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

RESTORE FREEDOM'S RESPONSE, IN DEFENSE OF THE US CONSTITUTION, THE MICHIGAN CONSTITUTION, AND THE RIGHTS OF ALL CITIZENS, TO GOVERNOR'S MOTION TO ALLOW UNCONSTITUTIONAL EOs TO CONTINUE

ORAL ARGUMENT REQUESTED, IF BEING HELD (CONTINGENT UPON COURT PERMISSION)

We here in Michigan were under Governor Whitmer's declaration of state of emergency, and the accompanying life and business restrictions, for just shy of seven months! The vast majority of her 192 EOs in 2020 are based upon her "emergency powers" of the 1976 Emergency Management Act or the 1945 Emergency Powers of Governor Act. On October 2, 2020, this Court concluded "that the Governor lacked the authority to declare a 'state of emergency' or a 'state of disaster' under the EMA after April 30, 2020, on the basis of the COVID-19 pandemic," and "that the EPGA is in violation of the Constitution of our state because it purports to delegate to the executive

branch the legislative powers of state government" and, consequently, "the EPGA cannot continue to provide a basis for the Governor to exercise emergency powers."[1]

Despite having absolutely no legal or constitutional authority for the hundreds of EOs the Governor is issuing to control virtually every aspect of our personal and professional lives,[2] she (along with the Director of the Department of Health and Human Services) now asks this Court to allow these EOs to continue through this month. Not only do the precedent and court rules not allow that, but neither do common sense nor the Constitutional oath which we all took.

First, the Governor and Director argue that MCR 7.315(C)(2)(a) is relevant to this request. It is not. MCR 7.315(C) specifically deals with Orders or Judgments Pursuant to Opinions. However, in response to a certified question, "[n]o binding order or judgment will be entered."[3] In fact, "a Supreme Court opinion becomes binding precedent . . . at the time a signed opinion is date-stamped and filed with the Clerk of the Supreme Court, unless this Court, in rendering an opinion, specifically states that the opinion is effective at a different date."[4] Indeed,

> A rule of law enunciated in a Supreme Court opinion is determinative of the legal question involved and, upon compliance with [MCR 7.315(B)], becomes binding precedent . . . at that time. Conversely, an order or judgment entered pursuant to an opinion, [MCR 7.315(C)(4)], is strictly limited in its scope to the particular parties involved in the appeal. Routine

[1] *In re Certified Questions*, __ Mich __, __ (2020) (Docket No. 161492); slip op at 48.
[2] The numerous ways in which these EOs affected our daily lives are listed on page 28-29 in the majority opinion of *In re Certified Questions*.
[3] *In re Certified Question*, 432 Mich 438, 463 (1989) (separate opinion of Levin, J.).
[4] *Riley v Northland Geriatric Ctr,* 425 Mich 668, 678 (1986).

issuance of an order or judgment does not affect the precedential force of an opinion."[5] [6] [7]

Next, the Governor acts as though she's an innocent victim in all of this, and that we all owe it to her to "hang in there" for just a bit longer. As soon as this Court's decision was announced on Friday afternoon, the Governor did a press conference telling all in Michigan that her EOs were still "the law for at least 21 more days." This is despite this Court explicitly stating that "the executive orders issued by the Governor in response to the COVID-19 pandemic now lack any basis under Michigan law."[8] She then told the public that "as a result . . . of the court's action and the legislature's action, our COVID-19 cases could likely go up. There will be uncertainty, there'll be disruption and possibly greater risk to our economy, to our loved ones, possibly more people quarantined and more fatalities."[9] The Governor should have been working *with* the legislature and *within* the confines of the constitution all along, but now she chooses to

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[5] *Id.* at 680.

[6] This Court further explained that "[a]n opinion of this Court is not rendered meaningless because litigants involved in the controversy cannot begin execution or enforcement until issuance of an order or judgment. Further, this does not connote that an opinion is applicable to everyone but the litigants to that case. Rather, the opinion does apply to those litigants, and, whether or not an order or judgment issued pursuant to that opinion is enforced or executed between the parties, is an issue separate and distinct from when the opinion has precedential effect. This Court will not equate issuance of an order or judgment for execution or enforcement purposes, [MCR 7.315(C)(4)], with the precedential effect of an opinion for guidance and authority, [MCR 7.315(B)]." *Id.* at 680-681.

[7] Furthermore, the filing of a timely motion for rehearing or the granting of such a motion does not postpone nor deprive a previous opinion of precedential effect. *Id.* at 681. "If we, in granting a motion for rehearing, believe that the precedential effect of an opinion should be postponed pending rehearing, we will specifically so indicate in the order granting rehearing or by separate order. If this Court does not expressly postpone the precedential effect of an opinion, then only the order is postponed pending rehearing . . . and not the precedential force of the initial opinion." *Id.* Moreover, the Governor has not even expressed an intent to file a motion for rehearing, so it does not even make sense to *preemptively* set aside the precedential effect of this Court's determination of the Governor's current complete lack of legal authority for her COVID-19 EOs, let alone is there any legal authority for this Court to do so.

[8] *In re Certified Questions*, __ Mich __, __ (2020) (Docket No. 161492); slip op at 3.

[9] Michigan Governor Gretchen Whitmer Press Conference Transcript October 6, available at www.rev.com/blog/transcripts/michigan-governor-gretchen-whitmer-press-conference-transcript-october-6 , accessed October 8, 2020.

blame the legislature for bringing her to court for her illegal actions, and the court for declaring her actions void of legal or constitutional authority.

Further, despite being a government official and an officer of the court, the Governor directly misled the people of Michigan in saying "the ruling does not mean that the orders I issued violated the law."[10] This Court said "the Governor did not possess the authority under the EMA to renew her declaration of a state of emergency or state of disaster based on the COVID-19 pandemic after April 30, 2020,"[11] thus violating the law.

Even more concerning is that "the Governor and Director seek to ensure that some responsive measures can be placed under alternative executive authority," as declared in their Motion for Immediate Consideration. In fact, the Governor told us on social media that "the Court held the law was unconstitutional . . . [but that] ruling doesn't mean all the protections we have will go away. I have additional powers that I will use to protect our families from the virus. . . . [Namely,] the Department of Health and Human Services, will issue epidemic orders to maintain our statewide mask mandate, and limitations on gatherings."[12] After explaining how the new MDHHS emergency order "restricting gathering sizes and requiring face coverings in public

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[10] *Id.* See also, Governor Gretchen Whitmer Facebook Video, posted October 5 at 7:57pm, available at https://www.facebook.com/watch/?v=829580594469524, last accessed October 8, 2020. (Original transcript wording provided within the video itself.) Also on Governor Gretchen Whitmer official Twitter account, posted October 5 at 8:10pm, available at https://twitter.com/GovWhitmer/status/1313270301698990080, last accessed October 8, 2020.

[11] *In re Certified Questions*, __ Mich __, __ (2020) (Docket No. 161492); slip op at 12, n9.

[12] Governor Gretchen Whitmer Facebook Video, posted October 5 at 7:57pm, available at https://www.facebook.com/watch/?v=829580594469524, last accessed October 8, 2020. (Original transcript wording provided within the video itself.) Also on Governor Gretchen Whitmer official Twitter account, posted October 5 at 8:10pm, available at https://twitter.com/GovWhitmer/status/1313270301698990080, last accessed October 8, 2020. *See also,* Michigan Governor Gretchen Whitmer Press Conference Transcript October 6, available at www.rev.com/blog/transcripts/michigan-governor-gretchen-whitmer-press-conference-transcript-october-6 , accessed October 8, 2020.

spaces [] should sound familiar because that's what we've been doing [and] we're going to keep doing it.,"[13] she also emphasized that "[a]s your governor, I will continue to use every tool at my disposal to combat COVID-19."[14]

Despite this Court invalidating all of the Governor's COVID-19 EO mandates since May 1st, that still left "open many avenues for the Governor and Legislature to work together to address this challenge . . . ."[15] This is because "'[r]especting the separation of powers forecloses no substantive outcomes. It only requires us to respect along the way one of the most vital of the procedural protections of individual liberty found in our Constitution.'"[16] Yet, instead of working with the legislature toward a "substantive outcome" that respects individual liberties, the Governor remains focused on continuing to combat COVID-19 through unilateral methods that violate various constitutional protections.[17] [18]

More specifically, this Court just finished telling us that it is "not prepared to rewrite [a law in our state] or to construe it in an overly narrow or strained manner to avoid rendering it unconstitutional under the nondelegation doctrine or any other

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[13] Michigan Governor Gretchen Whitmer Press Conference Transcript October 6, available at www.rev.com/blog/transcripts/michigan-governor-gretchen-whitmer-press-conference-transcript-october-6, accessed October 8, 2020.

[14] *Id.*

[15] *In re Certified Questions*, __ Mich __, __ (2020) (Docket No. 161492); slip op at 3, n1

[16] *Id.,* quoting *Gundy v United States*, 588 US ___, ___; 139 S Ct 2116, 2145 (2019) (Gorsuch, J., dissenting).

[17] See Office of Governor Gretchen Whitmer, *Statement from Governor Whitmer on Michigan Supreme Court Ruling on Emergency Powers*, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499-541283--,00.html, accessed October 8, 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.").

[18] *In re Certified Questions*, __ Mich __, __ (2020) (Docket No. 161492); slip op at 28, citing *Walsh v River Rouge*, 385 Mich 623, 639 (1971). ("The invocation of a curfew or restriction on the right to assemble or prohibiting the right to carry on businesses licensed by the State of Michigan involves the suspension of constitutional liberties of the people.")

constitutional doctrine."[19] Indeed, it is "the responsibility of this Court in recognizing the separation of powers to ensure that the Legislature does not exceed its constitutional authority in 'making the law' either by encroaching upon the powers of another branch or by relinquishing its own powers to another branch."[20] Moreover, the legislature's power is "only to make *Laws*, and not to make *Legislators.*"[21]

Instead of heeding this instruction from this Court, the Governor simply shifted her reliance from the EMA and EPGA to MCL 333.2253 and 333.2453.[22] But, just as the legislature had no constitutional authority to make the Governor a "legislator," it likewise had no constitutional authority to make her subordinates (still within the executive branch) "legislators."[23] The Governor told us on October 6th that the Director is "an important part of [her] administration and . . . [she's] very pleased with the action [he's] taking [by issuing these new orders] and would anticipate more."[24] So, by her own admission, the Governor is simply trying to exercise the same legislative powers

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[19] *In re Certified Questions*, __ Mich __, __ (2020) (Docket No. 161492); slip op at 20.
[20] *Id.* at n16.
[21] *Id.* at 22, where this Court also points out that "[o]ne of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority," citing Cooley, Constitutional Limitations (1886), pp 116-117.
[22] *See* Emergency Order Under MCL 333.2253 - Gathering Prohibition and Mask Order, https://www.michigan.gov/documents/coronavirus/MDHHS_epidemic_order_-_Gatherings_masks_bars_sports_-_FINAL_704287_7.pdf, accessed October 9, 2020, ("On Friday, October 2, 2020, the Michigan Supreme Court concluded that the Governor was not authorized by law to issue executive orders addressing COVID-19 after April 30, 2020, invalidating the executive orders on that topic. . . . In the absence of the Governor's emergency orders, it is necessary to issue orders under the Public Health Code addressing these topics.")
[23] We must keep in mind MCL 8.8, which clearly explains that laws are only one of three things: a public act of the legislature, an initiated law adopted by the people, or an EO reorganizing the executive branch made pursuant to Const 1963, art 5 § 2.
[24] Michigan Governor Gretchen Whitmer Press Conference Transcript October 6, available at www.rev.com/blog/transcripts/michigan-governor-gretchen-whitmer-press-conference-transcript-october-6, accessed October 8, 2020. She continued later in the press conference by saying "[T]he law of Michigan, by virtue of these epidemic orders, are [sic] that we have to mask up and that we can't congregate in large numbers. And I believe that there will be additional measures that the Director will be taking in the coming hours and days."

through the Public Health Code that she was prohibited by the constitution from using through the EPGA.

In fact, MCL 333.2253 and 333.2453 use nearly identical "instructional" language as the EPGA[25], allowing the Director (or local health official, as in 333.2453) to issue emergency orders when *he* deems it "necessary to protect the public health." Just like the EPGA, the Governor and Director read MCL 333.2253 as allowing this legislative power in the executive branch to extend indefinitely. The Governor also told us

> Director Robert Gordon has epidemic powers that he can and is using, and I would anticipate more orders even yet today, perhaps, or in the coming days. *He can extend* those, and I fully anticipate until we have some comfort that we've gotten our arms around this disease that they will be extended. . . . [M]ask up. That remains the law in Michigan right now through the Director's epidemic orders. Those powers were not at issue in the Supreme Court. They are still standing and they will be exercised so long as they need to be.[26]

Considering the Director's orders state they are punishable by a misdemeanor 6-month term of imprisonment and/or a fine of $200 *and* a civil fine up to $1,000, as well as summary (lack of due process) licensing sanctions, we must remember "[t]he area of permissible indefiniteness narrows . . . when the regulation invokes criminal sanctions and potentially affects fundamental rights . . . ."[27] Among other things, the Director's

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[25] MCL 10.31, which allows "the governor [to] promulgate reasonable orders, rules, and regulations as he or *she considers necessary to protect life* and property . . . ." (emphasis added).
[26] Michigan Governor Gretchen Whitmer Press Conference Transcript October 6, available at www.rev.com/blog/transcripts/michigan-governor-gretchen-whitmer-press-conference-transcript-october-6 , accessed October 8, 2020.
[27] *In re Certified Questions*, __ Mich __, __ (2020) (Docket No. 161492); slip op at 26, citing *United States v Robel*, 389 US 258, 275 (1967) (Brennan, J., concurring in the result).

orders severely limit our right to peaceably assemble,[28] operate our businesses at normal capacity[29] and require us to wear masks.[30] [31]

It is no secret that the Governor and Director are trying to blame the legislature and this Court for "taking away their powers to save us," but they are letting their partisan preferences yield nothing but disdain for their oaths of office and of the constitution in general. The Director said this week that his emergency order

> is lawful under the Michigan Supreme Court's recent decision. That decision rested on something called "the nondelegation doctrine"—a legal notion never before used to invalidate a Michigan statute, and not used to invalidate a federal statute for 85 years. . . . [T]he 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.[32]

While mocking the constitutional concept of nondelegation, the Director fails to see how the US and Michigan Constitutions differ on this point. Both allow for the specific

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[28] See US Const, Am I "Congress shall make no law . . . prohibiting the free exercise" of religion "or abridging . . . the right of the people peaceably to assemble . . .," and Const 1963, art I § 3 "The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives . . ." and art I § 4 "Every person shall be at liberty to worship God *according to the dictates of his own conscience*." (Emphasis added.)

[29] See Const 1963, art I § 10 "No . . . law impairing the obligation of contract shall be enacted."

[30] See Const 1963, art I § 4 and art I § 23 "The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people."

[31] However, MCL 333.2253 only allows these orders to 1) prohibit the gathering of people for any purpose, 2) insure continuation of essential public health services, and 3) enforce current health laws. Requiring us to wear masks and to limit our business capacities are not terms that "enforce current health laws," as there are no laws on the books that require us to do those things. They are further not measures to "insure the continuation of essential public health services," as that does not fit within the plain meaning of those words. According to Black's Law Dictionary Deluxe Eight Edition, "health" is the "freedom from pain or sickness," or "the state of being sound or whole in body, mind, or soul," while "service" is providing "useful things for others." Therefore, the Director may provide masks to Michigan residents, and offer educational opportunities about COVID-19, and offer other related items or services - but not *require* the people to do anything, especially nothing that goes against their religious beliefs (such as mask wearing, etc.). Moreover, no public health law can infringe upon our right, "undiminished," to peaceably assemble, as expressly protected by our state Constitution in article 1 section 3, and the first amendment to our United States Constitution.

[32] Robert Gordon, Director, *An order that can save lives from COVID-19*, available at https://www.michigan.gov/coronavirus/0,9753,7-406-98158-541432--,00.html, accessed October 9, 2020.

exercise of powers by each respective branch,[33] but only the Michigan Constitution has a specific separation of powers *clause*, followed by a specific nondelegation *clause*.[34] So, while the entire body of nondelegation and separation of powers "caselaw" may be considered *persuasive* in this analysis, the "language [of our state constitution] *must* receive such a construction as is most consistent with plain, common sense, unaffected by any passing excitement or prejudice,"[35] because "[t]he meaning of our constitution was fixed when it was adopted . . . ."[36] [37]

When there is one predominant and reasonable construction of a statute, and "that very construction stands in violation of the Michigan Constitution,"[38] such as in the case of the EPGA, "the Constitution does not permit judges to look the other way; [they] must call foul when the constitutional lines are crossed."[39] The same holds true for

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[33] US Const, art I, art II and art III; and Const 1963, art IV § 1, art V § 1, and art VI § 1.
[34] Const 1963, art III § 2.
[35] *Twitchell v Blodget,* 13 Mich 127, 142 (1865), (emphasis added). *See also, Citizens Protecting Michigan's Constitution v Secretary of State,* 503 Mich 42, at n. 63, criticising the Chief Justice's dissent for looking at what cases in general have said about the relevant constitutional terms, instead of 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.)
[36] *Twitchell* at 138.
[37] Indeed, in the context of the U.S. Constitution, the "nondelegation inquiry always begins (and most often ends) with statutory interpretation." *Gundy v United States*, 588 US __, ___; 139 SCt 2116, 2123 (2019) (opinion by Kagan, J.) With that context in mind, this Court already explained that "necessary to protect life and property" is a standard "insufficient to satisfy the nondelegation doctrine." *In re Certified Questions*, __ Mich __, __ (2020) (Docket No. 161492); slip op at 32. This Court further ruled that the EPGA dolled out power to the executive branch "restrained by only two words-- 'reasonable' and 'necessary'-- that do almost nothing to cabin either the authority or the discretion of the person in whom this power has been vested," (*Id.* at 46-47) where MCL 333.2253 and 333.2453 only contain one of those "limiting" words. This Court then concluded that "nothing within either the 'necessary' or 'reasonable' standards . . . serves in any realistic way to transform an otherwise impermissible delegation of legislative power into a permissible delegation of executive power." *Id.* at 35.
[38] *In re Certified Questions*, __ Mich __, __ (2020) (Docket No. 161492); slip op at 21.
[39] *Id.* at 41, quoting *Gundy* at 2135 (Gorsuch, J., dissenting).

members of the legislative and executive branches. The irony here is that in their Motion presently before this Court to allow the unconstitutional EOs to continue to be imposed upon the 10 million people in Michigan, the Director and Governor rest upon MCR 7.315(C), which focuses on specific relief as between the named parties to the case. However, with the Governor's EOs and the Director's emergency orders, the fact that they directly impact the 10 million people in Michigan is all the more reason why the Governor, the Director, the Legislature, and this Court must remember the oath we each took[40] to uphold not only the US, but also Michigan, Constitutions.

Lastly, *amicus curiae* reminds *everyone* involved that

> The question is not whether the constitution ought to have permitted the exercise of this power; but whether, by a fair construction of the language of the instrument . . . the power in question has been prohibited. . . . [And the] duty, therefore, of the courts of final resort, to declare an act of the legislature [or executive] unconstitutional and void, when it plainly conflicts with the constitution, is clear and imperative.[41]

Thus, *amicus curiae* urges this Court to deny the Governor's Motion before this Court, and for any such other relief as the Court may deem is just and necessary for the proper enforcement of our constitutional framework, as well as the protections of our constitutionally-protected liberties. After all, our liberties are to be exercised by all people unabridged and undiminished, during times of emergency or not.

Respectfully Submitted: October 9, 2020

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[40] US Const, art VI; Const 1963, art XI § 1; or MCL 15.151.
[41] *Twitchell* at 149-150.