UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, AND JEFFERY GULICK,

Plaintiffs,

v

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, and ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services,

Defendants.

No. 1:20-cv-414

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

ATTORNEY GENERAL DANA NESSEL'S MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

James R. Peterson (P43102)
Stephen J. van Stempvoort (P79828)
Amy E. Murphy (P82369)
Miller Johnson, Co-counsel for Plaintiffs
45 Ottawa Avenue SW, Suite 1100
Grand Rapids, Michigan 49503
(616) 831-1700
petersonj@millerjohnson.com
vanstempvoorts@millerjohnson.com
murphya@millerjohnson.com

Ann M. Sherman (P67762)
Deputy Solicitor General
Rebecca Berels (P81977)
Assistant Attorney General
Attorneys for Defendant Nessel
Michigan Dep't of Attorney General
P.O. Box 30212, Lansing, MI 48909
(517)335-7628
shermana@michigan.gov
berelsr1@michigan.gov

Christopher M. Allen (P75329)
John G. Fedynsky (P65232)
Darrin F. Fowler (P53464)
Joshua O. Booth (P53847)
Joseph T. Froehlich (P71887)
Assistant Attorneys General for Defendants Whitmer and Gordon
Michigan Dep't of Attorney General
P.O. Box 30754, Lansing, MI 48909 (517) 335-7573
allenc28@michigan.gov boothj2@michigan.gov fedynskyj@michigan.gov
froehlichj1@michigan.gov fowlerdf@michigan.gov

ATTORNEY GENERAL'S MOTION TO DISMISS ORAL ARGUMENT REQUESTED

Michigan Attorney General Dana Nessel moves to dismiss all the claims against her in Midwest Institute of Health, PLLC, D/B/A Grand Health Partners,

Wellston Medical Center, PLLC, Primary Health Services, PC, and Jeffery Gulick's complaint and states as follows:

1. Plaintiffs filed their complaint on May 12, 2020, raising various federal constitutional claims including vagueness, procedural and substantive due process, and the dormant Commerce Clause, as well as state-law claims involving the authority of the Governor to issue certain executive orders under two state statutes: The Emergency Powers of the Governor Act and the Emergency Management Act.

2. Plaintiffs request declaratory and injunctive relief and money damages.

3. Plaintiffs claims are moot because the challenged Executive Orders have been rescinded and no exception to the mootness doctrine applies here.

4. This Court should decline to exercise supplemental jurisdiction under 42 U.S.C. § 1367 over the state-law claims, which involve novel legal issues regarding the interpretation of state statutes and arise in the extraordinary context of the COVID-19 pandemic and the State's response to the pandemic.

5. This Court should decline to exercise its discretion to grant declaratory relief as to Count I because the *Grand Trunk* factors counsel against such relief. *See Grand Trunk W. R. Co. v. Consol. Rail Corp.*, 746 F.2d 323 (6th Cir. 1984)

6. Additionally, the well-established factors for the extraordinary relief of a permanent injunction do not weigh in Plaintiffs' favor.

7. On the merits, Plaintiffs' claims against the Attorney General fail to state a claim under Federal Rule of Civil Procedure 12(b)(6) and the Attorney

General should be dismissed from the case. Attorney General Nessel is entitled to qualified immunity as to the money damages claims against her, and the remainder of the claims are not viable.

8. Consistent with Local Rule 7.1(d), the undersigned contacted the lead counsel for Plaintiffs, Mr. James Peterson, on May 27, 2020, to ask whether Plaintiffs would concur in Defendant Attorney General Dana Nessel's motion to dismiss and explaining the grounds to be raised in support of the motion. Mr. Peterson indicated that Plaintiffs did not concur in the motion, thus necessitating the filing of the motion and brief in support. A separate certification accompanies this motion.

For these reasons, and the reasons stated more fully in the accompanying brief in support of this motion, Michigan's Attorney General Dana Nessel respectfully requests that this Honorable Court grant this motion to dismiss, dismiss all claims against her, and dismiss her from the case.

Respectfully submitted,

Dana Nessel
Attorney General

<u>/s/ Ann M. Sherman</u>
Ann M. Sherman (P67762)
Deputy Solicitor General
Rebecca Berels (P81977)
Assistant Attorney General
Attorneys for Defendant Attorney General Dana Nessel
Michigan Dep't of Attorney General
P.O. Box 30212, Lansing, MI 48909
(517) 335-7628
ShermanA@michigan.gov
BerelsR1@michigan.gov

Dated: June 2, 2020

Certificate of Service

I hereby certify that on June 2, 2020, I electronically filed this ATTORNEY GENERAL DANA NESSEL'S MOTION TO DISMISS with the Clerk of the Court using the ECF system which will send notification of such filing.

A courtesy copy of the aforementioned document was placed in the mail directed to:

THE HONORABLE PAUL L MALONEY
137 FEDERAL BLDG
410 W MICHIGAN AVE
KALAMAZOO MI 49007

THE HONORABLE MAGISTRATE JUDGE PHILLIP J GREEN
601 FEDERAL BLDG
110 MICHIGAN ST NW
GRAND RAPIDS MI 49503

<u>/s/ Ann M. Sherman</u>
Ann M. Sherman (P67762)
Deputy Solicitor General
Rebecca Berels (P81977)
Assistant Attorney General
Attorneys for Defendant Attorney
General Dana Nessel
Michigan Dep't of Attorney General
P.O. Box 30212, Lansing, MI 48909
(517) 335-7628
ShermanA@michigan.gov
BerelsR1@michigan.gov

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DEFENDANT ATTORNEY GENERAL DANA NESSEL'S BRIEF IN SUPPORT OF MOTION TO DISMISS

James R. Peterson (P43102)
Stephen J. van Stempvoort (P79828)
Amy E. Murphy (P82369)
Miller Johnson, Co-counsel for Plaintiffs
45 Ottawa Avenue SW, Suite 1100
Grand Rapids, Michigan 49503
(616) 831-1700
petersonj@millerjohnson.com
vanstempvoorts@millerjohnson.com
murphya@millerjohnson.com

Ann M. Sherman (P67762)
Deputy Solicitor General
Rebecca Berels (P81977)
Assistant Attorney General
Attorneys for Defendant Nessel
Michigan Dep't of Attorney General
P.O. Box 30212, Lansing, MI 48909
(517)335-7628
shermana@michigan.gov
berelsr1@michigan.gov

Christopher M. Allen (P75329)
Joshua O. Booth (P53847)
John G. Fedynsky (P65232)
Joseph T. Froehlich (P71887)
Darrin F. Fowler (P53464)
Assistant Attorneys General for Defendants Whitmer and Gordon
Michigan Dep't of Attorney General
P.O. Box 30754, Lansing, MI 48909 (517) 335-7573
allenc28@michigan.gov boothj2@michigan.gov fedynskyj@michigan.gov
froehlichj1@michigan.gov fowlerdf@michigan.gov

DEFENDANT ATTORNEY GENERAL DANA NESSEL'S BRIEF IN SUPPORT OF MOTION TO DISMISS

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Does this Court lack jurisdiction to hear Plaintiffs' claims, which are moot?

2. Should this Court decline to exercise supplemental jurisdiction over Plaintiffs' state law authority claim challenging Michigan's Emergency Powers of the Governor Act and its Emergency Management Act, especially where this issue is already squarely before Michigan's highest court?

3. Should this Court decline to issue the requested declaratory relief where the *Grand Trunk* factors counsel against such relief, and should this Court deny the request for permanent injunctive relief where the well-established factors weigh in favor of the Attorney General?

4. Should this Court dismiss Plaintiffs' claims against the Attorney General, where they fail to state a claim upon which relief may be granted because the Attorney General is entitled to qualified immunity as to Plaintiffs' claim for money damages, and the underlying claims are not viable as to the Attorney General?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

<u>Authority</u>:

Collins v. Harker Heights, 503 U.S. 115 (1992)

Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health, 186 U.S. 380 (1902)

Grand Trunk W. R. Co. v. Consol. Rail Corp., 746 F.2d 323 (6th Cir. 1984)

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INTRODUCTION

These are unprecedent times. Michigan, like the rest of the world, is at war. But not with an enemy it knows. Not with an enemy it can see. Michigan is at war with an invisible foe. A foe so stealthy that it took us by surprise and, as the battle rages on, continues to surprise us with its pervasiveness and reach. A foe so wily that we do not know who has been exposed to it, who is doing the exposing, and how we will ultimately arm ourselves against its pernicious attacks. A foe so deadly that it has taken the lives of thousands of Michiganders and sickened tens of thousands more in mere months. While our foe has no face, it has a name: SARS-CoV-2, or COVID-19.

This public health battle has presented many challenges, and our key leaders have risen to meet them. The Governor, through her broad authority under the Emergency Powers of the Governor Act, declared a statewide emergency and issued reasonable executive orders consistent with that authority. Most notably, she has ensured that Michiganders employ the best, if not only, available weapon in this deadly fight: social distancing. The Governor's swift, decisive action has saved, and is saving, countless lives. And the Attorney General has worked to enforce these important orders, exercising her constitutional role as the State's chief law enforcement officer.

Yet, on the heels of these victories, Plaintiffs challenge the Attorney General in her enforcement role, raising various claims related to 2020-17 and Executive Order 2020-77—neither of which remain in effect today—on various grounds, including that: (1) the Governor lacked the authority to issue the orders; (2)

vagueness; (3) procedural and substantive due process; and (4) the dormant Commerce Clause. These claims fail for three reasons.

First, and as a threshold matter, because the challenged Executive Orders no longer remain in effect and the capable-of-repetition-but-evading-review exception does not apply, Plaintiffs' claims are moot and the complaint should be dismissed in its entirety. *Second*, even looking past the mootness question, this Court should decline to exercise its discretion to issue declaratory relief and should not grant the requested permanent injunction because the factors required to grant those extraordinary relief are not met. *Third* and finally, the Attorney General should be dismissed from this case because Plaintiffs have failed to state a claim against her—she is entitled to qualified immunity on the money damages claims, and none of the claims are viable. Throughout this war with COVID-19, the Attorney General has properly overseen enforcement of Executive Orders 2020-17 and 2020-92 in her role as Michigan's chief law enforcement officer.

STATEMENT OF FACTS

Sources of Michigan gubernatorial authority during an emergency.

As a general rule, "[e]mergencies do not create power or authority in a governor, as the executive, but they may afford occasions for the exercise of powers already existing." 38 Am. Jur. 2d, Governor, § 4. The Michigan Constitution does not mention any gubernatorial emergency powers. Therefore, although the Governor has inherent constitutional authority to protect the health and welfare of the People of Michigan, her authority during an emergency largely stems from one of two statutes: either the Emergency Powers of the Governor Act, Mich. Comp. Laws § 10.31 *et seq*. (EPGA), or the Emergency Management Act, Mich. Comp. Laws § 30.401 *et seq*. (EMA).[1]

The Legislature enacts the EPGA.

In 1945 in the midst of World War II, the Michigan Legislature enacted the EPGA, which authorizes "the governor to proclaim a state of emergency, and to prescribe the powers and duties of the governor with respect thereto."[2] 1945 P.A. 302; *see also* Mich. Comp. Laws § 10.31.

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[1] The Governor may also work with the Michigan Department of Health and Human Services to implement provisions of the Public Health Code. *See* Mich. Comp. Laws § 333.1101 *et seq*.

[2] Since its promulgation, the EPGA has not been substantively amended. *See* 2006 P.A. 546 (containing minor, facial amendments).

The Legislature enacts the EMA.

Later, in 1976, the Legislature enacted the EMA, which, among other things, is designed to "provide for planning, mitigation, response, and recovery from natural and human-made disaster within and outside this state." 1976 P.A. 390. The EMA delegates the responsibility of "coping with dangers to this state or the people of this state presented by a disaster or emergency" to the Governor. Mich. Comp. Laws § 30.403(1). It also specifically references and recognizes the Governor's broad powers under the EPGA and provides that the Governor may exercise those powers "independent of" the EMA. Mich. Comp. Laws § 30.417(d).

The world is hit with a pandemic: COVID-19.

The coronavirus disease 2019 (COVID-19) is a severe acute respiratory illness caused by SARS-CoV-2—a highly contagious virus that has quickly spread across the globe, killing tens of thousands and infecting millions more. The virus is thought to spread mainly through close, person-to-person contact[3] via "respiratory droplets,"[4] and experts say that coming within six feet of an infected person puts

[3] Center for Disease Control, *How COVID-19 Spreads,* available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html.

[4] World Health Organization, Modes of transmission of virus causing COVID-19, available at https://www.who.int/news-room/commentaries/detail/modes-oftransmission-of-virus-causing-covid-19-implications-for-ipc-precautionrecommendations.

one at a high risk of contracting the disease.[5] That is, when a person is within six feet of an infected person, infected respiratory droplets can land in or around the healthy person's mouth, nose, or eyes, and can even be inhaled into the lungs, thus infecting that person with the virus.[6] Moreover, some people experience only mild symptoms of infection,[7] and could spread the disease before they even realize they are infected. And, perhaps most troubling, some of those infected with COVID-19 are asymptomatic, yet still spread the virus.[8]

Social distancing is currently the only solution.

The virus that causes COVID-19 is similar to other coronaviruses (a large family of viruses that cause respiratory illnesses), but the strain is "novel," *i.e.*, never-before-seen in humans.[9] Accordingly, there is no approved vaccine or treatment. Since there is no way to prevent or treat COVID-19, the CDC has

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[5] Centers for Disease Control, Social Distancing, Quarantine, and Isolation, available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/socialdistancing.html.

[6] Center for Disease Control, *How COVID-19 Spreads,* available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html.

[7] World Health Organization, *Q & A, What are the Symptoms of Covid-19*?, available at https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses

[8] Center for Disease Control, *How COVID-19 Spreads,* available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html.

[9] CDC, *Coronavirus Disease 2019 Basics,* available at https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics.

indicated that "[t]he best way to prevent illness is to avoid being exposed."[10] Therefore, experts recommend that the public engage in "social distancing," that is, the practice of avoiding public spaces and limiting movement. A main objective of social distancing is "flattening the curve," *i.e.*, reducing the speed at which COVID-19 spreads. Without a flattening of the curve, the disease will spread too quickly, overwhelm our healthcare system, and wipe out our already scarce healthcare resources—including staff, medical equipment, and personal protective equipment.

As a result of these expert recommendations, jurisdictions across the globe have imposed sweeping measures to stem the viral tide that has overwhelmed healthcare systems worldwide. In the United States alone, all 50 states and the District of Columbia have had emergency orders in place to fight the war against COVID-19.

Michigan's Governor responds to COVID-19.

Since Michigan has been among the states hardest hit by COVID-19, the Governor has instituted aggressive measures in an effort to address Michigan's staggering statistics and protect the health and safety of Michigan residents. Despite these aggressive efforts, COVID-19 remains present and pervasive in Michigan: As of May 21, 2020, at least 57,532 have been confirmed infected and 5,516 have died—all in under three months.[11]

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[10] CDC, *How to Protect Yourself and Others,* available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html

[11] Michigan.gov, *Coronavirus*, available at: https://www.michigan.gov/coronavirus/ (last accessed June 6, 2020 at 9:30 AM).

The Governor's containment efforts have included issuing various executive orders[12] aimed at curbing the spread of COVID-19 as well as protecting Michiganders from the economic, social, and other ramifications of the crisis. In her first executive order related to COVID-19, issued on March 10, 2020, the Governor declared a state of emergency under both the EMA and the EPGA. EO 2020-4. The March 10, 2020 declaration was rescinded and replaced by an expanded declaration of emergency and disaster under both the EMA and the EPGA on April 1, 2020. EO 2020-33.

In the interim, on March 20, 2020, the Governor issued Executive Order 2020-17, which was rescinded on May 21, 2020, and replaced by Executive Order 2020-96 and subsequently, Executive Order 2020-110. EO 2020-17; EO 2020-96; EO 2020-110. Executive Order 2020-17 required the temporary postponement of all non-essential medical and dental procedures, EO 2020-17, and was imposed "[t]o mitigate the spread of COVID-19, protect the public health, provide essential protections to Michiganders, and ensure the availability of healthcare resources," including personal protection equipment, ventilators, and hospital beds. Preamble to EO 2020-17. Another order—Executive Order 2020-21, *i.e.*, Michigan's "Stay Home, Stay Safe" Order—issued on March 23, 2020, and later replaced by other

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[12] An executive order is a directive handed down from the executive branch of government—in this case, the Governor—generally without input from the legislative or judicial branches. *See* U.S. Const. art. V, § 2; *Soap & Detergent Ass'n v. Natural Resources Comm*, 330 N.W.2d 346 (Mich. 1982). All of the Governor's Executive Orders are available at: https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html.

orders with varying degrees of restrictiveness (including Executive Order 2020-77, Executive Order 2020-92, and Executive Order 2020-96), imposed temporary restrictions on activities that are not necessary to sustain or protect life. *See* EO 2020-21; EO 2020-42; EO 2020-59; EO 2020-70; EO 2020-77; EO 2020-92; EO 2020-96. On June 1, 2020, Michigan's existing Stay Home, Stay Safe Order was ultimately rescinded and replaced by Executive Order 2020-110, which imposes temporary restrictions on certain events, gatherings, and businesses only, rather than on Michiganders as a whole. EO 2020-110.

The Governor requests extensions of the state of emergency under the EMA.

The state of emergency initially declared on March 10, 2020, under the EMA was set to expire on April 7, 2020, so the Governor requested a 70-day extension from the Legislature. In response to this request, the Legislature extended the declaration under the EMA for 23 days, or until April 30, 2020.[13]

The Governor subsequently requested a second extension under the EMA, but on April 30, 2020—the date the legislatively-extended state of emergency was set to expire—the Legislature declined. Therefore, the Governor, after terminating the existing state of emergency under the EMA, *see* EO 2020-66, issued an executive order declaring a new 28-day state of emergency under that Act. EO 2020-68. Via a separate order, the Governor extended the previously declared state of emergency

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[13] *See* Senate Concurrent Resolution 2020-24, http://www.legislature.mi.gov/(S(id4mutkghmrbux0ojtc0br1c))/mileg.aspx.

under the EPGA to May 28, 2020. EO 2020-67. The Governor did the same in Executive Order 2020-99. *See* EO 2020-99. In each order, the Governor explicitly stated that all executive orders that rested on the previously declared states of emergency now rested on Executive Order 2020-67 and Executive Order 2020-68. *See* EO 2020-67; EO 2020-68; EO 2020-99.

On May 21, 2020, the Governor issued Executive Order 2020-96, which lifted some previous restrictions—for example, by permitting social gatherings of groups of ten or fewer people, and by allowing retail businesses to re-open with some social-districting measures in place. The Governor subsequently issued Executive Order 2020-110, which rescinds Executive Order 2020-96 and imposes even further lessened restrictions—for example, permitting many businesses that were previously closed to start to re-open, and allowing outdoor gatherings of 100 or fewer people. EO 2020-110. As they relate to this case, both EO 2020-96 and EO 2020-110 permit the non-essential medical procedures that EO 2020-17 had temporarily postponed.

Plaintiffs file suit.

On May 12, 2020, Plaintiffs filed the instant action, and then filed a motion for preliminary injunction, which they later withdrew. (Dkt. 1, 9, 10, 21.) The Attorney General now files this motion to dismiss because: (1) Plaintiffs' claims are moot; (2) this Court should decline to issue the requested declaratory relief on the state-law authority issue; (3) Plaintiffs are not entitled to the extraordinary relief of a permanent injunction; (4) the Attorney General is entitled to qualified immunity

on the money damages claims; and (5) Plaintiffs have failed to state a claim upon which relief may be granted.

ARGUMENT

I. Plaintiffs' claims are moot.

As a threshold matter, because the Governor has rescinded and replaced the Executive Orders at issue in this case with a new, less restrictive Executive Order that does not contain the restrictions that Plaintiffs now challenge, Plaintiffs' claims are moot.

Mootness is a question of jurisdiction, which "derives from the requirement of Article III of the [United States] Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (quotations omitted). "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

Relevant here, repeal of a statute while a case is pending routinely renders an issue moot. *See, e.g., Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 644 (6th Cir. 1997). That is because, as this Court has explained, "a statute must be analyzed by the appellate court in its present form." *See id.* at 644 (citing *Kremens v. Bartley,* 431 U.S. 119, 129 (1977); *Hall v. Beals,* 396 U.S. (1969)).

In this case, on May 21, 2020, the Governor issued a new Executive Order—Executive Order 2020-96—which rescinded Executive Order 2020-17 and Executive Order 2020-92 (which replaced Executive Order 2020-77) and imposed significantly

lessened restrictions as compared to its predecessors. EO 2020-96. Subsequently, on June 1, 2020, the Governor issued Executive Order 2020-110, which further lessens restrictions. EO 2020-110. Thus, the challenged executive orders no longer have any legal force. And notably, Executive Order 2020-96 did not, and Executive Order 2020-110 does not, impose *any* of the restrictions of Executive Order 2020-17 and Executive Order 2020-77 that Plaintiffs claim are invalid. Accordingly, the provider Plaintiffs were able to resume non-essential medical and dental procedures beginning May 29, 2020, at 11:59 pm. EO 2020-96 § 19. Similarly, as of that same timeframe, Mr. Gulick could schedule (if he had not already) and undergo his knee replacement surgery. *Id.* at §§ 8(a)(6), 19.

And, although there is an exception to the mootness rule for situations that are "capable of repetition, yet evading review," *e.g.*, *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 603 (1982), under the current circumstances there are no facts suggesting that the conduct is capable of repetition—*i.e.*, that the restrictions of Executive Orders 2020-17 and Executive Order 2020-77 will be re-enacted. For one, case law on this issue supports a finding of mootness: In *Kentucky Right to Life*, the Sixth Circuit rejected the plaintiffs' argument that, because the state legislature remained free to reenact the prior statutory scheme, their claims were properly before the court even after the law had changed. *Kentucky Right to Life*, 108 F.3d at 643. On the other hand, in *City of Mesquite v. Aladdin's Castle,* 455 U.S. 283, 289–90 (1983) the Supreme Court refused to dismiss the claims as moot because the governmental entity, in no uncertain terms,

indicated that if the claims were dismissed as moot, it would definitely enact the unconstitutional ordinance again.

Here, like in *Kentucky Right to Life*, and unlike in *Aladdin's Castle*, although there is a *possibility* that the Governor could issue a future executive order that places some restrictions on nonmedical procedures, it is far from a sure thing. A gubernatorial executive order is an official act—and one not entered into lightly. *See Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990) (treating government action with "more solicitude" than action by a private party). And the possibility of such a re-issuance depends on circumstances that are not yet known—the path of COVID-19. In addition, based on the Governor's new executive order, Executive Order 2020-110, she is clearly moving in the direction of *lifting* restrictions, not returning to more restrictive measures. EO 2020-110.

But even if some restrictions tighten in the future, the contours of a future executive order could be very different from those challenged here. *See Kentucky Right to Life*, 108 F.3d at 644 (citing *Kremens*, 431 U.S. at 129). This is particularly true with respect to Plaintiffs' vagueness challenge. *See id.* (holding that overbreadth analysis is inappropriate if the challenged statute has been amended or repealed) (quoting *Bigelow v. Virginia,* 421 U.S. 809, 817–19 (1975)).

Ultimately, given the enactment of Executive Order 2020-96 and Executive Order 2020-110, Plaintiffs are no longer constrained by the restrictions of Executive Order 2020-17 and Executive Order 2020-77 that they claim are invalid. As such, Plaintiffs' claims are moot.

II. This Court should decline to exercise supplemental jurisdiction over Plaintiffs' state-law authority issue.

Plaintiffs first challenge the EPGA on its face, claiming it is open-ended and permits unbridled lawmaking by the Governor, with no temporal, durational, substantive, or legislative checks in violation of the nondelegation doctrine and the separation-of-powers clause of the Michigan Constitution. (Dkt. 1, Compl. ¶ 106, PageID.26.) This is a state-law claim over which the Court should decline to exercise supplemental jurisdiction.

Supplemental jurisdiction is a matter of discretion, and "need not be exercised in every case in which it is found to exist." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). The purpose of joining claims in federal court is "judicial economy, convenience and fairness to litigants." *Id.* Absent those criteria, "a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them." *Id.* (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)). "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties." *Gibbs*, 383 U.S. at 726.

Under 28 U.S.C. § 1367(c), the court can decline to exercise supplemental jurisdiction over a claim in several circumstances: "(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." Illustratively, in *Doe v. Sundquist*, 106 F.3d 702, 704 (6th Cir. 1997), the plaintiffs

sought a preliminary injunction to block the enforcement of a new state statute addressing the disclosure of adoption records. The complaint alleged both state and federal constitutional violations. The court declined to exercise supplemental jurisdiction since the issue was one of "peculiar relevance to the primary police functions of the state." *Id.* at 707. The court determined that the state had an interest in "having the first opportunity to construe its own constitution and laws" and thus the court declined to exercise supplemental jurisdiction over the state law claim and dismissed the claims that relied on federal law. *Id.*

Here, too, Michigan should have the first opportunity to construe its *own* laws and determine whether they violate the State's delegation and separation-of-powers doctrines. In fact, two state-court judges have recently opined on the EPGA and EMA in the preliminary injunction context, (*Mich. United for Liberty v. Whitmer*, Michigan Court of Claims Docket No. 20-000061-MZ; *Martinko v. Whitmer*, Michigan Court of Claims Docket No. 20-000062-MM); and a third just addressed on the merits all the issues Plaintiffs raise in Counts I and II. (*Mich. House and Senate v. Whitmer*, Michigan Court of Claims Docket No. 20-000079-MZ, attached as Ex. 1). And the defendants in the *House and Senate* case, and the plaintiffs in the *Martinko* case each recently filed separate bypass applications to the Michigan Supreme Court. (*Mich. House and Senate v. Whitmer*, Mich. Docket No. 161377; *Martinko v. Whitmer*, Mich. Docket No. 161333.) Thus, this very issue is already squarely before Michigan's highest court, and this Court has an interest

in "avoiding the unnecessary resolution of state law issues." *Hankins v. The Gap, Inc.*, 84 F.3d 797, 803 (6th Cir. 1996).

There is yet another compelling reason to decline supplemental jurisdiction: the circumstances here are exceptional under § 1467(c)(4) because the state-law questions are novel and the COVID-19 pandemic is unprecedented, necessitating swift state action. For all these reasons, this Court should decline to exercise supplemental jurisdiction over the state-law claims.

III. This Court should not grant the requested declaratory or injunctive relief.

This Court should exercise its discretion to deny the requested declaratory relief, and it should deny Plaintiffs' request for permanent injunctive relief because the factors weigh in the Attorney General's favor.

A. This Court should not grant declaratory relief on the state-law issues.

Plaintiffs request declaratory relief on the issue of the validity of the EPGA or the EMA. (Dkt. 1, Compl.,¶¶ 83–99, PageID.22–25) as well as on their delegation and separation-of-powers arguments (*Id.* at ¶¶ 100–112, PageID.25–28.) This Court should decline to exercise its discretion to issue declaratory relief on these issue, as the well-established *Grand Trunk* factors counsel against such relief.

It is well-settled that the decision to exercise jurisdiction over a declaratory judgment action rests in the sound discretion of the court. *Wilton v. Seven Falls Co.,* 515 U.S. 277, 286–288 (1995); *Scottsdale Ins. Co v. Flowers,* 513 F.3d 546, 544

(6th Cir. 2008). The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction . . . , any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201; *Public Service Comm'n of Utah v. Wycoff*, 344 U.S. 237 (1952).

The Sixth Circuit considers the following factors in determining whether it is appropriate for a district court to issue a declaratory ruling: (1) whether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for *res judicata*;" (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and, (5) whether there is an alternative remedy which is better or more effective. *Grand Trunk W. R. Co. v. Consol. Rail Corp.,* 746 F.2d 323, 326 (6th Cir. 1984) (citing 6A Moore's Federal Practice ¶ 57.08[2] at 57–37 (1983)); *see also Muhammad v. Paruk,* 553 F. Supp. 2d 893 (E.D. Mich. 2008) (dismissing an action after weighing these factors).

Here, factors three, four, and five counsel against a grant of declaratory relief on these issues. When they filed this action, Plaintiffs understood that these issues had already been raised in state-court cases. It was a race to see if this Court would opine on this issue before the state courts. And, again, given that the state-law issue have already been decided by the Michigan Court of Claims and are now

squarely before Michigan's Supreme Court via a bypass application in the *House & Senate* case, Mich. Docket No. 161377, a federal court declaration would increase friction between state and federal courts. Also, the state courts are the appropriate courts to decide the issue of the validity of state laws. Letting the issue play itself out in Michigan courts is a more effective remedy than federal-court intervention.

Declaratory relief is therefore inappropriate.

B. Plaintiffs are not entitled to permanent injunctive relief because they do not meet the well-established factors for such extraordinary relief.

In considering whether to grant permanent injunctive relief, a court must consider four factors: (1) actual success on the merits, (2) whether failure to grant the injunction will result in irreparable injury, (3) whether issuance of the injunction would cause substantial harm to the opposing parties, and (4) whether the injunction will not disserve the public interest. *Jolivette v. Husted*, 694 F.3d 760, 765 (6th Cir. 2012). A permanent injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997).

1. Plaintiffs cannot succeed on the merits.

As explained more fully below in Argument IV, Plaintiffs cannot succeed on the merits of any of their claims against the Attorney General.

2. The lack of a permanent injunction will not result in irreparable injury to Plaintiffs.

In considering whether to issue an injunction, courts must consider whether the plaintiff will suffer irreparable injury without the injunction. *Certified Restoration Dry Cleaning Network v. Tenke Corp.,* 511 F.3d 535, 550 (6th Cir. 2007). "To demonstrate irreparable harm, the plaintiffs must show that . . . they will suffer actual and imminent harm rather than harm that is speculative or unsubstantiated." *Abney v. Amgen, Inc.,* 443 F.3d 540, 552 (6th Cir. 2006). That is, a plaintiff seeking preliminary injunctive relief must do more than show that irreparable harm is merely possible; they must "demonstrate that it is *likely* in the absence of an injunction." *NDSL, Inc. v. Patnoude*, 914 F. Supp. 2d 885, 899 (W.D. Mich. 2012) (citing *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 22 (2008) (emphasis in original). And harm is not irreparable if it can be fully compensated by monetary damages. *Overstreet v. Lexington–Fayette Urban County Gov't,* 305 F.3d 566, 578 (6th Cir. 2002).

As an initial matter, because the challenged Executive Orders are no longer in force, Plaintiffs will suffer *no* harm absent a permanent injunction—let alone irreparable harm. That is, the provider Plaintiffs may now begin conducting medical procedures previously deemed non-essential. And Mr. Gulick can schedule (if he has not done so already) and undergo his knee replacement surgery.

Regardless, the injuries that Plaintiffs claim to have suffered are not irreparable. The provider Plaintiffs have not demonstrated that economic harm is likely—only that it is possible. Nor have they shown that their alleged harm cannot

be fully compensated by monetary damages. For example, they have not demonstrated that their business will be threatened by insolvency, as opposed to merely taking a temporary financial hit, which losses would be calculable. And, as was true with the plaintiffs in *Michigan Bell Telephone Co. v. Engler*, 257 F.3d 587, 599 (6th Cir. 2001), where the court recognized that the telephone company could recoup its losses by raising rates, provider Plaintiffs can recoup their financial losses now that the restrictions imposed by Executive Order 2020-17 and Executive Order 2020-77 are eased. There is no reason to believe that patients who were previously postponed will not now reschedule their procedures.

The provider Plaintiffs also claim loss of goodwill as an irreparable harm. *Id.* While loss of customer goodwill can constitute irreparable harm, *Basicomputer Corp. v. Scott,* 973 F.2d 507, 512 (6th Cir. 1992) (internal citation omitted), here it is unlikely that Michigan citizens—most of whom are well aware of the various executive orders—will have any ill will toward businesses that were required to comply with executive orders and that did everything possible to keep Michiganders safe during the COVID-19 crisis. And there is no reason to believe that future customers will be deterred from using their services, since they were not singled out in the prohibition against non-essential medical procedures. All similar businesses faced the same restrictions under the challenged executive orders. Even those individuals who were unhappy with Executive Order 2020-17 and Executive Order 2020-77 are likely to blame the Governor, not the businesses who were compelled by law to comply with her orders, subject to criminal penalties for noncompliance.

As to Mr. Gulick, he claims he could not have his scheduled knee replacement, could not receive follow up care for his previous knee replacement, is in "excruciating pain," is unable to "get prescription pain medication until he can be seen on June 11, and has had to reduce his work hours by 80%." (Dkt. 10, Br. Supp. PI, PageID.245.) The challenged orders did not prohibit his licensed medical providers from taking action to "address [his] medical emergency or to preserv[e] [his] health and safety." (Dkt. 1, Compl., Ex. 4, EO 2020-17 § 1, PageID.69.) Nor did they prevent him from scheduling his surgery for a future date. And his reduced hours can be compensated by money damages.

Finally, as outlined in Argument IV below, Plaintiffs cannot demonstrate that their federal constitutional rights have been violated. This factor therefore weighs against a permanent injunction.

3. The balance of harms weighs in the Attorney General's favor, and an injunction is contrary to the public interest.

The remaining factors, "harm to the opposing party and weighing the public interest, merge when the Government is the opposing party." *Nken v. Holder,* 556 U.S. 418, 435 (2009).

Here, it is difficult to discuss the balance of harms and the public interest when the challenged Executive Orders no longer have any legal effect (which, again, underscores that Plaintiffs' claims are moot.) But during the time they were in effect, Executive Order 2020-17 and Executive Order 2020-77 saved lives in Michigan by helping to "flatten the curve" of Michigan cases and deaths, and

conserved valuable medical resources to allow our healthcare system to remain ready to treat an influx of cases. That was clearly in the public interest during this deadly pandemic. And the Attorney General enforced those Executive Orders in her role as Chief Law Enforcement Officer.

In conclusion, Plaintiffs have failed to meet the well-established permanent injunction factors and are therefore not entitled to injunctive relief.

IV. This Court should dismiss all claims against the Attorney General because Plaintiffs have failed to state a claim on which relief can be granted.

Generally, when considering a motion to dismiss under Rule 12(b)(6), the Court must construe the complaint in the light most favorable to plaintiff, accept the plaintiff's factual allegations as true, and draw all reasonable factual inferences in plaintiff's favor. *See Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008). But "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.' " *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555; *see Ashcroft v. Iqbal*, 556 U.S. 662, 680–81 (2009); *Albrecht v. Treon*, 617 F.3d 890, 893 (6th Cir. 2010). "To survive a motion to dismiss, [plaintiff] must allege 'enough facts to state a claim to relief that is plausible on its face.' " *Traverse Bay Area Intermediate Sch. Dist. v. Michigan Dep't of Educ.*, 615 F.3d 622, 627 (6th Cir. 2010).

Here, for the various reasons detailed below, Plaintiffs have failed to state a claim against the Attorney General that is plausible on its face.

A. Plaintiffs' allegations are sparse as to the Attorney General.

To begin, Plaintiffs' sparse allegations directly against the Attorney General are embodied in just seven paragraphs of a 151-paragraph Complaint:

- ¶ 61: That on March 25, the Attorney General's office admitted of EO 2020-21, "I think it's a difficult executive order to really wrap your arms around," and that "[t]he Attorney General's office explained that its process of clarifying the meaning of the order occurred on an ad hoc, case-by-case basis: 'Every instance we get a call asking about whether or not businesses essential is being first reviewed by our office and then shared with the governor's office so that we can begin to get some clarity around the executive order. ' ";

- ¶ 62: That the portion of the Attorney General's official website that provides guidance to businesses and law enforcement regarding the definition of "critical infrastructure workers" has linked to the updated CISA guidance, instead of to the March 19 CISA Guidance, which Executive Orders 2020-42, 2020-59, 2020-70, and 2020-77 explicitly reject;

- ¶ 63: That the Attorney General's office reiterated that violating the order could result in criminal penalties and forced closure of a business by law enforcement;

- ¶ 80: That, after the Legislature refused to extend the Governor's declaration of emergency past April 30, the Attorney General issued a letter to law enforcement officials asserting that the Governor's executive orders—including her Stay Home, Stay Safe orders—continued to be valid under the Emergency Powers of the Governor Act and directing that law enforcement officials continue to enforce the Governor's orders, but without defending the extension of the emergency under the Emergency Management Act;

- ¶ 120: Again, that the Attorney General's Office said the standards adopted in Executive Order 2020-77 are "difficult . . . to really wrap your arms around" and that the office attempts to clarify the meaning of the order with the Governor's office on an ad hoc basis, but had not outlined criteria under which those ad hoc determinations are evaluated.

- ¶ 124: Again, that the Attorney General's official website links to the updated CISA guidance, instead of to the March 19 CISA Guidance.

These sparse allegations against the Attorney General do not state a claim that is plausible on its face as to the Attorney General, and all claims against the Attorney General should therefore be dismissed. *See Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 680–81.

B. Attorney General Nessel is entitled to qualified immunity as to the request for money damages.

Plaintiffs' Complaint requests money damages. (Dkt. 1, Compl., Prayer for Relief (d), PageID.36.) The Attorney General has qualified immunity as to the money-damages claims.

Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing that the official violated a statutory or constitutional right, and that the right was "clearly established" at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 567 U.S. 731, 735 (2011). Lower courts have discretion to decide which of the two prongs of qualified-immunity analysis to tackle first. *See Pearson v. Callahan,* 555 U.S. 223, 236 (2009).

The U.S. Supreme Court has explained that "[a] [g]overnment official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [were] sufficiently clear" that every "reasonable official would [have understood] that what he is doing violates that right.' " *al-Kidd*, 567 U.S. at 741 (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). Although courts do not require a case directly on point, existing precedent must have placed

the statutory or constitutional question "beyond debate." *Id*. And qualified immunity "gives government officials breathing room to make 'reasonable but mistaken judgments about open legal questions.' " *al-Kidd*, 567 U.S. at 743 (quoting *Malley v. Briggs,* 475 U.S. 335, 341 (1986). The claims against the Attorney General for money damages fall far short of that threshold.

Here, as explained below in Argument IV.C, D, E, and F, Plaintiffs cannot prove a constitutional violation against the Attorney General. But even if they could, she would be entitled to qualified immunity because application of the challenged Executive Orders raise *new* legal questions, such that *no case* would have clearly established that the Attorney General was violating the Due Process Clause or the dormant Commerce Clause by enforcing the orders. To the contrary, what the Attorney General would have understood, based on the U.S. Supreme Court's words in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 26 (1905), was that in a pandemic, "[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community." *Id*. If that is somehow incorrect based on the COVID-19 pandemic here in Michigan, the Attorney General is entitled to breathing room to be mistaken in her judgment.

And as to Plaintiffs' state-law claims (Counts I and II), a Michigan state court has already held that the Governor had the authority to issue orders under the EPGA. (*Mich. House and Senate v. Whitmer*, Michigan Court of Claims Docket No.

20-000079-MZ, attached as Ex.1.) This is current Michigan law, and, as the State's top lawyer and chief law enforcement officer, the Attorney General intends to abide by it unless it is overturned. Even if a court later rules differently, at a minimum, the issues were open legal questions and thus were not clearly established such that the Attorney General would have known she was violating state law by enforcing Executive Orders 2020-17 and 2010-77.

Therefore, the Attorney General is entitled to qualified immunity on Plaintiffs' money-damages claims.

C. The challenged executive orders were reasonable under the EPGA (Count II).

Plaintiffs allege that the Governor has applied any authority granted to her under the EPGA arbitrarily, unreasonably and in violation of Michigan's Separation of Powers Clause and has failed to comport with the terms of that Act. (Dkt. 1, Compl., ¶ 107, PageID.26.) But that is inaccurate as to the challenged orders.

Executive Order 2020-17 temporarily restricted non-essential medical procedures, with the goal of mitigating the spread of COVID-19, protecting public health, providing essential protections, and ensuring the availability of healthcare resources—including staffing, medical equipment, and personal protective equipment. Executive Order 2020-77 temporarily suspended certain activities that were not necessary to sustain or protect life, and prohibited a person or entity from operating a business or conducting operations "that require[ed] workers to leave their homes or places of residence except to the extent that those workers [we]re

necessary to sustain or protect life, [or] to conduct minimum basic operations." EO 2020-77 § 4.

To be a valid exercise of the authority granted under the EPGA, Executive Order 2020-17 and Executive Order 2020-77 must have been "reasonable orders" that the Governor "consider[ed] necessary to protect life and property or to bring the emergency situation within the affected area under control." Mich. Comp. Laws § 10.31(2). In promulgating each of these executive orders, the Governor specifically stated that she considered the restrictions imposed by those orders to be "reasonable and necessary" to mitigate the spread of COVID-19 and protect the public health across the State of Michigan. *See, e.g.*, EO 2020-17; EO 2020-92. She was correct in her assessment.

No one would dispute that these orders placed restrictions on liberties that would, in a "normal" context, be unreasonable. But these are not normal times. And while the Constitution does not disappear in the face of a public health crisis, neither is the Bill of Rights a "suicide pact." *See Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). Instead, it is well-settled that, in times of public health crises, a state may restrict the rights of individuals in order to secure the safety of the community:

> Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.

Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 27 (1905).

To that end, "[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country

essential to the safety, health, peace, good order, and morals of the community." *Id.* at 26. Such conditions are unreasonable only if they have "no real or substantial relation to those objects [of securing public health and safety], or [are], beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 31.

COVID-19 has created a public health crisis of unprecedented gravity in our lifetime. Responding to, having the resources to respond to, and stemming the spread of, COVID-19 are paramount to all our well-being. And it is widely accepted that, in the absence of any vaccine or treatment, the most effective—if not only—way to combat this highly infectious virus and flatten the curve so our healthcare system and its resources are not overwhelmed, is through social distancing.

In promulgating Executive Order 2020-17 and Executive Order 2020-77, which placed restrictions on certain activities to conserve medical resources and limit social interactions, the Governor had done just that. Michigan was able to flatten its curve, dropping from third in the nation in terms of the number of COVID-19 cases, to eighth in the nation on June 2, 2020.[14] The absence of the restrictions imposed in both of the challenged executive orders would have opened gateways for the virus to reach every family and social network in every part of the State, leading to a significant spike in the number of cases and an overburdening of our healthcare system. And the absence of the restrictions imposed in Executive

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[14] CNN, *Tracking Covid-19 cases in the US*, available at: https://www.cnn.com/interactive/2020/health/coronavirus-us-maps-and-cases/ (last accessed June 2, 2020 at 11:00 AM).

Order 2020-17 specifically would have led to shortages of medical supplies and equipment necessary to fight this virus—resources that were already in short supply.

Accordingly, Executive Order 2020-17 and Executive Order 2020-77 bore a real and substantial relationship to securing the public health and safety. Given the challenging circumstances presented by COVID-19, the Governor validly exercised the powers delegated in the EPGA to issue reasonable executive orders aimed at mitigating its spread and ensuring the health and safety of the People of Michigan. Therefore, the Executive Orders were reasonable, valid, and enforceable under the EPGA.

D. The challenged Executive Orders were not vague (Count III).

Plaintiffs allege that Executive Order 2020-17 and Executive Order 2020-77 did not give any person of ordinary intelligence a reasonable opportunity to know what is prohibited and to be able to act accordingly. (Dkt. 1, Compl., ¶¶ 116, 118, PageID.28–29.) This argument is unavailing.

As an initial matter, the United States Supreme Court has suggested that federal courts should not opine on whether a state statute is vague until the highest state court has had an opportunity to give the statute a narrowing or clarifying construction. *See Steffel v. Thompson*, 415 U.S. 452, 469 (1974). The Michigan Supreme Court has not yet had that opportunity with respect to the challenged executive orders. In any event, Executive Order 2020-17 and Executive Order 2020-17 were not vague.

A law is void for vagueness if its prohibitive terms are not clearly defined such that a person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion. *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.,* 163 F.3d 341, 358–59 (6th Cir. 1998) (citing *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972)). Significantly, "the degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *United Food & Commercial Workers Union*, 163 F.3d at 498. The United States Supreme Court has also explained that "the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry." *Village of Hoffman Estates v Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 498 (1982). To succeed, Plaintiffs must demonstrate that the law is impermissibly vague in all of its applications. They have not made that showing.

With respect to Executive Order 2020-17, that order gave a medical provider fair notice of what was prohibited and thus was not vague in the context of the COVID-19 pandemic. The Order specifically defined a "non-essential procedure" as one that was "not necessary to address a medical emergency or to preserve the health and safety of a patient, as determined by a licensed medical provider." EO 2020-17. The Governor gave discretion to medical providers to determine a what was non-essential and what constituted a medical emergency for each individual patient because providers were best suited to determine what was medically necessary. Medicine is a regulated profession, and doctors have extensive training

in determining a what constitutes medical emergency and what steps are necessary to preserve a patient's health. The medical Hippocratic Oath is similarly undefined, yet medical professionals understand what "help the sick" and "abstain from all intentional wrong-doing and harm" mean in any situation.

Further, the Executive Order 2020-17 enumerated procedures that *must have been postponed*, including joint replacement, bariatric surgery, and cosmetic surgery (except for emergency or trauma-related surgery where postponing would significantly impact the health or safety of the patient). It also indicated procedures that *should have been excluded* from postponement, such as surgeries related to advanced cardiovascular disease that would prolong life, oncological testing and treatment, pregnancy-related visits, labor and delivery, organ transplants, and procedures related to dialysis. Finally, the order detailed the procedures that *must have been excluded* from postponement, including emergency or trauma-related procedures, where delaying would significantly impact the health and welfare of the patient. In this way, the Order gave medical personnel examples on a continuum from those that must have been postponed to those that must not have been postponed, leaving the professional to determine where each patient was uniquely situated. Thus, the term "non-essential" procedure was limited by illustrative examples so there was not unfettered discretion, yet still allowed a degree of latitude for doctors in determining what this meant for each patient.

The Governor recognized that medical providers were intimately aware of their patients' health and what was needed to thrive, and rightly gave them the

necessary discretion rather than mandating a one-size-fits-all approach and an inflexible definition of non-essential procedures that would rob those providers of that discretion. As such, Executive Order 2020-17 was not unconstitutionally vague, and Plaintiffs have failed to state a void-for-vagueness claim.

With respect to Executive Order 2020-77, Plaintiffs argue that order is vague because it is unclear who qualifies as "critical infrastructure workers." (Dkt. 1, Compl., ¶ 118–24, PageID.29–30.) The thrust of Plaintiffs' claim is premised on their belief that there was no rational reason for the Governor's decision as to what industries qualify as critical infrastructure. (*Id.* at ¶ 119, PageID.30.) But, even if that belief were true (which the Attorney General does not concede), that does not make the Executive Order vague. To the contrary, as Plaintiffs point out, the Executive Order referenced a list promulgated by the Cybersecurity and Infrastructure Security Agency (CISA) on March 19, 2020, *see* EO 2020-77, which contained a detailed description of what workers and industries constitute critical infrastructure.[15] Such a list provided significant guidance for critical infrastructure designations to those subject to the Executive Order.

Despite this detailed list, Plaintiffs complain that the Governor's use of the CISA guidance was insufficient because the guidance "superseded," and the Governor provided no reason for continued use of "superseded" guidance. (Dkt. 1, Compl., ¶ 119, PageID.29.) Again, the Governor's failure to provide a reason for her

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[15] Available at: https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf.

decision to rely on the same guidance (though superseded) does not render the Executive Order vague. And, in any event, continually relying on one guidance actually provides *more* clarity than would repeatedly changing the standards as the guidance is revised. Indeed, to revise the Executive Order's standards as the guidance is updated would require those subject to the Executive Order to keep abreast not only of changes within the text of the applicable Executive Orders, but also of changes within the CISA guidance.

While Plaintiffs argue that the Attorney General added confusion because her website linked to the updated CISA guidance, (Dkt. 1, Compl., PageID.30), they fail to recognize that the Executive Order itself linked to the March 19, 2020 guidance. *See* EO 2020-77 § 8. Moreover, there are no allegations that the Attorney General has been improperly enforcing based on incorrect guidance or that Plaintiffs have been harmed as a result. Second, with respect to what constitutes a critical infrastructure operation, the differences between the March 19 CISA guidance and the updated guidance are fairly minimal. (See comparison of March 19 and updated guidance.[16]) Indeed, although the updated guidance gives more specific examples, under either version of the guidance, Plaintiffs would know whether they constitute critical infrastructure.

Plaintiffs further argue that the Attorney General "admitted [Executive Order 2020-77] was vague because she said the standards adopted in Executive

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[16] Available at https://www.foxrothschild.com/content/uploads/2020/04/CISA-Comparison-Guidance-on-the-Essential-Critical-Infrastructure-Workforce-2.0-to-3.0.pdf.

Order 2020-77 are 'difficult . . . to really wrap your arms around' " and she had attempted to clarify the meaning of the order with the Governor's office on a case-by-case basis. (Dkt. 1, Compl., ¶ 120, PageID.29.) But the quoted statement was taken out of context and cannot be interpreted as an admission that EO 2020-77 was vague. Indeed, it is difficult to wrap your arms around the entire pandemic, particularly at the speed at which events are unfolding. And coordination as to consistency of enforcement, and determinations made on a case-by-case basis, are not tantamount to "ad hoc" enforcement.

Finally, with respect to both challenged executive orders, they should be viewed in the context of what their preambles state as their purpose: "To mitigate the spread of COVID-19, protect the public health, provide essential protections to vulnerable Michiganders, and ensure the availability of health care resources." EO 2020-17; EO 2020-77. This purpose provides an objective framework for determining the definition of the term "non-essential procedures" and "critical infrastructure workers," much like the preamble and school context the court considered in *Grayned v. City of Rockford*, 408 U.S. 104 (1972). In *Grayned*, the plaintiff had alleged that an anti-noise ordinance was unconstitutionally vague as it prohibited noise that "disturb[ed] or tend[ed] to disturb" school sessions. *Id.* at 108. Even though enforcing the statute required some degree of police judgment, the Court determined that it was not unconstitutionally vague, especially when considering the ordinance's preamble and the school context in which the statute

was written. *Id.* at 110–11. Likewise, here, the purpose of the executive order gives both those subject to and those enforcing the order guidance and parameters.

In sum, Plaintiffs have failed to state a void-for-vagueness claim.

E. The Attorney General's enforcement of the challenged Executive Orders did not violate procedural or substantive due process.

Plaintiffs' claims also fail under both procedural and substantive due process.

1. The challenged Executive Orders did not violate procedural due process (Count IV).

Plaintiffs allege that Executive Order 2020-17 provides no procedure or process through which to challenge the determination that certain medical treatments—such as bariatric surgery or joint replacement—are non-essential. (Dkt. 1, Compl., ¶ 132, PageID.32.) They argue that Executive Order 2020-77 provides no process through which to challenge a business's designation as non-critical infrastructure, does not outline the criteria that would serve as a reasonable guide to such a determination, and provides no pre-deprivation or post-deprivation process. (*Id.* at ¶ 131, PageID.31.) Plaintiffs' arguments fall short.

In attempting to combat a public health emergency, "[a]ll constitutional rights may be reasonably restricted." *In re Abbott*, 954 F.3d 772, 786 (5th Cir. 2020) (citing *Jacobson*, 197 U.S. at 11); *see also Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 393 (1902) (upholding state quarantine of passengers on boat even when all were healthy). Indeed, "a community has the right to protect itself against an epidemic of disease which

threatens the safety of its members." *Jacobson*, 197 U.S. at 27. And the health and safety of the public is a "paramount governmental interest which justifies summary administrative action." *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 300 (1981).

Relevant here, procedural due process is "not a technical conception with a fixed content unrelated to time, place and circumstance." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961)). Rather, it is a flexible standard in which the court analyzes government and private interests. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Government interests include the administrative burden the additional procedural requirements would impose on the state. *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976). Other considerations include the length of time involved and the finality of the deprivation. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 434 (1982). In other words, due process is "calls for such procedural protections as the particular situation demands." *Morissey v. Brewer*, 408 U.S. 471, 481 (1972).

In this case, the pandemic sets the stage for any process due to the citizens of the state of Michigan. COVID-19 hit Michigan quickly and furiously and did not allow for extended deliberation on how to best preserve individual liberties. In addressing this emergency, the Governor was expeditious and crafted a series of Executive Orders aimed at advancing the State's interest in saving lives.

Specifically, the purpose of all of the Executive Orders is "[t]o mitigate the spread of COVID-19, protect the public health, provide essential protections to

vulnerable Michiganders, and ensure the availability of health care resources." *E.g.*, EO 2020-97. And the effect of the Stay Home, Stay Safe orders is to mitigate the spread of the deadly virus and to save lives. The challenged Executive Orders and the restriction on Plaintiffs were temporary. And they were in force only until they were no longer necessary. There was no permanent taking and the Executive Orders did not result in an erroneous deprivation of liberty.

The Executive Orders were also narrowly tailored. They detailed who constituted critical infrastructure workers who could leave their homes for narrow purposes in order to keep the economy running. And they gave businesses—indeed, *these* Plaintiffs, flexibility and discretion to determine on a patient-by-patient basis which patients' needs were "essential." With each subsequent Executive Order that she enacts, the Governor evaluates the science, the number of cases, and the availability of medical supplies and medical professionals, in order to determine how much to relax the restrictions to continue saving lives while allowing for more businesses to open. Under these circumstances, procedural due process requires no more.

Plaintiffs' private interests pale in comparison. Mr. Gulick experienced a temporary delay in surgery that was not essential to his survival. If it had been necessary, his doctor could have completed the surgery in accordance with the medical oath he took to do all that is necessary to save a life. Indeed, Executive Orders 2020-17 and 2020-77 did not prevent surgery if it was medically necessary. In fact, Executive Order 2020-17 provided an exception "for emergency or trauma-

related surgery where postponement would significantly impact the health, safety, and welfare of the patient." EO 2020-17. Further, all Plaintiffs' financial loss from the restriction does not compare to the thousands of people who could have lost their lives but for the Governor's swift action. The Executive Orders were necessary and a proper attempt to contain the virus.

On balance, the Governor's stated purpose in implementing the Executive Orders and the very real possibility of the loss of more lives far outweighs the Plaintiffs' procedural-due-process concerns. The inconvenience to Plaintiffs in postponing a non-essential surgery and loss of income are temporary losses. Had the Governor not acted swiftly in enacting the Executive Orders and keeping everyone in their homes, the results could be far reaching to society and include an immeasurable number of fatalities. As such, Plaintiffs have not stated a procedural due process claim.

2. The Attorney General's enforcement of Executive Orders 2020-17 and 2020-77 did not violate substantive due process (Count V).

Plaintiffs allege that Executive Orders 2020-17 and 2020-77 violated the right to intrastate travel and the right to practice one's chosen profession. (Dkt. 1, Compl., ¶ 136, PageID.32.) They assert that strict scrutiny applies. (*Id.* at ¶ 138, PageID.32–33.) In their application of strict scrutiny, Plaintiffs argue that: (1) once the curve has been flattened, the protection of public health in the face of a global pandemic is not compelling state interest, and (2) the government has made no

attempt to narrowly tailor Executive Order 2020-17 or Executive Order 2020-92 to serve that interest. (*Id.* at ¶ 139, PageID.33.) Plaintiffs are mistaken.

The hallmark of substantive due process is to protect an individual against "*arbitrary* action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (citing *Dent v. West Virginia*, 129 U.S. 114 (1889)) (emphasis added). The threshold question is "whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998). When a statute is enacted to protect the public safety, review is only available if it "has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 U.S. at 31.

In engaging in a substantive due process analysis, the court determines whether there is a fundamental liberty at stake, and if so, the government can infringe on that liberty if there is a "compelling state interest" that is "narrowly tailored." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The U.S. Supreme Court, however, has been "reluctant to expand the concept of substantive due process." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

While the Supreme Court has recognized interstate travel as a fundamental right, *Saenz v. Roe*, 526 U.S. 489, 498 (1999), it has not yet determined whether the Constitution protects a limited right of intrastate travel, *Johnson v. Cincinnati*, 310 F.3d 484, 496–97 (6th Cir. 2002). The Sixth Circuit is one of a few circuits that has acknowledged a right to intrastate travel as fundamental. *Id.* at 498.

But even when there are personal liberties violated, a government's quarantine can be constitutionally reasonable in a public health context. *See Jacobson*, 197 U.S. at 11. Indeed, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id*. at 27. The government can quarantine citizens until "the spread of the disease among the community at large has disappeared." *Id.* at 29.

Here, as in *Jacobson*, there are compelling government interests at stake: controlling the pandemic and saving lives.

Plaintiffs argue that there was no compelling government interest since the curve of the pandemic had flattened. But that argument ignores science and medical knowledge. It has been widely publicized that, even if the curve flattens temporarily, the public is not out of danger since the virus has not been eradicated. COVID-19 is extremely contagious, and even though social distancing helped flatten the curve, the virus will be ever-present unless and until the medical profession finds a cure or a vaccine. Thus, the government's interest is both compelling and continuous.

The Executive Orders were narrowly tailored to carry out that compelling interest in at least three ways. First, they were narrowly tailored to prevent the spread of COVID-19. Executive Order 2020-77 separated the various industries based on the essential nature of the workers and allowed at least some critical infrastructure workers to continue working in-person. While the Governor adopted the federal CISA guidelines regarding the definition of critical infrastructure

workers, her failure to adopt subsequent iterations of the guidelines is of no merit. There is no requirement to do so, and, in fact, it is less confusing for the public to have one iteration of the definition of critical infrastructure workers than to have that definition change over time. As time went on and the curve began to flatten, the Governor issued subsequent Executive Orders that loosened restrictions and carefully determined the categories of workers that were less likely to come into close contact with others and the Orders relaxed restrictions for an increasing number of industries. These determinations were not arbitrary, but rather, calculated to slowly allow sections of the economy to open without sacrificing gains made through the original Stay Home, Stay Safe order.

Second, Executive Order 2020-17 was narrowly tailored to preserve precious medical resources that have been in short supply since the COVID crisis began.

Third, the Executive Orders provided the least restrictive way to control the spread of the virus while attempting to keep the economy afloat. The most restrictive method would have been to maintain a complete economic shutdown. Instead, the challenged Executive Orders provide for some level of autonomy under some circumstances, depending on whether the individuals were critical infrastructure workers and essential to the economy. And notably, with each subsequent Executive Order, the Governor released some restrictions, allowing for more autonomy for community members. Under these difficult circumstances, the Governor's orders were necessary, tailored narrowly, and responded to "a terrible

context [where] the consequences of mistaken indulgence can be irretrievably tragic." *Siegel v. Shinnick*, 219 F. Supp. 789, 791 (E.D.N.Y. 1963).

In sum, Plaintiffs have failed to state a substantive due process claim.

F. The Attorney General's enforcement of the challenged Executive Orders did not violate the dormant Commerce Clause (Count VI).

Lastly, Plaintiffs argue that Executive Order 2020-17 and Executive Order 2020-77 violated the dormant Commerce Clause. (Dkt. 1, Compl., PageID.34–35.) Not so.

Under the Commerce Clause of the United States Constitution, Congress is granted the power "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. While the Clause is framed as an affirmative grant of power to Congress, it has also "long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *S-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984). This "dormant" form of the Commerce Clause "limits the power of states 'to erect barriers against interstate trade.' " *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 644 (2010) (citing *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980)).

In evaluating a dormant Commerce Clause challenge to a state law, courts engage in a two-step inquiry. *Id.* First, a court must determine whether "a state statute directly regulates or discriminates against interstate commerce, or [whether] its effect is to favor in-state economic interests over out-of-state interests." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573,

579 (1986). If so, the statute is "generally struck down . . . without further inquiry." *Id.* If not, that is, if the "statute has only indirect effects on interstate commerce and regulates evenhandedly," *id.*, a court must apply the balancing test enumerated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). *Int'l Dairy Foods Ass'n*, 622 F.3d at 644. Under this balancing test, a court must uphold "a state regulation unless the burden it imposes upon interstate commerce is 'clearly excessive in relation to the putative local benefits.' " *Id.* (citing *Pike*, 397 U.S. at 142). The party challenging the statute bears the burden of proving that the burdens placed on interstate commerce outweigh the benefits that accrue to intrastate commerce. *E. Kentucky Res. v. Fiscal Court of Magoffin Cty., Ky.*, 127 F.3d 532, 545 (6th Cir. 1997).

Here, the first prong of the dormant Commerce Clause analysis is not at issue: Plaintiffs make no claim that the challenged executive orders directly regulated or discriminated against interstate commerce or had the effect of favoring in-state economic interests over out-of-state interests. Rather, the thrust of Plaintiffs' argument under the dormant Commerce Clause is directed at the second prong; specifically, that the burdens imposed by the challenged Executive Orders outweighed their public-health benefit. (Dkt. 1, Compl., ¶¶ 149–150, PageID.35.) But Plaintiffs fail to make any such showing, and therefore have failed to state a dormant Commerce Clause claim.

To be sure, the economic burden that Plaintiffs faced under the challenged Executive Orders was significant. But, in relation to the putative local benefits of

those orders—which were far greater than Plaintiffs would have this Court believe, and which were not illusory as Plaintiffs claim—that burden was not clearly excessive. In fact, the balance tips sharply in favor of the benefits that accrued from the challenged Executive Orders.

As demonstrated in Sections I.B.1.c. and I.B.3. above, the challenged Executive Orders were highly effective in achieving their stated public-health goals. Both orders slowed the spread of COVID-19 across the State of Michigan, resulting in a flattening of the curve. Additionally, Executive Order 2020-17 preserved healthcare resources, including highly-sought-after personal protective equipment, to allow Michigan's healthcare system to stand ready to treat an influx of cases.

Moreover, while Plaintiffs argue that less burdensome means were available to available to achieve the same ends, "[i]t is no part of the function of a court" to decide which measures are "likely to be the most effective for the protection of the public against disease." *Jacobson*, 197 U.S. at, 30. Indeed, the Supreme Court has long recognized that the enactment of measures designed to protect the public health, including measures aimed at the prevention of the spread of disease such as those at issue here, rests at the heart of a State's police power. *Id*. at 24–25. And, particularly relevant here, over a century ago, the Supreme Court recognized that, "until Congress has exercised its power on the subject, . . . state quarantine laws and state 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. . . ."

Compagnie Francaise de Navigation a Vapeur, 186 U.S. at 387 (1902).[17] Thus, under established Supreme Court law, the Commerce Clause is not implicated by state laws aimed at controlling the spread of disease.

In sum, because Plaintiffs have failed to demonstrate that the burdens of the challenged executive orders were clearly excessive in relation to their public-health benefit, Plaintiffs have failed to state a dormant Commerce Clause claim.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Defendant Attorney General Dana respectfully requests that this Honorable Court dismiss all of Plaintiffs' against her, either because they are moot, because this Court should not exercise supplemental jurisdiction over Plaintiffs' state-law claims, because the Court should not issue the requested declaratory and injunctive relief, or because in Plaintiffs' sparse factual allegations against her, they fail to state a claim upon which relief may be granted as to any of the claims.

Respectfully submitted,

Dana Nessel
Attorney General

<u>*/s/ Ann M. Sherman*</u>
Ann M. Sherman (P67762)
Deputy Solicitor General
Rebecca Berels (P81977)
Assistant Attorney General

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[17] While this case was decided prior to current dormant commerce clause jurisprudence, it remains good law and has been cited with favor in recent cases related to the COVID-19 crisis from other jurisdictions. *See In re Abbott*, 954 F.3d 772, 783–84 (5th Cir. 2020); *Wisc. Legislature v. Palm*, __ N.W.2d __, No. 2020AP765-OA, 2020 WL 2465677, at *43 (Wisc. May 13, 2020).

Attorneys for Defendant Attorney
General Dana Nessel
Michigan Dep't of Attorney General
P.O. Box 30212, Lansing, MI 48909
(517) 335-7628
ShermanA@michigan.gov
BerelsR1@michigan.gov

Dated: June 2, 2020

Certificate of Service

I hereby certify that on June 2, 2020, I electronically filed this Defendant Attorney General Dana Nessel's Motion to Dismiss with the Clerk of the Court using the ECF system which will send notification of such filing.

A courtesy copy of the aforementioned document was placed in the mail directed to:

THE HONORABLE PAUL L MALONEY
137 FEDERAL BLDG
410 W MICHIGAN AVE
KALAMAZOO MI 49007

THE HONORABLE MAGISTRATE JUDGE PHILLIP J GREEN
601 FEDERAL BLDG
110 MICHIGAN ST NW
GRAND RAPIDS MI 49503

<u>/s/ Ann M. Sherman</u>

Ann M. Sherman (P67762)
Deputy Solicitor General
Rebecca Berels (P81977)
Assistant Attorney General
Attorneys for Defendant Attorney
General Dana Nessel
Michigan Dep't of Attorney General
P.O. Box 30212, Lansing, MI 48909
(517) 335-7628
ShermanA@michigan.gov
BerelsR1@michigan.gov

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, AND JEFFERY GULICK,

Plaintiffs,

v

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, and ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services,

Defendants.

No. 1:20-cv-414

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

DEFENDANT ATTORNEY GENERAL DANA NESSEL'S BRIEF IN SUPPORT OF MOTION TO DISMISS

EXHIBIT 1 TO
DEFENDANT ATTORNEY GENERAL DANA NESSEL'S
BRIEF IN SUPPORT OF MOTION TO DISMISS

Exhibit 1 – Order in *Mich. House and Senate v. Whitmer*,
Michigan Court of Claims Docket No. 20-000079-MZ

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 emergency[1] as well as a state of disaster[2] 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 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 judgement 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 statues 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 Parochiaid, 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.

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[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

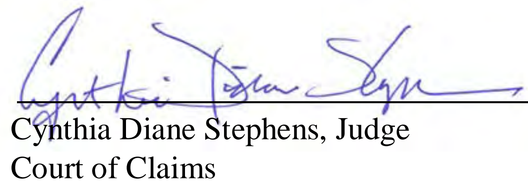
executive). The Governor's characterization of the 28-day limit as a legislative veto is not accurate. The 28-day limit is not legislative oversight or a "veto" of the Governor's emergency declaration; rather, it is a standard imposed on the authority so delegated. That is, the Governor is afforded with 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