

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN HOUSE OF
REPRESENTATIVES
and MICHIGAN SENATE,

Plaintiffs-Appellants,

v.

GRETCHEN WHITMER, in her
official capacity as Governor for the
State of Michigan,

Defendant-Appellee.

Supreme Court No.

Court of Appeals No. 353655

Court of Claims No. 20-000079-MZ

**This appeal involves a ruling that
State governmental action is
invalid.**

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Exhibit 1

Governor's April 27, 2020 Letter



STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST
LT. GOVERNOR

RECEIVED by MSC 8/28/2020 11:10:25 AM

April 27, 2020

VIA EMAIL

The Honorable Mike Shirkey
Senate Majority Leader
Michigan Senate
P.O. Box 30036
Lansing, Michigan 48909

The Honorable Lee Chatfield
Speaker of the House
Michigan House of Representatives
P.O. Box 30014
Lansing, Michigan 48909

Re: Extension of emergency and disaster declaration in Executive Order 2020-33

Speaker Chatfield and Leader Shirkey,

The COVID-19 pandemic continues to ravage our state. To date, Michigan has 38,210 confirmed cases of COVID-19 and 3,407 confirmed deaths caused by the disease. Many thousands more are infected but have not been tested. This disease, caused by a novel coronavirus not previously identified in humans, can easily spread from person to person and can result in serious illness or death. There is currently no approved vaccine or antiviral treatment.

To fight this unprecedented threat, I issued Executive Order 2020-4 on March 10, 2020, which declared a state of emergency across our state. On April 1, 2020, I issued Executive Order 2020-33, which rescinded the previous declaration and declared a new state of emergency and a state of disaster, reflecting the broader crisis we face. Since I first declared an emergency, my administration has taken aggressive measures to fight the spread of the virus and mitigate its impacts, including temporarily closing schools, restricting the operation of places of public accommodation, allowing medical professionals to practice to the full extent of their training regardless of licensure, limiting gatherings and travel, requiring workers who are not necessary to sustain or protect life to stay home, and building the public health infrastructure necessary to contain the infection.

There remains much more to be done to stave off the sweeping and severe health, economic, and social harms this disease poses to all Michiganders. To meet these demands, my administration must continue to use the full range of tools available to protect the health, safety, and welfare of our state and its residents. I welcome your and your colleagues' sustained partnership in fighting this pandemic. While I have multiple independent powers to address the challenges we now face, the powers invoked by Executive Order 2020-33 under the Emergency Management Act, 1976 PA 390, as amended, MCL 30.403 et seq., provide important protections to the people of Michigan, and I hope you agree they should remain a part our state's ongoing efforts to combat this pandemic throughout the full course of that fight.

For that reason, and in shared recognition of what this fight will require from us, I request a concurrent resolution under MCL 30.403(3) and (4) extending the state of emergency and the state of disaster declared in EO 2020-33 under the Emergency Management Act by 28 days from the date that Senate Concurrent Resolution No. 24 expires. As to the individual emergency orders I have issued, including Executive Order 2020-59, these measures expire at the time stated in each order, unless otherwise continued.

Sincerely,



Gretchen Whitmer
Governor

cc: House Democratic Leader Christine Greig; Senate Democratic Leader Jim Ananich

Exhibit 2

May 22, 2020 Order of the Court of
Claims

STATE OF MICHIGAN
COURT OF CLAIMS

MICHIGAN HOUSE OF REPRESENTATIVES,
and MICHIGAN SENATE,

OPINION AND ORDER

Plaintiffs,

v

Case No. 20-000079-MZ

GOVERNOR GRETCHEN WHITMER,

Hon. Cynthia Diane Stephens

Defendant.

_____ /

This matter arises out of Executive Orders issued by Governor Gretchen Whitmer in response to the COVID-19 pandemic. Neither the parties to this case nor any of the amici deny the emergent and widespread impact of Covid-19 on the citizenry of this state. Neither do they ask this court at this time to address the policy questions surrounding the scope and extent of contents of the approximately 90 orders issued by the Governor since the initial declaration of emergency on March 10, 2020 in Executive Order No. 2020-4. The Michigan House of Representatives and the Michigan Senate (Legislature) in their institutional capacities challenge the validity of Executive Orders 2020-67 and 2020-68, which were issued on April 30, 2020. They have asked this court to declare those Orders and all that rest upon them to be invalid and without authority as written. The orders cited two statutes, 1976 PA 390, otherwise known as the Emergency Management Act (EMA); and 1945 PA 302, otherwise known as the Emergency Powers of Governor Act (EPGA). In addition, the orders cite Const 1963, art 1, § 5, which generally vests the executive power of the state in the Governor. This court finds that:

1. The issue of compliance with the verification language of MCL 600.6431 is abandoned.
2. The Michigan House of Representative and Michigan Senate have standing to pursue this case.
3. Executive Order 2020-67 is a valid exercise of authority under the EPGA and plaintiffs have not established any reason to invalidate any executive orders resting on EO 2020-67.
4. The EPGA is constitutionally valid.
5. Executive Order No. 2020-68 exceeded the authority of the Governor under the EMA.

I. BACKGROUND

The Court will dispense with a lengthy recitation of the pertinent facts and history and will instead jump to the Governor's declaration of a state of emergency¹ as well as a state of disaster² under the EMA and the EPGA on April 1, 2020, in response to the COVID-19 pandemic. Executive Order No. 2020-33. Both chambers of the Legislature adopted Senate Joint Resolution No. 24 which approved "an extension of the state of emergency and state of disaster declared by Governor Whitmer in Executive Order 2020-4 and Executive Order 2020-33 through April 30, 2020. . . ." The Senate Concurrent Resolution cited the 28-day legislative extension referenced in MCL 30.403 of the EMA.

¹ The EPGA does not define the term "state of emergency." However, the EMA defines the term as follows: "an executive order or proclamation that activates the emergency response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected." MCL 30.402(q).

² While the EPGA does not use, let alone define, the term "state of disaster," the EMA defines the term as "an executive order or proclamation that activates the disaster response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected." MCL 30.402(p).

The public record affirms that the governor asked the legislative leadership to extend the state of disaster and emergency on April 27, 2020. The Legislature demurred and instead passed SB 858, a bill without immediate effect, which addressed some the subject matter of several of the COVID-19-related Executive Orders, but did not extend the state of emergency or disaster or the stay-at-home order. The Governor vetoed SB 858.

On April 30, 2020, the Governor issued Executive Order 2020-66 which terminated the state of emergency and disaster that had previously been declared under Executive Order 2020-33. The order opined that “the threat and danger posed to Michigan by the COVID-19 pandemic has by no means passed, *and the disaster and emergency conditions it has created still very much exist.*” Executive Order No. 2020-66 (emphasis added). However, EO 2020-66 acknowledged that 28 days “have lapsed since [the Governor] declared states of emergency and disaster under the Emergency Management Act in Executive Order 2020-33.” *Id.* The order declared there was a “clear and *ongoing* danger to the state” (Emphasis added).

On the same day, and only one minute later, the Governor issued two additional executive orders. First, she issued Executive Order No. 2020-67, which cited the EPGA. [In addition, the order contained a cursory citation to art 5, § 1.] EO 2020-67 noted the Governor’s authority under the EPGA to declare a state of emergency during ““times of great public crisis . . . or similar public emergency within the state. . . .”” *Id.* quoting MCL 10.31(1). The order noted that such declaration does not have a fixed expiration date. *Id.* Then, and as a result of the ongoing COVID-19 pandemic, EO 2020-67 declared that a “state of emergency remains declared across the State of Michigan” under the EPGA. The order stated that “[a]ll previous orders that rested on Executive Order 2020-33 now rest on this order.” *Id.* The order was to take immediate effect. *Id.*

In addition to declaring that a state of emergency “remained” under the EPGA, the Governor simultaneously issued Executive Order No. 2020-68; this order declared a state of emergency and a state of disaster under the EMA. [In addition, like all previous orders, the order contained a vague citation to art 5, § 1 as well.] Hence, EO 2020-68 essentially reiterated the very same states of emergency and disaster that the Governor had, approximately one minute earlier, declared terminated. The order declared that the states of emergency and disaster extended through May 28, 2020 at 11:59 p.m., and that all orders that had previously relied on the prior states of emergency and disaster declaration in EO 2020-33 now rest on this order, i.e., EO 2020-68.

The House of Representative and the Senate subsequently filed this case asking for an expedited hearing and a declaration that EO 2020-67 and EO 2020-68, and any other Executive Orders deriving their authority from the same, were null and void.

COMPLIANCE WITH MCL 600.6431

The Governor noted in her reply brief that the complaint, as originally filed in this court did not meet the verification requirement of MCL 600.6431(2)(d). At oral argument the Governor acknowledged that the verification requirements were not met when the complaint was originally filed; however, a subsequent filing was notarized in accordance with the statute. The Governor also acknowledged that the failure to sign the verified pleading before a person authorized to administer oaths was not necessary for invoking this Court’s jurisdiction. Finally, the Governor agreed that she was not seeking dismissal of the action based on plaintiffs’ initial lack of compliance. For those reasons this Court will consider the issue moot and decline any analysis of the arguments predicated on MCL 600.6431.

STANDING

The issue of standing is central to this case as it is with all litigation. Courts exist to manage actual controversies between parties to whom those controversies matter. The Legislature has cited MCR 2.605 in support of its standing to pursue this declaratory action. The Legislature asserts that it has a need for guidance from this Court in order to determine how it will proceed to protect what it articulates as its special institutional rights and responsibilities. The Governor challenges whether the Legislature has standing to bring this suit. The Governor argues that the institution of the Legislature has no more interest in the outcome of this suit than any member of the public. She further claims that the Legislature does not need the guidance of the Court to determine how to carry out its constitutional duties. It is the opinion of this Court that the Legislature has standing to pursue its claims before this Court.

Both parties cite the seminal case on the issue of standing, *Lansing Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). In that case, the Supreme Court refined the concept of standing under the Michigan Constitution. In doing so, the Court rejected the federal standing analysis and articulated an analytical framework rooted in the Michigan Constitution. The *Lansing Schs Ed Ass'n* Court looked to whether a cause of action was authorized by the Legislature. Where the Legislature did not confer a right to a specific cause of action, a plaintiff must have “a special injury or right, or substantial interest, that will be detrimentally affected in a manner different than the citizenry at large” *Id.* at 372.

The Governor relies heavily on the recent case of *League of Women Voters of Mich v Secretary of State*, __ Mich App __; __ NW2d __ (2020) (Docket Nos. 350938; 351073), which is itself now on appeal to the Michigan Supreme Court. That case, similar to the instant case, was brought under the aegis of MCR 2.605 and asked the court to declare that an Attorney General Opinion’s interpretation of a statute was invalid. The Court of Appeals majority in *League of*

Women Voters examined the issue through the lens of MCR 2.605 and found that in that case the institution of the Legislature had no standing: “Given the definition of ‘actual controversy’ for the purposes of MCR 2.605, we are not convinced that the Legislature has demonstrated standing to pursue a declaratory action here. No declaratory judgment is necessary to guide the Legislature’s future conduct in order to preserve its legal rights.” *Id.*, slip op at p. 7.

League of Women Voters was the first examination of the issue of institutional standing in Michigan. For that reason, the court focused on the logic of the Supreme Court’s decision in *Dodak v State Admin Bd*, 441 Mich 547; 495 NW2d 539 (1993), which analyzed a standing issue in relation to individual legislators. *Dodak*, like this case, presented a conflict between the executive and legislative branches of state government. That Court, like this one, is mindful that in such instances the issue of legislative standing requires a litigant to overcome “a heavy burden because, courts are reluctant to hear disputes that may interfere with the separation of powers between the branches of government.” *League of Women Voters*, __ Mich App at __, slip op at p. 8 (citation and quotation marks omitted; cleaned up). There must be a “personal and legally cognizable interest peculiar” to the legislative body, rather than a “generalized grievance that the law is not being followed.” *Id.* (citations and quotation marks omitted). In *Dodak* four legislators pressed a case concerning what they asserted was an abrogation of their individual rights as members of the appropriations committees when the State Administrative Board was allowed to redistribute funds allocated by the Legislature between departments of state government. Ultimately the Supreme Court found that the chair of the appropriation committee did in fact have a peculiar and special right and a potential for a personal injury sufficient to acquire standing. In *Dodak*, 441 Mich at 557, the Supreme Court cited with approval federal authorities holding that an individual legislator “only has standing if he alleges a diminution of congressional influence

which amounts to a complete nullification of his vote, with no recourse in the legislative process.’ Dodak, 441 Mich at 557, quoting *Chiles v Thornburgh*, 865 F3d 1197, 1207 (CA 11, 1989). In *League of Women Voters* the institution claimed its right was to have a constitutionally correct interpretation of certain legislation. The *League of Women Voters* Court found that indeed every citizen had such a right and the Legislature once it enacted a statute had no special relationship to it. *League of Women Voters*, __ Mich App at __, slip op at p. 8. The case did not, remarked the Court, concern the validity of any particular legislative member’s vote. *Id.*

While it is a close question, this Court finds that the issue presented in this case is whether the Governor’s issuance of EO 2020-67 and/or EO 2020-68 had the effect of nullifying the Legislature’s decision to decline to extend the states of emergency/disaster. The United States Court of Appeals for the Sixth Circuit recently found that a legislative body under certain circumstances does have standing. See *Tennessee General Assembly v United States Dep’t of State*, 931 F3d 499 (CA 6, 2019). The logic of their analysis is persuasive and compatible with both *Dodak* and *League of Women Voters*. In *Tennessee General Assembly*, the Sixth Circuit surveyed two cases from the Supreme Court of the United States to illustrate when a legislative body, or portion thereof, may have standing. *Id.* at 508, citing *Coleman v Miller*, 307 US 433; 59 S Ct 972; 83 L 3d 1385 (1939); and *Ariz State Legislature v Ariz Independent Redistricting Comm*, __ US __; 135 S Ct 2652; 192 L Ed 704 (2015). Surveying *Coleman* and its progeny, the Sixth Circuit explained that, “legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.” *Tennessee General Assembly*, 931 F3d at 509 (citation and quotation marks omitted). The Sixth Circuit further noted that *Arizona State Legislature* Court also conferred standing under article III to a legislature. In

that case, the legislature claimed that the power to redistrict accrued to them under the Arizona constitution. The challenged action in that case was “more similar to the ‘nullification’ injury in *Coleman*.” *Tennessee General Assembly*, 931 F3d at 510, citing *Arizona State Legislature*, ___ US at ___; 135 S Ct at 2665. To that end, the proposal at issue would have completely nullified any legislative vote, and there was “a sufficiently concrete injury to the Legislature’s interest in redistricting . . . that the Legislature had Article III standing.” *Id.*, citing *Arizona State Legislature*, ___ US at ___; 135 S Ct 2665-2666.

The injury claimed in this case is that EO 2020-67 and EO 2020-68 nullified the decision of the Legislature to not extend the state of emergency or disaster. The Legislature claims this right is exclusively theirs as an institution under the EMA and this state’s Constitution. Understanding that *Lansing Schs Ed Ass’n* specifically departed from the Article III analysis of its predecessor cases, the nullification argument is nevertheless not incompatible with the *Lansing Schs Ed Ass’n* focus on “special injury.” This type of injury sounds similar in the nature of the right that was taken from the one plaintiff who had standing in *Dodak*, 441 Mich at 559-560, i.e., the member of the House Appropriations Committee who lost his right to approve or disapprove transfers following the Governor’s actions.

In this respect the instant matter is distinguishable from *League of Women’s Voters*, ___ Mich App at ___, slip op at 9, where the Court of Appeals remarked that “the validity of any particular legislative member’s vote is not at issue[.]” Plaintiffs have at least a credible argument that they are not merely seeking to have this Court resolve a lost political battle, nor are plaintiffs only generally alleging that the law is not being followed. Cf. *id.* at 8. Rather, they are alleging that the Governor eschewed the Legislature’s role under the EMA and nullified an act of the legislative body as a whole. This is an injury that is unique to the Legislature and it shows a

substantial interest that was (allegedly) detrimentally affected in a manner different than the citizenry at large. Cf. *id.* at 7 (discussing standing, generally).

As a final argument on standing, the Governor contends that the Legislature does not need declaratory relief to guide its future actions. She and at least one amicus brief note that the Legislature has in fact moved toward amending the EPGA. At oral argument the Legislature was almost invited to amend either the EMA or EPGA. However, while the legislative body is well aware of its power to enact, amend, and repeal statutes, this Court believes that guidance as to the issues presented in this case will avoid a multiplicity of litigation. The parties here have pled facts of an adverse interest which necessitate the sharpening of the issues raised.

ANALYSIS OF AUTHORITIES CITED IN THE CHALLENGED EXECUTIVE ORDERS

The Executive Orders at issue cite three sources of authority: the EMA, the EPGA, and Const 1963, art 5, § 1. The Court will examine each to determine whether the Governor possessed authority to issue the challenged orders.

ARTICLE 5 OF THE MICHIGAN CONSTITUTION

The challenged orders in this case all contain a brief citation to art 5, § 1. This section of the Michigan Constitution vests “executive power” in the Governor. See Const 1963, art 5, § 1. The Governor invokes this power in claiming authority to issue the challenged Executive Orders. The Legislature has argued that Governor errs in relying on her art 5, § 1 “executive power” to issue orders in response to the pandemic. This court agrees that “Executive power” is merely the “authority exercised by that department of government which is charged with the administration or execution of the laws.” *People v Salsbury*, 134 Mich 537, 545; 96 NW 936 (1903). In fact, the

Governor has not claimed in her briefing or at oral argument that she had the authority to enact EO 2020-67 or EO 2020-68 absent an enabling statute. Through two distinct acts, stated in plain and certain terms, the Legislature has granted the Governor broad but focused authority to respond to emergencies that affect the State and its people. The Governor’s challenged actions—declaring states of disaster and emergency during a worldwide public health crisis—are required by the very statutes the Legislature drafted. Thus, the focus of this opinion, is on those two distinct acts, the EMA and EPGA.

THE EPGA AUTHORIZED EO 2020-67 AND SUBSEQUENT ORDERS RELIANT THEREON

The Court will first turn its attention to the EPGA and to plaintiffs’ arguments that the EPGA did not permit the Governor to issue a statewide emergency declaration in EO 2020-67 or any subsequent orders reliant on EO 2020-67. Plaintiffs advance two arguments in support of their position: (1) first, they contend that the EPGA, unlike the EMA, does not grant authority for a *statewide* declaration of emergency, but instead only confers upon the Governor the authority to issue a local or regional state of emergency; (2) second, plaintiffs argue that if the EPGA does grant authority for a statewide state of emergency, the delegation of legislative authority accomplished by the act is unconstitutional. The Court rejects both of plaintiffs’ contentions regarding the EPGA and concludes that EO 2020-67, and any orders relying thereon, remain valid.

Turning first to the scope of the EPGA, the Court notes that the statute bestows broad authority on the Governor to declare a state of emergency and to take necessary action in connection with that declaration. See MCL 10.31(1). Under the EPGA, 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.” *Id.*

The Legislature stated that its intent in enacting MCL 10.32 was to “to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster.” Section 2 of the EPGA continues, declaring that the provisions of the EPGA “shall be broadly construed to effectuate this purpose.” *Id.*

Reading the EPGA as a whole, as this Court must do, see *McCahan v Brennan*, 492 Mich 730, 738-739; 822 NW2d 747 (2012), the Court rejects plaintiffs’ attempt to limit the scope of the EPGA to local or regional emergencies only. Informing this decision is the statement of legislative intent in MCL 10.32, which declares that the EPGA was intended to confer “sufficiently broad power” on the Governor in order to enable her to respond to public disaster or crisis. It would be inconsistent with this intent to find that “sufficiently broad power” to respond to matters of great public crisis is constrained by contrived geographic limitations, as plaintiffs suggest. The Court also notes that this “sufficiently broad” power granted by the Legislature references “the police power of the state[.]” MCL 10.32. In general, the police power of the state refers to the state’s inherent power to “enact regulations to promote the public health, safety, and welfare” of the citizenry at large. See *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 73; 367 NW2d 1 (1985). It cannot be overlooked that the police power of the state, which undeniably pertains to the state as a whole, see, e.g., *Western Mich Univ Bd of Control v State*, 455 Mich 531, 536; 565 NW2d 828 (1997), was given to a state official, the Governor, who possesses the executive power of the entire state. See Const 1963, art 5, § 1. Plaintiffs’ attempts to read localized restrictions on broad, statewide authority given to this state’s highest executive official are unconvincing.

The Act has a much broader application than plaintiffs suggest. The Act repeatedly uses terms such as “great public crisis,” “public emergency,” “public crisis,” “public disaster,” and

“public safety” when referring to the types of events that can give rise to an emergency declaration. See MCL 10.31(1); MCL 10.32. These are not terms that suggest local or regional-only authority. See *Black’s Law Dictionary* (11th ed) (defining public safety). See also *Merriam-Webster Online Dictionary*, <<https://www.merriam-webster.com/dictionary/public>> (accessed May 11, 2020) (defining “public” to mean “of, relating to, or affecting *all the people of the whole area of a nation or state*”) (emphasis added). Taking these broad terms and imposing limits on them as plaintiffs suggest would run contrary to MCL 10.32’s directive to broadly construe the authority granted to the Governor under the EPGA. See *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) (explaining that it is “well established that to discern the Legislature’s intent, statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole.”). And in this context, it is apparent the EPGA employs broad terminology that empowers the Governor to act for the best interests of all the citizens of this state, not just the citizens of a particular county or region. It would take a particularly strained reading of the plain text of the EPGA to conclude that a grant of authority to deal with a public crisis that affects all the people of this state would somehow be constrained to a certain locality. Moreover, adopting plaintiffs’ view would require the insertion into the EPGA of artificial barriers on the Governor’s authority to act which are not apparent from the text’s plain language. To that end, even plaintiffs would surely not quibble that the broad authority bestowed on the Governor under the act would permit her to respond to an emergency situation that affected one county, or perhaps even multiple counties. Under plaintiffs’ view, if that emergency became too large and it affected the entire state, the Governor would have to pick and choose which citizens could be assisted by the powers granted by the EPGA because, according to plaintiffs, rendering emergency assistance to the state’s entire citizenry is not an option under the EPGA. While plaintiffs generally contend there

are localized or regionalized limitations on the Governor's authority under the EPGA, they do not explain how to demarcate the precise geographic limitations on the Governor's authority under the EPGA—and this is for good reason: there are no such limitations.

In arguing for a contrary interpretation of the scope of the Governor's authority under the EPGA, plaintiffs selectively rely on parts of the statute and ignore the contextual whole. For instance, they focus on the notion that a city or county official may apply for an emergency declaration in order to support their assertion that the EPGA only applies to local or regional emergency declarations. In doing so, plaintiffs ignore that the same sentence permitting local officials to apply for an emergency declaration also authorizes two state officials—one of whom is the Governor herself—to apply for or make an emergency declaration. See MCL 10.31(1). Equally unpersuasive is plaintiffs' fixation on the word "within" as it appears in MCL 10.31(1). Plaintiffs note that MCL 10.31(1) permits the Governor to declare a state of emergency in response to "great public crisis, disaster, rioting, catastrophe, or similar public emergency *within the state*" (emphasis added). According to plaintiffs, the use of the word "within" means that an emergency can only be declared at a particular location *within* the state, and precludes the state of emergency from being declared for the entire state. However, a common understanding of the word "within," including the same definition plaintiffs cite, demonstrates the flaw in plaintiffs' position. The word "within" is generally used "as a function word to indicate enclosure or containment." *Merriam-Webster's Online Dictionary*, <<https://www.merriam-webster.com/dictionary/within>> (accessed May 20, 2020). For instance, it can refer to "the scope or sphere of" something, such as referring to that which is "within the jurisdiction of the state." *Id.* In other words, the term "within" refers to the jurisdictional bounds of the state. The authority to declare an emergency "within" the state is, quite simply, the authority to declare an emergency across the entire state.

Plaintiffs next argue that, when the EPGA is read together with the EMA, it is apparent that the EPGA is not meant to address matters of statewide concern. In general, both the EPGA and the EMA grant the Governor power to act during times of emergency. “Statutory provisions that relate to the same subject are *in pari materia* and should be construed harmoniously to avoid conflict.” *Kazor v Dep’t of Licensing & Regulatory Affairs*, 327 Mich App 420, 427; 934 NW2d 54 (2019). “The object of the *in pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes. If statutes lend themselves to a construction that avoids conflict, that construction should control.” *In re AGD*, 327 Mich App 332, 344; 933 NW2d 751 (2019) (citation and quotation marks omitted).

Here, when the EMA and the EPGA are read together, it is apparent that there is no conflict between the two acts even though they address similar subjects. While plaintiffs are correct in their assertion that the EMA contains more sophisticated management tools, that does not mean that the EPGA is limited to local and regional emergencies only. Nor does the fact that both statutes apply to statewide emergencies mean that one act renders the other nugatory. Instead, the Court can harmonize the two statutes, see *In re AGD*, 327 Mich App at 344, by recognizing that while both statutes permit the Governor to declare an emergency, the EMA equips the Governor with more sophisticated tools and options at her disposal. The use of these enhanced features comes at some cost, however, because the EMA is subject to the 28-day time limit contained in MCL 30.405(3)-(4), whereas an emergency declaration under the less sophisticated EPGA has no end date. Finally, plaintiffs’ contentions regarding a conflict between the EMA and the EPGA are belied by MCL 30.417. That section of the EMA expressly states that nothing in the EMA was intended to “Limit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of

the Michigan Compiled Laws” MCL 30.417(d). In other words, the EMA explicitly recognizes the EPGA and it recognizes that the Governor possesses similar, but different, authority under the EPGA than she does under the EMA.

Plaintiffs’ final attempt to assert that the EPGA was intended as a local or regional act is to point to what they describe as the history of the EPGA. In general, the legislative history of an act and the historical context of a statute can be considered by a court in ascertaining legislative intent; however, these sources are generally considered to have little persuasive value. See, e.g., *In re AGD*, 327 Mich App 342 (generally rejecting legislative history as “a feeble indicator of legislative intent and . . . therefore a generally unpersuasive tool of statutory construction”) (citation and quotation marks omitted). Here, the history cited by plaintiffs is particularly unpersuasive because, having reviewed the same, the Court concludes that it does not even address or suggest the local limit plaintiffs attempt to impose on the EPGA. Nor have plaintiffs directed the Court’s attention to a particular piece of history that expressly supports their claim; they instead rely on mere generalities and anecdotal commentary. Finally, the EPGA presents no ambiguity requiring explanation through extrinsic historical commentary.

In an alternative argument, plaintiffs argue that, assuming the Governor’s ability to act under the EPGA gives her statewide authority, the executive orders issued pursuant to the EPGA are nevertheless invalid. According to plaintiffs, the Governor’s exercise of lawmaking authority under the orders runs afoul of separation of powers principles.

Plaintiffs’ constitutional challenge to the EPGA fares no better than their attempt to limit the Act’s scope. This Court must, when weighing this constitutional challenge to the EPGA, remain mindful that a statute must be presumed constitutional, “unless its constitutionality is

readily apparent.” *Mayor of Detroit v Arms Tech, Inc*, 258 Mich App 48, 59; 669 NW2d 845 (2003) (citation and quotation marks omitted). Indeed, “[t]he power to declare a law unconstitutional should be exercised with extreme caution and never where serious doubt exists with regard to the conflict.” *Council of Orgs & Others for Ed About Parochial, Inc v Governor*, 455 Mich 557, 570; 566 NW2d 208 (1997).

Const 1963, art 3, § 2 declares that “[t]he powers of government are divided into three branches: legislative, executive and judicial.” The Constitution dictates that “[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.” *Id.* The issue in this case concerns what plaintiffs have alleged is an unconstitutional delegation of legislative power to the Governor. While the Legislature cannot delegate its legislative power to the executive branch of government, the prohibition against delegation does not prevent the Legislature “from obtaining the assistance of the coordinate branches.” *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8; 658 NW2d 127 (2003) (citation and quotation marks omitted). As explained by our Supreme Court, “[c]hallenges of unconstitutional delegation of legislative power are generally framed in terms of the adequacy of the standards fashioned by the Legislature to channel the agency’s or individual’s exercise of the delegated power.” *Blue Cross & Blue Shield v Milliken*, 422 Mich 1, 51; 367 NW2d 1 (1985).

In general, the Supreme Court has recognized three “guiding principles” to be applied in non-delegation cases:

First, the act in question must be read as a whole; the provision in question should not be isolated but must be construed with reference to the entire act. Second, the standard should be as reasonably precise as the subject matter requires or permits. The preciseness of the standard will vary with the complexity and/or the degree to which subject regulated will require constantly changing regulation. The various and varying detail associated with managing the natural resources has led to

recognition by the courts that it is impractical for the Legislature to provide specific regulations and that this function must be performed by the designated administrative officials. Third, if possible the statute must be construed in such a way as to render it valid, not invalid, as conferring administrative, not legislative power and as vesting discretionary, not arbitrary, authority. [*State Conservation Dep't v Seaman*, 396 Mich 299, 309; 240 NW2d 206 (1976) (internal citations and quotation marks omitted).]

Any discussion of plaintiffs' non-delegation issue must acknowledge that the policy goals and the complexity of issues presented under the EPGA do not concern ordinary, everyday issues. Rather, as the title of the act and its various provisions reflect, the EPGA is only invoked in times of emergency and of "great public crisis," and when "public safety is imperiled[.]" MCL 10.31(1). Hence, while the Governor's powers are not expanded by crisis, the standard by which this Court must view the standards ascribed to the delegation at issue must be informed by the complexities inherent in an emergency situation. *Blue Cross & Blue Shield*, 422 Mich at 51; *State Conservation Dep't*, 396 Mich at 309.

With that backdrop, and when viewing the EPGA in its entirety, the Court concludes that the Act contains sufficient standards and that it is not an unconstitutional delegation of legislative authority. At the outset, MCL 10.31(1) provides parameters for when an emergency declaration can be made in the first instance. The power to declare an emergency only arises during "times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled" *Id.* In addition, the statute provides a process for other officials, aside from the Governor, to request or aid in assessing whether an emergency should be declared. See *id.* (allowing input from "the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police"). Therefore, the EPGA places parameters and limitations on the Governor's power to declare a state of emergency in the first instance, which weighs against plaintiffs'

position. Cf. *Blue Cross & Blue Shield*, 422 Mich at 52-53 (finding an unconstitutional delegation of legislative authority where there were no guidelines provided to direct the pertinent official's response and where the power of the official was "completely open-ended.").

Furthermore, the EPGA provides standards on what a Governor can, and cannot, do after making an emergency declaration. As for what she can do, 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) (emphasis added). The Legislature's use of the terms "reasonable" and "necessary" are not trivial expressions that can be cast aside as easily as plaintiffs would have the Court do. Rather than being mere abstract concepts that fail to provide a meaningful standard, the terms "reasonable" and "necessary" have historically proven to provide standards that are more than amenable to judicial review. See, e.g., MCL 500.3107(1)(a) (describing, in the context of personal injury protection insurance, "allowable expenses" that consist of "reasonable" charges incurred for "reasonably necessary products, services and accommodations . . ."). Thus, the Court rejects any contention that these terms are too ambiguous to provide meaningful standards. See *Klammer v Dep't of Transp*, 141 Mich App 253, 262; 367 NW2d 78 (1985) (concluding that a delegation of authority which permitted an administrative body to continue to employ an individual for such a period of time as was "necessary" provided a sufficient standard, under the circumstances). See also *Blank v Dept' of Corrections*, 462 Mich 103, 126; 611 NW2d 530 (2000) (opinion by Kelly, J.) (finding a constitutionally permissible delegation of authority, in part, based on the enabling legislation constrained rulemaking authority to only those matters that were "necessary for the proper administration of this act."). Finally, in addition to the above standards, the EPGA goes on to expressly list examples of that which a Governor can and cannot do under the EPGA. See MCL

10.31(1) (providing a non-exhaustive, affirmative list of subjects on which an order may be issued); MCL 10.31(3) (containing an express prohibition on orders affecting lawfully possessed firearms). Accordingly, the EPGA contains some restrictions on the Governor's authority and it provides standards for the exercise of authority under the Act.³

In sum, the Court concludes that plaintiffs' challenges to the Governor's authority to declare a state of emergency under the EPGA and to issue Executive Orders in response to a statewide emergency situation under the EPGA are meritless. Thus, and for the avoidance of doubt, while the Court concludes that the Governor's actions under the EMA were unwarranted—see discussion below—the Court concludes that plaintiffs have failed to establish a reason to invalidate Executive Orders that rely on the EPGA.

EXECUTIVE ORDER 2020-68 WAS NOT AUTHORIZED BY THE EMA

Turning next to the Governor's orders issued pursuant to the EMA, the Court again notes that the legitimacy of the initial declaration of emergency and disaster, Executive Order No. 2020-04, is unchallenged in this case. The extension of that declaration under EO 2020-33 is likewise agreed to be a legitimate exercise of gubernatorial power. This court is not asked to review the scope of myriad emergency measures authorized under either declaration. The laser focus of this case is the legitimacy of EO 2020-68, which re-declared a state of emergency and state of disaster under the EMA only one minute after EO 2020-66 cancelled the same. The Legislature contends that the issuance of EO 2020-68 was ultra vires, and this Court agrees.

³ The Court notes that Judge Kelly reached a similar conclusion, albeit in the context of denying a motion for preliminary injunction, in the case of *Mich United for Liberty v Whitmer*, Docket No. 20-000061-MZ.

The EMA allows circumvention of the traditional legislative process only under extraordinary circumstances and for a finite period of time. Enacted in 1976, the EMA grants the Governor sweeping powers to cope with “dangers to this state or the people of this state presented by a disaster or emergency.” MCL 30.403(1). These powers include the authority to issue executive orders and directives that have the force and effect of law. MCL 30.403(2). The Governor may also, by executive order, “Suspend a regulatory statute, order, or rule prescribing the procedures for conduct of state business, when strict compliance with the statute, order, or rule would prevent, hinder, or delay necessary action in coping with the disaster or emergency.” MCL 30.405(1)(a). Additionally, the Governor may issue orders regarding the utilization of resources; may transfer functions of state government; may seize private property—with the payment of “appropriate compensation”—evacuate certain areas; control ingress and egress; and take “all other actions which are which are necessary and appropriate under the circumstances.” See, e.g., MCL 30.405(1)(b)-(j). This power is indeed awesome.

The question presented is whether the Governor could legally, by way of Executive Order 2020-68, declare the exact states of emergency and disaster that she had, only one minute before, terminated. The Legislature answer with an emphatic, “No,” and the Governor offers an equally emphatic, “Yes.”

As with most contracts, the Legislature asserts that time is of the essence in the limits of the extraordinary power afforded the executive under the EMA. The Act is replete with references to timing. MCL 30.403 provides as follows:

The state of disaster shall continue until the governor finds that the threat or danger has passed, the disaster has been dealt with to the extent that disaster conditions no longer exist, or until the declared state of disaster has been in effect for 28 days. *After 28 days, the governor shall issue an executive order or proclamation*

declaring the state of disaster terminated, unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature. An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the disaster, the area or areas threatened, the conditions causing the disaster, and the conditions permitting the termination of the state of disaster. [MCL 30.403(3) (emphasis added).]

Later the act addresses the duration of a “state of emergency,” and its extension under MCL 30.403(4):

The state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency has been in effect for 28 days. After 28 days, the governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature. An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the emergency, the area or areas threatened, the conditions causing the emergency, and the conditions permitting the termination of the state of emergency. [Emphasis added.]

The limitation of 28 days is repeated multiple times. A state of emergency or disaster, once declared, terminates no later than 28 days after being initially declared. The Governor can determine that the emergent conditions have been resolved earlier than 28 days. Alternatively, the Governor may ask the Legislature to extend the emergency powers for a period of up to 28 days from the issuance of the extension. Nothing in Act precludes legislative extension for multiple additional 28-day periods. In this case the Governor stated in EO 2020-66 that she expressly terminated the previously issued states of emergency and disaster—not because the disaster or emergency condition ceased to exist—but because a period of 28 days had expired. In fact, EO 2020-66, the order that terminated the states of disaster and emergency under the EMA, expressly acknowledged that the emergency and/or disaster had not subsided and still remained. In this respect, EO 2020-66 complied with MCL 30.403(3) and (4)’s directives that the Governor “shall,”

after 28 days, “issue an executive order or proclamation declaring” that the state of emergency and/or disaster terminated.

However, the Governor argues that she may continue to exercise emergency powers under the EMA without legislative authorization in this case. She argues that she has a duty and the authority to do so because the Legislature failed to grant her the requested extension despite the fact that the emergent conditions continued to exist.

Neither party to this case denies that the COVID-19 emergency was abated as of April 30. No serious argument has been offered that had the Governor not issued EO 2020-68 that all of the emergency measures authorized by EO-33 would have terminated with the signing of EO 2020-66 on April 30 even if had the governor not vetoed SB 858, which purported to embody several of the expiring Executive Orders and which would not have been effective until 90 days later because the Legislature did not give that bill immediate effect. The Governor asserts she had a duty to act to address the void. She argues that MCL 30.403(3) and (4) compelled her, upon the termination of the states of emergency and disaster accomplished by way of time, to declare anew both states of emergency and disaster within minutes. The Governor makes this argument by emphasizing language in MCL 30.403(3) and (4) stating that, if the Governor finds that a disaster or emergency occurs, then she “shall” issue orders declaring states of emergency or disaster. Thus, argues the Governor, when the 28-day emergency and disaster declarations ended, but the disaster and emergency conditions remained, the Governor was compelled, irrespective of legislative approval, to re-declare states of emergency and disaster.

The EMA does not prohibit a governor from declaring multiple emergencies or disasters during a term of office or even more than on disaster at the same time. Indeed, the collapse of the

dam at the Tittabawassee River sparked the issuance of a separate state of emergency and disaster during of this lawsuit. Clearly the collapse of the dam and the subsequent flooding was a new and different circumstance from the COVID-19 pandemic. Returning to the instant case, it could also be argued that the very fact that the Legislature had neither authorized the extension of the emergency powers of the Governor under the EMA nor put in place measures to address the emergent situation was itself a new emergency justifying gubernatorial action. However, the “new” circumstance was occasioned not by a mutation of the disease into something such as “COVID-20,” a precipitous spike in infection, or any other factor, except the Legislature’s failure to grant an extension.

Thus, while the Governor emphasizes the directive that she “shall” declares states of emergency and disaster, the Court concludes that the Governor takes these directives out of context and renders meaningless the legislative extension set forth in MCL 30.403(3) and (4). The Governor’s position ignores the other crucial “shall” in the statute. “After 28 days, the governor *shall* issue an executive order or proclamation declaring the state of” disaster or emergency terminated, “*unless a request by the governor for an extension of the state of*” disaster or emergency “*for a specific number of days is approved by resolution of both houses of the legislature.*” See MCL 30.403(3) (as to disasters); MCL 30.403(4) (as to emergencies). The language employed here is mandatory: The Governor “*shall*” terminate the state of emergency or disaster *unless* the Legislature grants a request to extend it. See *Smitter v Thornapple Twp.*, 494 Mich 121, 136; 833 NW2d 785 (2013) (explaining that the term “shall” denotes a mandatory directive). Stated otherwise, at the end of 28 days, the EMA contemplates only two outcomes: (1) the state of emergency and/or disaster is terminated by order of the Governor; or (2) the state of emergency/disaster continues *with legislative approval*. The only qualifier on the “shall terminate”

language is an affirmative grant of an extension from the Legislature. There is no third option for the Governor to continue the state of emergency and/or disaster on her own, absent legislative approval. Nor does the statute permit the Governor to simply extend the same state of disaster and/or emergency that was otherwise due to expire. To adopt the Governor's interpretation of the statute would render nugatory the express 28-day limit and it would require the Court to ignore the plain statutory language. Whatever the merits of that might be as a matter of policy, that position conflicts with the plain statutory language. The Governor's attempt to read MCL 30.403(2) as providing an additional, independent source of authority to issue sweeping orders would essentially render meaningless MCL 30.405(1)'s directive that such orders only issue upon an emergency declaration. It would also read into MCL 30.403(2) broad authority not expressed in the subsection's plain language. See *Robinson*, 486 Mich at 21 (explaining that, when it interprets a statute, a reviewing court must "avoid a construction that would render part of the statute surplusage or nugatory") (citation and quotation marks omitted). See also *United States Fidelity & Guarantee Co v Mich Catastrophic Claims Ass'n*, 484 Mich 1, 13; 795 NW2d 101 (2009) ("As far as possible, effect should be given to every phrase, clause, and word in the statute."). The Court is not free to "pick and choose what parts of a statute to enforce," see *Sau-Tuk Indus, Inc v Allegan Co*, 316 Mich App 122, 143; 892 NW2d 33 (2016), yet that is precisely what the Governor's position has asked the Court to do. The language of MCL 30.403(3) and (4) requiring legislative approval of an emergency or disaster declaration should not so easily be cast aside.

Finally, and contrary to the Governor's argument, the 28-day limit in the EMA does not amount to an impermissible legislative veto. See *Blank v Dept' of Corrections*, 462 Mich 103, 113-114; 611 NW2d 530 (2000) (opinion by KELLY, J.) (declaring that, once the Legislature delegates authority, it does not have the right to retain veto authority over the actions of the

executive). The Governor's characterization of the 28-day limit as a legislative veto is not accurate. The 28-day limit is not legislative oversight or a "veto" of the Governor's emergency declaration; rather, it is a standard imposed on the authority so delegated. That is, the Governor is afforded with broad authority under the EMA to make rules and to issue orders; however, that authority is subject to a time limit imposed by the Legislature. The Legislature has not "vetoed" or negated any action by the executive branch by imposing a temporal limit on the Governor's authority; instead, it limited the amount of time the Governor can act independently of the Legislature in response to a particular emergent matter.

CONCLUSION

IT IS HEREBY ORDERED that the relief requested in plaintiffs' motion for immediate declaratory judgment is DENIED. While the Governor's action of re-declaring the same emergency violated the provisions of the EMA, plaintiffs' challenges to the EPGA and the Governor's authority to issue Executive Orders thereunder are meritless.

This order resolves the last pending claim and closes the case.

Dated: May 21, 2020

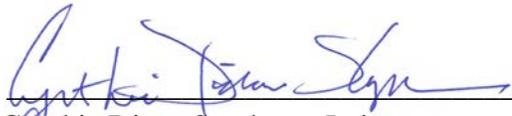

Cynthia Diane Stephens, Judge
Court of Claims

Exhibit 3

August 21, 2020 Court of Appeals
Majority Opinion

If this opinion indicates that it is “FOR PUBLICATION,” it is subject to revision until final publication in the Michigan Appeals Reports.

RECEIVED by MSC 8/28/2020 11:10:25 AM

STATE OF MICHIGAN
COURT OF APPEALS

HOUSE OF REPRESENTATIVES and SENATE,

FOR PUBLICATION

August 21, 2020

9:00 a.m.

Plaintiffs-Appellants/Cross-Appellees,

and

JOHN F. BRENNAN, MARK BUCCHI, SAMUEL
H. GUN, MARTIN LEAF, and ERIC ROSENBERG,

Cross-Appellants,

v

No. 353655

Court of Claims

LC No. 20-000079-MZ

GOVERNOR,

Defendant-Appellee/Cross-
Appellant/Cross-Appellee.

Before: MARKEY, P.J., and K. F. KELLY and TUKEL, JJ.

MARKEY, P.J.

Plaintiffs, the Michigan House of Representatives and the Michigan Senate (the Legislature), appeal by right the opinion and order of the Court of Claims granting a declaratory judgment in favor of defendant, the Governor of Michigan, with respect to the Governor’s authority to extend a state of emergency and to issue associated executive orders under the emergency powers of governor act (EPGA), MCL 10.31 *et seq.* The Court of Claims additionally concluded, however, that actions taken by the Governor under the Emergency Management Act (EMA), MCL 30.401 *et seq.*, were ultra vires. The Governor has filed a cross-appeal in regard to that ruling and also takes issue with the determination by the Court of Claims that the Legislature had standing to file suit and seek declaratory relief. Prospective intervenors John F. Brennan, Mark Bucchi, Samuel H. Gun, Martin Leaf, and Eric Rosenberg, all of whom are attorneys, cross appeal the denial of their motion to intervene in this lawsuit. Proceeding on the assumption that the Legislature had standing to sue, we hold that the Governor’s declaration of a state of emergency, her extension of the state of emergency, and her issuance of related executive orders fell within the scope of the Governor’s authority under the EPGA. We further hold that the EPGA is constitutionally sound. We therefore decline to address whether the Governor was additionally

authorized to take those same measures under the EMA and whether the Governor violated the EMA: the matters are moot. Finally, we hold that there is no basis to reverse the order of the Court of Claims denying the motion to intervene. In sum, we affirm on the issues necessary to resolve this appeal.

I. PREFACE

This case arises out of a worldwide pandemic involving the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), which causes the disease known as COVID-19. In an effort to combat the spread of COVID-19 in Michigan, the Governor declared and extended a state of emergency and issued numerous executive orders in connection with the emergency. This lawsuit stems from a dispute between the Governor and the Legislature regarding the scope of the Governor's authority to issue, implement, and extend those emergency-based executive orders. We are not called upon nor is it our role to examine and resolve issues concerning the nature of COVID-19, the data related to the disease, the statistical or human impact of COVID-19 on Michiganders, whether emergency circumstances justifying the executive orders existed, or the appropriateness of the measures the Governor has taken in tackling COVID-19. Rather, we are presented with pure procedural and legal issues, including whether the Legislature had standing to bring suit against the Governor, whether the Governor's declarations and orders exceeded her constitutional and statutory authority, whether the EPGA violates the separation of powers and attendant nondelegation doctrine, and whether the prospective intervenors were entitled to intervene in the suit.

II. CONSTITUTIONAL AND STATUTORY FRAMEWORK

In Michigan, “[t]he powers of government are divided into three branches: legislative, executive and judicial.” Const 1963, art 3, § 2. And “[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.” *Id.* “[T]he legislative power of the State of Michigan is vested in a senate and a house of representatives.” Const 1963, art 4, § 1. “[T]he executive power is vested in the governor.” Const 1963, art 5, § 1.

In 1945, the Legislature enacted the EPGA. 1945 PA 302. The EPGA was later amended pursuant to 2006 PA 546. MCL 10.31 currently provides:

(1) During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled, either upon application of the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police or upon his or her own volition, the governor may proclaim a state of emergency and designate the area involved. After making the proclamation or declaration, 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. Those orders, rules, and regulations may include, but are not limited to, providing for the control of traffic, including public and private transportation, within the area or any section of the area; designation of specific zones within the area in which occupancy and

use of buildings and ingress and egress of persons and vehicles may be prohibited or regulated; control of places of amusement and assembly and of persons on public streets and thoroughfares; establishment of a curfew; control of the sale, transportation, and use of alcoholic beverages and liquors; and control of the storage, use, and transportation of explosives or inflammable materials or liquids deemed to be dangerous to public safety.

(2) The orders, rules, and regulations promulgated under subsection (1) are effective from the date and in the manner prescribed in the orders, rules, and regulations and shall be made public as provided in the orders, rules, and regulations. The orders, rules, and regulations may be amended, modified, or rescinded, in the manner in which they were promulgated, from time to time by the governor during the pendency of the emergency, but shall cease to be in effect upon declaration by the governor that the emergency no longer exists.

(3) Subsection (1) does not authorize the seizure, taking, or confiscation of lawfully possessed firearms, ammunition, or other weapons.

Notably, MCL 10.31 does not provide any active role for the Legislature during a public emergency, let alone the power to directly act as a check against a governor's exercise of authority under the EPGA. Our Supreme Court has recognized that "the emergency powers granted to the Governor by Act 302 are exclusive." *Walsh v City of River Rouge*, 385 Mich 623, 640; 189 NW2d 318 (1971). With respect to the EPGA, the Legislature expressly articulated its intent, explaining:

It is hereby declared to be the legislative intent to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. *The provisions of this act shall be broadly construed to effectuate this purpose.* [MCL 10.32 (emphasis added).]

A violation of any order, rule, or regulation promulgated by a governor under the EPGA is punishable as a misdemeanor if the order, rule, or regulation expressly states that a violation constitutes a misdemeanor. MCL 10.33.

A little over 30 years later, the Legislature enacted the EMA. 1976 PA 390. The EMA has been amended a couple of times since its inception. See 1990 PA 50; 2002 PA 132. Section 3 of the EMA provides:

(1) The governor is responsible for coping with dangers to this state or the people of this state presented by a disaster or emergency.

(2) The governor may issue executive orders, proclamations, and directives having the force and effect of law to implement this act. . . . [A]n executive order, proclamation, or directive may be amended or rescinded by the governor.

(3) The governor shall, by executive order or proclamation, declare a state of disaster if he or she finds a disaster¹] has occurred or the threat of a disaster exists. The state of disaster shall continue until the governor finds that the threat or danger has passed, the disaster has been dealt with to the extent that disaster conditions no longer exist, or until the declared state of disaster has been in effect for 28 days. *After 28 days, the governor shall issue an executive order or proclamation declaring the state of disaster terminated, unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature. . . .*

(4) The governor shall, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists. The state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency has been in effect for 28 days. *After 28 days, the governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature. . . .* [MCL 30.403 (emphasis added).]

As reflected in MCL 30.403, if a governor wishes to extend an existing state of disaster or emergency beyond 28 days, the Legislature must approve the extension by resolution. In that respect, the EMA diverges from the EPGA. Of substantial significance, the EMA expressly provides that it shall not be construed to “[l]imit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of the Michigan Compiled Laws,” i.e., the EPGA.

III. BACKGROUND AND PROCEDURAL HISTORY

A. THE GOVERNOR ACTS IN RESPONSE TO COVID-19 CASES IN MICHIGAN

On March 10, 2020, in Executive Order (EO) 2020-4, the Governor declared a state of emergency due to the escalation of COVID-19 cases and deaths in Michigan. The legal authorities the Governor cited in support of the declaration were the EMA, the EPGA, and Const 1963, art 5, § 1. Among other actions, the Governor closed elementary and secondary schools in EO 2020-5, barred visitors to healthcare facilities under EO 2020-6, shuttered restaurants and bars in EO 2020-9, and restricted nonessential medical and dental procedures pursuant to EO 2020-17. The Governor issued the first stay-at-home directive on March 24, 2020, under EO 2020-21, which also identified various exceptions and parameters in regard to the mandate and criteria with which to evaluate whether to maintain, intensify, or relax restrictions in the future.

¹ The statutory definition of “disaster” includes an “epidemic.” MCL 30.402(e).

On April 7, 2020, both chambers of the Legislature adopted Senate Concurrent Resolution No. 24 (2020), which indicated approval of the Governor’s declaration of a state of emergency or disaster² and, consistent with the EMA, set an expiration date of April 30, 2020, in respect to the duration of the declared emergency. On April 9, 2020, the Governor issued EO 2020-42, which rescinded EO 2020-21, opined that the SARS-CoV-2 continued to be aggressive and a threat to public health, and which extended the stay-at-home directive until April 30, 2020. On April 24, 2020, the Governor issued EO 2020-59, rescinding EO 2020-42 and extending the stay-at-home order until May 15, 2020.

B. THE DISPUTE BETWEEN THE LEGISLATURE AND THE GOVERNOR ARISES

On April 27, 2020, the Governor, as required by the EMA, asked the Legislature to extend the state of emergency. The Legislature declined to pass a resolution extending the state of emergency. Instead, the Legislature passed 2020 SB 858, which provided that “[n]otwithstanding the termination of the underlying state of disaster or state of emergency declaration under this act,” more than two dozen of the Governor’s EOs would be extended with end dates varying from April 30, 2020, to December 31, 2020. Despite extending some of the EOs under 2020 SB 858, the Legislature essentially sought to reopen Michigan businesses subject to precautionary measures recommended by the Centers for Disease Control and Prevention, with those measures scheduled to expire on May 30, 2020, under the proposed legislation. The Legislature submitted 2020 SB 858 to the Governor on April 30, 2020. The Governor vetoed the bill.

On April 30, 2020, the Governor issued EO 2020-66. The EO noted that the coronavirus remained “present and pervasive in Michigan,” that “[t]he health, economic, and social harms of the COVID-19 pandemic” remained “widespread and severe,” and that the danger continued to “constitute a statewide emergency and disaster.” The order indicated that a statewide response was necessary to save lives, protect public health and safety, and to avert catastrophe, while acknowledging the effects on the economy and society as a whole. EO 2020-66 observed that the Legislature, “despite the clear and ongoing danger to the state,” refused to extend the state of emergency pursuant to the EMA. EO 2020-66 terminated the state of emergency under and as required by the EMA.

That same day, however, the Governor issued EO 2020-67, which cited the EPGA as supporting legal authority for this order. EO 2020-67 was issued one minute after EO 2020-66 was released. EO 2020-67 included language from the EPGA, and it declared that a state of emergency was to remain in place. Quoting MCL 10.31(2), the order provided that the state of emergency would cease “ ‘upon declaration by the governor that the emergency no longer exists.’ ” EO 2020-67 did set a discontinuation date of May 28, 2020, subject to evaluation by the Governor before expiration in order for her to assess whether the state of emergency should continue beyond that date. The Governor then issued EO 2020-68 *pursuant to the EMA*, declaring—*anew*—a state of emergency across Michigan. This order was made effective

² Hereafter, for ease of reference, we shall simply refer to a state of “emergency,” which shall also encompass a state of “disaster,” unless otherwise indicated.

immediately and was scheduled to continue through May 28, 2020. EO 2020-68 indicated that the Governor would evaluate the continuing need for the order before its expiration. EOs 2020-67 and 2020-68 extended the life of various earlier EOs.³

C. THE LEGISLATURE COMMENCES SUIT AGAINST THE GOVERNOR IN THE COURT OF CLAIMS

The slew of EOs the Governor issued on April 30, 2020, triggered an immediate response from the Legislature. On April 30th, the Senate adopted a resolution authorizing the Senate Majority Leader to commence legal action on behalf of the Senate challenging the Governor's authority to extend or redeclare a state of emergency; the House adopted a similar resolution.

On May 6, 2020, the Legislature filed suit in the Court of Claims against the Governor alleging that EO 2020-67 (April 30, 2020 order keeping a state of emergency in place under the EPGA) and EO 2020-68 (April 30, 2020 order redeclaring a state of emergency under the EMA) were invalid.⁴ The Legislature contended that the Governor's actions were not statutorily or constitutionally authorized. The Legislature alleged a violation of the EMA in Count I, a violation of the EPGA in Count II, a violation of Const 1963, art 5, § 1, in Count III, and a violation of the Separation of Powers Clause, Const 1963, art 3, § 2, in Count IV. Additionally, the Legislature moved for a declaratory judgment, asking the Court of Claims to declare that the Governor's EOs were ultra vires. In particular, the Legislature requested the following declarations:

1. The Governor's authority to act under the EMA ended April 30, 2020;
2. The EPGA does not provide authority for the Governor's COVID-19 executive orders;

³ EOs 2020-67 and 2020-68 were later rescinded by orders that themselves were subsequently rescinded. The Governor eventually extended the state of emergency pursuant to EO 2020-165, which order is set to expire on September 4, 2020, subject to evaluation of the need to continue the state of emergency. EO 2020-165 stated:

This order constitutes a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. Subject to the ongoing litigation, and the possibility that current rulings may be overturned or otherwise altered on appeal, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act of 1976 when emergency and disaster conditions exist yet the legislature has not granted an extension request, this order constitutes a state of emergency and state of disaster declaration under that act.

⁴ Although these two particular EOs have been rescinded, the dispute remains very much alive given the subsequent EOs the Governor has issued. Accordingly, the lawsuit is not moot. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

3. The Governor has no lawmaking power under Const 1963, art 5, § 1; and
4. The Governor's ongoing COVID-19 executive orders violate the separation of powers.

The Governor responded that the complaint did not satisfy the verification requirement of MCL 600.6431(2)(d).⁵ The Governor further argued that the Legislature lacked standing because it had no special interest at stake and could not meet the obligation to show an actual controversy under MCR 2.605. The Governor also insisted that she had authority under both the EPGA and the EMA to declare states of emergency and to issue orders to protect the residents of Michigan. The Governor additionally posited that the standards contained in the EPGA protected against any claim that the Legislature improperly delegated its lawmaking or legislative power to the executive branch when it enacted the EPGA. Thus, there was no violation of the Separation of Powers Clause.

The Legislature replied that it had standing because it held a special and unique interest in the case where the Governor had nullified a legitimate legislative decision not to authorize continuation of the state of emergency. The Legislature also asserted that it had established the existence of an actual controversy for purposes of seeking declaratory relief under MCR 2.605. The Legislature disputed that the EMA granted the Governor continuing authority to act alone beyond the initial 28-day period of a state of emergency, contending that to so rule would render the legislative-approval provision in MCL 30.402 obsolete. Furthermore, the Legislature maintained that the EPGA did not provide the Governor with boundless authority and that the EPGA infringed upon the separation of powers.

D. THE EFFORT TO INTERVENE

Cross-appellants, five individual attorneys, moved to intervene in the lawsuit, arguing that they “enthusiastically agreed” with the Legislature but wanted the Court of Claims to remember that attorneys had an interest in “being free of unlawful and arbitrary strictures on [their] personal and professional activities.” The Legislature expressed concerns about a potential delay should the Court of Claims choose to grant the motion to intervene, insisting that the Legislature adequately represented the position of prospective intervenors. The Governor opposed intervention on the basis of the purported delay that would occur by allowing the attorneys into the suit. The Governor indicated that prospective intervenors would be more appropriately heard as amici curiae.

The Court of Claims denied the motion to intervene, reasoning that the Legislature adequately represented the interests of the five attorneys. The Court of Claims also determined that issues that would be created by allowing intervention were outside the focus of the case and

⁵ MCL 600.6431(2)(d) requires that a complaint filed in the Court of Claims contain, among other things, “[a] signature and verification by the claimant before an officer authorized to administer oaths.”

that intervention would cause a delay in the proceedings. The Court of Claims permitted the five cross-appellants to be received as amici curiae.

E. OPINION AND ORDER OF THE COURT OF CLAIMS

The Court of Claims conducted a hearing on the issues posed in the case and permitted extensive arguments by the parties. Subsequently, the Court of Claims issued a written opinion and order. The Court of Claims first disposed of the Governor's argument regarding the verification requirement of MCL 600.6431(2)(d). Considering that the Governor acknowledged that a subsequent filing by the Legislature was notarized in accordance with the statute, the Court of Claims determined that the issue was moot and declined to analyze it.

The Court of Claims next addressed the question of the Legislature's standing to bring the action and obtain relief, framing the issue as "whether the Governor's issuance of EO 2020-67 and/or 2020-68 had the effect of nullifying the Legislature's decision to decline to extend the states of emergency/disaster." It cited with approval federal caselaw from the Sixth Circuit of the United States Court of Appeals holding that legislators have standing to sue when arguing that their votes had been nullified. The Court of Claims also noted that the Sixth Circuit had indicated that a completely nullified legislative vote is a sufficiently concrete injury to the Legislature's interest as to support standing. The Court of Claims distinguished *League of Women Voters v Secretary of State*, __ Mich App __; __ NW2d __ (2020), because the Legislature here was not seeking court resolution of a lost political battle; it was instead alleging that the Governor's actions uniquely injured it by nullifying an act of the body as a whole. The Court of Claims concluded that the Legislature had standing.

The Court of Claims next made short shrift of the Governor's reliance on Const 1963, art 5, § 1, which vested her with executive power, in providing her the requisite authority to issue the EOs. The Court of Claims observed that the Governor did not assert that she had authority to issue the EOs solely on the basis of the constitutional provision and absent enabling legislation.

The Court of Claims next examined the EPGA, explaining that it bestowed broad authority on the Governor to declare a state of emergency and to act to bring the emergency under control. The Court of Claims rejected the Legislature's attempt to restrict the scope of the EPGA to only local or regional emergencies, stating that that argument was inconsistent with the EPGA's plain language, which casts a much wider net. The Court of Claims discounted the Legislature's argument that when the EPGA and EMA are read together, it is apparent that the EPGA was not intended to address statewide concerns. The Court of Claims opined that the Legislature itself harmonized the two acts when it expressly provided that nothing in the EMA was intended to limit a state of emergency proclaimed under the EPGA. The Court of Claims rebuffed the argument that the legislative history of the EPGA revealed a limitation to local matters, determining in part that the Legislature was relying on "mere generalities and anecdotal commentary."

The Court of Claims likewise dispatched the Legislature's argument that the Governor's EOs violated the separation of powers. It relied on caselaw holding that the Legislature may, without violating the Separation of Powers Clause, obtain the assistance of the executive branch, provided the Legislature sets forth adequate standards. The Court of Claims concluded that the EPGA contained sufficient standards and criteria to guide a governor's declaration of an

emergency and to issue associated EOs, including the requirement that orders be reasonable and necessary under the circumstances. The Court of Claims determined that the Legislature's challenge of the EPGA was meritless and that the Legislature had failed to establish grounds to invalidate the EOs predicated on the EPGA.

Finally, the Court of Claims turned to the validity of EO 2020-68, in which the Governor redeclared a state of emergency under the EMA. The Court of Claims opined that nothing in the EMA precluded legislative extension for multiple 28-day periods. According to the Court of Claims, the Governor's redeclaration of an emergency occurred only because the initial 28-day period had expired without renewal, not because the emergency had ceased to exist and then reemerged. The Court of Claims focused on the language in the EMA providing that a governor "shall issue an executive order" declaring the emergency terminated absent the Legislature's approval of an extension by resolution. MCL 30.403(3) and (4). The Court of Claims characterized the 28-day statutory limit in MCL 30.403 as a restriction imposed on gubernatorial authority. It indicated that the Legislature limited the time in which the Governor could act independently in responding to a specific emergency. The Court of Claims ruled that because the Legislature did not extend the emergency by resolution upon request by the Governor, the Governor's issuance of EO 2020-68 was ultra vires under the EMA.

IV. ANALYSIS

A. STANDING

We conclude that the Governor's declaration and extensions of a state of emergency, along with the associated EOs, were actions all falling within the scope of the Governor's authority under the constitutionally-sound EPGA. Our holding renders moot issues concerning whether the Governor was additionally authorized to take those same measures under the EMA or whether the Governor violated the EMA. The Legislature is thus not entitled to relief even if it has the requisite standing to sue the Governor. In light of this highly expedited appeal, we shall proceed on the assumption that the Legislature had standing to file suit against the Governor for declaratory relief.

B. THE EPGA

1. STANDARD OF REVIEW

We review de novo as a question of statutory interpretation whether the Governor exceeded the power granted her by statute. See *Mich Gun Owners, Inc v Ann Arbor Pub Sch*, 502 Mich 695, 702; 918 NW2d 756 (2018). "That means that we review it independently, with no required deference to the trial court." *Id.* "Likewise, this Court reviews de novo constitutional questions, including those concerning the separation of powers." *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

2. RULES OF STATUTORY CONSTRUCTION

In *Slis v Michigan*, __ Mich App __, __; __ NW2d __ (2020); slip op at 12, this Court recited the well-established principles of statutory construction, observing:

This Court's role in construing statutory language is to discern and ascertain the intent of the Legislature, which may reasonably be inferred from the words in the statute. We must focus our analysis on the express language of the statute because it offers the most reliable evidence of legislative intent. When statutory language is clear and unambiguous, we must apply the statute as written. A court is not permitted to read anything into an unambiguous statute that is not within the manifest intent of the Legislature. Furthermore, this Court may not rewrite the plain statutory language nor substitute its own policy decisions for those decisions already made by the Legislature.

Judicial construction of a statute is only permitted when statutory language is ambiguous. A statute is ambiguous when an irreconcilable conflict exists between statutory provisions or when a statute is equally susceptible to more than one meaning. When faced with two alternative reasonable interpretations of a word in a statute, we should give effect to the interpretation that more faithfully advances the legislative purpose behind the statute. [Quotation marks and citations omitted.]

3. DISCUSSION AND RESOLUTION – SCOPE AND EXTENT OF AUTHORITY

The Legislature argues that the Governor cannot use the EPGA to justify an indefinite statewide emergency. The Legislature further contends that the Court of Claims created an irreconcilable conflict between the EPGA and the EMA with its construction of the two acts. The Legislature also maintains that the text of the EPGA and its historical context establish that the EPGA is intended to address emergencies that are confined to the local level and not statewide emergencies. As an overview of its position, the Legislature asserts as follows:

All parties agree that the EPGA and the EMA cover the same subject matter. Under fundamental principles of statutory construction, they must be harmonized and read so that every word in both statutes is given meaning. Only the Legislature has offered such a reading here: the EPGA is for localized issues, while the EMA can reach as widely as a statewide disaster. The Court of Claims's adoption of the Governor's position—that the statutes independently authorize every single action she has taken—renders ever[y] word of the 1976 EMA's 12 pages of text surplusage. This Court should reverse.

We hold that the plain and unambiguous language of the EPGA and the EMA does not support the Legislature's position. We begin by dissecting the EPGA's language to determine whether the EPGA's application was intended to be restricted to local emergencies. The first sentence of MCL 10.31(1) provides:

During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled, either upon application of the mayor of a city, sheriff of a county, or the commissioner of the

Michigan state police or upon his or her own volition, the governor may proclaim a state of emergency and designate the area involved.

It hardly sounds as if the Legislature were focused solely on local emergencies when speaking in terms of a great public crisis, disaster, catastrophe, or similar emergency that imperils public safety. Indeed, its use of the adjective “great” instead suggests legislative contemplation of an emergency that is expansive or substantial, not merely a local emergency. A statewide outbreak of disease such as COVID-19 can certainly constitute a great public crisis, disaster, or catastrophe, and it undoubtedly can imperil public safety. Although “rioting” occurs most often in a limited area, statewide rioting can happen. Moreover, rioting is but one example of a public emergency listed in MCL 10.31(1). The statutory language also plainly states the public emergency must exist “within the state.” *Id.* Contrary to the Legislature’s strained interpretation, an emergency “within” our state can patently encompass not only a local emergency but also a statewide emergency affecting all of Michigan. There can be no dispute that the spread of COVID-19 was and is occurring “within the state” of Michigan. The prepositional phrase “within the state” clearly does not restrict the emergencies the EPGA contemplates to isolated emergencies in local communities. A single Michigan county can be described as being “within the state,” but the same is true when discussing all 83 of Michigan’s counties viewed together as a whole: they are “within the state.” The Legislature could have easily expressed that the EPGA pertains only to public emergencies within a village, city, township, county, or other unit of governance, or the Legislature could have stated that the EPGA does not apply to statewide emergencies, *but it did not do so.*⁶ The language the Legislature chose likely reflected the unremarkable and self-evident proposition that emergencies occurring outside the state did not implicate the EPGA.

With respect to the language in the first sentence of MCL 10.31(1) referring to an application for a declaration of emergency from a mayor, county sheriff, state police commissioner, or a governor acting on his or her own volition, we easily determine that the language is broad enough to encompass the occurrence of either a localized or a statewide emergency. While an application by a mayor or a county sheriff would likely relate to a local emergency, an application by a state police commissioner⁷ or governor could unquestionably concern a statewide emergency.

The concluding language in the first sentence of MCL 10.31(1) provides that a “governor may proclaim a state of emergency and *designate the area involved.*” (Emphasis added.) The

⁶ Our review of the Michigan Compiled Laws reveals that the Legislature has used the phrase “within the state” on numerous occasions in various contexts with the indisputable intent to include the entire state of Michigan. For example, the Insurance Code of 1956 provides that the insurance commissioner may restrict the solicitation of new business “within the state.” MCL 500.437(5). The Revised Judicature Act of 1961 establishes jurisdiction of the courts over corporations that conduct general business “within the state.” MCL 600.711(3). As yet another example, the rules of the State Higher Education Facilities Commission relate to institutions of higher education “within the state.” MCL 390.44.

⁷ “The [state police] commissioner shall formulate and put into effect plans and means of cooperating with the local police and peace officers *throughout the state . . .*” (Emphasis added.)

emphasized language plainly does not preclude the declaration of a state of emergency that designates the entire state as the “area involved.” There is no restrictive or limiting language with respect to the term “area,” and “area” simply means, in pertinent part, “a geographic region.” *Merriam-Webster’s Collegiate Dictionary* (11th ed). Were we to exclude the “state” as a whole from constituting the “area” subject to an order, rule, or regulation under the EPGA, we would be reading language into an unambiguous statutory provision and rewriting the plain language of the EPGA. That we may not do.

The second sentence of MCL 10.31(1) provides that “[a]fter making the proclamation or declaration [of 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.” (Emphasis added.) The prepositional phrase “within the affected area” is plain and unambiguous. Consequently, for the reasons discussed above in examining the term “area” and the phrase “within the state,” the language can concern a local emergency or a statewide emergency depending on the extent of the public crisis, disaster, or catastrophe. An “affected area” can span the entire state, especially with respect to a contagious disease, thereby establishing a statewide emergency that needs to be controlled. Additionally, and quite obviously, a governor’s efforts under the EPGA “to protect life and property” can extend to the lives and property of persons in a local community or the lives and property of everyone in Michigan.

Keeping our attention on the EPGA for now, we note that the last sentence of MCL 10.31(1) provides:

Th[e] orders, rules, and regulations may include, but are not limited to, providing for the control of traffic, including public and private transportation, within the area or any section of the area; designation of specific zones within the area in which occupancy and use of buildings and ingress and egress of persons and vehicles may be prohibited or regulated; control of places of amusement and assembly and of persons on public streets and thoroughfares; establishment of a curfew; control of the sale, transportation, and use of alcoholic beverages and liquors; and control of the storage, use, and transportation of explosives or inflammable materials or liquids deemed to be dangerous to public safety.

There is nothing in the plain and unambiguous language of this provision that limits or restricts the use of orders, rules, and regulations to solely confront local emergencies; the language is broad enough to include statewide emergencies. We have already dispensed with the arguments regarding the word “area.” And all of the specific examples of orders, rules, and regulations can apply in a limited manner at a local level or in an extensive manner at a statewide level. For example, during a state of emergency, a governor could regulate the use of buildings in a small town or across the entire state.

Without yet considering the EMA, pursuant to the plain and unambiguous language of the EPGA, we conclude that a governor has the authority to declare a *statewide* emergency and to promulgate reasonable orders, rules, and regulations during the pendency of the statewide emergency as deemed necessary by the governor, and which the governor can amend, modify, or rescind. Additionally, a declared statewide emergency only ends upon the governor’s declaration

that the emergency no longer exists. That has yet to occur in the instant case. As noted earlier in this opinion in regard to the EPGA, the Legislature specifically declared that its intent was “to invest the governor with sufficiently *broad power of action* in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster.” MCL 10.32 (emphasis added). Our conclusion regarding the breadth of the EPGA and that it pertains to statewide emergencies is entirely consistent with the expressed legislative purpose of the EPGA.⁸

The Legislature argues that the EPGA must be harmonized with the EMA and that a distinguishing feature between the two acts must be recognized because if they are effectively interchangeable and a governor can pick and choose which statute to invoke as he or she likes, the EMA and its requirement of legislative approval to extend a state of emergency are rendered surplusage. The Legislature contends that to distinguish the acts so as to make it possible to read them in harmony and give the EMA meaning, it is incumbent upon us to limit or restrict a governor’s authority under the EPGA to local emergencies. Again, the Legislature maintains that only the EMA applies to statewide emergencies.

When two or more statutes arguably relate to the same subject or have the same purpose, the statutes are deemed *in pari materia* and must be read together in order to discern legislative intent. *Measel v Auto Club Group Ins Co*, 314 Mich App 320, 329 n 7; 886 NW2d 193 (2016). The purpose of the rule of *in pari materia* is to effectuate the legislative goal as evinced by the harmonious statutes on a particular subject. *Id.* “When two statutes are *in pari materia* but conflict with one another on a particular issue, the more specific statute must control over the more general statute.” *Donkers v Kovach*, 277 Mich App 366, 371; 745 NW2d 154 (2007). “It is . . . well established that a later-enacted specific statute operates as an exception or a qualification to a more general prior statute covering the same subject matter and that, if there is an irreconcilable conflict between two statutes, the later-enacted one will control.” *In re Midland Publishing Co, Inc*, 420 Mich 148, 163; 362 NW2d 580 (1984). These are statutory-construction doctrines designed to discern the intent of the Legislature.

There can be no dispute that the EMA is much more comprehensive, specific, and detailed than the EPGA, that the EPGA is the older legislation, and that the EMA explicitly defines a disaster as including an “epidemic,” MCL 30.402(e). The Legislature relies on the doctrines of

⁸ Citing a 1945 newspaper article and a message from Governor William Milliken to the Speaker of the House of Representatives in the 1970s, the Legislature argues that the historical context of the EPGA reveals that it was intended for local matters, specifically rioting and civil disturbances. Extrinsic materials may play a role in statutory construction only to the extent that they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous language. *McCormick v Carrier*, 487 Mich 180, 221; 795 NW2d 517 (2010). “[T]he duty of this Court is to construe the language of Michigan’s statutes before turning to secondary sources” *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44, 57; 693 NW2d 149 (2005). Here, the clear and unambiguous language of the EPGA indicates that it applies to more than rioting and that it can encompass statewide emergencies; consequently, the secondary sources cited by the Legislature are of no relevance, nor are they inherently inconsistent with our analysis.

statutory interpretation mentioned above in its effort to persuade us that the EPGA must be construed to apply only to local emergencies. Given our earlier conclusion that the EPGA, when considered solely on the basis of the language in the EPGA, provides a governor with broad authority to issue orders to confront local as well as statewide emergencies, were we to adopt the Legislature’s argument, we would effectively be limiting, modifying, and abridging the EPGA. Our doing so would be in direct contravention of the Legislature’s directive in § 17 of the EMA, which provides that the EMA “shall not be construed to . . .

[l]imit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of the Michigan Compiled Laws, or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of this state independent of, or in conjunction with, this act. [MCL 30.417(d).]

The purpose of this provision is evident on its face and undeniable—the Legislature sought to arm a governor with a full legal arsenal to combat a public emergency, not just the EMA, but also the EPGA, other pertinent statutes, the Michigan Constitution, and even the common law, in conjunction with or independent of the EMA. MCL 30.417(d) does not permit us to use language in the EMA to diminish the reach and scope of the EPGA. The judiciary does not legislate.

Although the EMA specifically refers to an epidemic, we have determined that the EPGA would also cover a statewide emergency involving a contagious disease such as COVID-19, or in other words, an epidemic, which, because of COVID-19’s worldwide reach, is coined a pandemic. If, despite this conclusion, we held that only the EMA is implicated for purposes of ascertaining a governor’s authority to address an epidemic or a pandemic, we would offend MCL 30.417(d) and its mandate not to diminish a governor’s authority to act under the EPGA. We cannot employ statutory-construction principles or doctrines used to discern legislative intent to produce an interpretation that conflicts with an *explicit declaration* of the Legislature’s intent. See *People v Mazur*, 497 Mich 302, 314; 872 NW2d 201 (2015) (where the Legislature actually expressed a clear intent, application of the *in pari materia* doctrine to find a contrary legislative intent would not be proper). The Legislature’s general argument is contrary to the plain and unambiguous language of the EPGA, specifically MCL 10.31, and the EMA, specifically MCL 30.417(d).⁹

Our concurring and dissenting colleague constructs most of his statutory stance on the basis that the EMA specifically references an “epidemic,” concluding that this established that the EPGA was never intended to cover epidemics. We rejected this view for the reasons discussed

⁹ At oral argument, counsel for the Legislature responded to a query by this panel whether a governor could have acted on a statewide basis under the EPGA had the pandemic struck in 1975, a year before the EMA was enacted. Counsel replied in the negative, but also suggested that the EPGA could have been used on a county-by-county approach to address the hypothetical 1975 pandemic. This answer appears to accept that a governor can use the EPGA to address a statewide crisis, but would apparently have to do so in a laborious, fragmented fashion, categorizing each county separately. Regardless, the alleged distinction between local and statewide emergencies simply finds no support in the statutory language.

above. We also note that the Legislature does not even make the particular argument formulated by the dissent-concurrence in its brief, nor did it make the argument to the Court of Claims. Our colleague agrees that the argument actually posed by the Legislature—the EPGA solely addresses local emergencies and the EMA concerns both local and statewide emergencies—lacks merit. Although it is the Legislature’s position that the EPGA does not encompass statewide epidemics, it did not contend in its brief on appeal that the EPGA did not cover localized or regional epidemics or epidemics in general. Indeed, as noted earlier, the Legislature conceded that the parties agreed that the two acts “cover the same subject matter.” This is akin to a waiver of the issue. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Again, MCL 30.417(d) precludes construction of the EMA to “[l]imit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of the Michigan Compiled Laws[.]” We reject any contention that this provision only bars a limitation, modification, or abridgment of a governor’s authority to *proclaim or declare* a state of emergency under the EPGA, absent any application to the *extension* of a state of emergency, thereby allowing imposition of the legislative-approval provision in § 3 of the EMA. We believe this to be a tortured construction of MCL 30.417(d) which clearly sought to preserve the entire EPGA and to preclude diminishing any and all of the powers the EPGA granted a governor in addition to his or her initial authority to declare an emergency. Moreover, the argument ignores the manner in which the EPGA operates under MCL 10.31. Pursuant to MCL 10.31(2), a governor proclaims or declares a state of emergency, and it simply continues until the governor declares “that the emergency no longer exists.” There is no specific language in the EPGA regarding *extensions* of a state of emergency, so there would be no reason or need for such language in MCL 30.417(d).¹⁰

The Legislature makes the argument that the EMA is rendered meaningless if the Governor’s position is validated and the Governor can take the very same measures under both the EMA and the EPGA. We, however, are simply not at liberty to question or ignore the Legislature’s informed, intentional decision when enacting the EMA to leave the broad language of the EPGA untouched, fully intact, and operational. “It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws.” *Walen v Dep’t of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). Here, we find compelling the fact that in enacting the EMA, the Legislature specifically referenced the EPGA. Hence, we know with certainty that the Legislature was aware of the EPGA; therefore, we must presume that the Legislature recognized and appreciated that the EPGA did not require legislative approval of a governor’s actions in continuing a state of emergency until the emergency ceased. Despite this presumed knowledge, the Legislature, while requiring legislative approval to extend a state of emergency under the EMA, expressly declared that the EMA could not be construed as limiting, modifying, or abridging the EPGA.¹¹ Perhaps the Legislature desired an

¹⁰ To be clear, however, there is nothing in the EPGA that prevents a governor from acting incrementally during an emergency.

¹¹ We do conclude that reading a requirement for legislative approval to extend a state of emergency into the EPGA would have the effect of limiting, modifying, or abridging a governor’s

executive-legislative partnership in confronting a public emergency but also wished to avoid a political impasse and inaction in the face of an emergency should the partnership fail. Whatever the reason, we now simply read these statutes as required and accept the Legislature's explicitly articulated decision to retain the EPGA as a source of gubernatorial power during an emergency notwithstanding its subsequent enactment of the EMA.

4. DISCUSSION AND RESOLUTION – THE EPGA AND SEPARATION OF POWERS

The Legislature argues that if we construe the EPGA as urged by the Governor and determined by the Court of Claims, “then the statute faces a larger constitutional problem: separation of powers.” The Legislature contends that the lawmaking power rests exclusively with the Legislature, that the Governor is unilaterally making laws, that the crisis does not diminish the separation of powers doctrine, and that the EPGA's supposed delegation of power to the Governor cannot save the EOs.

As an initial observation, we are at a loss to understand how the EPGA is apparently constitutional for purposes of separation of powers if construed to solely give a governor the power to address local emergencies but violates the separation of powers doctrine if applied to statewide emergencies. If there were an unconstitutional delegation of legislative power to the executive branch under the EPGA, whether that power is exercisable to only combat local emergencies or instead available to tackle local and statewide emergencies seems inconsequential to the constitutional analysis and determination of a violation. Regardless, the Legislature has failed to meet its burden to show that the EPGA violates the Separation of Powers Clause.

A statute is presumed to be constitutional, and courts are obligated to interpret a statute as constitutional unless its unconstitutionality is readily apparent. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307; 806 NW2d 683 (2011). Extreme caution must be used when deciding whether to exercise the power to declare a statute unconstitutional. *Id.* If serious doubt exists with respect to whether we should declare a law unconstitutional, the power to do so must not be exercised. *Id.* at 307-308. Every reasonable presumption must be indulged in favor of the constitutional validity of a statute. *Id.* at 308. When examining an argument that a statute is unconstitutional, this Court does not make inquiry into the wisdom of the legislation. *Id.* The burden to prove that a statute is unconstitutional rests with the party who is challenging the law. *Id.*

As indicated earlier, legislative power is vested in the Legislature. Const 1963, art 4, § 1. Under Const 1963, art 4, § 51, “[t]he public health and general welfare of the people of the state are hereby declared to be matters of primary public concern” and “[t]he legislature shall pass suitable laws for the protection and promotion of the public health.” Under our Separation of Powers Clause, Const 1963, art 3, § 2, and what is known as the nondelegation doctrine, which flows from the Clause, the legislative branch may not delegate its lawmaking authority to the executive or judicial branches. *Taylor v SmithKline Beecham Corp*, 468 Mich 1, 8; 658 NW2d

authority under the EPGA because the EPGA gives the governor alone the power to determine when an emergency has ended.

127 (2003); *Detroit v Detroit Police Officers Ass'n*, 408 Mich 410, 458; 294 NW2d 68 (1980); *Osius v St Clair Shores*, 344 Mich 693, 698; 75 NW2d 25 (1956). In *Makowski v Governor*, 495 Mich 465, 482-483; 852 NW2d 61 (2014), our Supreme Court provided some clarification regarding the nondelegation doctrine, explaining:

While the Constitution provides for three separate branches of government, Const 1963, art 3, § 2, the boundaries between these branches need not be “airtight[.]” In fact, in designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. The true meaning [of the separation-of-powers doctrine] is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution. [Quotation marks, citations, and alteration omitted; latter alteration in original.]

The Michigan Supreme Court has recognized that the Separation of Powers Clause and the nondelegation doctrine do not prevent our Legislature from obtaining the assistance of the coordinate branches. *Taylor*, 468 Mich at 8-9. In *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 51-52; 367 NW2d 1 (1985), the Supreme Court observed:

Challenges of unconstitutional delegation of legislative power are generally framed in terms of the adequacy of the standards fashioned by the Legislature to channel the agency’s or individual’s exercise of the delegated power. Although for many years this and other courts evaluated delegation challenges in terms of whether a legislative (policymaking) or administrative (factfinding) function was the subject of the delegation, this analysis was replaced by the “standards” test as it became apparent that the essential purpose of the delegation doctrine was to protect the public from misuses of the delegated power. The Court reasoned that if sufficient standards and safeguards directed and checked the exercise of delegated power, the Legislature could safely avail itself of the resources and expertise of agencies and individuals to assist the formulation and execution of legislative policy.

The criteria this Court has utilized in evaluating legislative standards are . . . : 1) the act must be read as a whole; 2) the act carries a presumption of constitutionality; and 3) the standards must be as reasonably precise as the subject matter requires or permits. The preciseness required of the standards will depend on the complexity of the subject. Additionally, due process requirements must be satisfied for the statute to pass constitutional muster. Using these guidelines, the Court evaluates the statute’s safeguards to insure against excessive delegation and misuse of delegated power. [Citations omitted.]

The “standards test” satisfies the Separation of Powers Clause, and when legislation contains, either expressly or by incorporation, adequate standards, then the courts, the public, and the Legislature may, if necessary, constitutionally “check” the use of delegated power. *Westervelt*

v Natural Resources Comm'n, 402 Mich 412, 439; 263 NW2d 564 (1978). “In making th[e] determination whether the statute contains sufficient limits or standards we must be mindful of the fact that such standards must be sufficiently broad to permit efficient administration in order to properly carry out the policy of the Legislature but not so broad as to leave the people unprotected from uncontrolled, arbitrary power” *Dep’t of Natural Resources v Seaman*, 396 Mich 299, 308-309; 240 NW2d 206 (1976).

We hold that the EPGA contains standards that are as reasonably precise as the subject matter—public emergencies—requires or permits, such that the Legislature, by enacting the EPGA, safely availed itself of the resources and expertise of the executive branch to assist in the execution of legislative policy. Accordingly, the EPGA does not violate the Separation of Powers Clause, and the Legislature did not prove otherwise. The standards found in the EPGA are sufficiently broad to permit the efficient administration of carrying out the policy of the Legislature with regard to addressing a public emergency but not so broad as to leave Michiganders unprotected from uncontrolled, arbitrary power.

The Legislature complains about the alleged broad and sweeping nature of the EOs issued by the Governor and criticizes the Governor for subjecting citizens to criminal penalties for violating those expansive EOs. But it was the Legislature itself, exercising its role to make policy and enact laws in 1945, that expressly declared that a governor is to exercise “broad” police power during a public emergency, MCL 10.32, and that explicitly directed that a violation of an order could “be punishable as a misdemeanor,” MCL 10.33. Of course, the Legislature claims that the individuals composing the Legislature in 1945 overstepped their constitutional bounds when enacting the EPGA. We find it more than a bit disconcerting that the very governmental body that delegated authority to governors to confront public emergencies—and holds and has held the exclusive power to change it—steps forward 75 years later to now assert that it unconstitutionally delegated unconstrained authority.

Under the standards articulated by the Legislature in the EPGA, a governor may declare a state of emergency and promulgate orders, rules, and regulations to address a “great public crisis, disaster, rioting, catastrophe, or similar public emergency . . . , or [when there is] reasonable apprehension of immediate danger of a public emergency of that kind[.]” MCL 10.31(1). The declared emergency must imperil “public safety.” *Id.* Considering the complexity of the subject matter and the myriad unfathomable forms that a public emergency could take, we find this language is as reasonably precise as the subject matter requires or permits. Indeed, more exacting standards would likely be overly confining and unnecessarily bind a governor’s hands in any effort to mitigate and control an emergency at the very time he or she must need to be nimble.

Moreover, the orders, rules, and regulations must be “reasonable” and, as judged by a governor, “necessary to protect life and property or to bring the emergency situation . . . under control.” *Id.* Reasonableness and necessity, as couched in the statutory language, constitute appropriate limits or standards that prohibit and can prevent the exercise of uncontrolled and

arbitrary power, yet are sufficiently broad to permit a governor to carry out the legislative policy of protecting life and property during an emergency and controlling a great public crisis.¹²

Adding further parameters or guidelines, the EPGA sets forth examples of appropriate orders, rules, and regulations, touching on traffic, transportation, the establishment of zones to regulate the use and occupancy of buildings, the prohibition and regulation of ingress and egress relative to buildings, the control of places of assembly and streets, curfews, and the transportation of explosives. *Id.* And a governor’s authority ends when it is determined “that the emergency no longer exists.” MCL 10.31(2). Finally, the EPGA “does not authorize the seizure, taking, or confiscation of lawfully possessed firearms, ammunition, or other weapons.” MCL 10.31(3).¹³

In sum, exercising extreme caution, indulging every reasonable presumption in favor of the constitutionality of the EPGA, and evaluating the EPGA’s safeguards, criteria, and standards in total, not in a vacuum, we conclude that there was no excessive or improper delegation of power to the governor with the enactment of the EPGA.

C. THE EMA

If this panel, as urged by the Legislature, were to rule that the Governor violated the EMA and lacked authority to utilize the EMA to extend the state of emergency and issue EOs on and after April 30, 2020, it would be entirely pointless because the Governor had the authority to continue the very same state of emergency and issue the very same EOs under the EPGA. Stated otherwise, we could provide no meaningful relief to the Legislature if we ruled in its favor with respect to the EMA. Therefore, given our holding in regard to the EPGA, we can only conclude that any issues concerning the Governor’s powers under the EMA are now moot. See *Anway v Grand Rapids R Co*, 211 Mich 592, 610; 179 NW 350 (1920) (a matter is moot if a judgment on the matter, “when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy”); *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 493;

¹² See *Mich State Hwy Comm v Vanderkloot*, 392 Mich 159, 173; 220 NW2d 416 (1974) (the standard of “necessity” in eminent domain statute is a sufficient standard for delegation of authority because it is as reasonably precise as the subject matter requires or permits); see also *Klammer v Dep’t of Transp*, 141 Mich App 253, 262; 367 NW2d 78 (1985) (“In the context of this case, ‘necessary’ was a sufficiently precise standard.”). “A *reasonable* determination is the antithesis of one which is *arbitrary*.” *Dooley v Hwy Truckdrivers & Helpers, Local 107, Int’l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 192 F Supp 198, 200 (D Del, 1961) (emphasis added).

¹³ As reflected in our discussion of the various standards and criteria in MCL 10.31, there is no basis whatsoever for the claim by the dissent-concurrence that we are holding that the EPGA empowers a governor “to do anything” the governor wishes. Furthermore, the “reasonable” standard in MCL 10.31(1) relative to promulgated orders interjects an objective component into the statute. See *Radtko v Everett*, 442 Mich 368, 387; 501 NW2d 155 (1993) (reasonableness involves an objective not subjective examination). Finally, the EPGA does not allow for the issuance of never-ending orders, as the governor’s authority ceases at the conclusion of the emergency. MCL 10.31(2).

608 NW2d 531 (2000) (“An issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief.”); *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) (applying doctrine of mootness where “there is no meaningful relief this Court can provide because petitioners can assign their lottery winnings to the same parties under the amended statute”).

D. INTERVENTION

Prospective intervenors argue that the Court of Claims abused its discretion by denying their motion to intervene. “This Court reviews a trial court’s decision on a motion to intervene for abuse of discretion.” *Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610, 612; 773 NW2d 267 (2009). A court abuses its discretion when a decision falls outside the range of reasonable and principled outcomes. *Id.*

The five attorneys argue that their law practices “remain threatened by the possibility that the Governor will [impose] criminal prosecution for, well, going to our own offices ‘too often.’ ” Prospective intervenors acknowledge that the stay-at-home EOs have been lifted, a fact that would appear to render moot the majority of their claims. Regardless, reversal is unwarranted. In denying the motion to intervene, the Court of Claims reasoned, in pertinent part:

In this case, the putative intervenors echo much of the argument offered in support of the plaintiffs’ case and additionally present . . . an “as applied” challenge to the scope of the executive orders as they affect lawyers and litigants. The focus of the case pled by plaintiffs is on an assertion that the Governor is without authority to act as she has under the Michigan Constitution, [the EMA], or [the EPGA]; or that the EPGA itself is unconstitutional. Those issues are adequately represented by the plaintiffs. The distinct issues of whether any, all, or some of the executive orders impermissibly infringe on the rights, duties or privileges of attorneys or their clients is not the focus of this case and would be better framed in a separate action. Additionally, this matter is emergent and affording party status to these putative plaintiffs would delay resolution.

The rule regarding permissive intervention,¹⁴ MCR 2.209(B), provides as follows:

On timely application a person may intervene in an action

(1) when a Michigan statute or court rule confers a conditional right to intervene; or

(2) when an applicant’s claim or defense and the main action have a question of law or fact in common.

¹⁴ Prospective intervenors do not claim that they have a “right” to intervene under MCR 2.209(A).

In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

MCR 2.209(B)(2) was the only provision potentially implicated in this case. The five attorneys describe their arguments as “virtually identical” to those made by the Legislature. To the extent that this claim is true, our ruling today eliminates the need for future intervention by prospective intervenors to litigate the arguments already posed by the Legislature and rejected in this appeal. To the extent that the attorneys presented questions of law and fact unique to them, this does not bode well for them under MCR 2.209(B)(2), as it favors denial of intervention. Additionally, it would make no procedural sense to remand this case and allow the five cross-appellants to litigate those unique matters against the Governor; they can always file their own action or attempt to intervene in other lawsuits regarding the Governor’s EOs. Moreover, on appeal, prospective intervenors do not even address the issue of any delay that would have been caused by their intervention, although the Court of Claims cited undue delay as a basis for its ruling. “When an appellant fails to dispute the basis of a lower court’s ruling, we need not even consider granting the relief being sought by the appellant.” *Denhof v Challa*, 311 Mich App 499, 521; 876 NW2d 266 (2015). In sum, we hold that there is no basis for reversal.

V. CONCLUSION

Proceeding on the assumption that the Legislature had standing to file suit, we hold 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. We further hold that the EPGA does not violate the Separation of Powers Clause. We therefore decline to address whether the Governor was additionally authorized to take those same measures under the EMA and whether the Governor violated the EMA—those matters are moot. Finally, we hold that there is no basis to reverse the order of the Court of Claims denying the motion to intervene.

We affirm on the issues necessary to resolve this appeal.

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly

Exhibit 4

August 21, 2020 Court of Appeals
Concurring and Dissenting Opinion

If this opinion indicates that it is “FOR PUBLICATION,” it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN
COURT OF APPEALS

HOUSE OF REPRESENTATIVES and SENATE,

FOR PUBLICATION
August 21, 2020

Plaintiffs-Appellants/Cross-Appellees,
and

JOHN F. BRENNAN, MARK BUCCHI, SAMUEL
H. GUN, MARTIN LEAF, and ERIC ROSENBERG,

Cross-Appellants,

v

No. 353655
Court of Claims
LC No. 20-000079-MZ

GOVERNOR,

Defendant-Appellee/Cross-
Appellant/Cross-Appellee.

Before: MARKEY, P.J., and K. F. KELLY and TUKEL, JJ.

TUKEL, J. (*concurring in part and dissenting in part*).

INTRODUCTION

I agree with the majority’s decision that the Court of Claims properly denied the motion for intervention. I disagree, however, with the remainder of the majority’s opinion. The U.S. Supreme Court “consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.” *Mistretta v United States*, 488 US 361, 380; 109 S Ct 647; 102 L Ed 2d 714 (1989) (citations omitted).

Our Michigan Constitution broadly follows the same parameters, and has done so in similar terms since before statehood in 1837. Under our law, “The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.” Const 1963, art 3, § 2,” (Separation of Powers of Government.); see also *Nat’l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 613, 684 NW2d 800 (2004) (“By

separating the powers of government, the framers of the Michigan Constitution sought to disperse governmental power and thereby to limit its exercise.”), overruled on other grounds by *Lansing Sch Ed Ass’n v Lansing Bd of Ed* 487 Mich 349, 792 NW2d 686 (2010).¹

Under that tripartite approach, “the legislative power of the State of Michigan is vested in a senate and a house of representatives,” Const 1963, art 4, § 1; “the executive power is vested in the governor,” *id.* at art 5, § 1 (“Executive power.”); and “the judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house,” *id.* at art 6, § 1 (“Judicial power in court of justice; divisions.”), except “to the extent limited or abrogated by article 4, section 6 or article 5, section 2,” an exception which applies to each of the three branches.²

This case involves the scope of those executive and legislative powers; the questions presented are whether the Legislature, in the 1945 Emergency Powers of Governor Act (hereinafter the “EPGA”),³ and the 1976 Emergency Management Act (hereinafter, the “EMA”),⁴ authorized a governor to rule on an emergency basis without any durational limit; and whether, if the Legislature did give such authority, its delegation of that power was constitutional. The case comes to us under executive orders issued by Governor Gretchen Whitmer relating to the current pandemic involving Covid 19. The executive orders, which have evolved over time, have in various iterations significantly restricted the liberties of all Michigan citizens in many ways, imposing broad economic and travel restrictions; setting forth mandatory stay-at-home orders; and promulgating many other regulations. The executive orders are backed by criminal sanctions, which provide that persons who violate them are subject to the misdemeanor penalties of the EPGA, see MCL 10.33, and the EMA, see MCL 30.305(3). Those orders, and the associated

¹ Our first constitution, in 1835, preceded statehood but nonetheless provided that “[t]he powers of the government shall be divided into three distinct departments; the Legislative, the Executive and the Judicial; and one department shall never exercise the powers of another, except in such cases as are expressly provided for in this constitution.” Const 1835, art 3, § 1; and that “The legislative power shall be vested in a Senate and House of Representatives.” *Id.* at art 4, § 1. Almost identical provisions have been enacted in our three subsequent constitutions, including the current one. See Const 1850, art 4, § 1; Const 1908, art 5, § 1; Const 1963, art 3, § 2.

² That exception is not at issue here. Article 3, section 6 involves the authority of the governor to reorganize principal departments, and places a limit of 20 on the number of such departments; Article 5, section 2 involves a citizen’s redistricting commission.

³ 1945 PA 302 as amended, codified at MCL 10.31 *et seq.*

⁴ 1976 PA 390 as amended, codified at MCL 30.410 *et seq.*

criminal penalties, were imposed solely by executive order of the governor, bypassing the normal legislative process.⁵

The Governor asserts that her authority under the EPGA is essentially unlimited in scope and duration. The executive orders thus implicate statutory interpretation involving the interplay between the EPGA and the EMA, given that the later-enacted EMA provides that the governor's authority to issue such an executive order expires at the end of 28-days if not approved by both houses of the Legislature; the case also presents the question of whether, if the Legislature did grant such broad authority to the governor, such legislation was constitutional. And the Governor asserts that the Legislature lacks standing to bring the instant suit challenging the executive orders. All of those questions take place against a backdrop that no Governor ever has asserted such unbridled authority outside the normal and constitutionally-sanctioned legislative process.⁶

Ultimately, I believe the questions presented here yield a clear answer on statutory terms: the EPGA and the EMA, properly construed *in pari materia*, do not each stand on their own, as the Governor asserts and the majority holds; rather, at least in a case such as this involving an "epidemic," and for reasons discussed more fully in this opinion, the EMA's 28-day time limit controls. For reasons properly found by the Court of Claims, the Legislature has standing to bring

⁵ Various iterations of the orders have relied on different authorities. Executive Order 2020-67 invoked the Governor's Constitutional authority under Const. 1963 Art. 5, § 1 and the EPGA; Executive Order 2020-68 invoked the Governor's Constitutional authority and the EMA, declaring both a state of emergency and a state of disaster under the EMA. See generally Part III of this opinion. Ultimately, the analysis in this opinion does not rest on which statute the Governor relied upon in any particular order, because the statutes are to be interpreted *in pari materia*, and thus both are at issue. See generally Part III of this opinion.

⁶ It also is worth noting what is not at issue in this case, principally whether Covid 19 is an extremely dangerous public health challenge which must be addressed by government; clearly it is. The question thus is not whether actions should be taken by government, but rather how they should be taken—by unlimited executive fiat, or through constitutional methods in place since before statehood. We also do not weigh any particular policy prescription set forth by the Governor or the Legislature. Rather, the correct resolution turns on constitutional text; legislative language which expresses the Legislature's policy determinations, and legislative intent based on such language; all as filtered through well-established canons of construction which dictate how we view and interpret legal authorities. See *Robinson v Detroit*, 462 Mich 439, 474, 613 NW2d 307 (2000) (Corrigan, J., concurring) ("[A] Court exceeds the limit of its constitutional authority when it substitutes its policy choice for that of the Legislature[.]"). The case of course presents critical issues involving self-government, as "the underlying issues in these cases pertain to an 'emergency' of the most compelling and undisputed character," *House of Representatives v Governor*, ___ Mich ___, ___; 944 NW2d 706, 708 (2020) (Cavanagh, J., concurring), and "is arguably the most significant constitutional question presented to this Court in the last 50 years," *House of Representatives v Governor*, ___ Mich ___, ___; 943 NW2d 365, 371 (2020) (Zahra, J., dissenting), recon den 944 NW2d 706 (2020).

this suit, because the Governor's actions have vitiated the Legislature's express authority under the EMA to approve or disapprove executive orders extending beyond 28 days; properly construed, the EPGA has no role to play in this analysis. Thus, because the Governor's actions violate the EMA, as the Legislature has declined to extend the executive orders, as correctly found by the Court of Claims, I would affirm that portion of its order, and strike down the executive orders at issue. Given my preference, I also would not reach the Constitutional questions involved, particularly whether the Governor has improperly exercised legislative authority belonging to the Legislature, in violation of Article 3, § 2, of the 1963 Constitution. As discussed more fully in this opinion, the doctrine of constitutional avoidance directs us to decline such constitutional interpretation if a case can be decided on other grounds; here, the statutory analysis would fully dispose of the questions presented. However, the majority rejects the statutory analysis which I believe is mandated, which thus requires that I consider the constitutional question of whether the Governor improperly exercised (and continues to exercise) legislative powers, in violation of our Constitution. For reasons stated more fully in this opinion, I would find that the Governor's actions violate the separation of powers, and would strike down the executive orders on that basis as well. However, I agree with the majority that the Court of Claims did not abuse its discretion in denying intervention, and thus join Part IV(D) of the majority opinion.

I. STANDING

The majority never finds that the House and the Senate have standing to pursue the present case, simply assuming that there was standing. While I would find that there was nothing incorrect in that portion of the Court of Claims' opinion which found standing, I do not think that we can simply assume standing. Therefore, I will briefly review why I think the Legislature properly established standing for this case.

Whether a party has standing is a question of law that is reviewed de novo. *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019). Standing is a component of every case. See *Miller v Allstate Ins Co*, 481 Mich 601, 606-607; 751 NW2d 463 (2008) (citations omitted) ("Our constitution requires that a plaintiff possess standing before a court can exercise jurisdiction over that plaintiff's claim. This constitutional standing doctrine is longstanding and stems from the separation of powers in our constitution."); *Coldsprings Twp v Kalkaska Co Zoning Bd of Appeals*, 279 Mich App 25, 28; 755 NW2d 553 (2008) (citation and quotation marks omitted; emphasis added) ("[T]he elements of individual and organizational standing must be met in environmental cases *as in every other lawsuit*, unless the constitution provides otherwise.").

"[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue." *House Speaker v Governor*, 443 Mich 560, 572 n 15; 506 NW2d 190 (1993), citing *Flast v Cohen*, 392 US 83, 99-100; 88 S Ct 1942; 20 L Ed 2d 947 (1968). "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.'" *Lansing Sch Ed Ass'n*, 487 Mich at 355 (citations omitted). Absent standing, a court's decision would constitute a mere advisory opinion, which is outside the "judicial power"

provided for by our Constitution. See generally *Nat'l Wildlife Federation*, 471 Mich at 612-614, citing Cooley, *A Treatise on the Constitutional Limitations* (Little, Brown & Co, 1886) at 92.⁷

Thus, under the Michigan Constitution, a litigant has standing whenever there is a legal cause of action. Further, a litigant who meets the requirements of MCR 2.605 sufficiently establishes standing to seek a declaratory judgment. *Lansing Sch Ed Ass'n*, 487 Mich at 372. If a cause of action is not provided at law,

then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. [*Id.* at 373.]

Here, there is no cause of action provided by law. The EMA, however, provides that an executive order which the governor issues under its authority expires after 28 days “unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature.” MCL 30.403(3) (regarding states of disaster); MCL 30.403(4) (regarding states of emergency). The Legislature argues that under the required *in pari materia* reading of the EMA and the EPGA, the provisions of the EMA control; the Legislature thus argues that failing to grant it standing in this case would have the effect of nullifying the statutory scheme which the Legislature enacted regarding time limits for the executive orders at issue, a position which the Court of Claims accepted. In addition, the Legislature argues that the EPGA is unconstitutional.

“For purposes of determining standing, we must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *American Family Ass'n of Mich v Mich State Univ Bd of Trustees*, 276 Mich App 42, 45-46; 739 NW2d 908 (2007) (citations and quotation marks omitted). As such, I must consider as true the Legislature's

⁷ In a number of cases, including *House Speaker v State Admin Bd*, 441 Mich 547, 560 and n 20; 495 NW2d 539 (1993) and *Rohde v Ann Arbor Pub Sch*, 479 Mich 336; 737 NW2d 158 (2007), our Supreme Court emphasized that “[o]ne notable distinction between federal and state standing analysis is the power of this Court to issue advisory opinions. Const 1963, art 3, § 8. Under Article III of the federal constitution, federal courts may issue opinions only where there is an actual case or controversy.” See *House Speaker*, 441 Mich at 559 and n 20. Const 1963, art 3, § 8, is limited in scope in a number of respects, providing that “Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.” Thus, while that provision authorizes the Supreme Court under certain circumstances to issue an advisory opinion, there is no such provision granting this Court such authority. Thus, this Court is bound to find standing in a case before we may exercise the judicial power.

allegations that, in issuing her executive orders and repeatedly extending a state of emergency without legislative approval, the Governor encroached on its authority. See *id.*

It is of course clearly-settled law that “Interpretation of the State Constitution is the exclusive function of the judicial branch. Construction of the Constitution is the province of the courts and this Court’s construction of a State constitutional provision is binding on *all* departments of government.” *House Speaker*, 443 Mich at 575 n 19, citing *Richardson v Secretary of State*, 381 Mich 304, 309; 160 NW2d 883 (1968). See also *House Speaker*, 443 Mich at 575 n 19, citing *Regents of the Univ of Mich v Employment Relations Comm*, 389 Mich 96, 103; 204 NW2d 218 (1973) (“A conflict between the constitution and the statute is clearly a legal question which only a court can decide”).

I would find, as did the Court of Claims, that given the statutory structure of the EMA, and the significant issues regarding the EMA’s interrelationship with the EPGA, as well as the question of the constitutionality of the EPGA under the circumstances presented, see Part IV of this opinion, that the Legislature has alleged a special injury or right, as well as a substantial interest, that will be detrimentally affected in a manner different from the citizenry at large. *Lansing Sch Ed Ass’n*, 487 Mich at 372. The Legislature alleges that its statutory authority to decline a Governor’s request to extend a state of disaster or state of emergency is being effectively eviscerated through the Governor’s actions; given the language of the EMA, I agree that the allegation of a loss of such prerogatives through encroachment by a different branch of government constitutes “a special injury or right.” By definition, such an injury is one which only the Legislature could suffer, as the Legislature is the only entity which is given authority to authorize or to decline to authorize requests to extend a state of emergency. It seems clear to me that the Legislature thus alleges a “special injury,” as such an injury, if it occurred, could affect the scope of the Legislature’s powers only; and it also is clear that, because it is an injury which could affect the Legislature powers only, the injury is not one which would affect the citizenry at large, other than in the general sense of the law not being followed, which is insufficient to establish standing.

Moreover, a party has standing “if the statutory scheme implies that the Legislature intended to confer standing on the litigant.” *Lansing Sch Ed Ass’n*, 487 Mich at 372. Given the nature of the disputes in this case, involving statutory and constitutional interpretation, only the judicial branch could resolve them. And I see no reason to conclude that the Legislature would have gone to the trouble of enacting the time limitation provisions of the EMA, which, when applicable, work to grant it the ability to cabin the governor’s authority, if it did not intend to afford itself recourse to the courts in those instances in which it alleged that the governor failed to comply with such limits.

In other words, in my opinion the Legislature has alleged a special injury unique to it; an injury not available to the public at large, or any other person or entity, thus establishing that the Legislature’s injury is different in kind from any potentially suffered by the public at large; that the nature of the disputes are such that only the judicial branch can conclusively determine them; and that the statutory scheme evinces an intention on the part of the Legislature to grant itself

standing to litigate such suits.⁸ The fact that the injury would have “completely nullified” the Legislature’s authority under the statutory scheme, see *Arizona State Legislature v Arizona Independent Redistricting Comm*, ___ US ___; 135 S Ct 2652; 192 L Ed 704 (2015); *Tennessee General Assembly v United States Dep’t of State*, 931 F3d 499 (CA 6, 2019), and thus also would have satisfied the more restrictive Article III definition of standing, as the Court of Claims also concluded, in my opinion simply reinforces that the Legislature has established standing. I therefore turn to the merits of the case.

II. STANDARD OF REVIEW

The questions presented here all are subject to de novo review. We review de novo whether a party has standing to pursue a case, *In re Gerald L Pollack Trust*, 309 Mich App 125, 153; 867 NW2d 884 (2015); the proper interpretation and construction of statutes, *Joseph v Auto Club Ins Ass’n*, 491 Mich 200, 205; 815 NW2d 412 (2012); and the scope of constitutional provisions, *Thomas v Pogats*, 249 Mich App 718, 724; 644 NW2d 59 (2002).

III. STATUTORY CONSTRUCTION

As an initial matter, the majority states that the Legislature failed to argue, in its brief on appeal, that the EPGA does not apply to epidemics. At oral argument, however, the Legislature made clear that it *was* making such an argument. I question, therefore, whether the Legislature could be deemed to have waived anything. More fundamentally, this case properly involves interpretation of two statutes *in pari materia*. Under the *in pari materia* rules of construction, we are to find a harmonious reading of the two statutes if possible. In undertaking that task, we are not restricted by whether a party made a particular argument for a harmonious reading of the statutes; the proper interpretation of statutes is a judicial function, which cannot be waived by a party. I discern no basis for the Legislature’s argument that, properly construed, the EPGA has a geographic limitation, and therefore I agree with the majority as to that point; but nonetheless I would find that the proper construction demonstrates the inapplicability of the EPGA to an “epidemic.”

A. *IN PARI MATERIA* CANON OF CONSTRUCTION

Both the EPGA and the EMA deal with the declaration of a state of emergency in the generic sense;⁹ the invocation of emergency powers to address such emergencies, which powers vary markedly from those ordinarily in effect under our constitutional structure; and the limits, if

⁸ While I acknowledge that the Legislature has the power through the normal political process to amend or repeal the EMA and the EPGA, which may have application to future executive actions, it does not have the power to ensure that the Governor has not exceeded a governor’s power under these statutes as currently in force, the issue presented here. That is the judiciary’s role.

⁹ Under the EMA, a governor can declare a “state of disaster,” MCL 30.403(3), or a “state of emergency,” MCL 30.403(4). However, an epidemic can only be the basis for executive action as a state of disaster, as is expressly provided by the EMA’s definitions. See MCL 30.402(e); note 16 of this opinion (discussing the *expressio unius* canon of construction).

any, placed on a governor exercising such powers. As such, both statutes relate to the same subject matter, and thus are *in pari materia* (literally, “in a like manner”). “It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other.” *Detroit v Mich Bell Tel Co*, 374 Mich 543, 558; 132 NW2d 660 (1965), overruled on other grounds by *City of Taylor v Detroit Edison Co*, 475 Mich 109, 119; 715 NW2d 28 (2006). “ ‘The object of the rule *in pari materia* is to carry into effect the purpose of the legislature as found in harmonious statutes on a subject.’ ” *Jennings v Southwood*, 446 Mich 125, 137; 521 NW2d 230 (1994), quoting *Wayne Co v Auditor General*, 250 Mich 227, 233; 229 NW 911 (1930). That is because “[s]everal acts *in pari materia*, and relating to the same subject, are to be taken together, and compared in the construction of them, because they are considered as having one object in view, and as action upon one system.” 1 James Kent, *Commentaries on American Law* 433 (1826), cited in Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (Thompson/West, 2012), p 252. When applying an *in pari materia* construction, “[i]f statutes lend themselves to a construction that avoids conflict, that construction should control.” *Walters v Leech*, 279 Mich App 707, 710; 761 NW2d 143 (2008) (citation omitted). “When there is a conflict between statutes that are read *in para* [sic] *materia*, the more recent and more specific statute controls over the older and more general statute.” *People v Buehler*, 477 Mich 18, 26; 727 NW2d 127 (2007), abrogated in part on other grounds by *People v Arnold*, 502 Mich 438; 918 NW2d 164 (2018). In addition, and outside the *in pari materia* rules of construction, we construe statutes in such a manner that each word has meaning, and that no word is deemed to be surplusage or nugatory. *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007).¹⁰

B. BACKGROUND INFORMATION REGARDING THE STATUTORY SCHEMES

Under the EMA:

1. An “epidemic” expressly may be a triggering event for executive action.¹¹ MCL 30.402(e); MCL 30.403(3).
2. A declaration of a state of disaster authorizes a governor, in addition to some specific powers, to “Direct all other actions which are necessary and appropriate under the circumstances.” MCL 30.405(1)(j).
3. Such a state of disaster must terminate after 28 days unless the governor requests and the Legislature approves an extension. MCL 30.403(3).

¹⁰ Just so it is absolutely clear, there are three general canons of construction implicated here: (1) statutes regarding the same general subject matter are construed *in pari materia*; (2) we assume that the Legislature did not intend for its enactments to be mere surplusage, but rather that it strives for an interpretation which gives every word meaning; and (3) we assume that when the Legislature enacts legislation, it knows what the existing state of the law is and crafts its work accordingly.

¹¹ See Note 9 of this opinion.

Under the EPGA:

1. The governor may declare a state of emergency “[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state.” MCL10.31(1).
2. “After making the proclamation or declaration, 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,” and provides a non-exclusive list of the governor’s powers. MCL 10.31(1).
3. Such orders are in effect until they expire under their own terms, or when the governor declares “that the emergency no longer exists.” MCL 10.31(2). The majority concludes that the governor may invoke the EPGA based on an epidemic or a pandemic.¹² There are no categorical limits placed on the orders which a governor can impose after a declaration under either statute: the EPGA permits “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,” while the EMA permits the governor to “[d]irect all other actions which are necessary and appropriate under the circumstances.” There is no material difference between the two; each permits the governor to take whatever actions the governor deems necessary.

Thus, applying the rules of construction in a straightforward manner, it is readily apparent that the inclusion of the word “epidemic” in the definition of disaster under the EMA means that the Legislature did not understand any of the EPGA’s triggering events to include an epidemic; if the EPGA applied to an epidemic, there would have been no reason to include it in the EMA definition, as it would be a redundancy, contrary to how we construe statutes, because the governor can impose all of the same relief under the EPGA as may be imposed under the EMA. Reading the EPGA in the manner it does, the majority renders at least a portion of it a redundancy; there is

¹² Under that section, “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.” (Emphasis added.) The Covid threat has been deemed a “pandemic.” A “pandemic” is an outbreak of a disease that occurs over a wide geographic area and affects an exceptionally high proportion of the population. An “epidemic,” by contrast, means “an outbreak of disease that spreads quickly and affects many individuals at the same time.” A pandemic is thus more widespread and thus a greater disaster than an epidemic. The greater necessarily includes the lesser; as the EMA expressly defines an epidemic to be a disaster, a fortiori a pandemic also qualifies as a disaster.

nothing the governor can do under one statute that could not also be done under the other. Given that fact, there was no reason for the Legislature to have enacted the EMA.

Of course, we do not construe any word in a statute to be nugatory if there is an alternative interpretation. A straightforward reading of the statutes, in light of the canons of construction, in fact yields such an alternative interpretation: the Legislature would not have included the word “epidemic” as a permissible triggering event under the EMA, and would not have otherwise mimicked the EPGA, unless it understood the EPGA to not apply to an epidemic. This is the only interpretation which makes sense of the inclusion of the word “epidemic” in the EMA—a word which is notably absent from the EPGA—and which also explains the Legislature’s creation of executive authority which otherwise would be substantively identical to that provided in the EPGA.

C. THE GOVERNOR’S “BELT AND SUSPENDERS” ARGUMENT

The Governor makes two arguments in response to this point. First, the Governor argues that by including the word “epidemic” as a condition which can justify a state of disaster under the EMA, the Legislature employed “a belt and suspender” approach to show the importance it attached to the use of the word in the EMA; the Governor makes this assertion even though, in the Governor’s view, the EPGA already reached epidemics at the time the Legislature defined an “epidemic” as a disaster under the EMA. This response by the Governor is particularly weak, as it stands on its head a long-standing canon of construction which assumes that the Legislature did not intend to enact surplusage; rather, the Governor would have us hold that if the Legislature deems a situation unusually important, it *would* enact surplusage as a means of signaling to the world the importance it attaches to a particular construction. Frankly, this argument is frivolous, because there are accepted methods by which a Legislature knows how to communicate its intent, and by which courts know how to discern the Legislature’s intentions; enacting surplusage is simply the opposite of the manner in which the Legislature does so. See, e.g., *United States v Butler*, 297 US 1, 65 (1936) (“These words cannot be meaningless, else they would not have been used.”), cited in *Reading Law*, p 174. Our own Justice Cooley made the same point well over 150 years ago, when he wrote “The courts must lean in favor of a construction which will render a word operative, rather than one which may make some idle and nugatory.” Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 58 (1968), cited in *Reading Law*, p 174 n 3 (brackets and ellipsis omitted). That approach has been uniformly followed until the present. See, e.g., *Apsey*, 477 Mich at 127 (“Whenever possible, every word of a statute should be given meaning. And no word should be treated as surplusage or made nugatory.”).

The EPGA authorizes the Governor, in a state of emergency, which includes a “disaster,”¹³ to “promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect

¹³ The EPGA applies to a “great public crisis, disaster, rioting, catastrophe or similar public emergency.” There can be no doubt that a “public emergency” under that definition comports with the definition of “state of emergency” under the EMA, and that the EPGA’s use of the term

life and property or to bring the emergency situation within the affected area under control,” and provides a non-exclusive list of the governor’s powers. MCL 10.31(1). Thus, the majority holds that from 1945 on, following the enactment of the EPGA, and continuing on through 1976 and the enactment of the EMA until today, the governor had essentially unlimited authority to deal, on an emergency basis, with epidemics and threats to public health. Such a construction is an absurdity in light of the Legislature’s specific use of the word “epidemic” in the definition of “disaster,” in the EMA. As I already have noted, we assume that when the Legislature crafts legislation it knows what the existing law is, and takes it into consideration. *O’Connell v Dir of Elections*, 316 Mich App 91, 99; 891 NW2d 240 (2016). If the Governor’s position is correct, the Legislature, knowing that the Governor’s authority to take executive action under the EPGA included the authority to address an “epidemic,” nonetheless granted the Governor the authority, in the EMA, to address an “epidemic.” Such a conclusion flies in the face of how courts and legislatures go about their business of crafting their work and taking steps, through well-understood conventions, of ensuring that they each understand exactly what is intended of the other. Here, that means that the 1976 Legislature can only be deemed to have understood that the EPGA *did not* extend to epidemics; thus, the only legislative enactment which covers such an event is the EMA.¹⁴

“disaster,” which itself can constitute a “public emergency,” comports with the EMA’s use of that same term.

¹⁴ It is not entirely correct to say that neither the EPGA nor the EMA have any limits as to the nature of the orders which the governor may issue following a declaration of an emergency. Both the EPGA and the EMA, in nearly identical terms, provide that an executive order issued under either of them “does not authorize the seizure, taking, or confiscation of lawfully possessed firearms, ammunition, or other weapons,” EPGA, MCL 10.31(3); nor does it “authorize the seizure, taking, or confiscation of lawfully possessed firearms or ammunition,” EMA, MCL 30.405(2).

There are two possible interpretations of the inclusion of the firearms protection language in the two statutes. One is that the Legislature, in enacting the EMA, recognized that it was extending executive authority to new areas, in instances in which such authority had not previously existed; an “epidemic,” as discussed in Part III of this opinion, is one example of such a recognition by the Legislature. Given that knowledge, had the Legislature wanted to continue the policy-driven decision of protecting lawfully possessed firearms, it would have had to include such language in the EMA, because it would have understood that the EPGA did not apply to such circumstances. Such an interpretation supports the statutory conclusion I reach in this opinion.

The other alternative is that the Legislature simply wanted, again for policy reasons, to reduce the scope of the firearms-protection provision of the EMA, MCL 30.405(2), by removing “other weapons,” thereby limiting protections to lawfully-possessed firearms and ammunition. All firearms are weapons, but not all weapons are firearms. See *Merriam-Webster’s Collegiate Dictionary* (11th ed) (defining “firearm” as “a weapon from which a shot is discharged by gunpowder—usu. used of small arms” and defining “weapon” as “something (a club, knife, or gun) used to injure, defeat, or destroy” and as “a means of contending against another”); *New World Dictionary* (2nd ed) (defining “firearm” as “any weapon from which a shot is fired by the

D. THE GOVERNOR’S AND THE MAJORITY’S RELIANCE ON MCL 30.417(D)

The majority, and the Governor, rely on Section 17(d) of the EMA, in an attempt to show that the Legislature’s use of the word “epidemic” in the EMA works no redundancy with the EPGA. Under Section 17(d), MCL 30.417(d), the EMA “shall not be construed to do any of the following”:

(d) Limit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of the Michigan Compiled Laws, or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of this state independent of, or in conjunction with, this act.

This is the critical statutory provision in this case; it is the only textual basis which could arguably show a reasonable reading of Legislative intent in derogation of the normal canons of construction. See *People v Pinkney*, 501 Mich 259, 283; 912 NW2d 535 (2018) (holding that canons of construction can be overcome if there is sufficient evidence to do so).

1. SCOPE OF THE GOVERNOR’S AUTHORITY TO DECLARE A STATE OF EMERGENCY UNDER THE EPGA

Section 17(d) is divided into two disjunctive parts. As noted, the first portion provides that the EMA shall not be construed to “limit, modify, or abridge the authority of the governor to *proclaim* a state of emergency pursuant to” the EPGA (emphasis added). The authority to proclaim an emergency, under either the EPGA or the EMA, is a distinct authority. Whether the governor also has the additional power to have any such declared emergency continue, without any limitations or input from anyone else, so long as the governor sees fit to do so, the position the Governor argues and the majority adopts, is the question presented here and through an *in pari materia* reading of the two statutes, and is a conclusion with which I do not agree. Nothing that I have said regarding the governor’s authority under the EPGA and its interplay with § 17(d) in any way limits the authority of the Governor to issue a declaration of emergency. Simply put, the first part of § 17(d) has no application to this case.¹⁵

force of an explosion; esp., such a weapon small enough to be carried, as a rifle or pistol” and defining “weapon” as “an instrument or device of any kind used for fighting, as specif. in warfare,” and as “any means of attack or defense”). (Those definitions have remained consistent over time, and thus are no different today than they were upon enactment of the two statutes.) As an aid to statutory interpretation, this possibility does not clarify the interrelationship between the EPGA and the EMA at all, as there are two potentially harmonious readings of the statutes. However, one can conclude from the two firearms provisions that they either support the statutory interpretation I make in this opinion, or they are neutral as to it; in no way do they detract from that interpretation.

¹⁵ The majority simply misreads this portion of § 17(d), engrafting onto it language which it does not contain. The majority states that it rejects “any contention that this provision only bars a

That brings us to the second portion of the statute. It provides, as relevant here, that the EMA shall not be construed to “Limit, modify, or abridge the authority of the governor . . . to exercise any other powers vested in . . . him or her under . . . statutes[.]”¹⁶ Let us simply assume that the “statutes” referred to include the EPGA, because that assumption does not affect the final analysis. This is so because it is not *a construction of the EMA* as such which places the EPGA off-limits for an executive declaration regarding an epidemic. Rather, it is the straight-forward application of standard rules of construction, applicable in all instances to all statutes, under which we determine the scope of the EPGA as written by the Legislature. To recapitulate reasons already stated, *viz.*, that any other construction would render the Legislature’s use of the word “epidemic” in the EMA surplusage, it is clear that the Legislature which enacted the EMA did not understand the EPGA to encompass epidemics, because, simply put, the Legislature would not have intended to enact surplusage; we assume that when the Legislature crafts legislation it knows what the existing law is, and takes it into consideration, *O’Connell*, 316 Mich App at 99, and there simply is no reason the Legislature would have included the word “epidemic” in the EMA if it understood the EPGA to already have covered such a situation, *Apsey*, 477 Mich at 127. Thus, it is not the EMA which in any way limits the application of the EPGA to epidemics, but rather the standard rules of construction, which embody assumptions about how legislatures work, which control that interpretation. The canons of construction work in both directions—courts use the canons so that there are consistent applications of the law in judicial opinions; but the canons also allow legislators and legislatures to know in advance how courts will construe the work of a legislative

limitation, modification, or abridgement of a governor’s authority *to proclaim or declare* a state of emergency under the EPGA, absent any application to the *extension* of a state of emergency, thereby allowing imposition of the legislative-approval provision in § 3 of the EMA.” By this reading, the majority asserts that the word “proclamation” is broader than the mere formal announcement of a state of emergency. That reading is not supported by the statutory text. MCL 30.405 provides that “In addition to the general authority granted to the governor by this act, the governor may, upon the declaration of a state of disaster or state of emergency do 1 or more of the following: . . .” Thus, the text is clear that the governor’s authority to take certain actions has as a prerequisite the declaration of a state of disaster or emergency, but that those powers are distinct from, although they are triggered by, the declaration itself. The EMA also makes clear that an extension is a separate act requiring the Legislature’s approval. See MCL 30.403 and MCL 30.404.

¹⁶ It is not clear that the statutes referred to include the EPGA, as there already was one reference to that statute in section 17(d), and, as noted, that reference did not relate to the authority of the governor to do anything under the EPGA except to declare an emergency. Generally speaking, the doctrine of *expressio unius est exclusio alterius* (“express mention in a statute of one thing implies the exclusion of other similar things”) would exclude the EPGA from the inclusion in the collective “statutes.” *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 572, 592 NW2d 360 (1999). As applicable here, that would be because the single, specific reference in § 17(d) to the EPGA, followed by the general reference to “statutes” which follows would not include the EPGA as one of those statutes. But we need not decide that question here to determine the scope of the governor’s authority.

branch. The doctrine that the Legislature is presumed to know the existing law when it writes a statute includes a presumption that the Legislature knows how a law will be interpreted in connection with the canons. See *McNary v Haitian Refugee Ctr., Inc.*, 498 US 479, 496; 111 S Ct 888; 112 L Ed 2d 1005 (1991) (“It is presumable that Congress legislates with knowledge of our basic rules of statutory construction[.]”), cited in *Reading Law*, p 269 n 6.

Simply put, the Legislature would have known, prior to enactment of the EMA, that by including the word “epidemic” in it, it was telling the courts that the Legislature did not consider epidemics to be covered by the existing law, the EPGA, and that it understood that courts would so interpret its actions. Contrary to the majority, this is not “reading a requirement for legislative approval to extend a state of emergency into the EPGA.” It is simply a confirmation that given the language used and the standard canons of construction, the Legislature which enacted the EMA did not understand the EPGA to apply to an epidemic, and therefore has no application to the present circumstances. Indeed, there would be no point in reading something into a statute which never applied to the situation at hand. Nor does this analysis constitute a judicial construction which *limits, modifies, or abridges* the governor’s power, as is prohibited by § 17(d), but is a mere literal application of the Legislature’s words to demonstrate that the EPGA never extended so far as to encompass authority over an epidemic. This construction not only does not run afoul of § 17(d), it is compelled by it—a court cannot “limit,” or “modify,” or “abridge,” an authority of the Governor which the Governor never possessed in the first instance.¹⁷

2. THE GOVERNOR’S CONSTRUCTION LEADS TO AN ADDITIONAL REDUNDANCY

In addition, the majority’s and the Governor’s construction of the two statutes render another portion of the EMA redundant or nugatory. As the Court of Claims correctly noted, the EMA permits the Governor to declare a state of disaster or a state of emergency. Each of those types of declarations has a durational limit.

The state of disaster shall continue until the governor finds that the threat or danger has passed, the disaster has been dealt with to the extent that disaster conditions no longer exist, or until the declared state of disaster has been in effect for 28 days. After 28 days, the governor shall issue an executive order or proclamation declaring the state of disaster terminated, unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature. [MCL 30.403(3)].

¹⁷ And consistent with that reading, there was a public health code which long predated the EPGA, and which authorized emergency government action to address “cholera and other dangerous communicable diseases,” see 1885 PA 230, § 2. The EPGA did not repeal or amend that statute, thus strengthening the inference that the 1945 Legislature did not intend to change the emergency powers to address epidemics from the historical approach. That historical approach to epidemics and emergency powers changed with the enactment of the EMA.

Similarly, for a state of emergency:

The state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency has been in effect for 28 days. After 28 days, the governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature. [MCL 30.403(4)].

The majority and the Governor take the position that the EPGA and the EMA are coextensive, providing the Governor the same authority to issue orders, as to essentially any subject. Again, the Legislature knew all of that at the time it enacted the EMA. Yet the Legislature also enacted the 28-day time limit on the governor's unilateral authority under the EMA. To engraft such a durational limitation on the EMA, while leaving the governor's equivalent powers under the EPGA completely unconstrained, subject only to the governor's whim, would render the EMA's time limits surplusage.¹⁸

Indeed, unless we construe the statute in the manner I suggest, one is left scratching one's head wondering what the Legislature thought it was accomplishing through the EMA. According to the majority, what the Legislature thought it was accomplishing was the enactment of a clone of the EPGA, but with a provision terminating the governor's executive authority after 28 days unless that self-same Legislature gave its approval. But according to the majority, the Legislature also allowed the EPGA to co-exist, so that the governor could circumvent the 28-day limit on executive action by the governor which the Legislature had just gone to the trouble of enacting.

Such an assertion simply makes no sense. Obviously, the Legislature did not intend its pronouncements in the EMA to be surplusage or nugatory. Thus, properly construed, there is

¹⁸ The majority's construction of the word "epidemic" in the EPGA "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v Roadway Express, Inc*, 511 US 298, 312-313; 114 S Ct 1510; 128 L Ed 2d 274 (1994). See also *id.*, at 313, n 12; *Plaut v Spendthrift Farm, Inc*, 514 US 211, 216; 115 S Ct 1447; 131 L Ed 2d 328 (1995). In other words, when a court "construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Rivers*, 511 US at 313 n 12. We presume that when the Legislature acts, it knows what the law is. *Apsey*, 477 Mich at 127. Thus, under the majority's view, the Legislature knew in 1976 that it already possessed the same authority under the EPGA to address epidemic and public health emergencies as it was to enact under the EMA. And yet, the Legislature nonetheless enacted a limitation on the Governor's authority to act unilaterally under the EMA, but refused to enact a similar limit under the EPGA; and allowed the Governor to proceed under either authority. Thus, the Legislature enacted a durational limit of 28-days on executive action, but gave the Governor full authority to opt-out from under such time limits any time the Governor so chose. Again, it is logically absurd for a court to conclude that the Legislature so intended.

nothing in the EMA which limits the Governor's authority under the EPGA; the EPGA simply does not apply to the current situation, involving a pandemic, and the only authority upon which the Governor may rely for her executive orders regarding it is the EMA, with its associated time limit.

The majority's construction, meanwhile, is no construction at all. Although we are supposed to employ a harmonious reading of the two statutes if possible, the majority arrives at a construction under which the EPGA and the EMA each apply to an epidemic; the governor can proceed under either one, without any restriction; each permits the governor to exercise unlimited power; but one limits the governor's authority to 28 days without legislative authorization while the other continues indefinitely until the governor says otherwise. This result by the majority constitutes anything but a harmonious construction; it is a completely discordant result which does not even attempt to reconcile the inconsistencies between the two statutes, but simply lumps all of the various aspects of them together, throws up its hands, and concludes, essentially, "Who are we to say that the Legislature did not intend to nullify its own work?" If the majority was unable to harmonize the result, as it obviously was, then it was obligated to give controlling effect to the more recent and more specific statute, the EMA. See *Buehler*, 477 Mich at 26.¹⁹

IV. UNDER THE CIRCUMSTANCES OF THIS CASE, THE EPGA IS UNCONSTITUTIONAL

A. THE FRAMEWORK

The majority holds that the EPGA is constitutional on the basis of *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 51-52; 367 NW2d 1 (1985). This Court reviews constitutional issues de novo. *Janer v Barnes*, 288 Mich App 735, 737; 795 NW2d 183 (2010). Although the question presented in *Blue Cross* regarding the lawfulness of the delegation of legislative power

¹⁹ It is worth underscoring that the majority's construction of the word "epidemic" in the EPGA "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v Roadway Express, Inc*, 511 US 298, 312-313, 114 S Ct 1510, 128 L Ed 2d 274 (1994). See also *id.* at 313, n 12; *Plaut v Spendthrift Farm, Inc*, 514 US 211, 216, 115 S Ct 1447, 131 L Ed 2d 328 (1995). In other words, when a court "construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Rivers*, 511 US at 313 n 12. We presume that when the Legislature acts, it knows what the law is. *Apsey*, 477 Mich at 127. Thus, under the majority's view, the Legislature knew in 1976 that it already possessed the same authority under the EPGA to address epidemic and public health emergencies as it was to enact under the EMA. And yet, the Legislature nonetheless enacted a limitation on the Governor's authority to act unilaterally under the EMA, but refused to enact a similar limit under the EPGA; and allowed the Governor to proceed under either authority. Thus, the Legislature enacted a durational limit of 28-days on executive action, but gave the Governor full authority to opt-out from under such time limits any time the Governor so chose. Again, it is logically absurd for a court to conclude that the Legislature so intended.

was significantly narrower than the question presented here, in *Blue Cross* our Supreme Court established the framework for evaluating all such claims.

Blue Cross considered whether the Nonprofit Health Care Corporation Reform Act, MCL § 550.1101 *et seq.*, represented an unconstitutional delegation of legislative authority to Blue Cross Blue Shield of Michigan and other private parties. Specifically, that Act required each non-profit health care corporation to “assign a risk factor for each line of the corporation’s business.” *Blue Cross*, 422 Mich at 52-53. The Insurance Commissioner then was required either to approve or disapprove the factors proposed by the health care corporation, but “[n]o guidelines are provided to direct the Insurance Commissioner’s response.” *Id.* And finally, if the risk factors were disapproved, a panel of three actuaries “ ‘shall determine a risk factor for each line of business.’ No further directions are set forth to guide the panel.” *Id.* at 52-53. The Court held that “[t]he act is completely devoid of any indication why one factor should be preferred over another; no underlying policy has been articulated, nor has the Legislature detailed the criteria to be employed by the panel in making this determination.” *Id.* at 55, citing *Osius v City of St. Clair Shores*, 344 Mich 693; 75 NW2d 25 (1956). “This complete lack of standards is constitutionally impermissible,” such that “the lack of standards defining and directing the Insurance Commissioner’s and the actuary panel’s authority renders this dispute resolution mechanism constitutionally defective.” *Id.*

Blue Cross is instructive as to the present case, and establishes the framework for evaluating claims of improper delegation of legislative power. The Court held that in reviewing such claims, “1) the act must be read as a whole; 2) the act carries a presumption of constitutionality; and 3) the standards must be as reasonably precise as the subject matter requires or permits.” *Blue Cross*, 422 Mich at 51. “The preciseness required of the standards will depend on the complexity of the subject.” *Id.* Although the focus of the act at issue was narrow, the Court had no difficulty determining that it involved an impermissible delegation of legislative authority, because it gave no direction and created no standards as to how the authority should be exercised.

Moreover, our Supreme Court has noted on many occasions that

The separation of powers doctrine has never been interpreted to mean that the three branches of government

must be kept wholly and entirely separate and distinct, and have no common link or dependence, the one upon the other, in the slightest degree. The true meaning is that the *whole power of one of these departments* should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution.” [*House Speaker v Governor*, 443 Mich 560, 586 n 32; 506 NW2d 190 (1993), citing *Local 321, State, Co & Muni Workers of America v Dearborn*, 311 Mich 674, 677; 19 NW2d 140 (1945), in turn quoting Story, *Constitutional Law* (4th ed), pp 380 (emphasis added).]

See also *Makowski v Governor*, 495 Mich 465, 482; 852 NW2d 61 (2014) (also quoting *Local 321, State, Co & Muni Workers of America*).

B. THE EPGA DELEGATES LEGISLATIVE POWER

The issue here does not involve the declaration of an emergency; rather, the act of declaring such an emergency is properly to be regarded as executive action. See Const 1963, art 5, § 1. Instead, the issue is the orders authorized by such a declaration, which the majority holds have no categorical limitations, but rather essentially empower the governor to do anything.

More than one hundred years ago, our Supreme Court summed up quite nicely the principle involved: “The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action to depend.” *King v Concordia Fire-Ins Co*, 140 Mich 258; 103 NW 616 (1905), cited in *In re Brewster Street Housing Site in City of Detroit*, 291 Mich 313, 340; 289 NW 493 (1939). Thus,

The people, by the adoption of the Constitution, have vested the legislative power in the legislature of the State, subject to the initiative referendum and recall, and the legislature of the State cannot abdicate the power delegated to it by the Constitution, but it is clear the legislature may confer the authority for the finding of facts upon administrative officers, boards or commissions. [*In re Brewster Street Housing Site in City of Detroit*, 291 Mich at 340, citing *Horn v People*, 26 Mich 221 (1872).]

Clearly, the orders recently issued by the Governor involve no action by any administrative officer, board or commission; but rather the wholesale handing over to the governor of the unfettered discretion to legislate any emergency order which the Governor thinks appropriate. The delegation of authority under the EPGA, as interpreted by the majority, thus is legislative: “The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action to depend.” *King v Concordia Fire Ins Co*, 140 Mich 258, 268; 103 NW 616 (1905), citing *Locke’s Appeal*, 72 Pa 498 (1873). The orders here, however, involve the making of law. Thus, “[t]he true distinction, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferred authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.” *King*, 140 Mich at 268-269 (citation and quotation marks omitted).²⁰

²⁰ Indeed, our Supreme Court previously has held that a legislative act authorizing a quarantine to be carried out by health inspectors, under general rules enacted by the legislature which provided for discretion on the part of the inspectors as to when to detain persons and goods, subject to standards set forth in the legislation, was constitutional. *Hurst v Warner*, 102 Mich 238, 244; 60 NW 440, 441 (1894). The EPGA is quite different, in that it allows the governor to create any rule the governor wishes, as to any subject, in the first instance. That power is legislative.

C. AS INTERPRETED BY THE MAJORITY, THE GOVERNOR EXERCISES FULL LEGISLATIVE POWER AS WELL AS FULL EXECUTIVE POWER

Having determined that the orders issue by the Governor are in fact legislative, it is apparent that, under the circumstances of this case, the executive orders which were issued are in fact unconstitutional. As the majority interprets the governor's authority to issue the orders, they involve the whole power of the Legislature, as there are no subject matters which are outside their potential scope. Because, as the majority finds, there are no limits as to the subject matter which a governor may order or regulate or direct in this manner pursuant to the EPGA, the governor thus is granted "the *whole power of one of these departments*" of government, i.e., the full legislative power. *House Speaker*, 443 Mich at 586 n 32 (emphasis added). And the Governor of course retains the full executive power of that office as well. Const 1963, art 5, § 1.

Acting under the EPGA, the governor thus possesses the full power of the legislative branch, as well as the full power of the executive branch; in other words, the EPGA, as interpreted by the majority, commits to the governor "the whole power of one of these departments," allowing it to be "exercised by the same hands which possess the whole power of either of the other departments." *House Speaker*, 443 Mich at 586 n 32. That is, precisely the evil which the separation of powers doctrine was intended to preclude, and thus is unconstitutional. Const 1963, art 3, § 2. See *Makowski v Governor*, 495 Mich. at 482-483; *House Speaker*, 443 Mich at 586 n 32.

D. THE MAJORITY OPINION FAILS TO CONSTRUE THE EPGA IN A MANNER WHICH WOULD PRECLUDE ITS UNCONSTITUTIONALITY HERE

The unconstitutionality of such a procedure would be mitigated if there were any durational limits imposed as to an executive order issued under the EPGA or the EMA. A durational limit (and not merely a gubernatorial rescinding of an order, followed by its reissuance in the identical or near identical form) would change the nature of any such order from something legislative, which simply lives on until it is repealed, to a true emergency order, which would exist only during a genuine period of emergency.²¹

The violation of the constitution, in my opinion, thus occurs through the confluence of two different authorities approved by the majority: the retention of the Governor's executive powers; plus the unlimited nature of legislative power granted the governor following a declaration of an emergency, including the unlimited duration of any such order.

The lack of any durational limit simply underscores and compounds the constitutional difficulty, transforming temporary, and thus emergency orders, into something essentially unlimited and thus legislative. It is settled that when applying strict scrutiny analysis, applicable to many of the most important constitutional rights, a court can uphold an action only if it involves

²¹ As noted by the majority, "Pursuant to MCL 10.31(2), a governor proclaims or declares a state of emergency, and it simply continues until the governor declares 'that the emergency no longer exists.'" Taken together, these statements by the majority mean that a governor can order anything, forever, a truly striking concept in a democratic republic.

a “compelling governmental interest,” which must be “narrowly tailored” to achieve that interest. See, e.g., *Burson v Freeman*, 504 US 191, 198; 112 S Ct 1846; 119 L Ed 2d 5 (1992) (impingement of First Amendment right). The “narrow tailoring” requirement imposes an obligation that whatever permissible action impinges a constitutional right continue no longer than necessary. See, e.g., *City of Richmond v JA Croson Co*, 488 US 469, 497-498; 109 S Ct 706; 102 L Ed 2d 854 (1989) (prohibiting remedy for discrimination “essentially limitless in scope and duration.”); *In re National Security Letter*, 863 F3d 1110, 1126 (CA 9 2017) (“In order to ensure that the nondisclosure requirement is narrowly tailored to serve the government’s compelling interest in national security, a nondisclosure requirement must terminate when it no longer serves such a purpose.”).

The majority holds that the spare statutory standards of the EPGA, requiring only that the declaration involve a “great public crisis, disaster, rioting, catastrophe, or similar public emergency . . . or [when there is] reasonable apprehension of immediate danger of a public emergency of that kind,” which also must imperil “public safety,” is “as reasonably precise as the subject matter requires or permits.” The majority adds “Indeed, more exacting standards would likely be overly confining and unnecessarily bind a governor’s hands in any effort to mitigate and control an emergency at the very time he or she must need to be nimble.” Moreover, the majority acknowledges that not only is the “standard” completely amorphous, but contains a large measure of subjectivity to whatever a governor desires. Thus, the majority holds that an order entered pursuant to a declared emergency need only be “ ‘reasonable’ and, *as judged by a governor*, ‘necessary to protect life and property or to bring the emergency situation . . . under control.’ ” *Id.* (emphasis added). This means that there are few objective, outside controls or standards at all, save for “reasonableness”; the statute essentially requires only a governor’s subjective determination of what is necessary to control the situation.

Taking steps to deal with a global pandemic is certainly a “compelling government interest.” Thus, there is no doubt that a government could take steps to address such a crisis for at least some period of time on an emergency basis, through means that ordinarily would not comport with constitutional restrictions; after all, the “constitutional Bill of Rights” is not “a suicide pact,” *Terminiello v City of Chicago*, 337 US 1, 37; 69 S Ct 894; 93 L Ed 1131 (1949) (JACKSON, J., dissenting), nor is the constitutional separation of powers. This case does not address whether government has the authority to impose mandatory public health orders to address a crisis; clearly it does. See *Jacobson v Massachusetts*, 197 US 11; 25 S Ct 358; 49 L Ed 643 (1905). The issue here is not what actions may be taken, but how they are to be taken: by a governor, acting under emergency authority, with no limitations as to how, or how long, such measures may be instituted; or whether, following a reasonable period of emergency authority, legislative power must revert to normal constitutional norms. Our Constitution declares after all, that “All political power is inherent in the people.” 1963 Const art 1, § 1.

No doubt to address this potentially gaping exception to normal, constitutional governance, the Legislature, in the EMA, enacted a rule that executive orders to address a state of emergency or a state of disaster, after a reasonable period not to exceed 28-days, must either terminate or be ratified by the elected Legislature. The Legislature has not authorized continued emergency action relating to an epidemic. In addition, the statutory construction of the EPGA and the EMA set forth in Part III of this opinion avoids the constitutional infirmity identified here, because an executive order which either becomes legislatively-authorized after 28 days, or terminates, is constitutionally

reasonable. Indeed, that fact alone should give the majority pause about its statutory analysis that the EPGA applies without limitation to an epidemic, without any consideration of an *in pari materia* construction or the EMA's use of the word "epidemic." "If statutes lend themselves to a construction that avoids conflict, then that construction should control." *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). See also *Hunter v Hunter*, 484 Mich 247, 264 n 32; 771 NW2d 694 (2009) (citation and quotation marks omitted) ("[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.").

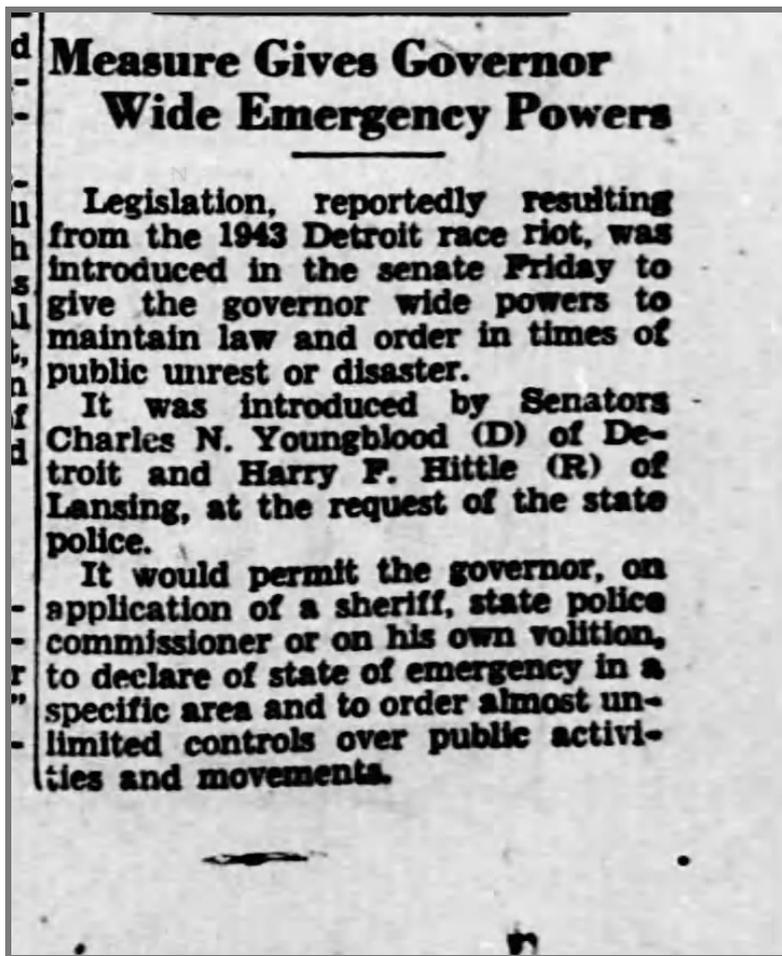
If the majority correctly read the EPGA and the EMA, in accordance with Part III of this opinion, such that only the EMA applied to an epidemic, then the executive orders here would be constitutional exercises of emergency powers, as they would be properly limited in duration, or constitutionally ratified by the Legislature. However, given the majority's construction, that the EPGA not only applies, but that it authorizes unilateral action by the governor which "simply continues until the governor declares 'that the emergency no longer exists,'" it is unconstitutional in these circumstances.

I respectfully dissent from the majority's standing, statutory interpretation, and constitutional interpretation analysis.

/s/ Jonathan Tukel

Exhibit 5

October 6, 1945 *Lansing State Journal*
Article



Clipped By:



mcampana
Wed, Apr 29, 2020

Exhibit 6

Governor Milliken Special Message

The Honorable William Ryan
 Speaker of the House
 State Capitol
 Lansing, Michigan
 Dear Speaker Ryan:

Transmitted to you with this letter is my Special Message on Natural Disasters to the First Session of the Seventy-Seventh Michigan Legislature.

Sincerely,
 WILLIAM G. MILLIKEN
 Governor

The message was referred to the Clerk and ordered printed in the Journal.

SPECIAL MESSAGE TO THE LEGISLATURE ON NATURAL DISASTERS

I am sending you this message today on a matter of utmost urgency.

Michigan is being threatened by the destructive forces of nature on a scale rarely experienced across the state. Seldom have our citizens been so helpless as individuals in coping with a sustained natural threat.

Waters bordering our shores have reached record high levels, and are going higher.

Wave action accelerated by wind is causing extensive flooding and serious erosion along hundreds of miles of shoreline.

Water that has long been about us is now upon us.

Numerous counties have been declared disaster areas, millions of dollars in property has been destroyed, thousands of people have been forced to evacuate their homes, scores of homes have been toppled into the lakes, and hundreds more are endangered.

Michigan State Police and National Guardsmen from more than a dozen cities, as well as trucks, helicopters and other equipment, have repeatedly been mobilized for emergency services, and prison trustees have provided emergency manpower.

Other steps have been taken to cope with the immediate and long-term effects. But we face a sustained threat and we need sustained efforts at the local, state and federal levels to meet it.

There is a critical need for greater emphasis on pre-disaster action.

Last November, I noted that the federal government had not viewed the Great Lakes problem with the sense of urgency that it deserved.

At that time, I asked for a nine-point program for federal assistance to cope with our shoreline problems. It now appears that a favorable response is developing.

In addition to elaborating today on steps that must be taken at the federal level, I want to outline what steps are being taken at the state level, and what further state action is needed, including prompt legislative action.

This is the situation in Michigan today:

- Lakes Erie and St. Clair are at the highest levels in this century and Lakes Huron and Michigan are near the highest mark for the century. Summer levels are now predicted to be 10 inches higher than last summer on Lakes Michigan and Huron, and five to six inches higher on Lake St. Clair and Lake Erie.
- We have flooding along 140 miles of Michigan shoreline, and there are more than 500 miles with extremely serious erosion problems. A dozen public water supply systems are in jeopardy.
- There are high risk shoreline areas in 35 of our 83 counties.
- About 5100 homes are threatened by flooding.
- Damage to public and private property totals an estimated \$30 million from flood-damage alone, and millions more in erosion damage.
- Upwards of 20,000 people have been forced to evacuate their homes.

All indications are that the situation will get worse before it gets better.

Above normal precipitation in recent years has filled our lakes to the brim and left surrounding land so saturated it cannot retain additional water.

There is no immediate hope of controlling the rising lake levels. We have succeeded in getting temporary controls on flow into the lakes from the north. But this will have little immediate effect. Nor would it help greatly to increase the flow from the south. Just as we have had no control over natural events which precipitated the current problem, we have no control over the elements of nature necessary to ease the problem.

I am urging the U.S.—Canadian International Joint Commission to control the regulatory works at Sault Ste. Marie as to provide maximum relief from flooding and erosion along Michigan shores. Changing the regulatory mechanism will help, but it will not result in major lowering of levels.

We cannot turn back Nature, nor can we eliminate all risk for those who live close to some of its greatest wonders. But the State has a responsibility to help its citizens cope with disaster, and to avert it to the extent possible.

While nearly 80 percent of the Great Lakes shoreline is privately owned, the problem is a matter of not only private but public concern. The multiple issues of flooding, public and private property damage, loss of beaches, effect on water quality and loss of tax base require a well-developed, sound program for coastal protection.

State Action

We have taken legislative and other steps to give us a shoreline management program that will help us avoid serious problems in the future.

But we need prompt action, including legislative action, that will provide state assistance for local and individual self-help efforts in the face of a sustained threat of natural disaster.

I am therefore taking and recommending these steps:

1. I have instructed the Michigan State Police, the Michigan National Guard, and other state agencies to develop contingency plans for rescue, evacuation and other emergency services in all shoreline areas. This has been done and plans are being implemented where needed.

2. I have instructed the Emergency Services Division of the Michigan State Police to mobilize a standby force of prison trustees and personnel from voluntary agencies for use where there are urgent manpower needs for diking and other emergency operations. Trucks and other equipment will be provided where needed.

3. I am recommending that an Emergency Contingency Fund, amounting initially to \$500,000, be created for allocation by the Governor in emergency situations.

4. I urge the Legislature to expedite consideration of my February 26 request for a \$370,000 supplemental appropriation to provide technical assistance for individuals and localities, and to develop a pilot program for shoreline protection. Only the federal government has the resources to provide for substantial construction of protective devices. But we should move ahead with a state demonstration program now to determine feasibility of protection techniques, and with means of providing technical assistance to those who can't wait for federal aid.

5. I urge the Legislature to revise the General Property Tax Act to exempt flood and erosion protective devices from property taxation. Land owners now in effect are penalized for such devices. Under existing law they become capitalized improvements for tax purposes.

6. I urge local tax assessors to act favorably on the March 29 request of the Michigan State Tax Commission, made in response to Senate Concurrent Resolution 74, to review the assessment of property which has been devalued because of natural disaster. The Commission made the request in telegrams to about 560 assessors in counties bordering the Great Lakes.

7. It is essential that local units of government be given legal authority to help themselves to combat natural disasters. The police powers of some political subdivisions are, at best, vague at the present time. We must clarify the role of government at the local level and the use of private property where that is the most appropriate method of dealing with actual or threatened disasters. To that end, I will prepare amendments to existing village, township and county laws that would give local governments the tools to get the job done. Such legislation should have high priority. I also want to work with the Legislature in determining means of giving local communities ability to create special assessment districts which would provide the benefits of long-term financing to those shoreline residents who want to help themselves.

8. The state law is unclear with respect to utilizing the National Guard for pre-disaster assistance. Accordingly, I will recommend legislation which will clearly address itself to the technical problems of the state's ability to deliver services at critical periods without being bound by bureaucratic and administrative red tape.

9. I recommend that the Legislature give the Governor plenary power to declare states of emergency both as to actual and impending disasters.

Under existing law, the powers of the Governor to respond to disasters is unduly restrictive and limited. The existing Civil Defense law which was enacted in 1953 was primarily intended to cover catastrophies that might ensue from military attack. There is a need to clarify and define the types of natural disasters and further to grant extraordinary powers where the imminent and practical threat of disasters is a reality.

While it is possible that many of the special problems created by non-military disasters can be handled by broad interpretation of existing Michigan law, the Governor's emergency powers are not specifically addressed to the imminent potential of disasters.

The existing civil defense powers of the Governor are general in nature and specify that they are to be exercised under conditions of attack. The emergency power of the Governor, set forth in Act 302 of 1945, are pertinent to civil disturbances, and only indirectly relate to natural disasters. The Act is silent with respect to powers necessary to combat imminent disasters.

Because many types of disasters such as floods, winds of varying degrees of velocity and blizzards often can be foretold as to where and when they will strike, it appears prudent to permit the disaster apparatus to function before there is an actual incidence of calamity. This would avert needless loss of life and property and tremendously reduce losses.

Accordingly, I recommend that the Governor have plenary power to declare states of emergency both as to actual and impending disasters and to take certain steps pursuant to that declaration. I will specify these steps in draft legislation that I will forward to you promptly with a request that it receive prompt action.

Local Action

I view the role of the State as secondary to that of local political subdivisions, and as the coordinating entity to maximize full federal participation. That is one reason I recommended the statutory clarification of the role of local government.

Local units of government should make all possible effort, and use all possible resources, prior to seeking state assistance. The State, in turn, uses the Emergency Services Division of the State Police as a clearing center for requests for assistance and for coordinating the state's response.

Federal Action

Congress has recognized that the states are generally unable to commit massive financial resources in disaster situations. In 1970, the Congress passed the Federal Disaster Relief Act, commonly known as P. L. 91-606, as primary mechanism to compensate public and private damaged losses as a result of natural disasters. As Governor, I must certify that the state has expended at least \$3.5 million in unreimbursed expenses in the 12 months preceding the disaster. With that certification, I can request that the President designate counties as federal disaster areas, thus making available the full resources of P. L. 91-606.

During the severe ice storm of March 13-15, 1972, we estimated a loss of about \$3.5 million dollars in damage to public and private property. I immediately designated 10 counties as disaster areas and requested presidential declarations so that the state and local units could be reimbursed for some of their damages. A presidential declaration was made on April 5 for seven counties and thereafter almost \$2 million in federal assistance was forthcoming to reimburse expenditures for public property loss.

On November 14, 1972, exceedingly high winds, coupled with the high lake levels, created disastrous flooding conditions in nine counties causing in excess of \$10 million in damages. I immediately designated those counties as disaster areas and authorized the full use of the National Guard where necessary for evacuation and other purposes. I subsequently requested a presidential declaration which the President issued November 20. As of this date, Michigan citizens have received and are still receiving federal assistance, and approximately \$5 million in federal loans under the Small Business Administration and the Farmers Home Administration have been disbursed.

The recent storm of March 16 caused extensive flooding again in 12 counties resulting in total property damage approximating \$16 million. On March 23, I requested a presidential declaration for assistance to those counties and also for full federal resources for pre-disaster assistance.

Michigan was hit with another storm on April 9 which in some areas caused more extensive flooding than during the previous month. It also accelerated erosion damage to an extent that there is danger of flooding in areas not previously vulnerable to floods.

Since the November storms, our efforts at the state level to minimize future disasters have been a joint undertaking with federal authorities. The Department of Natural Resources was authorized to explore all avenues of federal preventive assistance as a review of state resources recognized our inability to adequately solve the problem. Preventive flood measures require massive financial outlay as well as materials and labor, all of which are beyond the scope of state capabilities.

The U.S. Army Corps of Engineers is authorized by federal law to administer a flood preventive program called Operation Foresight. It is intended to provide temporary protection in low-lying areas for high lake levels and impending storms which pose a threat to life and property. Federal law requires that projects be (1) determined to be beyond state or local capacity, (2) justifiable from economic and engineering standpoints, (3) designed to cope with expected high water levels and solely of a temporary nature, and (4) feasible for timely completion. The federal law does not allow emergency measures to prevent or mitigate shoreline or beach erosion. For this reason, only on-shore protective devices are available.

On December 20, 1972, the Corps of Engineers advised me that it would begin Operation Foresight in Michigan. On January 25, 1973, I advised the Corps, as required by federal law, that the State of Michigan did not have resources to complete the program and designated the Department of Natural Resources and the Emergency Services Division of the State Police as coordinating agencies to work with the Corps of Engineers. We pledge our state resources to assist the Corps in this endeavor.

During January, February and March, 1973, the Corps and state officials conducted over 25 meetings and site inspections in shoreline communities explaining the requirements of Operation Foresight and offering extensive technical assistance.

Over 30 communities have submitted resolutions to the Department of Natural Resources requesting Operation Foresight assistance and the Corps has approved plans in at least 21 of these areas. The Corps of Engineers already has provided about \$5 million in construction aid, and has supplied more than 5 million sandbags for Michigan.

We have, then, had federal assistance in the form of President Nixon's responses to my requests for designation of disaster areas, and through the Operation Foresight program.

But more needs to be done for pre-disaster assistance.

I have outlined in this message a state action program which would give the State of Michigan a far greater capacity to deal with impending problems.

We need this further federal action:

1. At the present time Operation Foresight is primarily a diking preventive program. Offshore devices are prohibited under the federal law. I am asking our congressional delegation to press for the passage of federal legislation which would authorize the Corps of Engineers to repair, construct or modify flood and erosion control structures offshore where they will often do more good than onshore devices. This can help prevent erosion that, among other things, can lead to flooding.

I urge that you lend your support and pass appropriate resolutions expressing your support and urge our congressmen and senators to work for these amendments.

2. In the same context, the Federal Disaster Relief Act does not clearly define the areas of pre-disaster assistance that are intended to be covered. We are unable thus far to receive presidential approval for pre-disaster assistance under the Relief Act and I request that you join with me in urging our congressional delegation to work for prompt action on clarifying language that will clearly identify the areas of pre-disaster assistance that should be covered by federal laws.

3. Appropriation of sufficient funds to construct works authorized under Section 111 River & Harbor Act, 1968 PL 90-483.

4. Appropriation of sufficient funds to construct works authorized by Section 14, Flood Control Act of 1946—Construction of emergency works to protect roads, bridges and public works.

5. Amend Section 165 (c) (13) of the Internal Revenue Code of 1954 to allow casualty loss deductions for expenditures to construct protective works or to move homes from their original locations to prevent future storm losses.

6. Clarification by Internal Revenue Service of revenue ruling 79 as it relates to loss of land from erosion as a casualty loss.

7. Federal participation in construction of protective works for both public and private property.

8. Construction of low cost demonstration projects.

9. Provide research funds for lake level forecasting techniques which would be applicable to critical areas for prediction of specific erosion rates and flood damage.

10. Provide additional funding to coastal engineering research center of the Corps of Engineers for erosion-related activities on the Great Lakes.

11. Authorize the use of federal equipment for emergency control programs.

Conclusion

I have in this Special Message on Natural Disasters informed you of the role of the State of Michigan in recent months, and requested your urgently needed assistance in helping us cope with the problems facing us in the months ahead.

We have been effective in reacting to natural disasters.

We must be no less effective in preparing for them. In so doing, we can save lives and property.

From 1955 to 1969, our state suffered losses from flood damages of less than \$3 million. Since 1970, we have suffered well over \$30 million in damages to property, not to mention countless millions of dollars of damage to our shorelines.

All citizens of Michigan have a stake in the program I have outlined, including those who live far from a shoreline.

Today we are ravaged by one of our most precious resources — our water. We know not the form or the boundary of the natural disasters of tomorrow.

But we know that we must prepare for them.

Introduction of Bills

Rep. F. Robert Edwards introduced

House Bill No. 4535, entitled

A bill to amend chapter 66 of the Revised Statutes of 1846, entitled "Of estates in dower, by the curtesy, and general provisions concerning real estate," as amended, being sections 554.131 to 554.139 of the Compiled Laws of 1970, by adding section 34a.

The bill was read a first time by its title and referred to the Committee on Taxation.

Reps. Geake, Ziegler, Smart and Bennett introduced

House Bill No. 4536, entitled

A bill to amend section 35 of Act No. 331 of the Public Acts of 1966, entitled "Community college act of 1966," being section 389.35 of the Compiled Laws of 1970; to add section 34a; and to repeal certain acts and parts of acts.

The bill was read a first time by its title and referred to the Committee on Colleges and Universities.

Exhibit 7

*Social Distancing Law Project:
Assessment of Legal Authorities (2007)*

Social Distancing Law Project
Michigan Department of Community Health
Assessment of Legal Authorities

Introduction

This report provides an assessment of Michigan’s legal readiness to address pandemic influenza. This assessment includes both legal authority for pharmaceutical and non-pharmaceutical (social distancing) measures. As set out in the CDC’s *Interim Pre-pandemic Planning Guidance*¹, at the beginning of an influenza pandemic, the most effective mitigation tool (i.e., a well-matched pandemic strain vaccine) will probably not be available. Therefore, Michigan must be prepared to face the first wave of the pandemic without vaccine and, possibly, without sufficient quantities of influenza antiviral medications. Instead, Michigan must rely on an early, targeted, layered application of multiple, partially effective, non-pharmaceutical measures. These include restrictions on the movement of people and “social distancing measures” to reduce contact between individuals in the community, schools, and workplace.

This report focuses on the ability of Michigan to implement social distancing measures to prevent and control the spread of pandemic influenza, both when an emergency has been declared and in the absence of a declared emergency. Communicable disease surveillance, investigation, or outbreak control may involve the following potential public health procedures or social distancing measures, based upon the current Michigan Department of Community Health All Hazards Response Plan and Pandemic Influenza Plan:

- Travel alerts, warnings, or bans
- Communicable disease surveillance at borders
- Border closures
- Individual or group isolation
- Individual or group quarantine
- Altered work schedules or environmental controls to be enacted in workplaces
- Cancellation of public gatherings
- Identification of buildings for community isolation or quarantine
- Monitoring of isolated or quarantined individuals or groups

In its Pandemic Influenza Plan, MDCH addresses social distancing and other measures to be implemented, as appropriate, for each WHO phase / federal government response

¹ *Interim Pre-pandemic Planning Guidance: Community Strategy for Pandemic Influenza Mitigation in the United States – Early, Targeted, Layered Use of Nonpharmaceutical Interventions*, which can be found at http://www.pandemicflu.gov/plan/community/community_mitigation.pdf

stage of a pandemic. MDCH's current plan (Draft 3.1, May 2007) is posted on the Internet at http://www.michigan.gov/documents/mdch/MDCH_Pandemic_Influenza_v_3.1_final_draft_060107_2_198392_7.pdf. Social distancing interventions can and should be undertaken voluntarily. However, this report covers establishment and enforcement of social distancing means by state and local authorities if necessary to protect public health. This report also covers inter-jurisdictional cooperation and mass prophylaxis readiness.

Project Team for Michigan's Social Distancing Law Project

Michigan Department of Community Health:

Denise Chrysler, J.D., Project Lead, Director, Office of Legal Affairs.
 Deborah Garcia-Luna, J.D., Project Co-Lead, Legal Analyst, Office of Legal Affairs.
 Katherine Allen-Bridson, RN, BSN, CIC, Border Health Project Coordinator
 Peter Coscarelli, Acting Manager, Support Services Unit, Office of Public Health Preparedness
 Karen Krzanowski, M.A., M.P.H., State and Federal Policy Specialist and Emergency Management Coordinator, Office of Public Health Preparedness
 Corinne Miller, PhD, Director and State Epidemiologist, Bureau of Epidemiology
 Mary Grace Stobierski, DVM, MPH, Manager, Infectious Disease Epidemiology Section
 Eden V. Wells, MD, MPH, Medical Epidemiologist, Bureau of Epidemiology
 Marie Parker, Executive Secretary, Office of Legal Affairs, in charge of assembling report and logistics

Michigan Department of Attorney General:

Robert Ianni, J.D., Division Chief, Tobacco and Special Litigation Division; Director, Homeland Security
 Ronald J. Styka, J.D., Division Chief, Community Health Division

Federal Quarantine Station:

Gabriel J. Palumbo, MBA, MPH, Officer in Charge, CDC Detroit Quarantine Station

Assessment of Legal Authorities

The following definitions apply to terms used in this report:

1. "Jurisdiction" refers to Michigan, which is one of the 18 jurisdictions selected for review in the study.
2. "Legal authority" means any provision of law or regulation that carries the force of law.

3. “Procedures” means any procedures established by the jurisdiction relating to the legal question being researched, regardless of whether the procedures have the force of law.
4. “Restrictions on the movement of persons” means any limit or boundary placed on the free at-will physical movement of adult natural persons in the jurisdiction.
5. “Closure of public places” means an instruction or order that has the effect of prohibiting persons from entering a public place. “Public place” means a fixed space, enclosure, area, or facility that is usually available for entry by the general public without a specific invitation, whether possessed by government or private parties.
6. “Curfew” means an order or regulation prohibiting persons from being in certain public places at certain times.
7. “Person” [unless indicated otherwise] means a natural person, whether or not individually identified.
8. “Public health emergency” means any acute threat, hazard, or danger to the health of the population of the jurisdiction, whether specific or general, whether or not officially declared.
9. “Superior jurisdiction” means the federal government in respect to a state, or a state in respect to a locality.
10. “Inferior jurisdiction” means a state in respect to the federal government, or a locality in respect to a state government.

Exclusions:

1. This assessment excludes federal law.
2. This assessment excludes the closure of schools, which will be covered by another project of the CDC Public Health Law Program. However, the issue of school closures will likely come up during discussions at the legal consultation meetings in response to the overall fact pattern. The CDC Public Health Law Program will make the results of the CDC project on school closure available for the Legal Consultation Meeting associated with this project.

I. Restrictions on the Movement of Persons

- A. *Legal powers/authorities to restrict movement of persons during a declared public health emergency – What legal powers or authorities exist that could enable, support, authorize, or otherwise provide a legal basis for any restrictions on the movement of persons during a declared public health emergency? List all legal powers, authorities, and procedures (including but not limited to police powers, umbrella powers, general public health powers, or emergency powers or authorities) that could be used to authorize specific movement restrictions. (Examples: state’s legal powers, authorities, or doctrines for quarantine (see also subsection I-C below), isolation, separation, or other orders for persons to remain in their homes.)*

The Michigan Emergency Management Act, 1976 PA 390, MCL 30.401 *et seq.*, provides for planning and response to disasters and emergencies within the state. The Emergency Management Act distinguishes between a disaster and emergency as follows: a disaster is defined as “an occurrence or threat of widespread or severe

damage, injury, or loss of life or property resulting from a natural or man-made cause, including but not limited to, ...radiological incident, ...epidemic, air contamination..." MCL 30.402(e). An emergency is defined as "any occasion or instance in which the governor determines state assistance is needed to supplement local efforts and capabilities to save lives, protect property and the public health and safety, or to lessen or avert the threat of a catastrophe in any part of the state." MCL 30.402(h). The governor is required to issue an executive order or proclamation declaring a state of disaster or emergency if she finds a disaster or emergency has occurred or the threat of a disaster or emergency exists.

This question includes all provisions of law or procedure that:

1. *Regulate the initiation, maintenance, or release from restrictive measures, including, but not limited to:*

a. *Who can declare or establish such restrictions?*

In a declared state of emergency the governor "is responsible for coping with dangers to this state or the people of this state presented by a disaster or emergency." MCL 30.403(1). Among the express powers, is the authority to "utilize the available resources of the state and its political subdivisions, and those of the federal government made available to the state, as are reasonably necessary to cope with the disaster or emergency." MCL 30.405(1)(b). The governor is also authorized to "prescribe routes, modes, and destinations of transportation in connection with an evacuation," to "control ingress and egress to and from a stricken or threatened area, removal of persons within the area, and occupancy of premises within the area" and to "suspend a regulatory statute, order or rule prescribing the procedures for conduct of state business...except for criminal process and procedures." MCL 30.405(1)(a), (f), (g). In addition to those powers expressly granted under the Emergency Management Act, the governor may "direct all other actions which are necessary and appropriate under the circumstances." MCL 30.405(1)(j).

b. *Who can enforce such restrictions?*

If the declaration is of a public health emergency, the governor may direct the Michigan Department of Community Health (MDCH) to coordinate all matters pertaining to the response of the state to a public health emergency. MCL 30.408. Accordingly, the MDCH director or his or her designee could issue an order for quarantine. In addition, should the governor issue the order, enforcement could be by any law enforcement officer, since a violation of the governor's emergency orders is a misdemeanor. MCL 30.405(2).

c. *What are the legal powers and authorities for group quarantine?*

Under the Emergency Management Act, the governor has broad power to issue such orders which are "necessary and appropriate under the circumstances."

Thus, if necessary and appropriate, a group quarantine order may be issued. Anyone violating the order would be guilty of a misdemeanor.

d. What are the legal powers and authorities for area quarantine?

The governor has broad authority under the Emergency Management Act to eliminate any obstacles to implementation of necessary population control measures in a public health emergency.

e. What are the penalties for violating movement restrictions?

A violation of an executive order issued by the governor following the declaration of a disaster or emergency is punishable as a misdemeanor. MCL 30.405(2). In such circumstances, the maximum penalty is 90 days in jail and/or a fine of \$500. MCL 750.504.

2. *Provide any due process measures for a person whose movement is restricted.*

Because a violation of an order is a criminal offense, all due process measures attendant to a deprivation of liberty attach to an individual who violates an executive order restricting movement. In addition, any individual who can demonstrate the requisite standing could bring a civil action to challenge the propriety of the declaration or the application of the executive order to the petitioner.

3. *Relate to how long such measures can last, whether and how they can be renewed, and the authority/process/notice requirements for ending the measures.*

The Emergency Management Act provides that the governor's declaration of an emergency or disaster can last for up to 28 days. After 28 days, any extension would require a joint resolution of both houses of the legislature. MCL 30.403.

4. *May create liability for ordering the restriction of movement of persons.*

Any order that results in an illegal arrest or deprivation of civil rights is actionable under state or federal law. As a general rule, civil liability is limited under state law by governmental immunity. Health officials rendering services during a declared emergency are "not liable for an injury sustained by a person by reason of those services, regardless of how or under what circumstances or by what cause those injuries are sustained," willful acts and omissions excepted. MCL 30.411.

5. *Would otherwise tend to limit the legal basis of the jurisdiction.*

None known.

B. *Sufficiency of powers/authorities – Discuss the sufficiency of the authorities and powers to restrict the movement of persons during a declared emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

The Emergency Management Act is broad and provides sufficient authority for the governor to issue any order necessary to restrict movement of persons during an emergency or disaster.

2. *Uncertainties?*

None known.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction’s legal basis to restrict the movement of persons? (Examples: state administrative practice acts, specific provisions in law related to movement restrictions.)*

As discussed under “D” (page 7) below, the penalty for violating an order of MDCH’s director is a misdemeanor punishable by six months in jail and/or a fine of \$200. Violating the governor’s order is punishable by 90 days in jail and/or a fine of \$500. Michigan’s legislature might consider increasing the jail term for violating an order of the governor to six months. In Michigan, if the penalty for a misdemeanor is greater than 92 days imprisonment, law enforcement can arrest based on reasonable cause. If the penalty is 92 days or less, then law enforcement must obtain an arrest warrant or have witnessed the violation. MCL 764.15(1)(d).

C. *Legal powers/authorities specifically related to quarantine enforcement – Specifically related to quarantine orders, identify all state and/or local powers and authorities to enable, support, authorize, or otherwise provide a legal basis for enforcement of quarantines during a public health emergency.*

1. *What are the legal powers and authorities authorizing law enforcement to enforce quarantine orders issued by the jurisdiction?*

The Emergency Management Act provides criminal penalties for any violation of an emergency executive order. Accordingly, any law enforcement officer may be called upon to enforce the order. In addition the governor may ask the attorney general to seek civil enforcement. State agencies, such as MDCH may be directed to take administrative action to enforce the order.

2. *What are the legal powers and authorities prohibiting or inhibiting the use of law enforcement to enforce a quarantine order issued by the jurisdiction?*

None known.

3. *What are the legal powers and authorities authorizing law enforcement to enforce a federal quarantine order?*

If a violation of the federal order is subject to a criminal penalty, law enforcement

officers in the state of Michigan may assist in the enforcement of the order.

4. *What are the legal powers and authorities prohibiting or inhibiting the use of law enforcement to enforce a federal quarantine order?*

The only question will be whether the officer is enforcing a criminal law of the United States.

5. *What are the legal powers and authorities prohibiting or inhibiting the use of law enforcement to assist the federal government in executing a federal quarantine order?*

If a violation of the federal order is subject to a criminal penalty, law enforcement officers in the state of Michigan may assist in the enforcement of the order. In this regard, the Michigan Attorney General has opined that peace officers of the state may enforce violations of federal laws and regulations, at least when a criminal penalty attaches. OAG, 1967-1968, No 4631, p 194 (March 5, 1968). However, Michigan law provides no authority for law enforcement officers to enforce federal civil quarantine orders.

Potentially, if the governor declares a state of emergency or disaster, she can issue an executive order expanding the powers of the various police agencies to assist federal and state agencies in enforcing quarantine and isolation orders (MCL 30.405). Alternatively, this gap might be addressed by developing a process to appoint local and state police federal agents (much as they are sometimes appointed deputy marshals), in which case they would be acting pursuant to their federal appointment and authority. The governor or the MDCH could also accomplish enforcement by issuing quarantine orders that mirror the federal government's. State and local police could then enforce a violation of the governor's or MDCH's orders as a criminal act.

- D. *Sufficiency of powers/authorities to enforce quarantine – Discuss the sufficiency of the authorities and powers to enforce quarantine orders and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

The most prominent gap is the lack of authority by law enforcement to enforce a quarantine order, short of making an arrest. Law enforcement may benefit by the passage of legislation giving law enforcement specific authority to enforce public health orders for communicable diseases. Public health also needs to explore the options available for law enforcement in the manner of enforcement of public health orders. An individual who is ordered into isolation because he is ill would be taken to a treatment facility, however, the noncompliant subject of a quarantine order is another question. If police officers arrest and incarcerate people violating quarantine or round up and detain people who refuse an order not to congregate they will likely undo the effects the social distancing measures were intended to bring about.

2. *Uncertainties?*

None known.

3. *Are there any other legal provisions not previously listed in I-C above that could inhibit, limit, or modify the jurisdiction's legal basis to restrict the movement of persons? (Examples: state administrative practice acts, specific provisions in law related to quarantine.)*

None known.

E. *Legal powers/authorities to restrict movement of persons in the absence of a declared public health emergency – What legal powers or authorities exist that could enable, support, authorize, or otherwise provide a legal basis for any restrictions on the movement of persons in the absence of a declared public health emergency? List all legal powers, authorities, and procedures that could be used to authorize specific movement restrictions in the absence of an emergency declaration. (Examples: the state's legal powers, authorities, or doctrines for quarantine, isolation, separation, or other orders for persons to remain in their homes.)*

MDCH has broad and flexible powers to protect the public health, welfare and safety of persons within the state. These powers are set out in the Public Health Code, which is to be liberally construed for the protection of the health, safety, and welfare of the people of Michigan. MCL 333.1111(2). MDCH is required to generally supervise the interests of the health and life of Michigan's residents, implement and enforce public health laws, prolong life, and promote public health through organized programs. It is also specifically responsible for preventing and controlling disease; making investigations and inquiries as to the cause of disease, especially of epidemics; and the causes, prevention, and control of environmental health hazards, nuisances, and courses of illness. MDCH may exercise authority to safeguard properly the public health, prevent the spread of diseases and the existence of sources of contamination, and implement and carry out the powers and duties vested by law in the department. MCL 333.2226(d).

Michigan's Supreme Court has long recognized the authority of health officers to issue reasonable orders or regulations to control the spread of disease under their general statutory authority to prevent the spread of infection. *People v Board of Education of City of Lansing*, 224 Mich 388 (1923) (local board of health has authority to issue regulation to exclude unvaccinated children from schools, over the objection of the school board, while 17 cases of smallpox still existed in the city), *Rock v Carney*, 216 Mich 280 (1921) (health officer has quarantine power when sufficient reasonable cause exists to believe that a person is afflicted with a venereal disease).

In addition to a general grant of authority, the Public Health Code grants the state health director specific power to issue orders to address an emergency, as described in "1" (pages 9-10) below.

Most public health activities, including the prevention and control of communicable diseases, are carried out by Michigan's 45 local health departments. Local health departments, acting through their local health officers, hold the general powers described above. Further, both state and local health departments are granted "powers necessary or appropriate to perform the duties and exercise the powers given by law ... and which are not otherwise prohibited by law." MCL 333.2221(2)(g), MCL 333.2433(2)(f). Local health officers are also authorized to issue emergency orders, warning notices, and bring court actions, concerning residents within their jurisdictions. The organization and powers of local health departments are set out in MCL 333.2401 – 333.2498.

This question includes all provisions of law or procedure that:

1. *Regulate the initiation, maintenance, or release from restrictive measures, including, but not limited to:*
 - a. *Who can declare or establish such restrictions?*

If the state health director determines that conditions anywhere in the state constitute a menace to the public health, she is authorized to take full charge of the administration of applicable state and local law, rules, regulations, and ordinances. MCL 333.2251(3). Additionally, the Public Health Code grants the state health director (and local health officers) power to issue the following orders to address an emergency:

- **Imminent Danger Orders.** Upon determining that an "imminent danger" to the health or lives of individuals exists in this state, the director shall inform the individuals affected by the imminent danger and issue an order. The order shall be delivered to a "person" authorized to avoid, correct, or remove the imminent danger or be posted at or near the imminent danger. MCL 333.2251(1). "Person" includes an individual, any type of legal entity, or a governmental entity. MCL 333.2251(4)(b). "Imminent danger" is defined as "a condition or practice [that] could reasonably be expected to cause death, disease, or serious physical harm immediately or before the imminence of the danger can be eliminated through enforcement proceedings otherwise provided." MCL 333.2251(4)(a). In her order, the director shall incorporate her findings and require immediate action necessary to avoid, correct, or remove the imminent danger. The order may specify action to be taken or prohibit the presence of individuals in locations or under conditions where the imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove the imminent danger
- **Orders to Control an Epidemic.** Upon determining that the control of an epidemic is necessary to protect the public health, the director, by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure

continuation of essential public health services and enforcement of health laws. MCL 333.2253. “Epidemic” means “any increase in the number of cases, above the number of expected cases, of any disease, infection, or other condition in a specific time period, area, or demographic segment of the population.” R 325.171(g).

- **Orders to Abate a Nuisance.** The director may issue an order to avoid, correct, or remove, at the owner’s expense, a building or condition that violates health laws or which the director reasonably believes to be a nuisance, unsanitary condition, or cause of illness. MCL 333.2455.

Finally, the Public Health Code provides for the involuntary detention and treatment of individuals with hazardous communicable disease. MCL 333.2453(2). Upon a determination by a representative of MDCH (or the local health department) that an individual is a “carrier” and is “a health threat to others,” MDCH’s representative shall issue a warning notice to the individual requiring the individual to cooperate with MDCH or the local health department in efforts to prevent or control transmission of “serious communicable diseases or infections.” The warning notice may also require the individual to participate in education, counseling, or treatment programs, and to undergo medical tests to verify the person’s status as a carrier.

A “carrier” is “an individual who serves as a potential source of infection and who harbors or who the department reasonably believes to harbor a specific infectious agent or a serious communicable disease or infection, whether or not there is present discernible disease.” MCL 333.5201(1)(a). “Health threat to others” means that the individual “has demonstrated an inability or unwillingness to conduct himself or herself in such a manner as to not place others at risk of exposure to a serious communicable disease or infection.” MCL 333.5201(1)(b).

A warning notice:

- Must be in writing (may be verbal in urgent circumstances, followed by a written notice within 3 days).
- Must be specific and individual, cannot be issued to a class of persons.
- Must require the individual to cooperate with the health department in efforts to control spread of disease.
- May require the individual to participate in education, counseling, or treatment programs, and to undergo medical tests to verify carrier status.
- Must inform the individual that if the individual fails to comply with the warning notice, the health department shall seek a court order.

If the individual fails or refuses to comply with the warning notice, the health department must petition the circuit court (family division) for an order requiring testing, treatment, education, counseling, commitment, isolation, etc., as appropriate.

In an emergency, the health department may go straight to court (without first issuing a warning notice). Upon filing of affidavit by the health department, the court may order that individual be taken into custody and transported to an appropriate emergency care or treatment facility for observation, examination, testing diagnosis, treatment, or temporary detention. The court's emergency order may be issued *ex parte*; however, the court must hold a hearing on the temporary detainment order within 72 hours (excluding weekends and holidays).

b. Who can enforce such restrictions?

MDCH would need to rely on law enforcement and courts to enforce its orders. Violation of an order of the director is a misdemeanor, punishable by six months in jail or \$200, or both. MCL 333.2261. In Michigan, if the penalty for a misdemeanor is greater than 92 days imprisonment, law enforcement can arrest based on reasonable cause (i.e., without an arrest warrant or witnessing the violation), pursuant to MCL 764.15(1)(d).

While violation of the director's order is a misdemeanor, there is no parallel provision in the Public Health Code for violation of a local health officer's order. State law provides that a violation of a local health regulation is a misdemeanor. Therefore, this gap can be addressed by each local government adopting a regulation requiring persons to comply with a lawful order of the local health officer. Failure to comply with an order of the local health officer would be a violation of the regulation and punishable as a misdemeanor under state law. In some circumstances, a local health department may be able to seek enforcement under a provision of the Public Health Code that states it is a misdemeanor to willfully oppose or obstruct a representative of MDCH, the state or a local health officer, or any other person charged with enforcement of a health law in the performance of that person's legal duty to enforce that law. MCL 333.1291.

Finally, MDCH (and local health officers) can go to court to seek enforcement of its orders. MCL 333.2251(2), MCL 333.2451(2). The court could punish civilly or criminally via contempt. MDCH (and local health officers) may also maintain injunctive action "to restrain, prevent, or correct a violation of a law, rule, or order which the department [local health officer] has the duty to enforce or to restrain, prevent, or correct an activity or condition which the department believes adversely affects the public health." MCL 333.2255, MCL 333.2465.

c. What are the legal powers and authorities for group quarantine?

"Group quarantine" is not explicitly addressed in the Public Health Code. However, MDCH's director and local health officers have the authority to issue an imminent danger order, and require "group quarantine" as action required to avoid, correct, or remove the imminent danger. Alternatively, the director or local health officer could issue an emergency order to control an epidemic and require group quarantine as a procedure to be followed during the epidemic.

d. What are the legal powers and authorities for area quarantine?

“Area quarantine” is not explicitly addressed in the Public Health Code. However, MDCH’s director and local health officers have the authority to issue an imminent danger order, and require “area quarantine” as action required to avoid, correct, or remove the imminent danger. Alternatively, the director or local health officer could issue an emergency order to control an epidemic and require area quarantine as a procedure to be followed during the epidemic.

e. What are the penalties for violating movement restrictions?

Violation of the order of MDCH’s director is a misdemeanor, punishable by six months imprisonment, \$200 fine, or both.

2. *Provide any due process measures for a person whose movement is restricted.*

Both the U.S. and the Michigan Constitution prohibit depriving a person of liberty without due process of law. Const 1963, Art I, § 17. Due process is flexible; what process is due depends on the nature of the proceedings, the risks and costs involved, and the private and governmental interests affected. *By Lo Oil Co v Dept of Treasury*, 267 Mich App 19 (2005).

There are no statutory provisions, rules, or procedures with regard to the process for review of imminent danger orders or orders to control an epidemic. Fundamental fairness requires that orders directed toward individuals must be served on the individuals and orders directed toward groups or the general public must be sufficiently publicized to provide notice to individuals of required or prohibited conduct.

Violation of an order by MDCH’s director is a criminal offense. Thus, all due process measures attendant to a deprivation of liberty attach to a person who violates an order of the director that restricts movement. In addition, any person who can demonstrate the requisite standing could bring a civil action to challenge the propriety of the director’s order or the application of the order to the petitioner.

The Public Health Code sets out procedures for enforcement of a warning notice issued by MDCH’s director or a local health officer against a carrier who is a health threat to others. The individual has the right to an evidentiary hearing and the health department must prove the allegations by clear and convincing evidence. Before committing an individual to a facility, the court must consider the recommendation of a commitment panel, and the commitment order must be reviewed periodically. An individual who is the subject of either emergency proceedings or a petition on a warning notice has the right to counsel at all stages of proceedings. An indigent individual is entitled to appointed counsel. The

individual also has the right to appeal and review by the Michigan Court of Appeals within 30 days. MCL 333.2453(2), MCL 333.5201 – 333.5207

3. *Relate to how long such measures can last, whether and how they can be renewed, and the authority/process/notice requirements for ending the measures.*

There is no time limit on any of the state or local health officers' orders; nor is there a renewal requirement. The health officer who issued an emergency order would be responsible for monitoring the conditions that warranted the order, and respond as appropriate by modifying or rescinding the order as conditions change. Notice of any modifications, or rescission, would need to be sufficient to reasonably notify individuals or groups who are subject to the order.

4. *May create liability for ordering the restriction of movement of persons.*

MDCH and its employees and volunteers have governmental immunity from tort damages when engaged in a governmental function, absent "gross negligence" that is the proximate cause of the injury or damage. MCL 691.1407. Note: this section does not apply with respect to providing medical care or treatment to a patient with some exceptions. However, if an emergency were declared, the Emergency Management Act, MCL 30.411, would provide protection from liability. Additionally, MDCH's director, or an employee or representative of MDCH is not personally liable for damages sustained in the performance of departmental functions, except for wanton and willful misconduct. MCL 333.2228. The same provision applies to local public health. MCL 333.2465(2).

5. *Would otherwise tend to limit the legal basis of the jurisdiction.*

None known.

- F. *Sufficiency of powers/authorities – Discuss the sufficiency of the authorities and powers to restrict the movement of persons in the absence of a declared emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

Staff from MDCH and local health departments have participated in several activities to evaluate the sufficiency of the authorities and powers to restrict the movement of persons in the absence of a declared emergency. These activities include participation in the Turning Point Collaborative², table top and other facilitated exercises, and a roundtable discussion by a group of public health and legal experts on Michigan law. For the most part, the consensus of both state and local public health is that the Public Health Code provides broad and flexible powers that are sufficient for prompt and effective response to a public health emergency. While it is tempting to seek legislation that authorizes specific measures that might be imposed, there is a risk that public health's authority

² The Michigan Association for Local Public Health obtained an assessment of Michigan laws through the Turning Point Collaborative.

would be narrowed by too much specificity and detail under the principle *expressio unius est exclusio alterius* (the express mention of one thing implies the exclusion of all others).

As discussed above, one gap in enforcing restrictions of movement is the lack of a criminal penalty for violation of an emergency order of a local health officer. Another potential gap is the absence of provisions for due process where orders issued by MDCH or local health officers deprive individuals of liberty. This could be addressed either through legislation or by MDCH promulgating rules consistent with Michigan's Administrative Procedures Act. MCL 24.231 *et seq.* However, care is essential in establishing procedures to avoid binding the state and local health departments to a process or procedures beyond legal requirements that unnecessarily restrict their ability to act promptly and effectively to protect the public health.

While MDCH has addressed most social distancing measures in its Pandemic Influenza Plan, it has not addressed mass transit usage limits. MDCH needs to review this for inclusion as a potential social distancing measure to reduce spread of disease from close proximity of individuals typical of crowded mass transit.

2. *Uncertainties?*

Under Michigan's Constitution, Michigan's public universities constitute a "branch" of state government, autonomous within their own spheres of authority. Const 1963, Art VIII, §§ 5, 6, *National Pride at Work, Inc v Governor*, 274 Mich App 147 (2007), and cases cited therein. University governing boards might question whether the state health department has authority to issue orders that affect the operation of the university, such as orders to quarantine dorm students or prohibit class attendance. However, universities are not exempt from all regulation. MDCH needs to obtain advice from the Department of Attorney General regarding the parameters of its authority over university campuses, and the authority (if any) of local health departments. MDCH should engage the universities to develop memoranda of understanding and procedures for coordinating an effective response to pandemic influenza or other disease outbreaks.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's legal basis to restrict the movement of persons? (Examples: state administrative practice acts, specific provisions in law related to movement restrictions.)*

While MDCH is authorized to implement its police and statutory powers, there are limits on the exercise of these powers. These limitations include constitutional rights to substantive and procedural due process and equal protection under the laws. MDCH must act in good faith, and must not abuse its discretion in restricting the movement of individuals.

In *Rock v Carney, supra*, the Michigan Supreme Court upheld the authority of public health boards to determine what constitutes a dangerous communicable disease and take measures to prevent the spread. However,

the method adopted or exercised to prevent the spread thereof must bear some true relation to the real danger, and be reasonable, having in mind the end to be attained, and must not transgress the security of the person beyond public necessity.

216 Mich 280, 296.

In the *Rock* case, the Supreme Court held that the health officer abused his discretion by refusing home isolation and placard notice for a young woman with venereal disease, and instead removed the woman from her home and committed her to a hospital for twelve weeks.

Other limitations on exercising authority to restrict movement of persons:

Tribal boundaries, tribal entities. MDCH is in the process of drafting provisions for its pandemic influenza plan that address limitations on the exercise of authority on Indian land or concerning federally recognized tribes. Its All Hazards and Pandemic Influenza Plans currently provide:

- **State-Tribal Borders:** Public health emergencies occurring on tribal land are the responsibility of the tribal organization. Some Mutual Aid Agreements (MAAs) have been developed between local or state health or emergency agencies and tribes. In instances where pre-arranged MAAs have not been developed, Local or State Health organizations may provide services on tribal land upon the invitation of the tribe. (Emphasis in original).

Foreign Diplomats: In Attachment 18 of its Pandemic Influenza Plan, MDCH addresses its limitations to impose quarantine or other restrictions on foreign diplomats and their families and honorary counsels, and procedures to be followed in the event of a disease outbreak. Attachment 18 is attached to this assessment as Appendix 2.

Federal land, including military bases and V.A. hospitals. MDCH needs to research and address limits on its jurisdiction over federal lands. MDCH needs to coordinate with federal authorities to develop procedures and emergency communications protocol in the event of a pandemic influenza or other disease outbreak.

II. Curfew

A. *Legal powers/authorities for curfew during a declared public health emergency – What legal power, authorities, or procedures exist that that could enable, support, authorize, or otherwise provide a legal basis for curfew during pandemics, when a public health emergency has been declared?*

1. *What are the powers and authorities to institute curfews? Can local governments institute their own curfews under state and/or local law?*

The governor is specifically empowered to proclaim a state of emergency and designate the area involved “[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled.” After making the proclamation or declaration, the governor may promulgate reasonable orders, rules, and regulations necessary to protect life and property or bring the emergency situation with the affected area under control. The orders, rules, and regulations, may include curfew, as well as other measures. MCL 10.31.

Additionally, under the Emergency Management Act the governor has broad power to take any action that is necessary and appropriate during a declared emergency or disaster and may issue a curfew order. Local governmental units may declare a local state of emergency and take action to “provide for the health and safety of persons and property....” Notice is required. The Emergency Management Act provides that the order shall be “disseminated promptly by means calculated to bring its contents to the attention of the general public.” MCL 30.403. The order must also be filed with the secretary of state.

2. *Who can order curfew, and, if different, who makes the decision to institute curfew?*

Under the Emergency Management Act, the governor would issue the order. The chief executive official of the county or municipality would issue local orders. MCL 30.410.

3. *What is the process for mobilizing public health/law enforcement of curfew?*

There is no process set out in the Emergency Management Act for mobilizing public health/law enforcement of curfew. The director of the State Police is charged with implementing the orders and directives of the governor. MCL 30.407.

4. *Who can enforce curfew?*

Again, because violations of the governor’s emergency orders are misdemeanors, any law enforcement officer may enforce the order.

5. *Penalties for violating curfew?*

Penalties are 90 days imprisonment, or \$500, or both. MCL 10.33, MCL 30.405(2), MCL 750.504.

6. *How long can a curfew last?*

The curfew order could remain in effect for 28 days unless extended by joint resolution of the legislature.

7. *How can it be renewed?*

A curfew order can be renewed only by joint resolution of the legislature.

8. *Describe the authority/process/notice requirements for ending a curfew.*

The governor may rescind the order at any time. This can be done through issuance of an executive order in which case prompt public notice is required.

B. *Sufficiency of powers/authorities – Discuss the sufficiency of the authorities and powers to institute or maintain curfew during a declared emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

None known.

2. *Uncertainties?*

None known

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's legal basis to institute or maintain curfew? (Examples: state administrative practice acts, specific provisions in law related to curfew.)*

None known.

C. *Legal powers/authorities for curfew in the absence of declared public health emergency – What legal power, authorities, or procedures exist that that could enable, support, authorize, or otherwise provide a legal basis for curfew during pandemics, in the absence of a declared public health emergency?*

1. *What are the powers and authorities to institute curfews? Can local governments institute their own curfews under state and/or local law?*

MDCH's Director, or local health officers within their jurisdictions, could order curfew under their broad authority, provided curfew is a reasonable measure to address an imminent health danger or to control an epidemic. MCL 333.2251, 333.2253, 333.2451, 333.2453. However, a state or local health officer's authority does not include issuing orders (such as curfew) as general safety measures to manage disturbances or protect property.

2. *Who can order curfew, and, if different, who makes the decision to institute curfew?*

MDCH's director would make the decision to institute curfew, and would issue an order imposing curfew that could cover all or any area of the state. The local health officer would make the decision and issue an order imposing curfew for the local health department's jurisdiction.

3. *What is the process for implementing curfew?*

The Public Health Code does not set out a process, and one has not been developed by MDCH.

4. *What is the process for mobilizing public health/law enforcement of curfew?*

The Public Health Code does not set out a process, and one has not been developed by MDCH.

5. *Who can enforce curfew?*

Any law enforcement officer could enforce curfew imposed by an order of MDCH's director since it is a misdemeanor to violate an order of MDCH. MCL 333.2261. There is no parallel provision for violation of a local health officer's order, so enforcement would most likely depend on local regulations.

6. *Penalties for violating curfew?*

Violation of an order of MDCH is a misdemeanor punishable by six months in jail, a fine of \$200, or both.

7. *How long can a curfew last?*

There is no time limit on any of the state or local health officers' orders.

8. *How can it be renewed?*

There is no renewal requirement.

9. *Describe the authority/process/notice requirements for ending a curfew.*

If the state or a local health officer has the authority to impose curfew, then they have the authority to modify or end curfew. The health officer who issued an emergency order would be responsible for monitoring the conditions that warranted the order, and respond as appropriate by modifying or rescinding the order as conditions change. Notice of any modifications, or rescission, would need to be sufficient to reasonably notify individuals or groups who are subject to the curfew.

D. *Sufficiency of powers/authorities – Discuss the sufficiency of the authorities and powers to institute or maintain curfew in the absence of a declared emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

No known gaps in powers or authorities. However, MDCH does not address the use of curfew as a public health measure in its All Hazards Response Plan or any of its other plans. MDCH’s response plans should be reviewed for possible inclusion of curfew.

2. *Uncertainties?*

None known.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction’s legal basis to institute or maintain curfew? (Examples: state administrative practice acts, specific provisions in law related to curfew.)*

As discussed in I above, exercise of state and local health authority must be in good faith, reasonable, and consistent with constitutional rights to substantive and procedural due process and guarantees of equal protection.

III. **Inter-jurisdictional Cooperation and Restricting Movement of Persons**

A. *Legal provisions/procedures for inter-jurisdictional cooperation on restricting the movement of persons during a declared public health emergency – What provisions or procedures under law apply to giving and receiving assistance and otherwise working with other jurisdictions regarding restrictions of movement of persons during a declared public health emergency?*

1. *Provisions or procedures governing the relationships among superior jurisdictions? Among inferior jurisdictions?*

The Michigan Emergency Management Act, and plans thereunder, contain provisions requiring or authorizing inter-jurisdictional cooperation among superior jurisdictions and inferior jurisdictions.

The Emergency Management Act authorizes the governor to enter into a reciprocal aid agreement or compact with another state, the federal government, or a neighboring state or province of a foreign country, with the following limitations:

A reciprocal aid agreement shall be limited to the furnishing or exchange of food, clothing, medicine, and other supplies; engineering services; emergency housing; police services; the services of the national guard when not mobilized for federal

service or state defense force as authorized by the Michigan military act, ... MCL 32.501 to 32.851 ... and subject to federal limitations on the crossing of national boundaries by organized military forces; health, medical, and related services; fire fighting, rescue, transportation, and construction services and equipment; personnel necessary to provide or conduct these services; and other necessary equipment, facilities, and services. A reciprocal aid agreement shall specify terms for the reimbursement of costs and expenses and conditions necessary for activating the agreement. The legislature shall appropriate funds to implement a reciprocal aid agreement.

MCL 30.404(3).

The Emergency Management Act requires the emergency management division of the state police to prepare and maintain a comprehensive emergency management plan that covers mitigation, preparedness, response, and recovery for the state. MCL 30.407a. The Emergency Management Act further requires the director of each department of state government to participate in emergency planning for the state, serve as emergency management coordinator for his or her respective department, and provide an annex to the Michigan emergency management plan providing for the delivery of suitable emergency management activities. MCL 30.408. The Michigan emergency management plan describes the roles, responsibilities, and assignments of state departments, and provides the framework for state and local entities to work together under an incident command structure to address various types of emergencies. Under the emergency management plan, MDCH is the lead agency responsible for public health and mental health issues. Assigned responsibilities include:

- Coordinate the investigation and control of communicable disease and provide laboratory support for communicable disease diagnostics.
- Coordinate the allocation of medications essential to public health, including acquisition of medications from federal pharmaceutical stockpiles.
- Issue health advisories and protective action guides to the public.
- Coordinate appropriate medical services, providing support to hospitals, pre-hospital and alternate care settings in the medical management of mass casualty incidents.
- Provide technical assistance in the coordination of emergency medical services.
- Coordinate with local health departments, community mental health agencies, and state operated inpatient facilities.
- Provide liaison to federal emergency health and medical programs and services.
- Coordinate with the National Disaster Medical System.
- Ensure health facilities have emergency procedures.

As required by the Emergency Management Act, MDCH has provided and continuously updates response plans and annexes related to protecting the public's health. With regard to communicable disease, these include the Strategic National Stockpile Support Plan, Mass Fatality Plan, MDCH's All Hazards Response Plan, Communicable Disease Annex, and the Pandemic Influenza Plan. Module IX of the MDCH All Hazards Response Plan, Communicable Disease Annex, and Pandemic Influenza Response Plan address International and Border Travel Issues. Of note, many of the actual actions would be federal, although the MDCH director could implement orders to control intra-state movement, or recommend to the governor various actions. Public health procedures included in the plans include communicable disease surveillance at borders and travel alerts, warnings or bans.

The Emergency Management Act also promotes assistance during a disaster or emergency among local units of government. It provides that municipalities and counties may enter into mutual aid or reciprocal aid agreements or compacts with other counties, municipalities, public agencies, federally recognized tribal nations, or private sector agencies, or all of these entities. A compact entered into under this provision is limited to the exchange of personnel, equipment, and other resources in times of emergency, disaster, or other serious threats to public health and safety. The arrangements shall be consistent with the Michigan emergency management plan. MCL 30.410(2).

There are no provisions or procedures for inter-jurisdictional cooperation that specifically cover restrictions on the movement of persons during a public health emergency. However, there are numerous agreements for mutual aid or assistance that facilitate response to a public health emergency and could provide resources to implement social distancing measures if needed. These include provisions for sharing personnel, equipment, data, providing notification of disease threats, and providing facilities for treatment or mass prophylaxis.

These agreements include:

- **Emergency Management Assistance Compact (EMAC).** In 2001, Michigan adopted EMAC, which allows Michigan to operate as a part of the Interstate Mutual Aid Compact. See MCL 3.1001 (covering personnel) and MCL 3.991 (covering equipment). Consequently, once an emergency has been declared, Michigan has the authority to assist other states in an emergency and seek assistance from other states. This is of particular importance because the Interstate Mutual Aid Compact gives the state providing assistance a right to seek compensation for the services/assistance that it provides to the requesting state.
- **Michigan Emergency Management Assistance Compact (MEMAC).** Under the Emergency Management Act, MCL 30.410(2), Michigan has developed a mutual aid agreement for adoption by local units of governments

known as the Michigan Emergency Management Assistance Compact that may be found at http://www.michigan.gov/documents/MEMACFINAL7-3-03_69499_7.pdf MEMAC is entered into between the Michigan State Police Emergency Management and Homeland Security Division on behalf of the State of Michigan, and by and among each county, municipality, township, federally recognized tribal nation and interlocal public agency that executes the agreement and adopts its terms and conditions. MEMAC is designed to help Michigan's local governments share vital public safety services and resources more effectively and efficiently. MEMAC covers serious threats to public health and safety of sufficient magnitude that the necessary public safety response threatens to overwhelm local resources and requires mutual aid or other assistance. Typically, there would be a local, state or federal declaration of emergency or disaster; however, a declaration is not required.

- There are 1,858 local governments in the State of Michigan.³ This includes 83 counties, 1,242 townships, 272 cities, and 261 villages. As of July 25, 2007, the number of local governments that have adopted resolutions to participate in MEMAC is 104, including:
 - Counties – 25 (30%)
 - Townships – 41 (3%)
 - Cities – 32 (18%)
 - Villages – 6 (2%)

See Appendix 3 for a list of local jurisdictions within Michigan that participate in MEMAC.

- **Mutual Aid Agreements within Regional Medical Biodefense Networks.** The State of Michigan has organized eight (8) regional medical biodefense networks that include hospitals, medical control authorities, life support agencies, and other health care facilities. As part of their disaster planning objectives, the regions have been working to develop mutual aid agreements. To date, regions 1, 5 and 8 have adopted agreements. The other five regions continue to work on this.
- **Mutual Aid Agreements among Local Health Departments.** There are 45 local health departments in the State of Michigan, including:
 - 30 single-county health departments
 - 14 multi-county, district health departments
 - 1 city health department

In addition to their participation in MEMAC, by virtue of their governing entity's participation, some local health departments have also executed mutual aid

³ This number excludes school districts, intermediate school districts, planning and development regions and special districts and authorities. This information is from the *Michigan Manual*, p. 711.

agreements with neighboring local health departments. These agreements vary widely in terms of their scope and content. For example, the Southeast Michigan Local Health Department Mutual Aid Consortium Agreement is a relatively comprehensive mutual aid agreement. It was designed for participation by seven single-county health departments and one city health department.

- **Mutual Aid for Police Assistance.** Under MCL 123.811 *et seq.*, two or more counties, cities, villages, or townships, whether adjacent to each other or not, may enter into agreements to provide mutual police assistance to one another in case of emergencies. (Individuals preparing this report do not know the extent of agreements between law enforcement agencies under this law).
2. *Provisions or procedures governing the relationships between superior and inferior jurisdictions? (Include relationships among all levels of government and the federal government. See also section I-C above specifically related to quarantine orders.)*

The Emergency Management Act requires that the Department of State Police establish an emergency management division for the purpose of coordinating within the state the emergency management activities of county, municipal, state, and federal governments. The division is responsible for the Michigan emergency management plan, shall propose and administer statewide mutual aid compacts and agreements, and shall cooperate with the federal government and any public or private agency or entity in achieving emergency management activities. MCL 30.407a.

3. *What is the legal authority of the jurisdiction to accept, utilize, or make use of federal assistance?*

The Emergency Management Act provides that “upon declaring a state of disaster or emergency, the governor may seek and accept assistance, either financial or otherwise, from the federal government, pursuant to federal law or regulation.” MCL 30.404(2). Further, the emergency management division of the State Police “shall receive available state and federal emergency management and disaster related grants-in-aid and shall administer and apportion the grants according to appropriately established guidelines to the agencies of this state and local political subdivisions.” MCL 30.407a.

The Emergency Management Act also states that the governor may enter into a reciprocal aid agreement or compact with the federal government, subject to the limitations described in 1, above (page 20). MCL 30.404(3).

B. *Sufficiency of powers/authorities to cooperate with other jurisdictions during a declared public health emergency – Discuss the sufficiency of the authorities and powers to cooperate with other jurisdictions during a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

There are liability, workers compensation, and reimbursement questions outstanding. Current emergency response plans for communicable disease do not include provisions for limiting the usage of mass transit.

2. *Uncertainties?*

Liability, workers compensation, and reimbursement questions.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction’s legal basis to cooperate with other jurisdictions? (Examples: state administrative practice acts, specific provisions in law related to inter-jurisdictional cooperation.)*

The approval of the state administrative board is required for the governor to enter into a reciprocal aid agreement or compact under the Emergency Management Act, MCL 30.404(3).

C. *Legal provisions/procedures for inter-jurisdictional cooperation on restricting the movement of persons in the absence of a declared public health emergency – What provisions or procedures under law apply to giving and receiving assistance and otherwise working with other jurisdictions regarding restrictions of movement of persons in the absence of a declared public health emergency?*

1. *Provisions or procedures governing the relationships among superior jurisdictions? Among inferior jurisdictions?*

Subject to provisions of general law, the Michigan Constitution authorizes the state, any political subdivision, any governmental authority, or any combination thereof to enter into agreements for the performance, financing or execution of their respective functions, with any one or more of the other states, the United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in Michigan’s Constitution. Const 1963, Art III, § 5.

Additionally, any unit of government is authorized to enter into an interlocal agreement under Michigan’s Urban Cooperation Act, MCL 124.501 *et seq.*, to exercise jointly with any other public agency of this state, another state, a public agency of Canada, or with any public agency of the U.S. government any power, privilege, or authority that the agencies share in common and that each might exercise separately. MCL 124.504.

The Public Health Code authorizes both the state and local health departments to “[e]nter into an agreement, contract, or arrangement with governmental entities or other persons necessary or appropriate to assist the department in carrying out its duties and functions.” MCL 333.2226(c), MCL 333.2435(c)(e).

Under PA 89 of 1935, MCL 798.101 *et seq.*, the governor has the power to enter into interstate compacts with other states to address criminal behavior. The governor is authorized to enter into agreements or compacts with other states, for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of the penal laws and policies of the contracting states and to establish agencies, joint or otherwise, as may be deemed desirable for making effective such agreements and compacts. MCL 798.103. The intent and purpose of this act is to grant to the governor administrative power and authority if and when conditions of crime make it necessary to bind the state in a cooperative effort to reduce crime and to make the enforcement of the criminal laws of agreeing states more effective. Any interstate compact must not be inconsistent with the laws of Michigan, the agreeing states, or of the United States.

Agreements may be developed and implemented under these laws, whether or not an emergency has been declared. Additionally, with the exception of EMAC, all of the agreements described in Section III on inter-jurisdictional cooperation may be implemented in the absence of a declared public health emergency, as well as during a declared emergency. With regard to state and local health departments, declaration of an emergency or disaster does not relieve any state or local official, department head, or agency of its normal responsibilities. Nor does declaration limit or abridge the power, duty, or responsibility of the chief executive official of a county or municipality to act in the event of a disaster or emergency except as expressly set forth in the Michigan Emergency Management Act. MCL 30.417(e),(f). However, if the governor has declared an emergency or disaster, each state department and agency must cooperate with the state's emergency management coordinator and perform the services that it is suited to perform in the prevention mitigation, response to, or recovery from the emergency or disaster, consistent with the state emergency management plan. MCL 30.408.

Current agreements among superior or inferior jurisdictions include:

- **Great Lakes Border Health Initiative (GLBHI).** MDCH is a member of the GLBHI, along with the state health departments of Minnesota, New York, Ohio, Pennsylvania, and Wisconsin, and the Ontario Ministry of Health and Long-Term Care. GLBHI is funded by the Centers for Disease Control and Prevention's Early Warning Infectious Disease Surveillance (EWIDS) project, and aims to formalize relationships between U.S. and Canadian public health and emergency preparedness agencies responsible for communicable disease tracking, control and response. The member jurisdictions of Michigan, Minnesota, New York, Wisconsin, and Ontario have entered into a data sharing agreement, which is intended to improve early warning and infectious disease surveillance by facilitating the sharing of infectious disease information and establishing a protocol for communications. Ohio and Pennsylvania are expected to join the agreement once outstanding questions

have been answered. Mutual assistance agreements for equipment, specialized personnel, and services may be developed in the future.

- **Agreements with Indian Tribes.** A Memoranda of Understanding has been signed between one of Michigan’s local health departments and a federally-recognized tribe to use a tribal facility as a Strategic National Stockpile dispensing facility. Two of Michigan’s federally recognized tribes (Sault St. Marie Chippewa and Bay Mills Indian Community) have entered into mutual assistance agreements with the Chippewa County Health Department regarding notification of an occurrence of disease that may cause widespread illness. The Chippewa County Health Department and the Sault Ste. Marie Tribe of Chippewa Indians have also signed a mutual aid agreement regarding use of tribal property to provide mass health care in an emergency.
2. *Provisions or procedures governing the relationships between superior and inferior jurisdictions? (Include relationships among all levels of government and the federal government. See also section I-C above specifically related to quarantine orders.)*

Under the Public Health Code, MDCH and local health departments have concurrent authority over the prevention and control of diseases within the local health department’s jurisdiction. Both have powers to issue emergency orders and take other action as appropriate to address an imminent danger, epidemic, or other public health emergency. In exercising their authority, the state and local health departments must cooperate and coordinate their responses. MDCH has jurisdiction statewide. If MDCH’s director determines that conditions anywhere in the state constitute a menace to the public health, she has the authority to take full charge of the administration of applicable state and local health laws, rules, regulations, and ordinances. MCL 333.2251(3). Further, while disease prevention and control programs are primarily the responsibility of local public health, MDCH’s director can take primary responsibility as warranted by circumstances. MCL 333.2235(2).

3. *What is the legal authority of the jurisdiction to accept, utilize, or make use of federal assistance?*

MDCH and local health departments are authorized to receive grants from the federal government, in accordance with the law, rules and procedures of the state (and local governing unit with regard to local health departments). MCL 333.2226(e), 333.2435(e). As discussed above, the Public Health Code authorizes both the state and local health departments to enter into an agreement, contract, or arrangement with other governmental entities, which would include the federal government.

- D. *Sufficiency of powers/authorities to cooperate with other jurisdictions in the absence of a declared public health emergency – Discuss the sufficiency of the authorities and powers to cooperate with other jurisdictions in the absence of a declared public*

health emergency, and any potential gaps or uncertainties in those powers and authorities.

1. *Potential gaps?*

None

2. *Uncertainties?*

With the exception of EMAC, individuals preparing this report do not know whether Congress has given its consent to the state entering into agreements with other states or provinces. Further, it is not always clear when Congressional consent is required.

Individuals preparing this report do not know the extent of inter-jurisdictional agreements that concern law enforcement and the existence of other agreements not discussed in this report that are relevant to inter-jurisdictional cooperation regarding a serious communicable disease outbreak.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's legal basis to cooperate with other jurisdictions? (Examples: state administrative practice acts, specific provisions in law related to inter-jurisdictional cooperation.)*

None known.

E. Interagency/inter-jurisdictional agreements on restricting movement of persons – Where available, identify and provide copies of all interagency and inter-jurisdictional agreements (both interstate and intrastate) relating to restrictions on the movement of persons during public health emergencies and the enforcement of such restrictions

As discussed above, there are no provisions or procedures for inter-jurisdictional cooperation that specifically cover restrictions on the movement of persons during a public health emergency. However, the laws and agreements discussed above would facilitate response to a public health emergency and could provide resources to support social distancing measures if needed.

IV. Closure of Public Places

A. *Legal powers/authorities to order closure of public places during a declared public health emergency – What are the powers, authorities, or procedures to enable, support, authorize, or otherwise provide a legal basis for closure by state or local officials of public places (e.g., public facilities, private facilities, and business) during a declared public health emergency? For each of the jurisdiction’s legal powers, authorities, and procedures including, but not limited to, umbrella, general public health, or emergency powers or authorities, that could be used to authorize, prohibit, or limit closure, please address the following issues:*

1. *What are the powers and authorities authorizing closure?*

The governor is empowered to declare a disaster or emergency under circumstances where there is the threat or occurrence of widespread loss of life or injury. If the declaration involves a health emergency, an important component of mitigation would be limiting the exposure of well persons to those carrying the disease. Inasmuch as people may be infectious before they are symptomatic, closing places where large numbers of people gather in close proximity to one another may be the single most effective mitigation measure to be undertaken by the department. Accordingly, the governor, under the authority of the Emergency Management Act to direct such action “which are necessary and appropriate under the circumstances,” may order the closure of public places and cancellation of public gatherings if the closures and cancellations are needed to protect the public health from spread of pandemic influenza.

2. *What are the powers and authorities prohibiting closure?*

None known. But, there may be compensation issues.

3. *Who can declare or establish closure?*

Under the Emergency Management Act, such orders are issued by the governor.

4. *Who makes the decision to close a public place?*

Same as above.

5. *What is the process for initiating and implementing closure?*

No specific process is provided in the Emergency Management Act once a declaration is made.

6. *What is the process for enforcing closure and who enforces it?*

Violations of executive orders are crimes and may be enforced by any law enforcement officer.

7. *What are the penalties for violating closure?*

Violation is a misdemeanor punishable by 90 days jail, a \$500 fine, or both.

8. *What are the procedural and due process requirements for closure?*

The requirements depend on whether an order requiring closure is considered a “taking” of property, requiring due process and compensation. See D.1. below (pages 32-33).

9. *Is compensation available for closure? If so, what is it?*

Not specifically provided. But some question exists. See MCL 30.406, which addresses compensation for property and services, providing “compensation for property shall be paid only if the property is taken or otherwise used in coping with a disaster or emergency and its use or destruction is ordered by the governor or the director. A record of all property taken or otherwise used under this act shall be made and promptly transmitted to the office of the governor.”

10. *How long can a closure last?*

28 days unless extended by joint resolution of the legislature.

11. *How can it be renewed?*

By joint resolution of the legislature.

12. *Describe the authority/process/notice requirements for ending a closure.*

If ended by executive order, notice of termination is same as order of closure; by such means calculated to bring it to the attention of the general public.

B. *Sufficiency of powers/authorities to authorize closure of public places during a declared public health emergency – Discuss the sufficiency of the authorities and powers to authorize closure of public places during a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

Compensation is the main question.

2. *Uncertainties?*

Same as above.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction’s authority to close public places? (Examples: state administrative practice acts, specific provisions in law related to closure.)*

None known.

C. *Legal powers/authorities to order closure of public places in the absence of a declared public health emergency – What are the powers, authorities, or procedures to enable, support, authorize, or otherwise provide a legal basis for closure by state or local officials of public places (e.g., public facilities, private facilities, and business) in the absence of a declared public health emergency? For each of the jurisdiction’s legal powers, authorities, and procedures that could be used to authorize, prohibit, or limit closure, please address the following issues: What are the powers and authorities authorizing closure?*

1. *What are the powers and authorities prohibiting closure?*

None known. There may be compensation issues.

2. *Who can declare or establish closure?*

MDCH’s director and local health officers have the authority to issue an imminent danger order, and require closure of public places as action required to avoid, correct, or remove the imminent danger. Alternatively, the director or local health officer could issue an emergency order to control an epidemic and require closure of public places as a procedure to be followed during the epidemic.

3. *Who makes the decision to close a public place?*

MDCH’s director or the local health officers for their own jurisdictions.

The MDCH Pandemic Plan as well as the Michigan Pandemic Influenza State Operational Plan addresses the potential closure of public places in a moderate (1957-like) or severe pandemic:

- School dismissals or closures (including daycares and colleges and universities)
- Faith-based organizations
- Closure of public and private facilities
- Dismissal of entertainment activities/sports venues, etc
- Canceling of public gatherings

4. *What is the process for initiating and implementing closure?*

No specific process is set out in the Public Health Code. The process is the same as for issuing any other emergency order.

5. *What is the process for enforcing closure and who enforces it?*

Violation of the orders of MDCH’s director is a misdemeanor, enforceable by any law enforcement officer. Additionally, MDCH (and local health officers) can go to court to seek enforcement of its orders. MCL 333.2251(2), MCL 333.2451(2). The court could punish civilly or criminally via contempt. MDCH (and local health officers) may also maintain injunctive action “to restrain, prevent, or correct a violation of a law, rule, or order which the department [local health

- officer] has the duty to enforce or to restrain, prevent, or correct an activity or condition which the department believes adversely affects the public health.” MCL 333.2255, MCL 333.2465.
6. *What are the penalties for violating closure?*
Violation of an order of MDCH’s director is a misdemeanor, punishable by six months in jail or \$200, or both. MCL 333.2261. Enforcement and penalties for violation of a local health officer’s order depends on local law.
 7. *What are the procedural and due process requirements for closure?*
As discussed under “gaps” below (pages 32-33), MDCH needs to consult with the Department of Attorney General on constitutional parameters.
 8. *Is compensation available for closure? If so, what is it?*
No. This issue needs to be reviewed and addressed as a legal and a policy issue.
 9. *How long can a closure last?*
There is no time limit on any of the state or local health officers’ orders; nor is there a renewal requirement. The health officer who issued an emergency order would be responsible for monitoring the conditions that warranted the order, and respond as appropriate by modifying or rescinding the order as conditions change. Notice of any modifications, or rescission, would need to be sufficient to reasonably notify individuals or groups who are subject to the order.
 10. *How can it be renewed?*
See answer to 9 above. There is no renewal requirement.
 11. *Describe the authority/process/notice requirements for ending a closure.*
Closure is ended the same way it is commenced. An order is issued terminating the prior order closing public places, with notice sufficient to reasonably notify the public.
- D. *Sufficiency of powers/authorities to authorize closure of public places in the absence of a declared public health emergency – Discuss the sufficiency of the authorities and powers to authorize closure of public places in the absence of a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.*
1. *Potential gaps?*
Closing public places, and related prohibitions on gatherings, raise several issues under the United States and Michigan Constitutions. Under the Michigan Constitution, these include:

- No person shall be deprived of liberty or property without due process of law. Const 1963, Art I, §17.
- Freedom of assembly, free speech, and religion. Art I §§3, 4, 5.
- Eminent domain; private property shall not be taken for public use without just compensation. Const 1963, Art X, §2

MDCH will need to obtain legal advice from the Department of Attorney General on constitutional parameters for closing public places, prohibiting gatherings, and measures to restrict movement. Procedures and process need developed based both on legal and policy considerations.

2. *Uncertainties?*

See answer above.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's authority to close public places? (Examples: state administrative practice acts, specific provisions in law related to closure.)*

Only those already noted.

V. **Mass Prophylaxis Readiness**

A. *Legal powers/authorities for issuance of blanket prescriptions and use of other mass prophylaxis measures during a declared public health emergency – If it became necessary during a declared public health emergency to issue blanket prescriptions or order the use of other mass prophylaxis measures to enable emergency mass distribution of medical countermeasures (e.g., antivirals, vaccines), what legal powers, authorities, and procedures could enable, support, authorize or otherwise provide a legal basis for doing so? List all legal powers and authorities, policies, and procedures that could be used to authorize blanket prescriptions or other mass prophylaxis measures. For each of the powers and authorities listed, please address:*

1. *Who would make the decision to issue the blanket prescriptions or use other mass prophylaxis measures?*

In a declared state of emergency the governor can suspend the regulatory statutes and regulations that would in any way hinder or delay necessary action in coping with the emergency or disaster. MCL 30.405(1)(a). The governor is further authorized to utilize all available resources of the state government and each political subdivision of the state as reasonably necessary to cope with the emergency or disaster. MCL 30.405(1)(b). Under a declared state of disaster or emergency the governor could authorize a suspension of the statutory and regulatory requirements for prescriptions. The governor could directly authorize for mass prescribing and dispensing of vaccines, antivirals and other medications by others such as nurses, dentists, veterinarians and Emergency Medical Technicians (EMT).

2. *Who has the authority to issue the blanket prescriptions or order the use other mass prophylaxis measures?*

Under the Emergency Management Act, the power to order the use of mass prophylaxis is given to the governor. Since the governor does not meet the licensing requirements for a “prescriber,” she cannot issue blanket prescriptions unless she suspends the statutory and regulatory requirements for prescriptions. The Director of MDCH also has the legal authority to order the use of mass prophylaxis, and the Chief Medical Executive for MDCH has the authority to issue blanket prescriptions. Under the Michigan Emergency Management Plan (MEMP), which is consistent with the National Response Plan, MDCH is the lead agency for Emergency Support Function (ESF) #8. ESF #8 concerns the public health and mental health needs of the community, and includes coordinating the allocation of medications essential to public health and appropriate medical services. Thus, decisions regarding mass prophylaxis will most likely be made by the MDCH Director, with advice from the Chief Medical Executive, in addition consultation from the OPHP Director, the State Epidemiologist, and other Executive Staff or subject matter experts.

3. *How would the countermeasures be distributed?*

The Emergency Management Act does not specifically address distribution of countermeasures. However, detailed distribution plans for countermeasures for each federal stage/WHO phase are part of the MDCH Pandemic Influenza Plan and the MDCH Strategic National Stockpile Plan. Response includes:

- Receipt, storage and distribution of Strategic National Stockpile to local jurisdictions (carried out by MDCH’s Office of Public Health Preparedness, as set out in the SNS Plan)
- Coordinating local health department mass vaccination clinics
 - Monitoring of antiviral or vaccine administration with the Michigan Care Improvement Registry (MCIR)⁴
 - Monitoring of vaccine administration with MCIR
 - Monitoring of adverse effects (VAERS, AERS)
- Dispensing of antibiotics for post-exposure prophylaxis (CME’s Standing Orders/ local medical directors Standing Orders) from bioterror or communicable disease agent
- Dispensing of KI in a nuclear emergency
- Dispensing chemical or biological agent remedies
 - MEDDRUN is a state resource
 - Chempack is a federal resource for chemical response

Distribution will depend upon the event. Mobilization of the SNS requires a

⁴ Effective April 4, 2006, Michigan amended its law that created the Michigan Child Immunization Registry to expand it to a “care improvement registry” that could include immunization information on adults and be used during in an emergency to monitor antiviral or vaccine administration. MCL 333.9207.

Governor's Order, but local and state resources have to be depleted first. Before that MEDDRUN and CHEMPACK can be mobilized emergently within the first 24-48hours of an event. SNS Plans and the MEPPP address the procedures for such counter measures. Mass Dispensing Plans and Mass Vaccination Plans are outlined for every Local Health Department. Vaccine and antiviral countermeasure distribution plans are in place within the SNS Plan for Pandemic influenza, and distribution will occur pre-event; that is, in WHO Phases 4 and 5, so as to pre-position resources.

B. Sufficiency of authorities/procedures to issue blanket prescriptions or order the use of other mass prophylaxis measures during a declared public health emergency – Discuss the sufficiency of the authorities and powers to issue blanket prescriptions or order the use of other mass prophylaxis measures during a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.

1. Potential gaps?

None known.

2. Uncertainties?

None known.

3. Legal provisions that could inhibit, limit, or modify the jurisdiction's authority to issue blanket prescriptions or order the use of other mass prophylaxis measures? (Examples: state administrative practice acts, specific provisions in law related to blanket prescriptions/mass prophylaxis.)

None known.

C. Legal powers/authorities for issuance of blanket prescriptions and use of other mass prophylaxis measures in the absence of a declared public health emergency – If it became necessary in the absence of a declared public health emergency to issue blanket prescriptions or order the use of other mass prophylaxis measures to enable emergency mass distribution of medical countermeasures (e.g., antivirals, vaccines), what legal powers, authorities, and procedures could enable, support, authorize or otherwise provide a legal basis for doing so? List all legal powers and authorities, policies, and procedures that could be used to authorize such blanket prescriptions or order the use of other mass prophylaxis measures. For each of the powers and authorities listed, please address:

1. Who would make the decision to issue the blanket prescriptions or use other mass prophylaxis measures?

State and local public health would operate under the authority of the Public Health Code. The director of MDCH, and the local health officers, would make the decision whether to use mass prophylaxis measures, in consultation with the chief medical executive or medical director. If MDCH's director is not a physician, the director must designate a physician as chief medical executive who

is responsible to the director for the medical content of policies and programs. MCL 333.2202(2). Similarly, if a local health officer is not a physician, a physician must be appointed as medical director “responsible for developing and carrying out medical policies, procedures, and standing orders and for advising the administrative health officer on matters related to medical specialty judgments. R 325.13001.

2. *Who has the authority to issue the blanket prescriptions or order the use other mass prophylaxis measures?*

The director of MDCH, and the local health officer for his or her jurisdiction, have the authority to order the use of mass prophylaxis measures. Most likely, this would be done as an emergency order to respond to an imminent threat or danger to the public health or as an emergency order to address an epidemic. MCL 333.2251, 333.2253, 333.2451, 333.2453. If the state or local health officer is not a physician, blanket prescriptions would need to be issued by the chief medical executive or medical director. Standing orders for prescriptions and protocols for administering are already in place for pandemic influenza for mass dispensing sites. When MDCH approves a mass immunization program to be administered in the state, health personnel employed by a governmental entity who are required to participate in the program, or any other individual authorized by the director or a local health officer to participate in the program without compensation, are not liable to any person for civil damages as a result of an act or omission causing illness, reaction, or adverse effect from the use of a drug or vaccine in the program, except for gross negligence or willful and wanton misconduct. MCL 333.9203(3)

3. *How would the countermeasures be distributed?*

Mass vaccination clinics, Points of Distribution sites- see local and State Mass Dispensing/ Vaccination and the SNS plans

- D. *Sufficiency of authorities/procedures to issue blanket prescriptions or order the use of other mass prophylaxis measures in the absence of a declared public health emergency – Discuss the sufficiency of the authorities and powers to issue blanket prescriptions or order the use of other mass prophylaxis measures in the absence of a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

None known.

2. *Uncertainties?*

None known.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction’s authority to issue blanket prescriptions or order the use of other mass prophylaxis measures?*

(Examples: state administrative practice acts, specific provisions in law related to blanket prescriptions mass prophylaxis.)

The Public Health Code recognizes the right of individuals to refuse medical treatment, testing, or examination based on religious beliefs. MCL 333.5113. This right is not absolute, however, and a court may impose certain conditions on a carrier of a serious communicable disease who is a health threat to others under Part 52 of the Public Health Code, MCL 333.5201 *et seq.*

Conclusion

Michigan has many laws, response plans, and agreements in place for effective response to pandemic influenza, including pharmaceutical and social distancing measures. Completing this assessment has been valuable to identify areas of law that require further research, discussion, and development of process and procedures. This is especially true for social distancing measures that implicate constitutional rights of due process, freedom of religion, freedom of speech and assembly, and compensation for private property taken for the common good. Participating in this project has also emphasized the importance of policy and ethical considerations, as well as legal issues, in planning/implementing response measures to pandemic influenza. For example, the closure of businesses results in loss of income to the business owner. This raises legal - as well as policy and ethical questions - about the burden on the business owner for the common good. Similarly, the single mother without sick leave bears the burden of loss of income by home quarantine because she happened to be on a plane with sick passengers.

Completing this assessment has also helped identify potential gaps in response plans involving particular measures (such as mass transit limitations and curfew) and highlighted some logistical challenges (such as enforcement of measures). From this assessment it appears that several areas need to be pursued further with other government partners, namely implementation of social distancing measures involving Michigan's constitutionally created universities, on federal lands, and on Indian land.

VI. Other Issues

A. Other resources (legal powers and authorities, plans, policies or procedures, etc.) that your state might employ or rely upon to assist in pandemic response and the implementation of social distancing measures and/or mass prophylaxis readiness?

In addition to resources described above, the Attorney General's Office is completing a bench book covering public health emergencies.

MDCH's Director issued a memorandum in July 2004 explaining to health care providers that the HIPAA privacy rule does not impact state law requiring that identifiable patient information be provided to public health staff related to the prevention and control of serious communicable disease. This memorandum is in both hard copy and electronic form and widely available to assist public health staff address concerns or refusal to provide requested health information based on HIPAA.

B. Other such resources (e.g., laws, regulations, or policies; money, personnel, research, training) you do not currently have but would like to have? If so, what are they?

It appears that all levels of government have concerns about the source(s) of funding to implement restrictions on movement and social distancing measures.

C. Anything unique to your state in terms of pandemic preparedness and response measures related to social distancing or mass prophylaxis?

Michigan has the second highest person volume crossing (after New York) from Ontario to the United States, including three bridges and one tunnel. In addition to entry through the U.S./Canadian border, Michigan has four international airports.

VII. Table of Authorities

Attach a Table of Authorities as an appendix to the report, listing citations for all relevant legal authorities or procedures, including statutes, regulations, case law, Attorney General opinions, etc. Please list the code section or citation, followed by the text and a hyperlink, if available.

A Table of Authorities is provided as Appendix 1.

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Exhibit 8

MDHHS v. Manke, unpublished order of the Court of Appeals, entered May 28, 2020 (Docket No. 353607) (Swartzle, J., concurring in part and dissenting in part)

Court of Appeals, State of Michigan**ORDER**

Michigan Department of Health and Human Services v Karl Manke

Stephen L. Borrello
Presiding Judge

Docket No. 353607

Amy Ronayne Krause

LC No. 20-004700-CZ

Brock A. Swartzle
Judges

At issue are two emergency applications for leave to appeal filed from two orders of the trial court. The first order, entered May 11, 2020, denied appellant's emergency motion for issuance of a temporary restraining order (TRO) preventing appellee from continuing to operate his barbershop. The second order, entered May 21, 2020, denied appellant's motion for issuance of a preliminary injunction preventing appellee from operating his barbershop.

The motions for immediate consideration are GRANTED.

The case is REMOVED from abeyance.

In response to the COVID-19 virus, the Governor issued a series of Executive Orders (EO). EO 2020-69 prohibited certain businesses from operating, including "non-essential personal care services." § 1 of EO 2020-69. Section 3.a of EO 2020-69 provides that non-essential personal care services "includes but is not limited to hair, nail, tanning, massage, traditional spa, tattoo, body art, and piercing services, and similar personal care services that require individuals to be within six feet of each other." Appellee held a license which allowed him to operate a barbershop in Owosso, Michigan. On May 4, 2020, admittedly in contravention of the EO, appellee opened his barbershop and offered his services as a barber to the general public. Appellee refused to close his barbershop despite repeated warnings to do so by state and local authorities eventually leading to appellant's director's issuance of an Imminent Danger and Abatement Order calling on appellee to immediately close his barbershop to the public. Appellee refused to comply. Appellant then requested that the trial court issue a TRO, to be followed by a preliminary injunction, ordering appellee to immediately cease all operation of the barbershop. The trial court denied the request for a TRO. Appellant sought leave to appeal, and this Court ordered that the application be held in abeyance and that the trial court hold a hearing and issue an opinion and order on appellant's request for a preliminary injunction. In accordance with the order of this Court, the trial court held a hearing and issued an opinion and order concluding that appellant's request "presented a close call" but that it was "not fully convinced of the need for an injunction."

Appellant thereafter sought leave to appeal from the order denying the preliminary injunction.

"The objective of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights." *Michigan AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 145; 809 NW2d 444, 446 (2011). The status quo has been defined as "the last actual, peaceable, noncontested status which preceded the pending controversy." *Buck v Thomas Cooley Law*

School, 272 Mich App 93, 98 n 4; 725 NW2d 485 (2006), quoting *Psychological Services of Bloomfield, Inc v Blue Cross & Blue Shield of Michigan*, 144 Mich App 182, 185; 375 NW2d 382 (1985). Here, on May 4, 2020, when appellee provided his services to the public, the status quo was that non-essential personal care services such as barbershops were closed. In lieu of commencing a legal challenge to the constitutionality of EO 2020-69, appellee instead opened his barbershop and provided his services as a barber to the general public. Appellee continues to provide his services as a barber to the general public despite having his license summarily suspended by the State of Michigan.

When presented with a request for preliminary injunctive relief, a court should consider four factors:

(1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Davis v City of Detroit Fin Review Team*, 296 Mich App 568, 613; 821 NW2d 896 (2012).]

Turning to the likelihood that the party seeking the preliminary injunction will prevail on the merits, we note appellant's request for injunctive relief is premised on assertions that appellee's actions create an imminent danger to the public health, necessitating the issuance of what is entitled an Imminent Danger and Abatement Order. The power of appellant's director to issue the Imminent Danger and Abatement Order in response to an imminent danger to the public health comes from § 2251(1) of the Public Health Code (PHC), MCL 333.1101 *et seq.* An "imminent danger" is defined to mean an existing "condition or practice . . . that could reasonably be expected to cause death, disease, or serious physical harm immediately or before the imminence of the danger can be eliminated through enforcement procedures otherwise provided." MCL 333.2251(5)(b). The PHC recognizes the singular danger that an epidemic presents to the public health and welfare and the need to take exceptional action to control the rapid spread of the disease. MCL 333.2253(1).

The statute authorizes the director to issue orders to abate "imminent dangers" "upon a determination that an imminent danger to the health or lives of individuals exists in this state[.]" In the face of a declared public health emergency, the Legislature vested the Department with the power to exercise its discretion to decide whether an "imminent danger" exists, and in light of the Department's expertise in this realm, to "abate" the danger as the Department's experts see fit.

This expansive power easily encompasses the closing of defendant's barbershop. Thus, once the Governor declared a public health emergency, the Legislature determined that it was up to the *Department* to issue orders protecting the public health. Accordingly, in order to challenge the exercise of that authority, appellee had to present evidence that appellant overstepped the statutory boundaries. Appellee failed to present *any* evidence to rebut the Department's conclusion that operation of the barbershop posed a serious public health danger.

Here, appellant presented the trial court with evidence in the form of affidavits from Sarah Schultz, a paralegal working in the Corporate Oversight Division of the Michigan Attorney General's Office, and Joneigh Khaldun, MD, plaintiff's Chief Medical Executive and Chief Deputy Director for Health.

Schultz averred that she had been “tasked with gathering photographs and videos related to” defendant’s operation of the barbershop since he opened on May 4, 2020. Along with her affidavit, Schultz provided copies of photographs from Internet news articles; she identified web addresses for the photos, news articles and the internet videos. These photographs depict multiple people clearly within six feet of each other, some wearing masks and others not wearing masks. The trial court indicated that it had no reason to doubt Schultz’s representations, but stated “there’s no allegation that Ms. Schultz could authenticate the pictures.” However, appellant made Schultz available to testify and the trial court could have verified the photos simply by visiting the websites listed by Schultz. Additionally, the trial court seemingly treated evidence derived from news sources differently depending on which party the evidence favored. When deciding against the issuance of a TRO, the trial court relied heavily on the fact that “[w]hile Defendant worked at this place of business, Plaintiff served the abatement order on him, employing troopers of the Michigan State Police as process servers,” a factual finding with respect to which the trial court noted it “ha[d] no personal knowledge of these facts, but gleaned them from local and national news coverage.” However, when adjudicating the merits of appellant’s evidence derived from similar sources, the trial court dismissed appellant’s proffered evidence for lack of authentication. This conclusion was additionally erroneous because defendant never disputed the accuracy of this evidence.

Regarding Dr. Khaldun’s affidavit, it averred as follows:

4. COVID-19 is a novel coronavirus The is no human immunity to COVID-19, and there is no available treatment or vaccine for COVID-19.

* * *

6. COVID-19 is thought mainly to spread person-to-person (1) between people who are in close contact with a person infected with COVID-19 and (2) through respiratory droplets produced when an infected person coughs or sneezes. It may also be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their mouth, nose, or eyes.

7. Close contact is defined as being within approximately six feet of an infected person for a long period of time or having direct contact with infectious secretion. Examples of close contact include . . . being near someone who has COVID in a confined space if that person is not wearing a mask; and being coughed or sneezed on by someone who has COVID-19.

* * *

9. As of May 12, 2020, 1 in every 10 people diagnosed with COVID-19 in Michigan has died.

10. People of all ages can be infected. . . . The age range for people dying from COVID-19 in Michigan rages from age 5 to 107.

11. The disease often first infects the lungs and starts off mild with a cough, fever and fatigue. Some people quickly, within days, progress to severe disease including Acute Respiratory Distress Syndrome and a severe inflammatory response that can lead to multi-organ failure and death. No one knows exactly how a particular person will respond. There

are also reports of children across the country, including in Michigan, having a severe illness called Pediatric Multi-System Inflammatory Syndrome related to COVID-19. Some children have died from it.

12. In addition to being spread by symptomatic individuals, COVID-19 can also be spread by persons without any symptoms

13. As of May 11, 2020, Michigan has 47,552 confirmed cases of COVID-19 and 4,584 deaths. This is the 7th highest in the country in terms of confirmed cases and 3rd highest in terms of deaths. Those numbers do not reflect all cases of COVID-19. . . .

14. As of May 11, 2020, Shiawassee County has 211 confirmed cases of COVID-19 and 17 confirmed deaths.

15. Social distancing is currently the only effective means to slow the spread of COVID-19 and save lives. . . .

* * *

18. I have reviewed the recent news coverage, including pictures of the operation of Karl Manke’s Barbershop and the congregation of people outside the barbershop. The photos demonstrate that appropriate social distancing is not taking place inside the barbershop or outside of it. The photos further demonstrate that many individuals, including at times Karl Manke himself, are not wearing masks and are coming in close contact with one another.

19. Close contact, like that occurring both within Karl Manke’s Barbershop and outside the barbershop, is an imminent danger to the public health. The practices could reasonably be expected to cause death, disease, or serious physical harm to individuals and the public at large.

* * *

21. Given the number of known cases of COVID-19 in Michigan and how the disease is spread, there is a high likelihood that the continued operation of Karl Manke’s barber shop will result in irreparable harm to the public health. . . .

The trial court criticized Dr. Khaludun’s affidavit for not explaining how the doctor concluded that appellant’s barbershop presents a public health risk, even though the trial court believed this conclusion makes sense at face value. Such a finding was error as it was premised on the trial court second-guessing Dr. Khaludun’s medical and administrative conclusions. See *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002) (“Courts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency’s choice between two reasonably differing views.”). Additionally, the trial court’s repudiation of Dr. Khaludun’s affidavit was made despite appellee offering no evidence to rebut Dr. Khaludun’s assertions. Hence, the only evidence before the trial court was evidence which supported appellant’s assertion that there exists an imminent danger.

Rather than contest the factual underpinnings which establish an imminent danger, appellee's entire defense is premised on objections to the constitutional validity of the EO. Appellee raises several constitutional arguments. Relying on *Texas v Johnson*, 491 US 397; 109 S Ct 2533; 105 L Ed2d 342, appellee argues that the EO violates his First Amendment rights because the EO infringes on his freedom of speech. Appellee argues that continued operation of his barbershop is tantamount to a protest of the EO, in that his conduct is expressive similar to the flag burning in *Johnson*. However, unlike the defendant in *Johnson*, here, appellee was not singled out based on his expression of dissatisfaction with the EO. Additionally, as instructed by the Supreme Court, "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v O'Brien*, 391 US 367, 376; 88 S Ct 1673; 20 L Ed2d 672 (1968). "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* Here, the State has an important governmental interest in containing the spread of COVID-19 and the EO is directed at that interest and not at any speech or expressive conduct that may be expressed by appellee in continuing to provide services as a barber. This has been precedent for over a century. "That until Congress has exercised its power on the subject, such state quarantine laws and laws for the purpose of preventing, eradicating, or controlling the spread of contagious or infectious diseases, are not repugnant to the Constitution of the United States, although their operation affects interstate or foreign commerce, is not an open question." *Compagnie Francais de Navigation a Vapeur v Louisiana State Board of Health*, 186 US 380, 387; 22 S Ct 811; 46 L Ed 1209 (1902). Hence, appellant is likely to prevail on the issue of whether the EO violates appellee's First Amendment rights. *O'Brien*, 391 US at 376; *Davis*, 296 Mich App at 613.

Appellee also argues that implementation of the EO violates his constitutional right to equal protection under the law because some businesses are allowed to remain open whereas others are closed. However, appellee does not claim to be a member of a protected class; or that a fundamental right has been infringed. This leaves the rational basis test as the proper foundation for analysis. Rational basis applies to social and economic regulation, of which this is an example. *Phillips v Mirac, Inc*, 470 Mich 415, 434; 685 NW2d 174, 185 (2004). As previously indicated, the evidence submitted by appellant is sufficient to pass the rational basis test. Hence, on the pleadings before us, appellant is likely to prevail on this issue. *Davis*, 296 Mich App at 613.

Although appellee raises a myriad of additional issues, we cannot glean from any of the arguments set forth any bases on which appellee would prevail in his challenges to the authority of the Governor to issue EOs.

Regarding factor (2), the trial court only considered two affidavits provided by appellant. As previously discussed, the trial court ignored the findings and determination of appellant's chief medical executive, which establish the danger of irreparable harm. Moreover, as previously indicated, the trial court mishandled both affidavits.

The trial court also erred in concluding that factor (3) did not weigh in appellant's favor. While the trial court acknowledged the potential of harm to the public, it nonetheless substituted its judgment for that of the experts by concluding that this "harm does not justify the issuance of an injunction on such scant evidence." Again, the trial court rejected uncontested evidence when it reasoned that "an affidavit by a doctor who recited general facts about the virus and read a newspaper article" did not tip the scales in favor of issuing the injunction, "no matter how great the public emergency." As discussed and cited

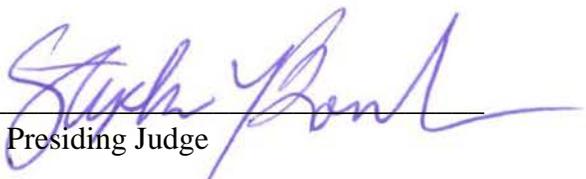
above, the evidence before the trial court was not scant. Chief medical executive Khaldun is a highly trained and experienced public health physician and administrative professional. Uncontroverted evidence clearly revealed that COVID-19 is a highly communicable illness. Uncontroverted evidence revealed that COVID-19 is spread by infected persons showing no symptoms that could serve to warn others of the possibility of infection. Uncontroverted evidence clearly revealed that COVID-19 can be spread from person-to-person quickly and reach people separate from an area of contamination. From this record, the trial court should have concluded that the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief. *Davis*, 296 Mich App at 613.

Finally, we agree with the trial court that factor (4) weighs in appellant's favor.

For the reasons set forth in this order, the emergency application for leave to appeal from the trial court's May 21, 2020 denial of appellant's request for a preliminary injunction is GRANTED. The decision of the trial court is REVERSED and the case is REMANDED for the trial court to enter a PRELIMINARY INJUNCTION ordering appellee to immediately cease all operations at the barbershop, to be enforced through the court's general contempt powers, MCL 600.1711.

The application for leave to appeal filed from the trial court's May 11, 2020 denial of appellant's request for a TRO is DISMISSED as moot.

We retain jurisdiction to verify entry of the preliminary injunction.


Presiding Judge

Swartzle, J., I concur in part and dissent in part. Specifically, I agree with my colleagues that the appellant's application for leave related to the denial of a TRO should be DISMISSED as moot. I also agree that the motions for immediate consideration should be GRANTED. Finally, I agree that the appellant's emergency application for leave related to the trial court's denial of a preliminary injunction should be GRANTED (but only in part), as both parties raise jurisprudentially significant issues that warrant review by this Court and, ultimately, our Supreme Court.

Where I diverge from my colleagues is with the additional relief that they grant on an immediate basis. Under our court rules, a "peremptory reversal" is proper where "reversible error is so manifest that an immediate reversal of the judgment or order appealed from should be granted without formal argument or submission." Importantly, the decision to grant such relief "must be unanimous." MCR 7.211(C)(4). As I read the majority's language, the majority has ordered "an immediate reversal" of the trial court's denial of preliminary injunctive relief without formal submission to a merits panel drawn randomly from the entire court, without oral argument, without the opportunity for amici briefs, and without a unanimous vote by this motions panel. The majority's order reads more like an in-depth opinion of this Court issued

by a merits panel, rather than the type of summary order normally issued by a motions panel. To my reading, the majority's relief appears to be a peremptory reversal, which seems procedurally irregular given that the panel's vote was not unanimous on this issue. Be that as it may, the majority has ruled.

With respect to the merits, both parties raise important issues—in my opinion, maybe the most jurisprudentially significant issues this State has seen in years or decades. The arguments raised in this case overlap with similar arguments in other cases, see, e.g., *Michigan House of Representatives v Governor*, Court of Claims, Docket No. 20-000079-MZ; *Michigan United for Liberty v Governor*, Court of Claims, Docket No. 20-000061-MZ. One of the most significant arguments is over the question of the constitutional and statutory validity of the Governor's post-April 29, 2020, Executive Orders.

The people of this State are constitutionally guaranteed a republican form of government, one with a separation of powers balanced between the three branches. US Const, art IV, § 4, cl 1; Const 1963, art 3, § 2. Simply put, the Legislature is supposed to legislate, the Executive is supposed to execute, and the Judiciary is supposed to judge. As set forth in our state Constitution, “No person exercising powers of one branch shall exercise powers belonging to another branch except as expressly provided in this constitution.” Const 1963, art 3, § 2. This case and others like it raise legitimate questions of whether the separation of powers between the Legislative and Executive branches has been impermissibly eroded during our government's response to the Covid19 pandemic.

For example, one source of authority cited in recent Executive Orders related to Covid19 is the Emergency Management Act, 1976 PA 390 (EMA). This act requires that, after the initial 28 days of an emergency or disaster declared by the Governor, the Legislature has a necessary and critical role in determining whether to extend the emergency/disaster and, if so, how best to address it. It has been reported that, near the end of the 28-day period, the Governor declared the Covid19 emergency/disaster terminated under the EMA, but then just a minute later, declared a new emergency/disaster with a purported new 28-day period. Was this a faithful execution of the EMA or, rather, an attempt to avoid the Legislature's role under the EMA?

As another example, the Governor has also relied on the Emergency Powers of Governor Act, 1945 PA 302 (EPGA). This WWII-era law is broadly worded, which could be viewed as a virtue or a vice. On the one hand, the act seems to grant the Governor unilateral authority to declare an emergency for an indeterminate duration, with broad powers to address the emergency. On the other hand, because the EPGA appears to have few, if any, real restrictions on the Governor's authority or even standards to guide that authority, this may mean that the Legislature unconstitutionally delegated its law-making authority to the Governor. As for the argument made by the Attorney General in one of the related cases that the Legislature could just add restrictions to the EPGA if it sees fit, the force of this argument is undercut if those restrictions can be avoided by, for example, terminating a declaration of emergency, waiting a minute, and then declaring a “new” emergency.

The validity of the recent Executive Orders is a key question in this and related cases. I have serious doubts, for example, whether the administrative order in this case would have been issued absent the Executive Orders related to Covid19, including those issued after April 29, 2020. Even setting those doubts aside, there is, at the very least, a sufficient basis to submit the case to a merits panel for a fuller analysis with the benefit of oral argument.

One need not question the motives for or wisdom of certain actions to question the underlying authority of those actions. In my opinion, the issues raised in this and related cases deserve more attention by the Judiciary than has been provided to-date. Therefore, rather than grant peremptory relief to the appellant, I would have joined in an order submitting this case for plenary review, on an expedited basis, by a merits panel randomly drawn from the entire Court with the opportunity for oral argument. See *Weisgerber v Ann Arbor Center for the Family*, 447 Mich 963; 521 NW2d 601 (1994) (LEVIN, J, dissenting).

Accordingly, for these reasons, I cannot join my colleagues in full, and therefore I concur in part and dissent in part.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

May 28, 2020

Date


Chief Clerk