciary, Const 1963, art 11, § 1, to conform [her] actions to constitutional requirements or confine them within constitutional limits." *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999). There's no grace period in that oath, either.

One might assume that some colorable legal basis at least underlies the Governor's extraordinary (and unusual) request. But there is none.

She first alludes to MCR 7.315(C)(2)(a), which contains this Court's mandate rule. But there is no "mandate" here; this is a certified questions case, and the opinion "binds" only because of the *Erie* deference that the federal court will afford it, not because of any action from this court. No order or judgment even enters in a case like this one. See *In re Certified Question*, 432 Mich 438, 463; 443 NW2d 112, 123 (1989) (separate opinion of Levin, J.) (explaining that, in a certified questions case, "[n]o binding order or judgment will be entered [by the Michigan Supreme Court]."). The

rules governing certified questions do not speak of any mandate or remittitur; they only say that "[t]he clerk shall send a paper copy or provide electronic notice of the Court's decision to the certifying court." MCR 7.308(A)(5). That happened on Friday afternoon. At least in *this* case, the Court is done with its work; there is nothing left to do 21 days from now or otherwise. For much the same reason, the Court did not speak of "immediate issuance" because (again) no judgment or order will *ever* issue. *Certified Questions,* 432 Mich at 464 ("No order, judgment or writ has ever been issued or could ever be issued on the basis of a response to a certified question.").

She also talks of times when this Court has postponed the precedential effect of an opinion. But the lone example she cites concerned the potential for delaying the precedential effect of a decision when a motion for rehearing is filed. See *Riley v Northland Geriatric Ctr*, 425 Mich 668, 681; 391 NW2d 331 (1986) (addressing an issue of statutory interpretation, not a constitutional issue). In that circumstance, the Court might have reason to believe that its decision is wrong. It makes sense to delay a potentially incorrect decision. But here, although the Governor "vehemently disagree[s] with [this] court's interpretation of the Michigan Constitution," she has not identified any specific flaw in the Court's opinion or even hinted that she intends to file a motion for rehearing. She wants to delay a legally sound decision.

In the end, the Governor's argument reduces to an argument of necessity. She states she wants time to try to shoehorn her actions into different statutes—and,

failing that, perhaps get around to speaking with the Legislature.[2] An emergency is said to justify the need. But this Court answered that argument more than a century-and-and-half ago:

> [I]t may easily happen that specific provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions can not be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of government, until they are amended or abrogated by the action prescribed by the authority which created them. It is not competent for any department of the government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things[.]
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> If the people, in establishing their government, see fit to place restrictions upon the exercise of any privilege, it must be assumed that in their view the exercise of the privilege without the restriction would be inexpedient and dangerous, and would not, therefore, have been permitted. Every restriction imposed by the constitution must be considered as something which was designed to guard the public welfare, and it would be a violation of duty to give it any less than the fair and legitimate force which its terms require.

People ex rel Twitchell v Blodgett, 13 Mich 127, 139 (1865). The Court should not wait to restore our constitutional structure.

It seems especially inappropriate to put off the Court's decision here given that the need for expediency derives from the Governor's own defiance and unwillingness to work with the Legislature. The complaint lands like an arsonist griping about the inconvenience of sweeping up the ashes. Take, for instance, the Governor's sudden

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[2] See Office of Governor Gretchen Whitmer, *Statement from Governor Whitmer on Michigan Supreme Court Ruling on Emergency Powers* <https://www.michigan.gov/whitmer/0,9309,7-387-90499-541283--,00.html> (accessed October 6, 2020) ("[A]fter 21 days, many of the responsive measures I have put in place to control the spread of the virus will continue under alternative sources of authority that were not at issue in today's ruling.").

concern over unemployment benefits. The Legislature had passed a bill *in April* to address those benefits and 28 other of the Governor's then-existing executive orders, which the Governor vetoed. See 2020 SB 858. The Emergency Management Act likewise contemplated a "transition" period of 28 days, but the Governor instead determined to adopt a strained interpretation of that act—one unanimously rejected by this Court—and run right through the period with no transition. Even after failing to convince the Attorney General and the lower courts on the issue, the Governor apparently never paused to consider that her reading of the law might be wrong, and she therefore took no steps to prepare for a decision like this one. She should not be granted 28 days of unconstitutionality merely because she failed to plan and therefore finds herself unready to act.[3]

At bottom, the Legislature stands ready to act. It wants to act. The Legislature even plans to meet this week. But it can only do be effective when it is returned to its position as the state's sole legislative body, not some parliament-in-waiting that sits quietly as the Governor decides whether and how to engage it. COVID-19 is a

[3] Unfortunately, both the Director and the Governor have instead blamed the Legislature and this Court for the situation that she has created. See Ball, *'We All Have to Do Our Part." Gov. Whitmer Releases Video Addressing Supreme Court Decision,* WXYZ Detroit <https://www.wxyz.com/news/coronavirus/we-all-have-to-do-our-part-gov-whitmer-releases-video-addressing-supreme-court-decision> (accessed October 6, 2020) ("As a result of the court and legislature[']s action, our COVID-19 cases will likely go up. There will be uncertainty, disruption, and possibly greater risk to our economy, more people quarantined and more deaths[.]"); Gordon, *An Order That Can Save Lives from COVID-19,* MDDHS Coronavirus <https://www.michigan.gov/coronavirus/0,9753,7-406-98158-541432--,00.html> (accessed October 6, 2020) (complaining that "the [non-delegation] doctrine has become popular on the anti-government right, and a 4-3 Michigan majority has now used it to invalidate a 75-year old Michigan law").

monumental challenge requiring the best in government to come together. The Court itself expressed a hope that the Legislature and the Governor would "work together to address this challenge." *Certified Questions*, slip op at 3 n 1. The best way for that to happen is to restore our ordinary system of governance as soon as possible. The Governor's motion should therefore be denied.

Respectfully submitted,

By: /s/ Stephanie A. Douglas
Stephanie A. Douglas (P70272)
Patrick G. Seyferth (P47475)
Susan M. McKeever (P73533)
Bush Seyferth PLLC
100 W. Big Beaver Rd., Ste. 400
Troy, MI 48084
(248) 822-7800
douglas@bsplaw.com
seyferth@bsplaw.com
mckeever@bsplaw.com

By: /s/ Michael R. Williams
Michael R. Williams (P79827)
Frankie A. Dame (P81307)
Bush Seyferth PLLC
151 S. Rose St., Ste. 707
Kalamazoo, MI 49007
(269) 820-4100
williams@bsplaw.com
dame@bsplaw.com

Hassan Beydoun (P76334)
General Counsel
Michigan House of Representatives
PO Box 30014
Lansing, MI 48909
hbeydoun@house.mi.gov

William R. Stone (P78580)
General Counsel
Michigan Senate
PO Box 30036
Lansing, MI 48909
bstone@senate.michigan.gov

Attorneys for the Michigan House of Representatives and the Michigan Senate

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