STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

MICHIGAN HOUSE OF REPRESENTATIVES And MICHIGAN SENATE,	**Supreme Court No. 161917**
Plaintiffs-Appellants,	**Court of Appeals No. 353655** **Court of Claims No. 20-000079-MZ**
v.	**THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATIONS OR OTHER STATE GOVERNMENTAL ACTION IS INVOLVED.**
GRETCHEN WHITMER, in her official capacity as Governor for the State of Michigan, **Defendant-Appellee,**	

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PROPOSED BRIEF OF AMICUS CURIAE

Oral argument requested

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ORDERS APPEALED FROM AND RELIEF SOUGHT

The undersigned (Amici)[1] address orders of the Court of Claims (COC) in Case No. 20-000079-MZ and Court of Appeals (COA) in their Case No. 353655.

The first COC order, issued on May 14, 2020, denied our Motion to Intervene in this litigation, but allowed us to be received as *amici curiae.* Order 1, herein. No hearing preceded that Order. The second is the Opinion and Order as to which the Legislature appeals, issued on May 21, 2020. Order 2, herein.

The COA also issued two orders of note. First, on July 20, 2020, the panel that heard and disposed of Case No. 353655 (COA Panel) denied our Motion for Peremptory reversal as potential intervenors, notwithstanding that no other litigant actually contested the argument on the merits we advanced before that Court. Order 3, herein. Finally, on August 21, 2020, by a 2-1 vote, the majority of the COA Panel upheld the COC, again without addressing the substantive argument we advanced (Amici Argument). Order 4. Notably, the dissenting opinion agreed with and amplified upon our Argument, i.e. that the 1945 Act/EPGA[2]/MCLA 10.31-33 does not grant any governor any authority to issue unilateral orders in the face of any disease or epidemic, because said statute is not addressed to the issue of public health at all.

While Amici encourage this Court to correct all four Orders, it is most important to reverse the majority Opinion the COA panel and affirm the dissenting opinion of COA Judge Tukel as to the scope of the EPGA and the illegitimacy of the Governor's contested orders. Thus, the Legislature should prevail herein.

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[1] In compliance with MCR 7.312 (H)(4) the undersigned report that no one except us has authored any part of this brief or any of our previous pleadings relative to this case, and no one except us has contributed anything in the way of financial support for this filing, or any other filing we have submitted in this case.

[2] Emergency Powers of Governor Act, of 1945. MCLA 10.31 et seq.

STATEMENT OF QUESTIONS PRESENTED

Did the 1945 Act, a/k/a/ the EPGA, empower Michigan governors to act unilaterally and in a geographically and temporally unlimited way to the outbreak of any disease?

Intervenors/ Appellants say "No"
The Legislature is unclear on the issue
The Governor and Court of Appeals say "Yes".

Did the COC and COA err/ abuse their discretion in refusing to allow Amici to fully participate in the proceedings below?

Intervenors/ Appellants say "Yes"
The Court and pre-existing parties said "No"

STANDARDS OF REVIEW

As briefed below, the COC Order 1 is subject to review for abuse of discretion. Orders 2 thru 4, being matters of constitutional and statutory construction, are reviewed *de novo* for error. *Michigan Department of Transportation v Tomkins,* 481 Mich 184 (2008); *Petition of Cammarata,* 341 Mic 528 (1954).

ARGUMENT

I. INTRODUCTION

To date, the merits of this case has been briefed and argued to four appellate level judges in this state. Three of those judges have simply assumed, largely because Covid-19 is a frightening disease that has infected and killed a lot of people, that the 1945 Act/EPGA granted Michigan governors "emergency" powers to issue orders affecting virtually every aspect of the social and economic lives of almost ten million Michigan residents when an epidemic of a communicable disease breaks out anywhere in Michigan. These powers allegedly include confining people to their homes regardless of their state of infection, and fining people for otherwise perfectly legal behavior, power leavened only by the dubious "requirement" that the governor subjectively believe the orders to be "necessary" and "reasonable", and otherwise limited only by the prescription that the Second Amendment to the US Constitution not be violated. According to these three judges, (a) a governor has these powers whenever the governor unilaterally deems an **epidemic** to constitute a "crisis" "disaster" or "catastrophe", or when the governor is invited to do so by any mayor, county sheriff, or the state police, (b) these powers reach every corner of this state, (c) they persist until the governor (not anyone else) deems the exigent circumstances to have ended, no matter how many months or years that may take, or how many people or businesses are harmed, and (d) this is all perfectly constitutional.

The EPGA was originally enacted on May 25, 1945, which was (a) more than two decades after the Spanish Flu pandemic killed millions worldwide, but (b) a couple years after race riots disturbed the City of Detroit, (c) 17 days after VE Day marked the successful end to the Allies' struggle against the "dictatorial" regimes of Adolf Hitler and Benito Mussolini, and (d) about ten weeks before the equally "dictatorial" regime of Japanese Emperor Hirohito was forced to capitulate, thus ending World War II. All of the foregoing makes it supremely "ironic"

for the judges to conclude that the Michigan Legislature chose that moment in history to confer such near "dictatorial" powers on **anyone** in the face of any disease.

We chose the word ironic. One Michigan appellate judge was more direct, the judge who actually confronted the language of the two relevant statutes and the axioms of statutory interpretation. He has aptly called the analysis that lead to this result "absurd". *Dissent of Tukel,* pp. 11, 15 (fnote 18), 16 (fnote 19). For the reasons addresses herein, we implore this Court to follow Judge Tukel's lead rather than mischievously circumlocute the issue by seizing on the Legislature's focus on unwritten geographic and temporal limits to the emergency powers described in the EPGA.

This case involves the status of the Governor's various quasi-legislative acts, both as to their statutory and, if necessary[3], constitutional validity. Since the contested Emergency Orders (EO's) disrupt the personal and professional lives of millions of Michiganians, this dispute is plainly one of "significant public interest" and has "major significance to the state's jurisprudence". MCR 7.305 (B) (3). Any further delay in ending this state of affairs will do harm far more significant that simply injuring the Legislature's constitutional dignity. These orders daily cause economic and personal harm to Amici, their clients, and over 9 Million Michigan residents whose personal and business lives hang in the balance, each person being separately and individually harmed depending on their unique circumstances. Thus, we ask this Court to accept and adopt Judge Tukel's excellent dissent, overrule the two lower courts, and confirm that the Governor's EO's, which purport to be authorized by the EPGA, are not authorized by said statute, that it confers no powers in the face of an epidemic, and that it cannot constitutionally delegate the unbridled and frequently arbitrary powers currently being exercised by the Governor, with obvious gusto.

[3] Judge Tukel also aptly reminds us of the axiom of constitutional avoidance where sub-constitutional analysis adequately disposes of a case. Tukel Dissent, pp. 3-4.

We sought to participate in this litigation in order to make it clear that, although we continue to generally agree with the Legislature's views that **their** statutory and constitutional prerogatives have been violated by the Governor, it is at least as important to remember that we five Amici, 35,000 licensed Michigan lawyers and over nine million Michiganians who do not hold elective office also have an interest in being free of unlawful and arbitrary strictures on our personal and professional activities. The Constitution and laws of Michigan exist in **at least** equal part to protect the rights of private citizens and businesses of this State, not merely to employ public officials and divide turf among them.

II. ISSUES ADEQUATELY RESOLVED BELOW

Given what transpired before the COC and COA, it is unnecessary to repeat the argument that the Legislature advanced and the lower courts properly accepted as to the 1976 Act/EMA. Without doubt, the right result was obtained on that front. The Governor's authority under the 1976 Act/EMA expired on April 30, 2020. Similarly, the Michigan Constitution does not itself confer the power to issue the contested EO's on any governor. What remains to be corrected and clarified, then, is solely the scope of the 1945 Act/EPGA.

III. STATUTORY AUTHORITY AND INTERPRATATION

Again, we acknowledge and applaud Judge Tukel's exposition of the correct statutory interpretation. The COC and the majority of the COA Panel simply sidestepped the threshold issue of whether the 1945 Act confers **any** authority in the face of **any** disease, by focusing on the Legislature's perhaps unfortunate efforts to read geographic and temporal limitations into that statute. In reality, as Judge Tukel observed, the 1945 Act contains no explicit reference to the size of an area in Michigan that can be the target of a governor's "emergency" declaration(s), nor the duration of a governor's "emergency" powers. This is both true and immaterial, since, as

Judge Tukel aptly explains, the 1945 Act also has no explicit or implied application to diseases, epidemics, or public health challenges in general.

All agree that unambiguous statutes are to be enforced as written, without a court substituting its own sense of public policy for that of the Legislature. *Kenneth Henes Special Projects Procurement, Mktg. & Consulting Corp. v. Continental Biomass Indus. (In re Certified Question)*, 468 Mich. 109 (2003). Courts are obliged to avoid interpretations of statutes that would render them unconstitutional or otherwise invalid. *General Motors v Appeal Board of Michigan Unemployment Compensation Commission,* 321 Mich 724 (1948); *Pigorsh v Fahner,* 386 Mich 508 (1972). We humbly observe that this axiom does **not** mean that courts are to everything in their power to artificially deem actions of the governor or government constitutional, no matter how facially unconstitutional they appear. It does mean that courts should interpret statutes to make them actually conform to the relevant constitutional requirements. A statute will only be given an interpretation leading to "mischievous" consequences when none other is possible. *In re Lambrecht,* 137 Mich 450 (1904).

When general, abstract terms are used in a statute, intermixed with more specific terms, the doctrine of *in ejusdem generis* applies to "confine" the interpretation of the general terms by the specific ones, particularly in cases involving penal statutes. *People v Powell,* 280 Mich 699 (1937). Since most of the Governor's EO's purport to carry criminal penalties for behaviors that are not, in general, even arguably objectionable, this rule will be particularly applicable to the analysis of the 1945 Act, below.

If more than one statute arguably relates to the same general topic, they may be considered *in pari materia.* *Houghton Lake Area Tourism & Convention Bureau v. Wood,* 255

Mich App 127 (2003). The duty of the court is to harmonize such statutes, giving effect to each, within its scope of reference. *Rowley v. Garvin,* 221 Mich App 699 (1997). However, if harmony is not possible, the later statute controls, or is construed as an exception to or refinement of the older statute. *Detroit Bd. of Education v. Parks,* 417 Mich. 268 (1983). Obviously, if this Court concludes that the subject statutes address **different** topics, like "riots" versus "epidemics", this rule does not apply. Judge Tukel has determined that the 1945 Act and 1976 Act address the same general topic, and aptly applied the rules as to the effect of the later statute on the former. In either event, the same result obtains. If the 1945 Act/EPGA does not address epidemics, does not authorize the EO's, and the case is resolved.

IV. THE TWO RELEVANT STATUTES

A. THE 1976 ACT. EMA

Without question, this statute **did** empower the governor to react to enumerated events that constitute "disasters" or "emergencies". It expressly includes both "epidemics" and "riots" in its list of what kind of events trigger gubernatorial "disaster" powers.

MCLA 30.402 defines various key terms, which follow:

> **(e)** "Disaster" means an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to, fire, flood, snowstorm, ice storm, tornado, windstorm, wave action, oil spill, water contamination, utility failure, hazardous peacetime radiological incident, major transportation accident, hazardous materials incident, **epidemic**, air contamination, blight, drought, infestation, explosion, or hostile military action or paramilitary action, or similar occurrences resulting from terrorist activities**, riots, or civil disorders.**

MCLA 30.402. Emphasis added.

Moreover, Judge Tukel aptly observed that the 1976 Act/EMA is the only one of the two statutes that empowers a governor in the face of an outbreak of **disease,** called an "epidemic" in that Act. Tukel Dissent, p. 9, etc. The 1945 Act, the Governor's sole source of support under the lower courts' opinions, makes no pretense of empowering a governor to exercise **any** unilateral powers in the face of an outbreak of disease, over any geographic area or for any length of time.

B. THE 1945 ACT. MCLA 10.31, et seq

The Governor claims that she enjoys geographically and temporally unlimited powers to issue EO's premised on what she terms as an ongoing "emergency", the Covid-19 epidemic, and the "science" as expounded by various "experts" of her choosing. This claim is inaccurate. The 1945 Act confers no powers on the Governor in the context of this or any epidemic.

As noted above, the 1945 Act/EPGA was enacted almost 30 years after the Spanish Flu pandemic. Therefore, it cannot be understood as a hurried response to **that** disease related event, nor can it be thought to have been written without the Legislature's knowing of such things as epi- and pan-demics. It is also undeniably true that, by 1945, the words "disease" and "epidemic" were well within the vocabulary and scope of awareness of any and all American legislatures. The question ably confronted by Judge Tukel, but dodged by all three other appellate judges, is whether the 1945 Act was written to confer emergency powers on Michigan's governors in the face of **epidemics**, outbreaks of communicable disease. A review of the 1945 Act in light of the above rules of construction and other authority demonstrates that it does **not** empower a governor in such events, no matter their geographic or temporal dimensions.

MCLA 10.31 (1) starts by listing the events that could trigger a governor's emergency powers. It uses numerous abstract terms such as "crisis", "disaster", "catastrophes" or other "similar public emergency", or the reasonable apprehension that such an event may soon occur,

and only one concrete term, "rioting". Obviously, if the Covid-19 epidemic is not one of these events, the 1945 Act **cannot** serve to authorize any of the Governor's contested actions

No one claims that the Covid-19 outbreak is anything like a "riot". As Judge Tukel confirmed, "epidemic" isn't a listed triggering event either, as it clearly is in the 1976 Act. Neither is "disease". Neither of those resembles a riot.

When seeking to interpret the other, more abstract terms ("crisis", "catastrophe", "similar emergency" and "disaster") the only concrete term, "rioting", must guide the interpretation. *People v Powell,* 280 Mich 699 (1937). This analysis compels the conclusion reached by Judge Tukel: i.e. that, while this epidemic causes what many people could loosely describe as crises of various kinds, and some might find the disease's effects catastrophic, even disastrous, it is not an event of the type which the 1945 Act empowers a governor to exercise extraordinary powers to combat.

Neither do this Court's jurisprudence, nor Black's Law Dictionary of the era (1933 Edition) treat "epidemics" as interchangeable with any of these abstract terms.

1. Catastrophes.

Our research suggests that this term has appeared in 58 opinions of this Court over the past 170 years. It is a term this Court has never used to describe a disease or epidemic, or act as a synonym for either. It **has** used the term in such contexts as "… accidents, fires, **catastrophes of nature …"** and other events, none being outbreaks of disease. *Swickard v Wayne County Medical Examiner,* 438 Mich 536 (1991).

Turning to Black's Law Dictionary, we have the following:

CATASTROPHE. A notable disaster; a more serious calamity than might ordinarily be understood from the term "casualty." Reynolds v. Board of Com'rs of Orleans Levee Dist., 139 La. 518, 71 So. 787, 791.

CASUALTY. Accident; event due to sudden, unexpected or unusual cause; event not to be foreseen or guarded against; inevitable accident; misfortune or mishap; that which comes by chance or without design. A loss from such an event or cause; as by fire, shipwreck, lightning, etc. Story, Bailm. § 240; Gill v. Fugate, 117 Ky. 257, 78 S.W. 191; Farmers Co-op. Soc. No. 1 of Quanah v. Maryland Casualty Co., Tex.Civ.App., 135 S.W.2d 1033, 1036.

2. Crises.

This term appears in 134 opinions over the same time period. As one might expect, it has been used to describe all manner of awful events, ranging from depressions, to prison overcrowding to a perceived glut in medical malpractice lawsuits. It has, to our knowledge, **never** been used as a definition or synonym for "disease" or "epidemic". Oddly, Black's did not include a definition of this term in its 1933 Edition.

In comparison, in *Peden v. City of Detroit,* 470 Mich 195 (2004) this Court tellingly used the term in the following context:

> ... Detroit police officers, including those who need not regularly engage in patrol functions, must be constantly capable of performing those functions during times of **riots or crises** , or special circumstances, such as the recent electrical blackout or, more predictably, during large special event gatherings, such as the Detroit Thanksgiving Day parade ...
>
> 470 Mich at ____ (emphasis added)

3. Disasters.

This term appears in fully 196 opinions over the same 170 plus years. These include lots of train wrecks, derailments, and trains accidentally killing unwary pedestrians. Fires, floods, tornadoes and the entire range of meteorological maladies to which Michigan is famously subject are all represented. Every industrial accident one could imagine, too, and a surprising number of people falling down elevator shafts. But not once is the word used as a synonym for "disease" or "epidemic".

In 1986, this Court ruled on the then governor's reaction to prison overcrowding under the "civil defense and **disaster** control act", but never opined that the act also empowered the governor to take charge in the case of disease. *Kent County Prosecutor v Kent County Sheriff,* 425 Mich 718 (1986). Indeed, over a century ago, this Court even managed to poetically weave this term into the review of a divorce judgment.

> ... the opposite sex is manifestly fervent but extremely migratory. Neither comes before the court with clean hands, and neither presents any claim for relief from nuptial **disaster** which specially appeals to the tender consideration of a court of equity. ...
>
> *Tisman v Tisman,* 176 Mich 94 (1913)

Black's Law Dictionary reveals the closest miss we could find, and even that did not involve a **communicable** disease.

> DISASTER. A sudden and ruinous misfortune, hence, one who had been pronounced by eminent physicians to be afflicted with dementia praecox, who had nervous breakdown, and who was without funds or ability to earn them by either mental or physical exertion, was overtaken by disaster. Robison v. Elston Bank & Trust Co., 113 Ind. App. 633, 48 N.E.2d 181, 188.

4. Emergency.

This most generic and ubiquitous of the terms appears in over 1400 opinions, 92 of which also include the word "disease". In the 1945 Act, the word follows and is expressly limited by the term "similar", which word refers back to "rioting". MCLA 10.31 (1). Hence, the term "emergency", as used in the 1945 Act, is the term **least** susceptible to being interpreted to include diseases or epidemics. *People v Powell,* 280 Mich 699 (1937).

Black's law Dictionary reveals **no** connotation of communicable disease or epidemic, especially one that, given the Governor's latest SHO's, and her public comments noted by the Legislature, seem fated to affect us, in one form or another, for months to come.

> EMERGENCY. A sudden unexpected happening; an unforeseen occurrence

> or condition; specifically, perplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency; pressing necessity. A relatively permanent condition of insufficiency of service or of facilities resulting in social disturbance or distress. Kardasinksi v. Koford, 88 N.H. 444, 190 A. 702, 703, 111 A.L.R. 1017; Contract Cartage Co. v. Morris, D.C.I11., 59 F.2d 437, 446; Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348, 291 P. 839, 843, 71 A.L.R. 161. "Emergency" in sense of constitutional provision respecting referendum does not mean expediency, convenience, or best interest. State v. Hinkle, 161 Wash. 652, 297 P. 1071, 1072.

Two of this Court's opinions published nearly a century ago **do** mention a link between disease and emergency. In the process, they also reveal an additional, compelling reason to **know** that the Governor's claim that the 1945 Act empowered **her** to act unilaterally and eternally to bring this disease to heal (no matter the cost to freedom and economic liberty), is a cynical, blatant canard. The history of public health legislation in Michigan belies it.

Judge Tukel strikes a similar theme on page 14 of his learned dissent, at footnote 17.

In *Rock v Carney,* 216 Mich 280 (1921), this Court reviewed the actions of **local** "public health officials" who forcibly examined and quarantined a young woman who had contracted two venereal diseases. In *Rock*, this Court acknowledged the broad statutory "emergency" powers delegated to **local** public health officials to intercede to contain the spread of "communicable" diseases, in cooperation with the State Board of Health**,** under a **1915 precursor to our current Public Health Code. 1 Comp. Laws Sect. 5018-5055 (1915).** 216 Mich at 283-288. This arrangement, statutory authority being delegated to **local** public health officials to combat outbreaks of diseases/ epidemics, was modified over the following decades, but remained largely intact until, in 1978, the Public Health Code was overhauled. MCLA 333.1101, et seq.

Parts 51 and 52 of said 1978 Code are particularly pertinent to the powers under discussion, and reveal a governor's largely non-existent statutory role in preventing the spread of communicable diseases ordained therein. MCLA 333.5101-.5267.

Obviously, 1945 falls between 1915 and 1978 in history. Thus, **if** the 1945 Act was actually intended to break form and authorize **governors** to supersede the authority of local public health officials in the face of epidemics, one would expect the Legislature to have at least **mentioned** the existing statutory schema that was being modified, and the fact that local public health officials, who had been designated to handle these events for decades, were being **supplanted by a governor.** But nothing of this sort appears anywhere in the 1945 Act. No mention of existing public health laws appears. Indeed, at least until the 1976 EMA, the allocation of responsibility and authority remained decidedly elsewhere.

Why? Because, as the Legislature has suggested, Judge Tukel has confirmed, and we have maintained outright, the 1945 Act had nothing whatsoever to do with disease, epidemics, or public health, and conveyed **no** power to **any** governor to take charge of these challenges to public health, neither unilaterally nor indefinitely. The 1945 Act was about **riots.**

In 1926, in *Kehoe v Board of Auditors,* 235 Mich 163 (1926), this Court revisited this same statutory schema in a slightly different context, in reference to a slightly different disease, smallpox. Once again, this Court acknowledged the clear statutory authority of **local public health officials** to coordinate the localities' reactions to outbreaks of communicable disease.

Hence, these two precedents, decided after the Spanish Flu pandemic, reveal this Court's early and clear acknowledgment that, throughout the 20th Century, it was **local public health officials** who held the statutory "emergency" power to combat outbreaks of disease and keep

these outbreaks from becoming epidemics[4]. Nothing in the 1945 Act/ EPGA **claims** to change that allocation of power and responsibility. It did not. As of 1945, the field that the Governor now seeks to preempt had been occupied by legislatively deputized local public health officials for many decades. Not until 1976 was any governor accorded any relevant emergency powers, subject to the now familiar 28 day sunset clauses, etc.

As such, as attractive as it now is to the Governor, having no frustrating sunset provisions to contend with, and no requirement to submit her plans to the Legislature's prerogatives, the 1945 Act is utterly inapplicable to the current Covid 19 situation.

5. Continuing Analysis of the 1945 Act

Each provision of the 1945 Act only serves to reinforce the above. When one refrains from simply assuming that the 1945 Act addressed diseases and epidemics, it becomes easy to read it as a riot control statute, and exceedingly difficult to perceive it as being drafted to confront diseases and epidemics.

The 1945 Act describes the people who can seek a governor's "emergency" intervention. The list is short: mayors, county sheriffs, or the state police. MCLA 10.31(1). Clearly, these officials are largely tasked to fight **crime,** such as is widespread in times of rioting, but not disease. Conversely, the EPGA doesn't authorize **any** public health official to seek these emergency orders or take any actions to guard the public **health**. Thus, on this count, it is implausible to deduce that the 1945 Act was actually intended to modify the existing public **health** laws and empower a governor to react to outbreaks of disease. It is doubly implausible to assume this application to outbreaks of disease was even thought of by the Legislature, when the EPGA acknowledges **no** role for Michigan's entire private and public medical communities,

[4] It is also noteworthy that, in these cases, the actions of the public health officials uniformly involved isolating the infected, rather than wholesale lockdowns of millions of uninfected people and tens of thousands of businesses.

or its public health officials. This passage thus reveals that the emergency powers enacted in 1945 were geared to helping local law enforcement cope with outbreaks of localized crime and violence, not outbreaks of disease.

The 1945 Act then authorizes the governor to "designate the area involved". MCLA 10. 31(1). Contrary to the Governor and lower courts' take on it, this language does **not** readily indicate or suggest that this "area" includes the entire state. Instead, as the Legislature has briefed, the context strongly implies that the "area" is a defined geographical **part** of the state where the "rioting or other similar emergency" is actually happening, or foreseen. Riots and civic unrest **are,** thank God, largely confined to relatively small geographic areas. They are the events mentioned in the EPGA. Epidemics are not.

Next, the statute authorizes a governor to issue orders that are objectively reasonable, and that the governor subjectively believes to be "necessary" to protect life, property, and to diffuse the emergency "within the affected area". MCLA 10. 31(1). Certainly, life and property are endangered by events like riots, looting and the like. Life is also endangered by diseases. Property generally is not. So, the Governor's interpretation is only plausible if one ignores the fact that terms like "disease", "epidemic" and "public health" do not appear anywhere in this statute.

Next comes the authorization of the types of topics emergency orders may address. MCLA 10.31(1). They include "control of traffic", which readily connotes forbidding people from driving to or from places where fires are burning or rioting and looting are going on, but has never, until this year, been judicially determined to mean "taking your car anyplace in Michigan except your own garage, driveway, or stretch of street between your house and the nearest pet supply shop".

The 1945 Act also permits a governor to designate buildings in "the affected area" that people could not enter, leave or use. In the context of riots and looting, this makes obvious sense. However, no governor before this one has urged the courts to turn the clear meaning of this passage on its ear to allow a statewide house arrest. Now, we are told, this phrase means that, not only can a governor forbid people from entering certain stores and buildings in certain distressed areas, it also empowers governors to order that more than 9,000,000 people cannot leave **one building,** their respective homes.

The 1945 Act also allows gubernatorial orders to control "places of amusement", which, again, far more readily connotes clubs and bars near a riot zone than every "nonessential" business in the state, and even some of the "essential" ones.

The 1945 Act does permit some control over pubic assembly in **public** places, which, given the First Amendment, carries with it certain obvious limitations. Again, given the presumed subject matter, riots, this provision makes obvious sense. When the presumed topic becomes disease, though, the situation gets much murkier. The passage says **nothing** about governors micro-managing how many guests, even relatives, one may have over to socialize at one's home, or come to one's private office to consult about a lawsuit, craft a will and trust, etc. It has **no** apparent application to regulating how one navigates a golf course or propels a fishing boat. Yet each of these activities are or have been the subject matter of EO's issued by the Governor claiming authority under this statute.

The 1945 Act allows establishing a "curfew", which, once again, has a clearly understandable application in the context of the areas surrounding riots, but has never, until now, been interpreted to mean anything so grandiose as "**everybody** go home … and stay there!"

The 1945 Act also allows control of alcoholic beverages which, like marijuana, the current Governor has taken pains **not** to limit. In the context of the heated tempers and short

fuses one readily associates with riots, this provision again makes obvious good sense. It has no apparent relevance to fighting diseases.

Finally, the 1945 Act permits limitations on explosives and flammable liquids. These are easy to understand terms. Pipe bombs and Molotov cocktails. These items have no discernible relevance to epidemics, but are *de rigeur* when riots break out.

Still, not a single mention of "disease", "epidemic" or "pandemic" appears.

MCLA 10.31 (2) doesn't add much to understanding what kind of events governors can treat as "emergencies". It does make it clear that, as to "emergencies" legitimately within its scope, these EO's can last as long as the governor sees fit and doesn't identify how any other branch of government can intervene to reign in a governor who displays excessive zeal for exercising "emergency powers". Is this because, as the Governor and lower courts claim, the 1945 Legislature intended that, once an epidemic comes to Michigan, all ordinary, collaborative norms are suspended and Michigan is subject to one politician rule, until that politician decides to stand down? Or is this, as Judge Tukel rightly says, an "absurd" interpretation that in no way comports with the clear intent of the 1945 Legislature?

MCLA 10.31 (3) disallows gun-grabbing. Again, in the context of riots and looting, this is a perfectly understandable provision. It has no discernible relevance to fighting exotic viruses.

Nothing in this section, or the entire statute, mentions a governor interacting with public health officials, diagnostic medical testing, drugs, medical "modeling", "public health", "public health care systems" or anything else that would suggest that this statute was intended to authorize "emergency" lockdowns of all people (universal except when performing an "essential" function) and most businesses to slow the spread of **any** disease. It doesn't even mention hospitals.

MCLA 10.32 provides for broad interpretation of the statute, to allow governors to do what is needed to diffuse emergencies **actually envisioned by the statute**. Of course, if infectious disease outbreaks are **not** such "emergencies", even the broadest interpretation cannot sustain this governor's orders.

In all, it requires a powerful stretch of willed **mis-**interpretation to conclude that, in 1945, the Legislature empowered Michigan's governors to unilaterally displace the state's entire existing, locally controlled public health apparatus, and the Legislature itself, to indefinitely place the entire state under house arrest, shut down and open businesses and industries at will, dictate minutiae like how one's boat can be powered or where one can buy paint, or anything else a governor deems relevant, to fight a **disease.** In fact, the word "quarantine" doesn't appear anywhere in the 1945 Act, either.

It is thus clear that **none** of the current Covid-19 EO's that infringe on millions of people's right to socialize, conduct business and hold their jobs, are actually authorized by The 1945 Act, because that statute never authorized gubernatorial interventions of a mandatory nature to curb the spread of **any** disease.

Further, as Judge Tukel aptly observed, if the1945 Act is read as the Governor insists, the statute is assuredly unconstitutional[5]. Michigan's governors would have plenary, geographically and temporally unlimited, legislative powers at their fingertips, simply by declaring that an outbreak of any one of many common infectious diseases constituted an "emergency". Can anyone doubt that, if this event, an epidemic, is allowed to stand as an

[5] This conclusion is made all the easier by the Governor's August 27, 2020 issuance of her EO-2020-172, attached, which purports to unilaterally amend the scope of the 2018 Paid Medical Leave Act to eliminate the previous 50 employee threshold of coverage. We don't opine on the merits of this action, but amending statutes is undoubtedly **legislative** behavior.

acceptable predicate for the types of draconian, and largely ineffective[6] orders issued by this governor, future governors will somehow restrain themselves when another disease, or anything **else** unpleasant that a politician could call a "crisis" or "emergency" with a straight face, arrives at a politically opportune moment? Of course not. To allow the lower Courts' opinions to stand would only serve to perpetuate a blatantly unconstitutional reading of this 1945 riot control statute, a reading, as Judge Tukel reminds us, all courts are obliged to avoid. *General Motors v Appeal Board of Michigan Unemployment Compensation Commission,* 321 Mich 724 (1948); *Pigorsh v Fahner,* 386 Mich 508 (1972). And it would serve as an open invitation to do exactly the "mischief" courts are also obliged to avoid, but politicians seem to find irresistible. *In re Lambrecht,* 137 Mich 450 (1904).

V. MCLA 30.417(d).

This section of the 1976 Act/EMA has lead both the Governor and three appellate judges to cling to the hope that, in 1976, the Legislature acknowledged that it had previously granted epidemic based authority to Michigan's governors, via the EPGA. The opposite is true, as Judge Tukel amply demonstrated in his Dissent, pp 11-16. At the risk of gilding his lily, we offer one additional insight.

The 1945 Act/EPGA mentions one concrete "triggering event" for gubernatorial emergency powers, i.e. "rioting". MCLA 10.31 (1). The 1976 Act/ EMA mentions almost two

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[6] As of August 23, 2020, Michigan suffers from the 8th HIGHEST per capita Covid related death rates among America's 50 states. https://www.worldometers.info/coronavirus/country/us. At the peak of the Governor's lockdown orders, late May, 2020, Michigan's unemployment rate reached the third HIGHEST in the country, too. It remains above average in the nation. https://www.bls.gov/opub/ted/2020/unemployment-rates-down-over-the-month-in-38-states-in-may-2020.htm Hence, the economic price Michigan's residents have paid for the Governor's "science-driven" strategies has been dear, but the strategies have hardly produced anything resembling the "life saving" of which the Governor routinely boasts.

dozen, including, notably, "…riots, or civil disorders." MCLA 30.402. This is the only explicit overlap between the "triggering events" cited in the two statutes and, hence, the only possible source of conflict between the two. Thus, MCLA 30.417 (d) shows unequivocally that the Legislature of 1976 was well aware of what the Legislature of 1945 had done and, rather than retroactively expand the list of events that would trigger 1945 Act emergency powers, and in the interest of avoiding conflict as to the one existing area of overlap, gave the governor his/her choice of statutory tools when confronting the **one** event mentioned in both laws, **rioting.**

As such, MCLA 30. 417 (d) actually further denudes the Governor's argument of credibility, as Judge Tukel explains. For another thing, given that the section clearly evinces knowledge of what the 1945 Act did and did not cover, it is significant that the 1976 Legislature did **not** add any of the other 20+ events mentioned in MCLA 30.402(e) to the preliminary language of the 1945 Act, MCLA 10.31 (1), as it clearly could have done.

VI. AMICI'S STANDING AND RIGHT TO INTERVENE

Two issues that have united all four appellate judges, however, have been the apparently firm conviction that we Amici, then acting as proposed Intervenors, either had no "standing" to complain about the Governor's actions, or should not be allowed to intervene in this case. In candor, it is far more important to **us** that this Court actually receive the fullest possible range of arguments on these plainly monumental issues than it is to be awarded some sort of personal "win". It is completely acceptable to us to have Judge Tukel and the Legislature get well deserved full credit for righting the errors into which his three colleagues wandered. Hence, we will linger on these topics as briefly as possible.

A. STANDING

The Governor has repeatedly challenged the standing of the Legislature to question the legal vitality of her EO's and SHO's, raising the possibility that, had the COC or COA agreed with her, no one would be permitted to argue the merits of this dispute. She has, in briefing below, semi-conceded that "private citizens" would have standing to debate these issues[7]. We are, obviously, private citizens who have been negatively impacted by the Governor's EO's and Stay Home Orders (SHO's). Among the litigants, we are the only ones who have spent any time under the viable threat of arrest or fining for, as the COA majority seemed to find entertaining, working outside of our homes too often. See COA Order 4, p. 20.

Under what this Court has announced as Michigan law, we have clear "standing" to advance these challenges. The lower courts ignored the clear authority of *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). In that signature case, this Court held that "Michigan standing jurisprudence should be restored to a limited, prudential approach that is consistent with long-standing historical approach to standing". *Id* at 352. In *Lansing*, four teachers and their union organizations sued the Lansing School District and the Lansing Board of Education. The four teachers argued that they had been "physically assaulted in the classroom…and each…incident…was reported to a school administrator". *Id.* Therefore, they sought and ultimately received standing to protest the failure of the local school board to follow a statute requiring the expulsion of dangerous students, with the Supreme Court reversing both the trial court and the COA on the issue. *Id.* at 355.

In this dispute, the lower courts have at least insinuated that being unlawfully threatened with criminal charges and fines for practicing a profession that, in our case, has been legal for

[7] This conviction did not prevent her from contesting our involvement in the COC case, however, which begs the question of whether the Governor actually recognizes **anyone's** "standing" to object to her self-proclaimed authority.

centuries, is something no private citizen in Michigan has "standing" to complain of. The judges perhaps unintentionally signaled their belief that our professional and personal prerogatives are, at most, a diverting intellectual issue they and other elected officials should get to debate among themselves, without our interference. We **hope** this Court will disabuse one and all of this unfortunate misperception of the role of taxpayer paid politicians and judges, especially those who have not been required to share the economic hardships visited on the rest of us this year.

In *Lansing,* this Court noted that, "The purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to 'ensure sincere and vigorous advocacy". *Id.,* citing *Detroit Fire Fighters Ass'n v Detroit,* 449 Mich 629; 633; 537 NW2d 436 (1995). Ironically, in this case, the only judge to have opined that, as we have argued, the 1945 Act does **not** authorize the Governor's actions, found himself forced to **disagree** with the Legislature's take on the issue in the process. *See* Tukel Dissent, p. 7. Perhaps the need for "sincere and vigorous advocacy" would have been better served had our involvement been more welcome.

B. INTERVENTION

MCR 2.209 (B) permits intervention when the proposed intervenors' claim or defense present a common question of law or fact with those presented in the "main action". We stand on what we briefed previously to this Court. While this may or may not be a topic this Court wishes to speak to, we felt it important to note, as discussed below.

As the COC aptly noted in May, it is generally held that leave to intervene be granted freely, unless doing so would prejudice the existing parties. The COA has previously acknowledged that the possibility that the judgment would be binding on the petitioner is sufficient to permit intervention. *Karrip v Cannonj,* 115 Mich App 726 (1982). Obviously, no one thinks that the resolution of this case **won't** affect we Amici and all 35,000 Michigan lawyers. At the COA level, we were, in fact, the first to file our brief on appeal. Had we filed an

independent suit, it would, in all likelihood, have been consolidated with this one anyway, as evidenced by the fact that this Court has already effectively consolidated this case with the Certified Question referred to it by the Sixth Circuit. Hence, it is no longer plausible to worry that we delayed the litigation of this case, or prejudiced any party. We qualified under the rule and we should have been allowed to participate.

In dealing with this topic, however, the COA majority made what one would hope are a number of clear, but honest mistakes. Otherwise, the Panel majority has demonstrated a regrettable lack of intellectual integrity.

We **did** indicate that the majority of the **issues** of fact and law advanced in the main action are, as the COA majority rushed to note, "virtually identical" to those presented by we Amici/Intervenors. Order 4, p. 21. What both the COC and the COA Panel ignored, however, was that, although we faced the same facts and issues the Legislature did, we advanced a distinctly different **argument** as it pertains to the scope of the 1945 Act and whether it empowers the Governor **at all** in the face of any disease. This is an argument reflected throughout Judge Tukel's dissent but, despite their claims to have done so, it is never actually confronted by **any** of the other three judges who have ruled on this case. Further, contrary to the COA majority's assertion, there is doubt whether our straightforward argument **was** "already posed" by the Legislature[8]. To put it plainly, three judges in the COC and COA have displayed the unsettling habit of first pretending that the Legislature has presented our argument, which it never actually has, and then pretending to have confronted, analyzed, and rejected our argument, which they never actually did. In fact, all they have done is to sidestep this argument, by setting up the Legislature's "implicitly limited geographic area" argument as a straw man to joust with.

[8] In point of fact, the COA majority actually opined that the Legislature had effectively **waived** this argument, before they turned about and claimed the Legislature "already posed" it as a basis for denying our intervention. Order 4, pp. 14-15, 21.

It is also noteworthy that the COA Panel majority also appears to have mis-cited or misinterpreted the significance of *Walsh v City of River Rouge,* 385 Mich 623, 640 (1971), insinuating that this Court has weighed in on and denied the power of the Legislature to contest gubernatorial emergency orders issued under the EPGA. Order 4, p. 3. Actually, *Walsh* was entirely devoted to analyzing the power of local mayors to exercise emergency powers similar to those described in the EPGA.

> It is against this background of competing policy considerations that we must resolve the legal question as to whether PA 1945, No 302, embodies a legislative intent to lodge exclusive powers in the Governor, **thereby pre-empting the field from local governments.**
>
> 385 Mich @ 634-35 **(emphasis s added)**

Thus, this Court has **not,** as the majority claims, ruled that the Legislature is without "any active role" in checking the Governor's issuance of various orders during this pandemic, even were one to consider a pandemic to be covered by the 1945 Act.

Of the four appellate judges to hear this case, only Judge Tukel has actually confronted and devoted any serious[9] critical attention to the threshold issue of whether the 1945 Act/EPGA empowers any governor to act unilaterally in the face of any disease, as we did. His conclusions and analysis are detailed, thoughtful, well researched and impeccably reasoned, and entirely consonant with ours, but not with any of his colleagues. We should have been allowed to intervene, not have our independent argument imagined out of existence by everyone except one

[9] The extent of the Majority's analysis of this threshold issue was to observe, without citation to any authority, and certainly without confronting the history of this Court's use of the language that appears on pp. 8-12 above (which was also briefed to them, by us), that "A statewide outbreak of disease such as Covid-19 **can certainly constitute** a great public crisis, disaster or catastrophe…". Order 4, p. 1 **(emphasis added)**. They similarly ignored the analysis on pp. 12-14, above, and Judge Tukel's thoughtful research as to the history of the public health statutes appearing in his footnote 17. With due respect, every author and likely reader of this brief is well aware that any number of events "can" be and often **are** described as "crises", "disasters", "catastrophes" and "emergencies" by people ranging from frenetic litigants to opportunistic politicians, to teenagers who badly want a new I-phone. Whether these terms, as a matter of law, include epidemics is a somewhat different legal question.

dissenting judge. Hopefully, this Court will give both it and Judge Tukel's masterful dissent heed, and, if so inclined, allow us some time to argue it when this Court convenes in early September.

VII. CONCLUSION

"The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority." *Township of Lake v Millar,* 257 Mich 135 (1932). The 1945 Act/EPGA never empowered any Michigan governor in the face of any disease. Therefore, in the absence of a new legislative endorsement under the 1976 Act, the Governor's contested EO's have no legally binding force as to any Michigan resident, or business.

This is not to suggest that, when faced with this or similar challenges in the future, Michigan's governor will be powerless to act swiftly to stabilize the situation. It merely means that, as the 1976 Act wisely provides, the time allotted to unilateral action is limited to no more than 28 days, after which the more normal collaborative governing processes must resume, for the benefit of all of the citizenry.

Finally, if the governmental parties to this case can compose their differences and achieve a consensual set of regulations, the issues of constitutionality may or, hopefully, may not come to the fore. At least some progress will happen. If they cannot achieve a hopefully reasoned compromise, one which restores the people of Michigan's full rights and liberties with all deliberate but prudent speed, the people and businesses of Michigan should not be subject to any further infringements on their rights and liberties, and their ability to exercise fully adult "prudence" in how they conduct their social and business lives. These people, over nine million Michigan residents and taxpayers, have been unlawfully held hostage by one politician for over

four months, and face any number of further months of similar mistreatment as things stand. This must end.

August 27, 2020

Respectfully Submitted,

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GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-172

Protecting workers who stay home, stay safe when they or their close contacts are sick

Rescission of Executive Order 2020-166

The lapsing of the federal supplement to unemployment benefits at the end of July means that more Michiganders feel pressure to go to work even when they are sick with COVID-19. Doing so, however, risks spreading infection at the workplace, which frustrates efforts to reopen the economy and get our kids back to school. Individuals who have COVID-19, or who may have COVID-19, must be encouraged to isolate themselves from others.

This executive order therefore prohibits employers from discharging, disciplining, or retaliating against employees who make the responsible choice to stay home when they or their close contacts are sick. The order has again been revised to clarify the definition of the principal symptoms of COVID-19.

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended (EMA), MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended (EPGA), MCL 10.31 et seq.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order

2020-4 and declared both a state of emergency and a state of disaster across the State of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And on April 30, 2020, finding that COVID-19 had created emergency and disaster conditions across the State of Michigan, I issued Executive Order 2020-67 to continue the emergency declaration under the EPA, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the EMA.

Those executive orders have been challenged in Michigan House of Representatives and Michigan Senate v. Whitmer. On August 21, 2020, the Court of Appeals ruled that the Governor's declaration of a state of emergency, her extensions of the state of emergency, and her issuance of related EOs clearly fell within the scope of the Governor's authority under the EPGA.

On August 7, 2020, I issued Executive Order 2020-165, again finding that the COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan. That order constituted a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. And, to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature had declined to grant an extension request, that order also constituted a state of emergency and state of disaster declaration under that act.

The Emergency Powers of the Governor Act provides a sufficient legal basis for issuing this executive order. In relevant part, it provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

Nevertheless, subject to the ongoing litigation and the possibility that current rulings may be overturned or otherwise altered on appeal, I also invoke the Emergency Management Act as a basis for executive action to combat the spread of COVID-19 and mitigate the effects of this emergency on the people of Michigan, with the intent to preserve the rights and protections provided by the EMA. The EMA vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)–(2). This executive order falls within the scope of those powers and duties, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has not granted an extension request, they too provide a sufficient legal basis for this order.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. It is the public policy of this state that an employer shall not discharge, discipline, or otherwise retaliate against an employee for staying home when he or she is at particular risk of infecting others with COVID-19. To effectuate that policy:

(a) Employers are prohibited from discharging, disciplining, or otherwise retaliating against an employee described in sections 2 or 3 of this order for staying home from work for the periods described in those sections.

(b) Employers must treat such an employee as if he or she were taking medical leave under the Paid Medical Leave Act, 2018 PA 338, as amended, MCL 408.961 et seq.

(1) To the extent that the employee has no paid leave, the leave may be unpaid. Employers are permitted, but not required, to debit any hours that an employee described in sections 2 or 3 of this order stays home from work from the employee's accrued leave.

(2) The length of such leave is not limited by the amount of leave that an employee has accrued under MCL 408.963 and must extend, whether paid or unpaid, as long as the employee remains away from work within the time periods described in sections 2 or 3 of this order.

(c) Nothing in this section shall be taken to prevent an employer from discharging or disciplining an employee:

(1) Who is allowed to return to work under sections 2 or 3 of this order but declines to do so;

(2) With the employee's consent (e.g., if the employee asks to be discharged); or

(3) For any other reason that is not unlawful.

(d) The director of the Department of Labor and Economic Opportunity shall have authority to enforce this order in the same manner and to the same extent as the director enforces the Paid Medical Leave Act under section 7 of that act, MCL 408.967. In addition, the director shall refer all credible complaints of violations to the relevant licensing authority.

2. Subject to the exceptions in section 5 of this order, it is the public policy of this state that any and all individuals who test positive for COVID-19 or who display the principal symptoms of COVID-19 should (apart from seeking medical care) remain in their home or place of residence until:

(a) 24 hours have passed since the resolution of fever without the use of fever-reducing medications;

(b) 10 days have passed since their symptoms first appeared or since they were swabbed for the test that yielded the positive result; and

(c) other symptoms have improved.

3. Subject to the exceptions in section 5 of this order, it is the public policy of this state that any and all people who have had close contact with an individual who tests

positive for COVID-19 or with an individual who displays the principal symptoms of COVID-19 should remain in their home or place of residence (apart from seeking medical care) until either:

(a) 14 days have passed since the last close contact with the sick or symptomatic individual; or

(b) The individual displaying COVID-19 symptoms receives a negative COVID-19 test.

4. Section 3 does not apply to the following classes of workers, provided that their employers' rules governing occupational health allow them to go to work:

(a) Health care professionals.

(b) Workers at a health care facility, as defined in section 7(d) of this order.

(c) First responders (e.g., police officers, fire fighters, paramedics, emergency medical technicians).

(d) Child protective service employees.

(e) Workers at child caring institutions, as defined in section 1 of Public Act 116 of 1973, MCL 722.111.

(f) Workers at adult foster care facilities, as defined in the Adult Foster Care Facility Licensing Act, MCL 400.703(4).

(g) Workers at correctional facilities.

5. An individual described in sections 2 or 3 of this order who voluntarily returns to work (i.e. without threat of discharge, discipline, or retaliation from their employer) prior to the periods specified in sections 2 or 3, respectively, shall not be entitled to the protections against discharge, discipline, or retaliation provided under section 1 of this order.

6. It is the public policy of this state that individuals with a suspected or confirmed COVID-19 infection or who have had close contact with such an individual (i.e. individuals described in sections 2 and 3 of this order) should leave the home or place of residence only:

(a) To the extent absolutely necessary to obtain food, medicine, medical care, or supplies that are needed to sustain or protect life, where such food, medicine, medical care, or supplies cannot be obtained via delivery. All food, medicine, and supplies should be picked up at the curbside to the fullest extent possible.

(b) To engage in outdoor activity, including walking, hiking, running, cycling, or any other recreational activity consistent with remaining at least six feet from people from outside their household.

7. For purposes of this order:

   (a) "The principal symptoms of COVID-19" are (i) any one of the following not explained by a known medical or physical condition: fever, an uncontrolled cough, shortness of breath; or (ii) at least two of the following not explained by a known medical or physical condition: loss of taste or smell, muscle aches ("myalgia"), sore throat, severe headache, diarrhea, vomiting, abdominal pain.

   (b) "Employer" means the same as it does in section 2(f) of the Paid Medical Leave Act, MCL 408.962(f), except that it shall also include employers with fewer than 50 employees.

   (c) "Close contact" means being within six feet of an individual for fifteen minutes.

   (d) "Health care facility" means the following facilities, including those which may operate under shared or joint ownership:

      (1) The entities listed in section 20106(1) of the Public Health Code, 1978 PA 368, as amended MCL 333.20106(1).

      (2) State-owned hospitals and surgical centers.

      (3) State-operated outpatient facilities.

      (4) State-operated veterans facilities.

      (5) Entities used as surge capacity by any of the entities listed in subdivisions (1)-(4) of this subsection.

8. Nothing in this order shall be taken to create a private right of action against an employer for failing to comply with section 1 of this order or against an individual for acting contrary to the public policies of sections 2, 3, 5, or 6 of this order.

9. Executive Order 2020-166 is rescinded, except that the protections it afforded to workers during the time it was in effect remain effective.

10. This order is effective immediately.

Given under my hand and the Great Seal of the State of Michigan.

Date: August 27, 2020

Time: 1:45 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE