STATE OF MICHIGAN
IN THE SUPREME COURT

In re CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

Supreme Court No. 161492

USDC-WD: 1:20-cv-414

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

GOVERNOR OF MICHIGAN, MICHIGAN ATTORNEY GENERAL, and MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES DIRECTOR,
Defendants.
/

The appeal involves a ruling that a statute or other state governmental action is invalid.

BRIEF OF MICHIGAN ATTORNEY GENERAL DANA NESSEL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This Court has jurisdiction to answer the certified questions under MCR 7.308(A)(3).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. This Court has discretion to decline to consider certified questions. Here, the federal district court should have dismissed the state-law claims based on mootness and Eleventh Amendment immunity. Should this Court decline to consider the certified questions?

   Plaintiffs' answer: No.

   Attorney General's answer: Yes.

   Federal district court's answer: No.

2. The Emergency Powers of the Governor Act (EPGA), MCL 10.31 *et seq*., does not limit the duration of an emergency and gives the governor the discretion to determine when an emergency has ended and when executive orders related to the emergency are no longer needed. Here, the exigencies still exist, Governor Whitmer has not yet terminated the state of emergency under the EPGA, and the EPGA functions independent of the Emergency Management Act (EMA). Even though the Governor did not have the authority to re-declare an emergency on April 30, 2020 under the EMA, does the Governor nonetheless have the authority under the EPGA after April 30, 2020 to issue or renew any executive orders related to the COVID-19 pandemic?

   Plaintiffs' answer: No.

   Attorney General's answer: Yes.

   Federal district court's answer: Did not answer.

3. A statute violates non-delegation and separation-of-powers principles when it does not contain reasonably precise standards. Both the EPGA and the EMA contain reasonably precise standards based on the subject matter and the complexities of an emergency. Does either the EPGA or the EMA violate the Separation-of-Powers or Non-Delegation doctrines of the Michigan Constitution?

   Plaintiffs' answer: Yes.

   Attorney General's answer: No.

   Federal district court's answer: Did not answer.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

Const 1963, art 3, § 2. Separation of powers of government

> Sec. 2. The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

MCL 10.31. Proclamation of state of emergency; promulgation of orders, rules, and regulations

> Sec. 1. During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled, either upon application of the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police or upon his or her own volition, the governor may proclaim a state of emergency and designate the area involved. After making the proclamation or declaration, the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control. Those orders, rules, and regulations may include, but are not limited to, providing for the control of traffic, including public and private transportation, within the area or any section of the area; designation of specific zones within the area in which occupancy and use of buildings and ingress and egress of persons and vehicles may be prohibited or regulated; control of places of amusement and assembly and of persons on public streets and thoroughfares; establishment of a curfew; control of the sale, transportation, and use of alcoholic beverages and liquors; and control of the storage, use, and transportation of explosives or inflammable materials or liquids deemed to be dangerous to public safety.
>
> (2) The orders, rules, and regulations promulgated under subsection (1) are effective from the date and in the manner prescribed in the orders, rules, and regulations and shall be made public as provided in the orders, rules, and regulations. The orders, rules, and regulations may be amended, modified, or rescinded, in the manner in which they were promulgated, from time to time by the governor during the pendency of the emergency, but shall cease to be in effect upon declaration by the governor that the emergency no longer exists.
>
> (3) Subsection (1) does not authorize the seizure, taking, or confiscation of lawfully possessed firearms, ammunition, or other weapons.

MCL 10.32. Powers of governor; legislative intent

Sec. 2. It is hereby declared to be the legislative intent to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. The provisions of this act shall be broadly construed to effectuate this purpose.

MCL 30.402. Definitions

Sec. 2. As used in this act:

(a) "Chief executive official" means:

(*i*) In the case of a county with an elected county executive, the county executive.

(*ii*) In the case of a county without an elected county executive, the chairperson of the county board of commissioners, or the appointed administrator designated by appropriate enabling legislation.

(*iii*) In the case of a city, the mayor or the individual specifically identified in the municipal charter.

(*iv*) In the case of a township, the township supervisor.

(*v*) In the case of a village, the village president or the individual specifically identified in the village charter.

(b) "Council" means the Michigan emergency management advisory council.

(c) "Department" means the department of state police.

(d) "Director" or "state director of emergency management" means the director of the department of state police or his or her designee.

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

hostile military action or paramilitary action, or similar occurrences resulting from terrorist activities, riots, or civil disorders.

(f) "Disaster relief forces" means all agencies of state, county, and municipal government, private and volunteer personnel, public officers and employees, and all other persons or groups of persons having duties or responsibilities under this act or pursuant to a lawful order or directive authorized by this act.

(g) "District coordinator" means the state police emergency management division district coordinator.

(h) "Emergency" means any occasion or instance in which the governor determines state assistance is needed to supplement local efforts and capabilities to save lives, protect property and the public health and safety, or to lessen or avert the threat of a catastrophe in any part of the state.

(i) "Emergency management coordinator" means a person appointed pursuant to section 9 to coordinate emergency management within the county or municipality. Emergency management coordinator includes a civil defense director, civil defense coordinator, emergency services coordinator, emergency program manager, or other person with a similar title and duties.

(j) "Local state of emergency" means a proclamation or declaration that activates the response and recovery aspects of any and all applicable local or interjurisdictional emergency operations plans and authorizes the furnishing of aid, assistance, and directives under those plans.

(k) "Michigan emergency management plan" means the plan prepared and maintained by the emergency management division of the department and signed by the governor.

(*l*) "Municipality" means a city, village, or township.

(m) "Person" means an individual, partnership, corporation, association, governmental entity, or any other entity.

(n) "Political subdivision" means a county, municipality, school district, or any other governmental unit, agency, body, board, or commission which is not a state department, board, commission, or agency of state government.

(o) "Rule" means a rule promulgated pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws.

(p) "State of disaster" means 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.

(q) "State of emergency" means 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 30.403. Responsibility of governor; powers and duties; declaration of state of disaster or emergency

Sec. 3. (1) The governor is responsible for coping with dangers to this state or the people of this state presented by a disaster or emergency.

(2) The governor may issue executive orders, proclamations, and directives having the force and effect of law to implement this act. Except as provided in section 7(2) [1], an executive order, proclamation, or directive may be amended or rescinded by the governor.

(3) The governor shall, by executive order or proclamation, declare a state of disaster if he or she finds a disaster has occurred or the threat of a disaster exists. The state of disaster shall continue until the governor finds that the threat or danger has passed, the disaster has been dealt with to the extent that disaster conditions no longer exist, or until the declared state of disaster has been in effect for 28 days. After 28 days, the governor shall issue an executive order or proclamation declaring the state of disaster terminated, unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature. 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. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and shall be promptly filed with the emergency management division of the department and the secretary of state, unless circumstances attendant upon the disaster prevent or impede its prompt filing.

(4) The governor shall, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists. The state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency has been in effect for 28 days. After 28 days, the governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature. 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. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and shall be promptly filed with the emergency management division of the department and the secretary of state, unless circumstances attendant upon the emergency prevent or impede its prompt filing.

MCL 30.404. Declaration of state of disaster or emergency; deployment of forces; federal assistance; reciprocal aid agreements

Sec. 4. (1) An executive order or proclamation of a state of disaster or a state of emergency shall serve to authorize the deployment and use of any forces to which the plan or plans apply and the use or distribution of supplies, equipment, materials, or facilities assembled or stockpiled pursuant to this act.

(2) Upon declaring a state of disaster or a state of emergency, the governor may seek and accept assistance, either financial or otherwise, from the federal government, pursuant to federal law or regulation.

(3) The governor may, with the approval of the state administrative board, enter into a reciprocal aid agreement or compact with another state, the federal government, or a neighboring state or province of a foreign country. A reciprocal aid agreement shall be limited to the furnishing or exchange of food, clothing, medicine, and other supplies; engineering services; emergency housing; police services; the services of the national guard when not mobilized for federal service or state defense force as authorized by the Michigan military act, Act No. 150 of the Public Acts of 1967, as amended, being sections 32.501 to 32.851 of the Michigan Compiled Laws, and subject to federal limitations on the crossing of national boundaries by organized military forces;

health, medical, and related services; fire fighting, rescue, transportation, and construction services and equipment; personnel necessary to provide or conduct these services; and other necessary equipment, facilities, and services. A reciprocal aid agreement shall specify terms for the reimbursement of costs and expenses and conditions necessary for activating the agreement. The legislature shall appropriate funds to implement a reciprocal aid agreement.

MCL 30.405. Additional duties of governor

Sec. 5. (1) In addition to the general authority granted to the governor by this act, the governor may, upon the declaration of a state of disaster or a state of emergency do 1 or more of the following:

(a) 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. This power does not extend to the suspension of criminal process and procedures.

(b) Utilize the available resources of the state and its political subdivisions, and those of the federal government made available to the state, as are reasonably necessary to cope with the disaster or emergency.

(c) Transfer the direction, personnel, or functions of state departments, agencies, or units thereof for the purpose of performing or facilitating emergency management.

(d) Subject to appropriate compensation, as authorized by the legislature, commandeer or utilize private property necessary to cope with the disaster or emergency.

(e) Direct and compel the evacuation of all or part of the population from a stricken or threatened area within the state if necessary for the preservation of life or other mitigation, response, or recovery activities.

(f) Prescribe routes, modes, and destination of transportation in connection with an evacuation.

(g) Control ingress and egress to and from a stricken or threatened area, removal of persons within the area, and the occupancy of premises within the area.

(h) Suspend or limit the sale, dispensing, or transportation of alcoholic beverages, explosives, and combustibles.

(i) Provide for the availability and use of temporary emergency housing.

(j) Direct all other actions which are necessary and appropriate under the circumstances.

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

(3) A person who willfully disobeys or interferes with the implementation of a rule, order, or directive issued by the governor pursuant to this section is guilty of a misdemeanor.

MCL 30.407. Powers and duties of director

Sec. 7. (1) The director shall implement the orders and directives of the governor in the event of a disaster or an emergency and shall coordinate all federal, state, county, and municipal disaster prevention, mitigation, relief, and recovery operations within this state. At the specific direction of the governor, the director shall assume complete command of all disaster relief, mitigation, and recovery forces, except the national guard or state defense force, if it appears that this action is absolutely necessary for an effective effort.

(2) If the governor has issued a proclamation, executive order, or directive under section 3 regarding state of disaster or state of emergency declarations, section 5 regarding actions directed by the governor, or section 21 regarding heightened state of alert, the director may, with the concurrence of the governor, amend the proclamation or directive by adding additional counties or municipalities or terminating the orders and restrictions as considered necessary.

(3) The director shall comply with the applicable provisions of the Michigan emergency management plan in the performance of the director's duties under this act.

(4) The director's powers and duties shall include the administration of state and federal disaster relief funds and money; the mobilization and direction of state disaster relief forces; the assignment of general missions to the national guard or state defense force activated for active state duty to assist the disaster relief operations; the receipt, screening, and investigation of requests for assistance from county and municipal governmental entities; making recommendations to the governor; and other appropriate actions within the general authority of the director.

(5) In carrying out the director's responsibilities under this act, the director may plan for and utilize the assistance of any volunteer group or person having a pertinent service to render.

(6) The director may issue a directive relieving the donor or supplier of voluntary or private assistance from liability for other than gross negligence in the performance of the assistance.

MCL 30.416. Acceptance and disbursement of federal grants; agreements with federal government

Sec. 16. After the president of the United States declares an emergency or a major disaster, as defined in the disaster relief act of 1974, Public Law 93-288, 88 Stat. 143, to exist in this state, the governor may apply for, accept, and disburse grants from the federal government pursuant to the disaster relief act of 1974. To implement and administer the grant program and to make financial grants, the governor may enter into an agreement with the federal government or any officer, or agency of the federal government, pledging the state's share for the financial grants.

MCL 30.417. Construction of act

Sec. 17. This act shall not be construed to do any of the following:

(a) Interfere with the course or conduct of a labor dispute. However, actions otherwise authorized by this act or other laws may be taken when necessary to forestall or mitigate imminent or existing danger to public health or safety.

(b) Interfere with the dissemination of news or comment on public affairs. However, any communications facility or organization, including radio and television stations, wire services, and newspapers, may be requested to transmit or print public service messages furnishing information or instructions in connection with a disaster or emergency.

(c) Affect the jurisdiction or responsibilities of law enforcement agencies, fire fighting forces, and units or personnel of the armed forces of the United States when on active duty. However, state, local, and interjurisdictional emergency operations plans shall place reliance upon the forces available for performance of functions related to disasters or emergencies.

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

(e) Relieve any state or local official, department head, or agency of its normal responsibilities.

(f) Limit or abridge the power, duty, or responsibility of the chief executive official of a county or municipality to act in the event of a disaster or emergency except as expressly set forth in this act.

MCL 30.419. Expenditure from disaster and emergency contingency fund

Sec. 19. (1) Under extraordinary circumstances, upon the declaration of a state of disaster or a state of emergency by the governor and subject to the requirements of this subsection, the governor may authorize an expenditure from the disaster and emergency contingency fund to provide state assistance to counties and municipalities when federal assistance is not available. If the governor proclaims a state of disaster or a state of emergency, the first recourse for disaster related expenses shall be to funds of the county or municipality. If the demands placed upon the funds of a county or municipality in coping with a particular disaster or emergency are unreasonably great, the governing body of the county or municipality may apply, by resolution of the local governing body, for a grant from the disaster and emergency contingency fund. The resolution shall certify that the affected county or municipality emergency operations plan was implemented in a timely manner. The resolution shall set forth the purpose for which the assistance is sought, the extent of damages sustained, and certify an exhaustion of local efforts. The assistance under this subsection is to provide grants, excluding reimbursement for capital outlay expenditures, in mitigation of the extraordinary burden of a county or municipality in relation to its available resources. Assistance grants under this section shall not exceed the following amounts or 10% of the total annual operating budget for the preceding fiscal year of the county or municipality, whichever is less:

(a) For a county or municipality with a population under 25,000 according to the most recent federal decennial census, $250,000.00.

(b) For a county or municipality with a population of 25,000 or more and less than 75,000 according to the most recent federal decennial census, $500,000.00.

(c) For a county or municipality with a population of 75,000 or more according to the most recent federal decennial census, $1,000,000.00.

(2) The director shall promulgate rules governing the application and eligibility for the use of the state disaster and emergency contingency fund. Rules that have been promulgated prior to December 31, 1988 to implement this section shall remain in effect until revised or replaced. The rules shall include, but not be limited to, all of the following:

(a) Demonstration of exhaustion of local effort.

(b) Evidence that the applicant is a county that actively maintains an emergency management program, reviewed by and determined to be current and adequate by the emergency management division of the department, before the disaster or emergency for which assistance is being requested occurs. If the applicant is a municipality with a population of 10,000 or more, evidence that the municipality either maintains a separate emergency management program, reviewed by and determined to be current and adequate by the emergency management division of the department, before the disaster or emergency for which assistance is being requested or occurs, or the municipality is incorporated in the county emergency management program.

(c) Evidence that the applicable county or municipal emergency operations plan was implemented in a timely manner at the beginning of the disaster or emergency.

(d) Reimbursement for expenditures shall be limited to public damage and direct loss as a result of the disaster or emergency, or expenses incurred by the applicant for reimbursing employees for disaster or emergency related activities which were not performed as a part of their normal duties, or for other needs required specifically for the mitigation of the effects, or in response to the disaster or emergency.

(e) A disaster assessment team established by the emergency management division of the department has substantiated the damages claimed by the applicant. Damage estimates submitted by the applicant shall be based upon a disaster assessment carried out by the applicant according to standard procedures recommended by the emergency management division.

INTRODUCTION

There are compelling reasons for this Court to decline to answer the certified questions and to instead await the cases that raise the same issues and are rapidly making their way through the State's appellate system. This federal case—and its threshold jurisdictional issues—does not afford a sound vehicle for this Court to address these issues.

But if this Court does decide to reach the merits of the questions presented, they are, as members of this Court have recognized, among the most important issues to come before this Court—questions that strike at the very heart of the democracy we so treasure. And, because of their importance to our basic system of governance, the answers to these questions cannot hinge on political party preference. Nor can the answers focus solely on *this* Governor or *this* crisis. Ultimately, this Court's answers to the certified questions will provide critical guidance as Michigan charts a course in handling not only today's emergency, but also future emergencies in circumstances we cannot now fathom.

Still, today's emergency—and, contrary to Plaintiffs' assertion, COVID-19 *is* an emergency—provides the backdrop out of which these important legal questions have arisen. These are unprecedented times. Indeed, as the Sixth Circuit has said, "[W]e are not living in normal times; we are living in pandemic times." *Adams & Boyle, PC v Slatery*, 956 F3d 913, 925 (CA 6, 2020). COVID-19 has hit Michigan hard. Just ask the tens of thousands who have been stricken with COVID-19, or the thousands more who have lost a loved one to this pernicious virus in the past four months. Ask ordinary citizens, who, practically overnight, have had to change

the patterns of their life, their work, their personal associations, and even their once-mundane tasks. And ask all the medical professionals who are still scrambling to keep up with the pandemic's evolving challenges.

Finally, ask the Governor, who has been forced to act swiftly and decisively to meet the many challenges that have arisen. Each day of this crisis, the Governor has had the unenviable task of navigating uncharted legal issues in an ever-changing environment. This has required that she make significant decisions on a remarkably short deadline to save the lives of the People of her State. Few governors have had to face challenges of this magnitude. Yet, the Governor has faced these challenges head-on, and her actions have resulted in an extraordinary, though temporary, flattening of the curve in Michigan.

Despite these significant victories, Plaintiffs ask this Court to effectively strip the Governor of her emergency powers and interrupt the continuity needed to eradicate the virus. As Justice Ginsburg once said, that is "like throwing away your umbrella in a rainstorm because you are not getting wet." *Shelby Cty, Ala v Holder*, 570 US 529, 590 (2013) (Ginsburg, J., dissenting). For the reasons that follow, this Court should refuse to do so.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

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 governor has the inherent

constitutional authority to protect the health and welfare of the People of Michigan. While the Michigan Constitution does not mention any gubernatorial emergency powers, her authority during an emergency largely stems from one of two statutes: either the Emergency Powers of the Governor Act, MCL 10.31 *et seq*. (EPGA), or the Emergency Management Act, MCL 30.401 *et seq*. (EMA).[1]

The Legislature enacts the EPGA.

In 1945 during 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 PA 302; see also MCL 10.31.

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 PA 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. MCL 30.403(1). The EMA specifically references and recognizes the governor's

[1] The governor may also work with the Michigan Department of Health and Human Services to implement provisions of the Public Health Code. See MCL 333.1101 *et seq*.

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

broad powers under the EPGA and provides that the governor may exercise those powers "independent of" the EMA. MCL 30.417(d).

The world goes to war against an invisible enemy in the form of a global 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. 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 you 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]

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[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-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations.

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

Moreover, some people experience only mild symptoms of infection,[7] or are asymptomatic, yet may still spread the virus to any number of people, becoming "super spreaders"[8] before even realizing they are infected.[9] Since the maximum incubation period is up to 14 days, an infected person can spread to others at any point without showing symptoms, resulting in an exponential number of cases resulting from just one initial infection.[10]

On March 11, 2020, the World Health Organization (WHO) declared a pandemic, and, two days later, the President issued a "Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease Outbreak." Since then, the virus spread furiously so that, as of August 4, 2020, there have been 18,142,718 confirmed cases of COVID-19 and 691,013 deaths, occurring in 216 countries.[11] In the United States, COVID-19 is present in all 50 states, and there has been a total 4,649,102 confirmed cases and 154,471 deaths.[12]

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[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] https://theconversation.com/a-few-superspreaders-transmit-the-majority-of-coronavirus-cases-139950.

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

[10] Center for Disease Control, *Clinical Care Guidance*, available at https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html.

[11] WHO, *Coronavirus Disease (COVID-19) Dashboard*, available at https://covid19.who.int/.

[12] WHO, *Coronavirus Disease (COVID-19) Pandemic: Cases in the US*, available at https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html.

Social distancing is the main defense to win the war.

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.[13] Accordingly, there is no approved vaccine or treatment. Since there is no way to prevent or treat COVID-19 (as opposed to treating its symptoms), the CDC has indicated that "[t]he best way to prevent illness is to avoid being exposed."[14] 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 arm them in fighting the war against COVID-19.

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

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

Michigan's Governor gathers armor to lead the battle against COVID-19.

Since Michigan has been hard-hit by COVID-19, Governor Whitmer has instituted aggressive measures to address Michigan's staggering statistics and protect the health and safety of Michigan residents. Despite these efforts, COVID-19 remains present and pervasive in Michigan. As of August 4, 2020, there have been 83,386 confirmed cases in Michigan and 6,212 deaths as a result of COVID-19.[15] The state is currently ranked ninth regarding total deaths.[16] Thus far, the number of fatalities in Michigan from the virus exceeds the number of Michigan lives lost in World War I and the Vietnam War combined.[17]

The Governor's containment efforts have included issuing various executive orders[18] 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. (Executive Order 2020-4, App 083a–084a.) Within three weeks of that declaration, there were 9,334 COVID-19 cases and 337 deaths.[19] The declaration of emergency was

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[15] https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html.

[16] https://www.cdc.gov/covid-data-tracker/#cases.

[17] Clodfelter, *Warfare and Armed Conflicts: A Statistical Encyclopedia of Casualty and Other Figures*, 1492–2015 (North Carolina: McFarland & Company, Inc., 4th ed, 2017), p 433, available at https://fas.org/sgp/crs/natsec/RL32492.pdf.

[18] 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 Const 1963, art 5, § 2; see generally *Soap & Detergent Ass'n v Natural Resources Comm*, 330 NW2d 346 (Mich 1982).

[19] (Executive Order 2020-151, App 147a–150a.)

rescinded and replaced by an expanded declaration of emergency and disaster under both the EMA and the EPGA on April 1, 2020. (Executive Order 2020-33, App 088a–090a.) One month later, there were 42,356 positive COVID-19 cases and 3,866 deaths[20]— a tenfold increase—making it clear that the war had begun.

The war continues, so Governor Whitmer requests extensions of the declared states of emergency and disaster under the EMA.

The state of emergency that the Governor 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 just 23 days, or until April 30, 2020.[21]

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 states of emergency and disaster under the EMA, (see Executive Order 2020-66, App 101a–104a), issued an Executive Order declaring a new 28-day state of emergency and disaster under that Act. (Executive Order 2020-68, App 109a–112a.) Via a separate order, the Governor extended the previously declared state of emergency under the EPGA to May 28, 2020. (Executive Order 2020-67, App 105a–108a.) In each order, the Governor explicitly stated that all executive orders that rested on the previously declared states of emergency now rested on Executive

[20] (Executive Order 2020-151, App 147a–150a.)

[21] See Senate Concurrent Resolution 2020-24, available at http://legislature.mi.gov/doc.aspx?2020-SCR-0024.

Order 2020-67 and Executive Order 2020-68. (See Executive Order 2020-67, App 105a–108a; Executive Order 2020-68, App 109a–112a.)[22] On May 21, 2020, in a related Court of Claims case, the court ruled that, even though the Governor's actions of re-declaring the state of emergency were not authorized by the EMA, the Governor had authority to issue Executive Orders under the EPGA during a statewide emergency, and that the plaintiffs' challenges regarding that authority were "meritless."[23]

Governor Whitmer implements responsive executive orders.

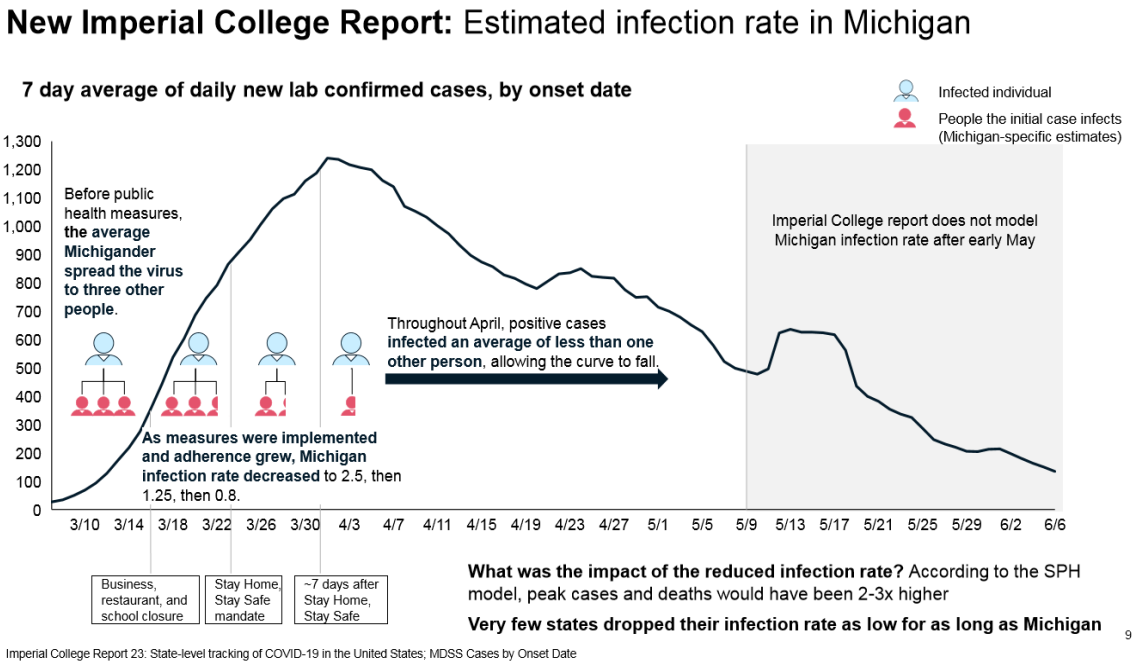
Throughout the battle, the Governor issued other executive orders to promote social distancing, thereby saving lives. On March 20, 2020, she issued Executive Order 2020-17, which was rescinded on May 21, 2020, and replaced by Executive Order 2020-96. (Executive Order 2020-17, App 085a–087a; Executive Order 2020-96, App 113a–125a.) Executive Order 2020-17 required the temporary postponement of all non-essential medical and dental procedures. 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 orders with varying degrees of restrictiveness, imposed temporary restrictions on activities that are not necessary to sustain or protect life. (See Executive Order 2020-21, Vol II, App 138c–145c;

[22] The current Executive Order declaring a state of emergency is Executive Order 2020-151, (App 147a–150a), which rescinded Executive Order 2020-127 and is in effect through August 11, 2020.

[23] *Michigan House of Representatives and Michigan Senate v Whitmer*, Case No. 20-000079-MZ (May 21, 2020).

Executive Order 2020-42, App 091a–100a; Executive Order 2020-59, Vol II, App 146c–157c; Executive Order 2020-70, Vol II, App 158c–171c; Executive Order 2020-77, Vol II, App 172c–188c; Executive Order 2020-92, Vol II, App 201c–213c; Executive Order 2020-96, App 113a–125a; Executive Order 2020-110, Vol II, App 214c–220c; Executive Order 2020-115, Vol II, App 237c–242c.) These measures temporarily succeeded in keeping COVID-19 contained, thereby flattening the curve, and preventing our health care systems from becoming overwhelmed.

That success is borne out in a recent study by Imperial College London:[24]



[24] https://content.govdelivery.com/attachments/fancy_images/MIEOG/2020/06/3441508/imperial-college-report_original.png, referencing Imperial College London, Report 23 from the MCR Centre for Global Infectious Disease Analysis, state-level tracking of COVID-19 in the United States, available at https://www.imperial.ac.uk/media/imperial-college/medicine/mrc-gida/2020-05-21-COVID19-Report-23.pdf.

The Governor's success allows for a loosening of restrictions.

Since the initial iterations of the "Stay Home, Stay Safe" Orders were successful in saving lives, the Governor released some of the restrictions as the number of COVID-19 cases temporarily slowed. On June 1, 2020, retailers in most of the State could resume operations, and two weeks later, hair salons and personal care services followed. (See Executive Order 2020-110, Vol II, App 214c–220c.) On June 10, 2020, the northern portion of the State was reopened so that theaters and gyms could resume business. (See Executive Order 2020-115, Vol II, App 237c–242c.) As businesses reopened, the Governor carefully implemented safeguards so in-person activities could resume safely, thus minimizing transmission of the virus. (See Executive Order 2020-91, Vol II, App 189c–200c; Executive Order 2020-97, App 126a–138a; Executive Order 2020-114, Vol II, App 221c–236c; Executive Order 2020-145, Vol II, App 248c–265c.)

The Governor reinforces armor in the face of spikes in COVID-19, and issues executive orders that close bars and require masks.

Despite the temporary flattening of the curve, the virus again began to thrive as the state reopened and person-to-person contact increased, resulting in an "acute risk of a second wave."[25] At one East Lansing bar, reopening resulted in over 180 positive cases.[26] The steadily increasing number of cases made restrictions and

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[25] (Executive Order 2020-151, App 147a–150a); https://www.washingtonpost.com/health/2020/04/21/coronavirus-secondwave-cdcdirector/.

[26] https://www.clickondetroit.com/news/local/2020/07/11/184-coronavirus-covid-19-cases-now-linked-to-outbreak-at-east-lansing-bar/.

safeguards necessary once again: closure of indoor service at bars and mandatory face mask usage. (See Executive Order 2020-143, Vol II, App 243c–247c; Executive Order 2020-153, Vol II, App 266c–270c.)

As the battle rages on, Plaintiffs file suit.

On May 12, 2020, Plaintiffs filed the instant action in the United States District Court for the Western District of Michigan, and on May 18, 2020, filed a motion for preliminary injunction. (Complaint, App 001a–040a.) The action challenges two Executive Orders related to provision of non-essential medical services—Executive Order 2020-17, (App 085a–087a), and Executive Order 2020-77, (Vol II, App 172c–188c)—and raises various federal constitutional claims including vagueness, procedural and substantive due process, and the dormant Commerce Clause, as well as state-law claims involving the Governor's authority under the EPGA and the EMA.

The federal court issued an invitation sua sponte to the parties to file briefs addressing the certification to this Court of the state-law claims. On June 10, 2020, after briefing and oral argument, the federal court certified the state-law claims to this Court, later issuing an opinion regarding certification. (App 060a–065a.) It subsequently denied Defendants' motion for reconsideration of this order, which raised Eleventh Amendment immunity, on June 16, 2020. (App 052a–059a.)

In the interim, Defendants filed motions to dismiss, which are still pending, and which raise many jurisdictional issues, including mootness and qualified

immunity. (Vol I, App 001c–061c.) Defendants later raised Eleventh Amendment immunity in a supplemental filing to their motions. (Vol I, App 078c–082c.)

Ultimately, due to the certification of the state-law issues to this Court, the federal case was held in abeyance until this Court reaches a decision.

STANDARD OF REVIEW

Under Michigan Court Rules 7.303(B)(4) and 7.301(A)(5), this Court's review of a request from a federal court to answer a certified question is discretionary. The federal district court did not rule on the certified questions presented; thus no standard of review is applicable.

SUMMARY OF ARGUMENT

Governor Whitmer had and has the authority to issue or renew executive orders related to the COVID-19 pandemic—even after April 30, 2020. The EPGA grants the Governor broad yet reasonable powers to respond to an emergency such as a pandemic. And the Act's plain language does not place durational restrictions on an emergency; it simply requires that the "great public crisis" or "disaster" that "imperils public safety" continue to exist. MCL 10.31(1); MCL 10.32. Nor does it limit the Governor's emergency powers to traffic control, sale of alcohol, or the transport of explosives (the Legislature specified that its list was not exhaustive) or merely to local circumstances. Finally, the Governor never terminated the emergency that supported her declaration of a state of emergency under the EPGA.

Even if this Court determines that the EMA did not allow the Governor to re-declare an emergency on April 30, 2020, that does not create a problem for the Governor's ultimate exercise of authority after that date because the EPGA is an independent source of power by which the Governor can continue to save lives.

Both the EPGA and the EMA are facially valid and are important sources of emergency powers. In 1945, the Legislature gave all future governors in Michigan much-needed tools to handle a crisis such as the crisis we are currently facing. Then, in 1976, the Legislature responded to changing times by providing more sophisticated tools in the EMA. Both are appropriate delegations of power, and therefore do not offend separation-of-powers principles, because they include reasonably precise standards that are appropriate to the complexities of an emergency, under which many unforeseen circumstances and challenges arise.

ARGUMENT

I. This Court should decline to consider the certified questions because the federal district court should have dismissed the state-law claims.

Although it is usually far preferable for this Court—rather than a federal court—to interpret significant state law on which this Court has not opined, this Court should decline to answer the certified questions presented here because the state-law claims in the underlying federal lawsuit should have been dismissed based on, among other things, mootness and Eleventh Amendment immunity. A better alternative to certification would have been for the federal court to hold the state-law questions in abeyance pending the outcome of: (1) in this case, the Defendants' appeal to the Sixth Circuit based on the denial of Eleventh Amendment immunity; and (2) this Court's resolution of these same state-law issues in *House & Senate v Whitmer*, which has been expedited by the Court of Appeals and will be briefed to this Court at the application stage prior to the date set for oral argument on the certified questions. Because the district court's certification order stays federal proceedings, WD Mich LCivR 83.1, holding the case in abeyance rather than certifying the case would not further delay the federal proceeding.

A. The state-law claims should have been dismissed as moot.

Attorney General Nessel filed a motion to dismiss the federal case on June 2, 2020, arguing, among other things that the state-law claims are moot. (*Grand Health v Whitmer*, AG Motion to Dismiss and Brief in Support, Vol I, App 001c–061c.) The federal district court has yet to rule on that motion. But the Attorney

General also raised mootness with respect to certification. (*Grand Health v Whitmer*, AG Supplemental Briefing on Certification, Vol I, App 062c–077c.) In certifying the questions to this court, the federal court improperly rejected the Attorney General's mootness argument.

When considering mootness, this Court's inquiry must be driven by federal—not state—caselaw on this issue. In the federal system, "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 US 486, 496 (1969), citing E. Borchard, Declaratory Judgments 35–37 (2d ed. 1941). Repeal of a statute while a case is pending routinely renders an issue moot, e.g., *Kentucky Right to Life, Inc v Terry*, 108 F3d 637, 644 (CA 6, 1997), because "a statute must be analyzed by the appellate court *in its present form*," see *id.* (emphasis added), citing *Kremens v Bartley,* 431 US 119, 129 (1977) ("[W]e apply the law as it is now, not as it stood below.").

Here, on May 21, 2020, the Governor issued a new Executive Order—2020-96—which rescinded the challenged Executive Orders and imposed significantly lessened restrictions as compared to its predecessors. (Executive Order 2020-96, App 113a–125a (rescinding and replacing Executive Order 2020-17 and Executive Order 2020-92, the order that replaced Executive Order 2020-77).) Thus, the challenged Executive Orders no longer have any legal force.

Moreover, there is no longer a live controversy. Plaintiffs' claims of harm are based on an inability to provide or receive preventative care. But notably, Executive Order 2020-96 and Executive Order 2020-110 did not impose *any* of the

restrictions of Executive Order 2020-17 and Executive Order 2020-77 that Plaintiffs claim are invalid. Indeed, the provider Plaintiffs were able to resume non-essential medical and dental procedures beginning May 29, 2020, at 11:59 pm. (Executive Order 2020-96 § 19, App 113a–125a.) Likewise, Mr. Gulick could schedule and undergo his knee replacement surgery. (*Id.* at §§ 8(a)(6), 19.)

Nevertheless, in the context of certification, the federal district court rejected Defendants' mootness arguments on the basis that Plaintiffs still had to comply with safety measures imposed by the Governor's later Executive Orders. (App 060a–065a, p 2.) But Plaintiffs' own complaint belies that harm, as it stated that, if allowed to reopen, "there is no question that Grand Health can conduct its operations in a manner that will take precautions to prevent the transmission of the virus that causes COVID-19." (Complaint, ¶ 18, App 001a–040a.)

And, while there is an exception to the mootness rule for situations that are "capable of repetition, yet evading review," *Globe Newspaper Co v Superior Court for Norfolk Cty*, 457 US 596, 603 (1982), not only would the statute have to be re-enacted in its exact form, but it would also have to be clear that the defendant insists on doing so.

In *Kentucky Right to Life*, for example, the Sixth Circuit dismissed the allegations as moot and 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. 108 F3d at 643. Compare that with *City of Mesquite v Aladdin's Castle,* 455 US 283, 289–90 (1983), where 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, as 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 non-essential medical 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 F2d 409, 415 (CA 6, 1990) (treating government action with "more solicitude" than action by a private party). And because the possibility of greater restrictions on non-essential medical procedures in the future depends on circumstances that are not yet known—namely, the path of COVID—the contours of future executive order could differ from those challenged in this federal action.

Maryville Baptist Church v Beshear, 957 F3d 610 (CA 6, 2020), is remarkably on point. There, in a similar challenge to gubernatorial emergency orders prohibiting drive-in church services based on COVID-19—and despite the possibility of greater restrictions at some point in the future—the Sixth Circuit expedited its decision, noting that "time is of the essence. The case will become moot just over three Sundays from now . . . when the Governor has agreed to permit places of worship to reopen." *Id*. at 612.

Under binding federal caselaw, Plaintiffs' state-law claims should have been dismissed as moot.

B. The federal claims should have been dismissed because they are barred by the Eleventh Amendment.

Both Defendants raised Eleventh Amendment immunity in a joint motion for reconsideration of the federal district court's decision to certify, as well as in a joint supplemental authority to their separate motions to dismiss. (*Grand Health v Whitmer*, Joint Motion for Reconsideration, Vol I, App 090c–098c; Joint Notice of Supplemental Authority and Exhibit A, Vol I, App 078c–089c.) The federal district court denied the motion for reconsideration on the grounds that Defendants waived Eleventh Amendment immunity by not raising it in their motions to dismiss or in the briefing or argument regarding certification. (*Grand Health v Whitmer*, Denial of Motion for Reconsideration, App 052a–095a.) The Attorney General and the Governor have each appealed that ruling to the Sixth Circuit,[27] The district court erred in holding that Defendants waived Eleventh Amendment immunity.

Sovereign immunity is a quasi-jurisdictional doctrine, meaning it can be waived through a state's litigation conduct. *Lapides v Bd of Regents of the Univ Sys of Ga*, 535 US 613, 618 (2002). But the touchstone of the waiver doctrine is intent—the state's litigation conduct must *clearly* indicate the state's intent to waive its immunity. *Id.* at 620. That is, a state waives its sovereign immunity where its dilatory assertion of immunity is a "tactical decision" giving the party an unfair

[27] Plaintiffs argue that "the Sixth Circuit lacks jurisdiction over the appeal" because it is taken from an "unappealable interlocutory order." (Plaintiffs' Brief, p 46.) But Plaintiffs fail to recognize that "the district court's denial of a claim of sovereign immunity by a state or state entity is *immediately appealable* under the collateral order doctrine." *Mingus v Butler*, 591 F3d 474, 481 (CA 6, 2010) (emphasis added).

advantage. *In re Bliemeister*, 296 F3d 858, 862 (CA 9, 2002). Where a state loses its case on the merits after extensive discovery, for example, a state may not then claim sovereign immunity. See *Ku v Tennessee*, 322 F3d 431, 435 (CA 6, 2003). But the Sixth Circuit has made clear that failure to raise sovereign immunity even in a motion for summary judgment is not a per se waiver—waiver occurs only where there is a *clear intent* to use the failure to raise immunity for strategic advantage:

> We have never held that the failure to raise sovereign immunity in an opening summary-judgment brief per se constitutes a waiver. Rather, properly focusing on the whole of [the defendant's] litigation conduct demonstrates that it did not clearly intend to waive its sovereign immunity and consent to federal jurisdiction. [*Barachkov v Davis*, 580 Fed Appx 288, 300 (CA 6, 2014), (Exhibit A to Joint Motion for Reconsideration, App 99c–110c).]

Here, Defendants have done nothing that evidences a clear intent to waive immunity. This case is still in its infancy. Service of the complaint was effectuated less than 30 days prior to the filing of Defendants' motion for reconsideration; Defendants filed their motions to dismiss only 9 days prior to the filing of the motion for reconsideration (and Plaintiffs had not yet responded); and Defendants have yet to even file an answer or raise affirmative defenses to the complaint. Moreover, there is no plausible strategic advantage to not having raised the defense earlier, as it would only have helped—not harmed—Defendants' case. The litigation conduct of the Defendants demonstrates that they have not waived sovereign immunity under the Eleventh Amendment and that dismissal of the state-law claims was appropriate.

In short, this case does not present a good vehicle for answering the certified questions, despite their import. Abeyance, not certification, is the preferable route.

II. Under the EPGA, Governor Whitmer had the authority after April 30, 2020, to issue or renew executive orders related to the COVID-19 pandemic.

Under the EPGA, "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled" the governor may, "upon . . . her own volition, . . . proclaim a state of emergency and designate the area involved." MCL 10.31(1). Following such a proclamation or declaration, the governor is authorized to "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.* As demonstrated below, the plain language of this Act granted Governor Whitmer the authority to issue or renew executive orders related to the COVID-19 crisis after April 30, 2020. And, even if this Court determines that the Governor did not have the authority to re-declare a state of emergency and disaster under the EMA on April 30, 2020, the EPGA nevertheless is an independent source of power from which the Governor could draw to continue to take the action necessary to save lives.

A. The plain language of the EPGA gives the governor continued authority.

The primary goal of statutory interpretation is to give effect to legislative intent. *Rowland v Washtenaw Cnty Rd Comm'n*, 477 Mich 197, 202 (2007). And the best indicator of legislative intent is the plain language of the statute. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237 (1999).

Here, the plain, unambiguous language of the EPGA grants the governor the authority to respond to a public emergency and provides the tools needed to effectively do so. That is, if the governor finds that the State is facing or is in reasonable apprehension of facing a "*great public crisis*, disaster, rioting, catastrophe, or similar public emergency," the governor may declare a state of emergency under the EPGA and issue reasonable executive orders that she believes necessary to protect the people of this state. MCL 10.31(1) (emphasis added). Importantly, such orders remain in effect until a "declaration by the governor that the emergency no longer exists." MCL 10.31(2).

The Legislature's expressed purpose in enacting the EPGA was to provide the governor with "sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster." MCL 10.32. Moreover, the Legislature has explicitly indicated that the provisions of the EPGA "shall be broadly construed to effectuate this purpose." *Id.*

On April 30, 2020, all of the requirements of MCL 10.31(1) were satisfied. The COVID-19 pandemic is a great public crisis that existed on March 10, 2020, when the Governor declared the first state of emergency under the EPGA. That crisis was still present on April 30, 2020; indeed, it still exists to this day, given the constant presence of the virus, the rapidly changing information about the virus, and the real threat of a second wave. Moreover, the Governor's executive orders were, and are, reasonable and necessary to address the emergency. Finally, the

Governor had not, and still has not, declared that the emergency no longer exists. Accordingly, the Governor had, and has, ongoing authority under the EPGA to issue reasonable, necessary executive orders to protect life and property and to bring the emergency situation under control.

In arguing that the EPGA does not support the Governor's actions, Plaintiffs attempt to erect artificial barriers to the Governor's exercise of her emergency authority by way of two main arguments. *First*, they boldly pronounce that the COVID-19 pandemic is not an "emergency" as that term is understood in the EPGA, because: (1) a "years-long public health problem" is not an emergency; (2) the dictionary definition of "emergency" does not encompass an extended public health crisis; (3) the EPGA allows only for narrowly defined, limited orders; and (4) the EPGA contemplates a local—not a statewide—emergency. (Plaintiffs' Brief, pp 17–24.) *Second*, they argue that the Governor terminated the emergency that supported her declaration of a state of emergency under the EPGA. (*Id*. at pp 24–29.) These arguments fail.

1. The COVID-19 pandemic is an emergency.

The plain language of the EPGA refutes each one of Plaintiffs' arguments that the pandemic is not an emergency.

a. The plain language of the EPGA places no durational restrictions on an emergency.

As an initial matter, it is not yet known whether COVID-19 will be a years-long public health problem. In fact, just this month Dr. Robert Redfield, Director of

the Centers for Disease Control and Prevention, said that nationwide use of face masks could significantly slow the spread of COVID-19 and end the epidemic in just four to six weeks.[28] The Governor certainly has not said that the COVID-19 emergency will last indefinitely.

But even if the pandemic lasts for some time, nothing in the EPGA precludes that set of circumstances from continuing to be an emergency. The EPGA's references to timing are few: The governor can promulgate reasonable orders *as soon as* she makes a proclamation or declares an emergency; her emergency measures become effective *from the date* indicated in the order; and, relevant here, she has discretion to determine *when* the emergency no longer exists and, *at that point*, the orders shall cease to be in effect. See MCL 10.31(1). The plain language of the EPGA—the best indicator of legislative intent, and the *only* tool a court should consult where, as here, the statute is unambiguous—simply does not contain the durational limitations that Plaintiffs seek to read into it. See *Dye by Siporin & Assocs, Inc v Esurance Prop & Cas Ins Co*, 504 Mich 167, 180 (2019) (internal footnotes omitted) ("Where the statutory language is clear and unambiguous, the statute must be applied as written. A court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." (quotations and citations omitted)). Not only that, but

[28] Julie Mazziotta, "If All Americans Wore Masks 'We Could Drive This Epidemic to the Ground,' Says CDC Director," People.com, available at https://people.com/health/americans-wore-masks-drive-this-epidemic-to-the-ground-says-cdc-director.

the governor's authority to make a determination about when an emergency exists and when it ends must be "broadly construed," MCL 10.32, and she has "sufficiently broad power of action in the exercise of the police power of the state." *Id.*

Resting this discretion in the hands of the governor is consistent with U.S. Supreme Court caselaw, which 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. *Jacobson v Commonwealth of Massachusetts*, 197 US 11, 24–25 (1905). Indeed, "[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." *Id.* at 30.

At some point the emergency will end. But what we know now is that the emergency is far from over. As the Imperial College Study warns, "the epidemic is not under control in much of the US" and "caution must be taken in loosening current restrictions if effective additional measures are not put in place."[29] And the plain language of the EPGA simply does not provide for a premature termination of a state of emergency declared under that Act in the face of ongoing danger.

At bottom, the plain language of the EPGA contains no restriction on the duration of an emergency, and Plaintiffs' claims to the contrary are unavailing.

[29] Imperial College London Report, "Summary."

b. The Legislature defined an "emergency" through its context—as a public crisis or disaster that imperils public safety—and the pandemic meets that definition.

Plaintiffs next resort to contemporaneous dictionary definitions of the word "emergency" in an effort to persuade this Court that the pandemic is not an emergency under the EPGA. (Plaintiffs' Brief, p 20.) But it is not necessary to consult a dictionary to understand what the Legislature meant by the word "emergency." The word's context illuminates its meaning.

This Court has said time and time again that statutory language must be read in context. E.g., *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421 (2003), quoting *Arrowhead Dev Co v Livingston Co Rd Comm,* 413 Mich 505, 516 (1982) ("[T]he emphasized language does not stand alone, and thus it cannot be read in a vacuum. Instead, '[i]t exists and must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute. . . .' "); *Gen Motors Corp v Erves (On Rehearing),* 399 Mich 241, 255 (1976) (opinion by Coleman, J.) ("[W]ords in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole."); *Timmis*, 468 Mich at 421, citing *McCarthy v Bronson,* 500 US 136, 139 (1991) & *Hagen v Dep't of Ed,* 431 Mich 118, 130–131 (1988) ("Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context."); *People v Vasquez,* 465 Mich 83, 89 (2001), quoting

Optometry, 342 Mich 555, 559 (1955) ("[I]n seeking meaning, words and clauses will not be divorced from those which precede and those which follow.").

Under the EPGA, to constitute an "emergency" there must be an "impending or actual public crisis or disaster," MCL 10.32—in fact, it must be a "*great* public crisis," a "disaster," a "catastrophe," or something similar. MCL 10.31(1) (emphasis added). Additionally, the public safety must be "imperiled." *Id.* While, in Plaintiffs' view, the ongoing pandemic does not qualify as a "public crisis," "disaster," "catastrophe," or "similar public emergency," the tens of thousands of Michigan residents who have already battled COVID-19, the many who have lost or are losing loved ones to the disease, and the countless Michiganders who do not feel safe leaving their homes and interacting freely in the public sphere, beg to differ.

Even if this Court consults dictionary definitions instead of relying on context, those definitions support the Governor's determination that an emergency still exists. Plaintiffs' own cited definition from Webster's New International Dictionary 837 (2d ed 1942)—"[a]n unforeseen combination of circumstances which calls for immediate action"—is applicable to the pandemic. Although the world has contemplated pandemics in a general sense, COVID-19, with its unique combination of virility and diverse medical effects, was not foreseen. (Had it been foreseen, we would not be calling it a "novel" coronavirus, and the world might have been more prepared.) And it arose quickly, calling for immediate responses nationwide, including gathering PPE, rethinking medical responses and equipment availability, and reassessing social customs. At this point, as both information and the virus

itself continue to change,[30] COVID-19 is still a moving target—in other words, an unforeseen combination of circumstances requiring immediate action.[31] As the Washington Supreme Court aptly said of COVID-19, "[O]ur understanding of this public health threat is evolving and incomplete. The virus's virulence and severity are unclear because there has been insufficient time to develop accurate, reliable, and widespread testing both for the virus and the presence of its antibodies." *Colvin v Inslee*, 2020 WL 4211571, opinion of the Washington Supreme Court, issued July 23, 2020 (Case No. 98317-8), p *2 (Vol I, App 125c–137c).[32]

Other contemporaneous definitions of "emergency" are similarly applicable to the pandemic. Two dictionaries define the word as a "crisis"—one of the words used in the EPGA. See The Modern Webster Dictionary for Home and School, 1941 ed (p 137) & Webster's Giant illustrated dictionary, 1943 (p 172) (both sources defining

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[30] ABC News, May 7, 2020, "Yes, COVID-19 is mutating, here's what you need to know," available at https://abcnews.go.com/Health/covid-19-mutating/story?id=70535183.

[31] Plaintiffs take issue with the Governor's six-phase plan, stating that these long-term policies "will remain in place even after the pandemic has been resolved." (Plaintiffs' Brief, pp 34–35.) But the plan is just that—policy. It sets forth expectations and guidance for the State's future response, but does not have the force of law and can be adapted to changing circumstances.

[32] These factors, at least at present, differentiate the pandemic from circumstances such as prison overcrowding, which courts have recognized as a long-term problem that needs a legislative solution. (See Plaintiffs' Brief, p 21, citing *County of Hudson v State of NJ Dep't of Corrections,* 2009 WL 1361546, unpublished decision of the Superior Court of New Jersey, Appellate Division, issued May 18, 2009 (Case No. A-2552-07T1), p * 7 (App 186a–191a).) See also *County of Gloucester v State*, 623 A2d 763, 768 (NJ, 1993) (internal citations omitted).

emergency as "a sudden occasion; pressing necessity; crisis").[33] And Webster's Dictionary of Synonyms lists the words "[e]xigency, contingency, crisis, pass, juncture, pinch, strait" as synonyms for "emergency." (Webster's Dictionary of Synonyms, 1st ed, 1942 (p 290).[34] All are applicable to the COVID-19 pandemic.

Notably, too, crisis is synonymous with "emergency," *id.* at 249; "catastrophe" is synonymous with "disaster," *id.* at 142, and "disaster" is synonymous with "catastrophe," *id.* at 256. And the words "disaster" and "catastrophe" "come into comparison when they denote an event or situation that is regarded as a terrible misfortune." *Id.* at 256. Thus, even if this Court uses dictionaries, they underscore that the EPGA defines the word "emergency" through its context.

Plaintiffs next argue that an emergency must pose an "immediate danger." (Plaintiffs' Brief, p 17.) First, COVID-19 *does* pose an immediate danger. Second, Plaintiffs remove that phrase from its context. The EPGA does not actually say that an emergency requires immediate danger. Rather, it says there must be a "great public crisis, disaster, rioting, catastrophe, or similar public emergency" *or* (note the use of the disjunctive) a "reasonable apprehension of immediate danger of a public emergency of that kind." MCL 10.31. The phrase "public emergency of that kind" refers back to the broad terms "public crisis," "disaster," and "catastrophe"—again, all of which encompass a pandemic.

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[33] Available at https://openlibrary.org/books/OL24223490M/Webster's_Giant_illustrated_dictionary_new.

[34] Available at https://archive.org/details/in.ernet.dli.2015.178721/page/n5/mode/2up.

Finally, Plaintiffs evoke an improper application of the doctrine of *ejusdem generis*, arguing that the list of what constitutes an emergency does not specifically mention "epidemics," and that all specific terms within the list are "exigencies that exist for a relatively limited period of time," meaning the general term, *i.e.* "or similar public emergency," must also be read to apply to circumstances of limited duration. (Plaintiffs' Brief, pp 18–19.) However, as demonstrated above, Plaintiffs' attempt to frame these terms as only applying to short-term occurrences is unavailing. And, under their proper interpretation, a pandemic is subsumed into many terms in the illustrative list. Indeed, a pandemic that has affected 83,386 individuals and has killed 6,212 in just over 4 months[35] certainly constitutes a public emergency that is (or is similar to) a great public crisis, a disaster, or a catastrophe. MCL 10.31(1) ("[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state").

In any event, "the doctrine [of *ejusdem generis*, like other canons of statutory construction,] does not apply when it would defeat the plain purpose and intent of the Legislature." *Natsch v City of Southfield*, 154 Mich App 317, 320 (1986), citing *In re Mosby,* 360 Mich 186, 192 (1960); *Utica State Savings Bank v Village of Oak Park,* 279 Mich 568, 573 (1937). Here, the plain meaning of "emergency" in the EPGA is clear and encompasses the COVID-19 pandemic. To employ the *ejusdem generis* canon to defeat that plain meaning, as Plaintiffs attempt, is improper.

[35] COVID-19 statistics available at https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html.

c. The plain language of the EPGA encompasses many types of orders and emergencies.

Plaintiffs then argue that MCL 10.31(1)'s illustrative list of the types of orders that the governor may issue during an emergency contemplates that they will be of brief duration and circumscribed scope.[36] (Plaintiffs' Brief, p 19.) Not so.

True, some of the enumerated types of orders are narrower, such as controlling traffic and the sale of alcohol, or prohibiting the transport of explosives. MCL 10.31(1). But others are quite broad, almost prescient of the widespread restrictions the Governor has put into place in response to the COVID-19 emergency: controlling the ingress and egress of persons from buildings; controlling the assembly of persons on public streets and thoroughfares; and controlling places of amusement and assembly. *Id.* Most importantly, the Legislature clearly signaled that this list of examples was non-inclusive: "Those orders, rules, and regulations *may* include, *but are not limited to* . . . " controlling traffic, occupancy of buildings, ingress and egress, places of amusement and assembly, curfews, transportation, sale of alcohol, and dangerous flammable materials. MCL 10.31(1) (emphasis added).

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[36] Plaintiffs assert that the historical context suggests that the EPGA was enacted in 1945 in response to localized riots in Detroit in 1943. (Plaintiffs' Brief, pp 19–20; App 050a–051a). But this Court need not consider legislative history where, as here, the plain language is unambiguous. *In re Certified Question from Sixth Circuit Court of Appeals*, 468 Mich 109, 113 (2003) ("When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction."). In any event, the fact that a particular emergency triggered the need for emergency powers does not signal that only a similar type of emergency would suffice, especially where, as here, the plain language indicates otherwise.

Similarly, not all the examples need be applicable to a given situation. No one would argue, for example, that the EPGA does not apply simply because no dangerous flammable materials are involved in a flood, or because the sale of alcohol need not be banned during a gas spill. The same is true here. Not every possible action item listed in MCL 10.31(1) need apply to the COVID-19 pandemic.

d. The EPGA's plain language does not limit a governor's powers to local emergencies.

Finally, Plaintiffs suggest that the EPGA applies only to local emergencies. (Plaintiffs' Brief, pp 19–20.) There is no textual support for this argument. Again, the Legislature defined the type of the possible emergency in the broadest terms: "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* . . . ." MCL 10.31(1) (emphasis added). And again, it is hard to argue that COVID-19 is not a great public crisis or disaster that imperils public safety. The COVID-19 virus spreads very quickly—to date it has affected at least 83,386 individuals and cause at least 6,212 deaths. Those numbers alone demonstrate the threat COVID-19 presents to public safety. The EPGA does not limit "public safety" to only local emergencies. The EPGA's broad language encompasses a public health crisis—a pandemic—that places the public in harms' way.

Moreover, MCL 10.31(1) references the "area involved," which could be a neighborhood, a city, a county, or, as here, the entire State. The EPGA places no

limitations on that phrase. And the phrase must be read in light of the EPGA's description of an emergency—a great public crisis or disaster.

In similar fashion, "the affected area" referenced in MCL 10.31(1) ("to bring the emergency situation within the affected area under control") can be local or statewide, as there are likewise no words of limitation in that phrase. Had the Legislature wanted to signal that the emergency was limited in geographical scope, it could have inserted the word "local" before the phrase "emergency situation"—"bring the *local* emergency situation. . . . under control." It certainly knew how to do so but did not. This demonstrates that the Legislature did not intend to limit the emergency to a local occurrence. It is also quite unbelievable that the Legislature, after having in 1945 recognized the need for the governor to have emergency powers, would have left the governor without those powers for a statewide emergency.

Additionally, the Act's reference to the "affected area" allows for two separate but related purposes: (1) to protect life and property; or (2) to bring the emergency situation within the affected area under control. The first purpose—protecting life and property—does not depend on the language "within the affected area." The two phrases are disjunctive.

In short, the plain language does not support the narrow reading Plaintiffs suggest.

2. The Governor's Executive Orders were reasonable and necessary.

Though Plaintiffs apparently do not challenge the reasonableness or the necessity of the Governor's Executive Orders, such an analysis is important in understanding the propriety of the Governor's actions under the EPGA. In promulgating each of her 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. And indeed, the Executive Orders she issued were both necessary "to bring the emergency situation within the affected area under control" and "reasonable" under the circumstances. MCL 10.31(1).

With respect to necessity, statistics have borne out that Michigan's restrictions mitigated the spread of COVID-19. It is well-documented that they helped Michigan temporarily flatten its curve,[37] as the recent study by Imperial College London confirms.[38] And as restrictions have lifted, Michigan's numbers have climbed.[39]

With respect to reasonableness, the Executive Orders were reasonable under the circumstances. No one would dispute that these orders place restrictions on

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[37] https://www.bridgemi.com/michigan-health-watch/now-michigan-success-story-flattening-pandemic-curve.

[38] Imperial College London, Report 23 state-level tracking of COVID-19, available at https://www.imperial.ac.uk/mrc-global-infectious-disease-analysis/covid-19/report-23-united-states/.

[39] https://www.freep.com/story/news/health/2020/06/24/michigan-coronavirus-cases-rising-again-after-flattening-the-curve/3251993001/.

liberties that would, in a "normal" context, be unreasonable. But, while the Constitution does not disappear in the face of a public health crisis, neither is the Bill of Rights a "suicide pact." *Terminiello v City of Chicago*, 337 US 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*, 197 US at 27.

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 (internal citations omitted). 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, and stemming the spread of, COVID-19 is paramount to all of our well-being. And it is widely accepted that, in the absence of any vaccine, the most effective—if not only—way to combat this highly infectious virus and control its escalation is through "social distancing," the practice of avoiding interactions with persons outside of an individual's household. The objective of social distancing is what has been termed "flattening the curve," that is, reducing the speed at which

COVID-19 spreads to save lives and conserve the limited resources of our healthcare system.

The statistics show that the Governor's Executive Orders did just that. Due to the Executive Orders limiting contact, Michigan was able to temporarily flatten its curve, dropping from third in the nation in terms of the number of COVID cases, to seventeenth in the nation as of August 4, 2020.[40] And the rising numbers in Michigan and elsewhere in the country as restrictions have been lifted further demonstrate how necessary and effective those restrictions were in preventing a spike in the number of cases that could lead to an overburdening of our healthcare system.

Accordingly, the Governor's Executive Orders bore, and still bear, a real and substantial relationship to securing the public health and safety, and, under the circumstances presented by COVID-19, did not result in a palpable invasion of fundamental rights. To the contrary, they were and are necessary, reasonable, valid, and enforceable under the EPGA.

3. The Governor never terminated the emergency that supported her declaration of emergency under the EPGA.

In Plaintiffs' second challenge to the validity of the Governor's actions after April 30, 2020, Plaintiffs presuppose that the pandemic *is* an emergency, but argue that, by April 30, the Governor had already terminated the only "emergency" that supported her declaration of emergency under the EPGA. (Plaintiffs' Brief, p 24.)

[40] https://www.cdc.gov/covid-data-tracker/#cases.

However, as explained below in Argument II.B.2.b, when the Governor terminated and re-declared a *state* of emergency and disaster under the EMA, she did not declare that the *emergency* no longer existed, and therefore did not terminate the state of emergency under the EPGA.

B. The EPGA gives the Governor sufficient authority to issue and re-issue executive orders after April 30, 2020, even if the EPA does not, because the Acts are independent.

As an initial matter, the federal court need not address the validity of the Governor's actions under the EMA because the Governor's authority under the EPGA is dispositive of Plaintiffs' state-law claims in the underlying federal case. That said, if this Court addresses the EMA, then despite the fact that the emergency related to the COVID-19 pandemic still existed on April 30, 2020—and endures to this day—the plain language of the EMA does not support the Governor's redeclaration on April 30, 2020. Regardless, the EPGA, which is independent from the EMA, provided sufficient authority on which the Governor could rely to act post-April 30.

1. The Governor's authority under the EMA expired on April 30, 2020, when the Legislature refused to grant an extension.

Under the EMA, a state of disaster or emergency "shall continue until[:]" (1) "the governor finds that the threat or danger has passed," (2) the governor finds that the disaster or emergency "has been dealt with to the extent that" disaster or emergency "conditions no longer exist," or (3) the declared state of disaster or

emergency "has been in effect for 28 days." MCL 30.403(3)–(4). If, after 28 days, the state of emergency or disaster is still in effect, 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." *Id.*

Here, the Governor first declared a state of emergency under the EMA due to the COVID-19 pandemic on March 10, 2020. (See Executive Order 2020-4, App 083a–084a.) The Governor rescinded and replaced that declaration with a declaration of a state of emergency and disaster on April 1, 2020. (See Executive Order 2020-33, App 088a–090a.) On April 7, 2020 (*i.e.*, 28 days from the initial declaration of a state of emergency), and in response to the Governor's request for a 70-day extension, the Legislature extended the declarations for 23 days, or until April 30, 2020.

Prior to the April 30, 2020 expiration, the Governor requested a second extension expiration. Despite the continuing emergency presented by the COVID-19 pandemic, the rapidly changing circumstances, and the ongoing necessity for swift responses, the Legislature took no action to further extend the declarations.[41]

[41] By failing to take such action, the Legislature did not exercise a legislative veto. The Legislature retains a legislative veto where, "upon delegating [the] authority [to adopt rules and regulations to the executive branch], . . . retain[s] the right to approve or disapprove [those] rules [and regulations]." *Blank v Dep't of Corr*, 462 Mich 103, 113 (2000). Here, the 28-day temporal restriction is not a retention of approval or disapproval authority, but a durational limit on the governor's exercise of delegated authority.

Consistent with the plain language of the EMA, the Governor then properly declared the states of emergency and disaster terminated under that Act. (See Executive Order 2020-66, App 101a–104a.)

Soon after, however, the Governor issued a new executive order that purported to re-declare a state of emergency and disaster under the EMA. (See Executive Order 2020-68, App 109a–112a.) The COVID-19 emergency undoubtedly persisted at that time, and the Governor, faced with an interpretive question of first impression and utmost urgency, read the EMA to permit her re-declaration in the face of such legislative inaction. Nonetheless, that re-declaration was beyond the scope of actions intended by the Legislature in enacting the EMA.

Again, the best indicator of legislative intent is the plain language of the statute. *Sun Valley Foods Co*, 460 Mich at 237. Here, the plain language of the EMA provides the governor with 28 days in which to take action to implement that Act and cope with the dangers presented by the disaster or emergency. But, after 28 days, both houses of the Legislature must approve the governor's request for an extension, or the governor "shall" declare the state of disaster or emergency terminated.

The plain language of the EMA provides that a state of disaster or emergency declared under that Act cannot continue for more than 28 days without legislative approval. This shows that the Legislature intended to provide a governor with the authority and flexibility to act quickly and unilaterally when initially presented with an emergency or disaster, but only for a limited period of time. Allowing the

Governor to repeatedly rescind and immediately replace the declared states of disaster and emergency would risk shortchanging this intent and rendering the Legislature's involvement in the extension process mere surplusage. See *Sweatt v Dep't of Corrections*, 468 Mich 172, 183 (2019) (internal citations omitted) (courts must avoid interpreting a statute in a way that would render any part of it "meaningless" or "nugatory").

In the end, it is unfortunate that the Legislature did not extend the state of disaster and emergency, given Michigan's remarkable progress in temporarily flattening the curve under the Governor's bold leadership. Time and the progression of COVID-19—including the recent spikes and resultant regression in states that attempted to reopen—have confirmed that extending the state of emergency and, consequently, the Governor's authority under the EMA, would have been wise. That said, the Governor's action in rescinding and replacing the declaration of the state of emergency and disaster under the EMA, while taken in good faith and motivated by a desire to save the lives of Michigan residents, was beyond what the Legislature contemplated in enacting the EMA.

2. The expiration of authority under the EMA has no bearing on the Governor's continuing authority under the EPGA because the EPGA is independent.

Regardless, this expiration of authority under the EMA has no bearing on the underlying case or on the Governor's ultimate authority to issue or renew executive orders related to the COVID-19 pandemic because the Governor's authority under the EPGA is independent of the EMA. That is, contrary to Plaintiffs' claims, the

EMA's 28-day temporal restriction cannot be read into the EPGA, and the Governor's termination of the declared state of emergency and disaster under the EMA did not also terminate the state of emergency under the EPGA.

a. The EMA's 28-day temporal restriction cannot be read into the EPGA.

To read the EMA's 28-day temporal restriction into the EPGA would be to judicially rewrite the EPGA in violation of well-established rules of statutory construction.

This Court has long held that "[i]f the statute's language is clear and unambiguous, then the statute must be enforced as written." *Iliades v Dieffenbacher N Am Inc*, 501 Mich 326, 336 (2018). And "[a] necessary corollary of this principle is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Id.* (quotations and citations omitted). Here, Plaintiffs do not claim that the EPGA is ambiguous (in fact, they argue that both the EMA and the EPGA are unambiguous), yet invite this Court to read into the EPGA a 28-day limitation on the Governor's emergency powers. This Court should decline the invitation.

For the same reason, this Court should disregard Plaintiffs' use of the *in pari materia* canon of statutory construction. The doctrine of *in pari materia* is an "interpretive aid . . . [that] can only be utilized in a situation where the section of the statute under examination is itself ambiguous." *Tyler v Livonia Pub Sch*, 459 Mich 382, 392 (1999), citing *Voorhies v Faust,* 220 Mich 155, 157 (1922). Because

Plaintiffs do not suggest that the EPGA is ambiguous, "in pari materia techniques are inappropriate." *Id.*

Although this Court has recently suggested that the application of the *in pari materia* canon is "not necessarily conditioned on a finding of ambiguity," it appears to have limited the application of that tool to cases where there is a patent conflict between two unambiguous statutes. See *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 74 n 26 (2017), citing *Int'l Bus Machines Corp v Dep't of Treasury*, 496 Mich 642, 651–653 (2014) (plurality opinion by Viviano, J.) (suggesting the application of *in pari materia* to resolve a patent conflict between two unambiguous statutes).

In this case, Plaintiffs attempt to manufacture a conflict between the EMA and the EPGA by arguing that, without "harmonizing" the statutes by reading the 28-day temporal restriction into the EPGA, the EMA is rendered meaningless. (Plaintiffs' Brief, pp 26–28.) But, as noted below in Argument III.B, though the EMA and the EPGA concern the same subject matter—*i.e.*, gubernatorial authority during an emergency—the scope of authority granted and the sophistication of the tools provided within each statute are different. Indeed, as the Court of Claims aptly recognized, "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 [a] 28-day time limit . . . , whereas an emergency declaration under the less sophisticated EPGA has no end date." (*House*

& Senate 5/21/20 Order, p 14, App 192a–216a.) As such, the operation of the EPGA does not render the EMA mere surplusage.

In fact, the language of the EMA explicitly recognizes the independence and continuing validity of the EPGA:

> This act shall not be construed to do any of the following:
>
> * * *
>
> (d) Limit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of the Michigan Compiled Laws [(*i.e.*, the EPGA)], or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of this state independent of, or in conjunction with, this act. [MCL 30.417(d).]

Plaintiffs attempt to limit the applicability of this recognition to simply the "proclamation" of a state of emergency under the EPGA. (Plaintiffs' Brief, p 28.) But, in so doing, they fail to recognize the import of the remainder of MCL 30.417(d), which declares the Legislature's intent that the EMA not be read to "[l]limit, modify, or abridge the authority of the governor to . . . exercise *any other powers* vested in him or her under . . . statutes . . . independent of, or in conjunction with, this act." MCL 30.417(d) (emphasis added). This broad recognition includes the *other* powers vested in the governor under the EPGA over and above the proclamation of a state of emergency. Reading the 28-day temporal restriction into the EPGA would limit, modify, or abridge such powers under the EPGA.

In addition, when the Legislature enacted the EMA, it could have abrogated the EPGA, but it chose not to.[42] Similarly, the Legislature could have amended the EPGA to include a temporal restriction similar to that within the EMA, but it did not. Instead, within the EMA, the Legislature plainly stated its intent that the EPGA continue to provide the governor with an independent source of authority under which to act in a time of public crisis. See *Alan v Wayne Cnty*, 388 Mich 210, 285 (1972) (recognizing that where the Legislature's intent is not to amend or alter another statute, both acts should be treated as valid and interpreted as written "unaffected by subsequent statutes"). In so doing, the Legislature expressed its intent that the EMA and the EPGA operate independently.

Therefore, the temporal restriction within the EMA has no legal impact on the question of the Governor's authority under the EPGA. Both prior to and since April 30, 2020, the Governor has had authority "[d]uring times of great public crisis" to "proclaim a state of emergency" and issue and reissue "reasonable orders" under the EPGA. MCL 10.31(1)–(2).

[42] Nor is there any indication that the EPGA was repealed by implication. Indeed, implied repeals "are disfavored" and a court must "presume, in most circumstances, that if the Legislature had intended to repeal a statute or statutory provision, it would have done so explicitly." *Int'l Bus Machines Corp*, 496 Mich at 651 (footnotes, citations, and quotations omitted).

b. The Governor's termination of the declared state of emergency and disaster under the EMA did not terminate the state of emergency under the EPGA.

To construe the Governor's termination of the declared state of emergency and disaster under EMA as terminating the emergency itself would be an unreasonable reading of the Governor's Executive Orders.

Under the plain language of the EPGA, executive orders issued following a declaration of emergency "shall cease to be in effect upon declaration by the governor that the *emergency* no longer exists." MCL 10.31(2) (emphasis added). Here, Plaintiffs claim that, through the issuance of Executive Order 2020-66 (App 101a–104a) (which terminated the declared states of emergency and disaster under the EMA), the Governor made such a declaration. (Plaintiffs' Brief, p 25.) That is not a reasonable reading of Executive Order 2020-66.

The Governor never declared in Executive Order 2020-66 "that the *emergency* no longer exists." MCL 10.31(2) (emphasis added). To the contrary, Executive Order 2020-66 laid out in significant detail the ongoing emergency conditions related to COVID-19 and concluded, "For the reasons set forth above, 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 2020-66, App 101a–104a (emphasis added).) Thus, far from declaring that the emergency no longer existed, Executive Order 2020-66 clearly stated that the emergency was ever-present.

Despite this ongoing emergency, the Governor recognized the temporal restriction under the EMA and properly terminated the *declared state* of emergency

and disaster under that Act. (*Id.*) Plaintiffs repeatedly claim that, by terminating the states of emergency and disaster under the EMA, the Governor declared that the emergency itself no longer existed and that the limitation of the termination to the EMA is "word play." (Plaintiffs' Brief, pp 24–26.) But Plaintiffs fail to recognize that Executive Order 2020-66 carefully distinguished between, on the one hand, the *emergency* itself, and on the other hand, the *declared states* of emergency and disaster under the EMA. As noted above, Executive Order 2020-66 clearly stated that the COVID-19 emergency persisted. And the termination language of Executive Order 2020-66—"[t]he state[s] of emergency [and disaster] declared under the Emergency Management Act . . . [are] terminated," (Executive Order 2020-66, App 101a–104a) does not alter that conclusion. As such, Executive Order 2020-66 did not have any effect on the underlying and sustained emergency that was the basis for the Governor's exercise of authority under the EPGA.

The issuance of Executive Order 2020-67 (App 105a–108a), which indicated that a state of emergency remains declared under the EPGA, bolsters this conclusion. Contrary to Plaintiffs' argument, Executive Order 2020-67 did not "manufacture a new emergency." (Plaintiffs' Brief, p 26.) Instead, it reiterated Executive Order 2020-66's detailed background of the ongoing emergency conditions presented by COVID-19 and declared that, due to these ongoing conditions, an emergency *still* existed, and therefore, a state of emergency under the EPGA *remained* declared. (Executive Order 2020-67, App 105a–108a.)

Finally, the Governor's May 1, 2020 statement that hospitals had sufficient stocks of personal protective equipment to allow for the resumption of non-essential medical care does not constitute an admission that the COVID-19 emergency no longer existed as of that date. (Plaintiffs' Brief, p 28–29.) First, this is not, as Plaintiffs claim, an assertion that hospitals were no longer in danger of being overrun, (*id.*), as a second wave of the virus could present such a danger of maxing out hospital capacity. Second, the danger that hospitals could lack the capacity and equipment to provide the necessary care was (and is) just one of the facts underlying the Governor's declaration of a state of emergency under the EPGA. Another fact underlying that declaration—indeed, the most significant fact—is the need to employ measures that save the lives of people within the State. That basis undoubtedly persists to this day.

In sum, the Governor never "terminated the . . . emergency" under the EPGA, as Plaintiffs claim. (Plaintiffs' Brief, p 24.) Rather, the Governor merely terminated the *declared states* of emergency and disaster under *the EMA* as was required by the plain language of that Act, while also clearly indicating that the emergency itself still existed. As such, the termination of the declared state of emergency and disaster under the EMA has no bearing on the ongoing emergency presented by COVID-19 and, consequently, the declaration of a state of emergency under the EPGA.

III. Neither the EPGA nor the EMA violates the Separation-of-Powers or Non-Delegation doctrines of the Michigan Constitution.

The federal district court has asked this Court to consider whether either the EPGA or the EMA violates the Separation-of-Powers or Non-Delegation doctrines of the Michigan Constitution. The answer is no.

A. The EPGA is facially constitutional.

Delegation of authority is an important issue. The Michigan Constitution vests legislative power in the House and Senate, and that power generally cannot be delegated. Const 1963, art 4, § 1; *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8 (2003). When the Legislature does desire to vest the executive branch with legislative authority, separation-of-powers principles require that the delegation of such authority contain "reasonably precise" standards. See generally *Westervelt v Natural Resources Comm'n*, 402 Mich 412, 438 (1978).

This Court has indicated that, when a court is faced with a question of the validity of a statute under the Non-Delegation and Separation-of-Powers doctrines, it should keep in mind the following considerations: "1) the act must be read as a whole; 2) the act carries a presumption of constitutionality; and 3) the standards must be as reasonably precise *as the subject matter requires or permits*." *Blue Cross & Blue Shield v Milliken*, 422 Mich 1, 51 (1985) (emphasis added), citing *Dep't of Natural Resources v Seaman,* 396 Mich 299 (1976). Importantly, "the preciseness required of the standards will depend on the complexity of the subject." *Id.* at 51–52, citing *Argo Oil Corp v Atwood,* 274 Mich 47, 53 (1935). Finally, for a statute to

pass constitutional muster, due process requirements must be satisfied. *Id*. at 52, citing *State Highway Comm v Vanderkloot,* 392 Mich 159 (1974).

Applying those considerations here, the EPGA is a constitutionally acceptable delegation of power to the executive branch. The EPGA as a whole contains standards that are as reasonably precise as they can be, given the Act's applicability to a wide range of potential, but as-of-yet unknown, emergencies and the concomitant, diverse complexities that are inherent in every emergency situation. (Case in point: A rapidly evolving, unforeseen global pandemic.) The plain language of the EPGA provides limitations: *First*, the initial declaration of a state of emergency may only occur 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. . . ." MCL 10.31(1).

Second, the governor's executive orders, rules, and regulations must be "reasonable," "necessary," and designed to "protect life and property or to bring the emergency situation within the affected area under control." *Id.* Plaintiffs argue that "reasonable" and "necessary" provide no standard at all. (Plaintiffs' Brief, pp 33–36.) But this Court and the Court of Appeals have repeatedly held that such terms are sufficient standards to cabin the executive branch's exercise of delegated authority. See *Blank v Dep't of Corrections*, 462 Mich 103, 126 (2000) (opinion by Kelly, J.) (finding a constitutionally permissible delegation of authority based, in part, on enabling legislation that constrained rulemaking authority to only those

matters that were "necessary for the proper administration of this act.") See also *Klammer v Dep't of Transp*, 141 Mich App 253, 262 (1985) (concluding that a delegation which permitted the continued employment of an individual for such a period of time as was "necessary" provided a sufficient standard, under the circumstances).

And *third*, the police power the governor may exercise under the EPGA is broad enough to provide only "*adequate* control," MCL 10.32 (emphasis added), not *total* control. Any greater detail within the standards would run the risk of hamstringing the Governor in her ability to adequately respond to the particular emergency that arises.

Finally, as to due process, the governor's decision as to whether an emergency exists or has ended is subject to judicial review. See *Cassell v Snyders*, 2020 WL 2112374, opinion of the United States District Court for the Northern District of Illinois, issued May 3, 2020 (Case No. 20 C 50153), p *14 ("[S]hould this or any future Governor abuse his or her authority by issuing emergency declarations after a disaster subsides, affected parties will be able to challenge the sufficiency of those declarations in court.") (Vol I, App 111c–124c). Other courts have certainly grappled with how to determine when gubernatorial emergency powers no longer exist. See, e.g., *County of Gloucester,* 623 A2d at 768 (internal citations omitted) (considering the passage of time and factors such as the extent to which the problem is within the government's control and the extent to which remedial efforts have been undertaken). Above and beyond that, emergencies do

not demand greater due process than the EPGA affords, as the U.S. Supreme Court has recognized. See *Jacobson*, 197 US at 26 ("[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.").

Because the EPGA is not an illegal delegation of legislative authority, under this Court's precedent it also passes muster under the Separation-of-Powers Clause of the Michigan Constitution. Again, the Separation-of-Powers Clause provides that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. And the non-delegation doctrine was created to ensure adherence to separation-of-powers principles: If the Legislature properly delegates authority to another branch (*i.e.*, provides sufficient standards), it does not violate the non-delegation doctrine and, as such, does not violate separation-of-powers principles. On the other hand, if the Legislature improperly delegates authority, it violates the non-delegation doctrine and separation of powers. See *Westervelt*, 402 Mich at 439 (reaffirming that the "standards test" satisfies separation-of-powers principles, and observing that when standards are as reasonably precise as the subject matter requires or permits, the principle that the Legislature may not delegate or abdicate "law-making" or "legislative" power "becomes merely a principle of description or convenience, not substance.").

This Court has also explained that, in Michigan, the Separation-of-Powers doctrine does not require "so strict a separation as to provide *no* overlap of responsibilities and powers" across the branches. *Judicial Attorneys Ass'n v State*, 459 Mich 291, 296 (1998) (citing various cases). That is, if the grant of authority to one branch "does not create encroachment or aggrandizement of one branch at the expense of the other, a sharing of power may be constitutionally permissible." *Id.*, citing *Soap & Detergent Ass'n*, 415 Mich at 752–753. In fact, in S*oap & Detergent* this Court held that even "*broad* legislative power" that had been "delegated to the Governor to effectuate executive reorganization" did not violate the Separation-of-Powers doctrine because the power was clearly limited. 415 Mich at 752–753. (emphasis added) (explaining that the area of executive exercise of legislative power, though broad, was very limited and specific; that the executive branch was not the sole possessor of the power, and the Legislature had concurrent power to transfer functions and powers of the executive agencies; and that the Legislature could still exercise veto power).

Here, because the EPGA's delegation of power to the executive branch is reasonable, there is no incursion into the legislative sphere of authority, but merely a tolerable potential overlap depending on the nature of the emergency. As in *Soap & Detergent*, the governor's powers under the EPGA, while broad, are nevertheless limited. Although the Legislature defers to the executive branch in determining what constitutes a crisis or disaster or what constitutes sufficient risk to property and life, there still must be an *impending or actual* public crisis or disaster, MCL

10.32, and the governor's orders must be *reasonable* in relation to the crisis and *necessary* "to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1). Also, the governor cannot continue to issue emergency orders, rules, or regulations after the public crisis or disaster has ended. Most importantly, the governor's emergency powers under the EPGA do not strip the Legislature of its lawmaking role. See Const 1963, art 4, § 1. The Legislature retains its lawmaking authority even if there is some temporary overlap during the crisis or disaster. [43]

The thrust of Plaintiffs' argument to the contrary is that, if this Court does not interpret the EPGA as Plaintiffs do—*i.e.*, as expressing a durational limit and addressing only local emergencies—then the Act violates separation-of-powers and non-delegation principles. (Plaintiffs' Brief, p 29.) Notably, Plaintiffs do not acknowledge or discuss this Court's caselaw regarding the permissible overlap between the authority of the branches of government. See *Soap & Detergent*, 415 Mich at 752–753. Nor do they acknowledge that state statutes carry a presumption of constitutionality. See *Blue Cross & Blue Shield*, 422 Mich at 51. Likewise, they do not factor in the U.S. Supreme Court's recognition that due-process rights are necessarily curtailed during an emergency. See *Jacobson*, 197 US at 24–25, 30.

[43] Plaintiffs complain that the Legislature does not have concurrent lawmaking authority during this pandemic because the Governor vetoes legislative efforts (Plaintiffs' Brief, pp 21–22). But gubernatorial veto is a normal part of the checks and balances that apply to all lawmaking.

Regardless, as to narrowing the EPGA to only local emergencies, that argument is not supported by the plain language of the Act. See Argument II.A.1.d. With respect to duration, Plaintiffs acknowledge—at least in theory—that the complexity of the subject matter is an important consideration in determining the degree of precision required. (Plaintiffs' Brief, p 31.) But they do not appropriately apply the concept, which is why they liken the EPGA, which must encompass all the complexities and moving parts of emergencies yet unknown, to the far more narrow Nonprofit Health Care Corporation Reform Act at issue in *Blue Cross & Blue Shield*, 422 Mich at 54–55, a portion of which gave open-ended authority to the Insurance Commissioner in the face of established actuarially sound practices proposed by the health care corporation. (Plaintiffs' Brief, pp 31–32).[44]

In sum, the EPGA does not violate the Non-Delegation or Separation-of-Powers doctrines.

B. The EMA is likewise facially constitutional.

As with the Governor's actions under the EMA, the federal court can dispose of Plaintiffs' state-law claims in the underlying case without reaching the facial constitutionality of the Act itself. In any event, because Plaintiffs' brief to this Court does not argue otherwise, Plaintiffs appear to concede that the EMA is

[44] Plaintiffs also cite federal caselaw. But as this Court noted in 2003, "[t]he United States Supreme Court has not used the nondelegation doctrine to invalidate a federal statute since the New Deal period." *Taylor*, 468 Mich at 9 n 8.

neither an illegal delegation nor a violation of separation-of-powers principles, and therefore is facially valid. Rightly so.

Under the EMA, "[t]he governor is responsible for coping with dangers to this state or the people of this state presented by a disaster or emergency." MCL 30.403(1). The Act defines "disaster" as "an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to . . . *epidemic*. . . ." MCL 30.402(e) (emphasis added). The Act defines emergency as "any occasion or instance in which the governor determines state assistance is needed to supplement local efforts and capabilities to *save lives*, *protect* property and the *public health* and safety, or to *lessen or avert the threat of a catastrophe* in any part of the state." MCL 30.402(h) (emphasis added).

As noted above, the first subsection of the EMA places the "responsibility" for "coping with dangers" on the governor. MCL 30.403(1). The second subsection is an actual grant of authority: "The governor may issue executive orders, proclamations, and directives having the force and effect of law to implement this act." MCL 30.403(2). Per the plain language of this subsection, the governor's authority is restricted to issuing orders that "implement th[e] act." *Id.* Taken together, the first and second subsections provide the governor with the authority and mechanism by which to utilize the tools established in the EMA to "cope" with an emergency or disaster.

The EMA's tools include the authority to seek assistance from the federal government, MCL 30.404; to disburse federal funds, MCL 30.416; to authorize expenditures from the disaster contingency fund, MCL 30.419; to direct the state director of emergency management to assume command of all disaster relief and recovery forces, MCL 30.407(1); and to:

> (a) 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. This power does not extend to the suspension of criminal process and procedures.
>
> (b) Utilize the available resources of the state and its political subdivisions, and those of the federal government made available to the state, as are reasonably necessary to cope with the disaster or emergency.
>
> (c) Transfer the direction, personnel, or functions of state departments, agencies, or units thereof for the purpose of performing or facilitating emergency management.
>
> (d) Subject to appropriate compensation, as authorized by the legislature, commandeer or utilize private property necessary to cope with the disaster or emergency.
>
> (e) Direct and compel the evacuation of all or part of the population from a stricken or threatened area within the state if necessary for the preservation of life or other mitigation, response, or recovery activities.
>
> (f) Prescribe routes, modes, and destination of transportation in connection with an evacuation.
>
> (g) Control ingress and egress to and from a stricken or threatened area, removal of persons within the area, and the occupancy of premises within the area.
>
> (h) Suspend or limit the sale, dispensing, or transportation of alcoholic beverages, explosives, and combustibles.
>
> (i) Provide for the availability and use of temporary emergency housing.

> (j) Direct all other actions which are necessary and appropriate under the circumstances. [MCL 30.405(1).]

These tools are narrowly defined and of limited applicability. And even the broadest of these provisions—granting the governor the authority to "[d]irect all other actions which are necessary and appropriate under the circumstances," MCL 30.405(1)(j)—must be read in the context of the act as a whole. See *Timmis*, 468 Mich at 416. When read as a whole with the remainder of the EMA, the provision means that the governor may direct only those actions that are "necessary and appropriate" to implement the EMA.

Along with the limits placed on its tools, the EMA contains a temporal restriction, which prevents impermissible incursion into the sphere of authority occupied by the Legislature. The EMA, which provides the governor with more specifically enumerated emergency-management tools than does the EPGA, in some cases affords the governor more overlap into the legislative sphere than does the EPGA. For example, the EMA allows the governor to "suspend" certain regulatory statutes, orders, or rules that relate to conducting state business to the extent they "prevent, hinder, or delay necessary action in coping with the disaster or emergency." MCL 30.405(1)(a). Moreover, the EMA allows the governor to declare a state of emergency or a state of disaster based on the mere "threat" of either, as opposed to only during such an emergency or upon "reasonable apprehension of immediate danger," as contemplated under the EPGA. See MCL 30.402(e), (h); MCL 40.403(3), (4); MCL 10.31(1).

Accordingly, the temporal restriction provides a reasonably precise standard that allows the Legislature to re-evaluate the state of the declared emergency or disaster and make a determination as to whether the use of the EMA's tools, particularly those that are more legislative in nature, should be extended. Given the various standards within the EMA—including its temporal restriction—the EMA is not an unconstitutional delegation of legislative authority, nor does it violate the Separation-of-Powers Clause of the Michigan Constitution.

CONCLUSION AND RELIEF REQUESTED

This Court should decline to consider the certified questions because the district court should have dismissed the state-law questions based on mootness and Eleventh Amendment immunity. If the Court does consider them, the plain language and the circumstances of the COVID-19 pandemic dictate that, while the Governor did not have the authority to re-declare an emergency or disaster under the Emergency Management Act (EMA) on April 30, 2020, she had the authority under the Emergency Powers of the Governor Act (EPGA) to issue and re-issue emergency orders after April 30, 2020. Additionally, both the EPGA and the EMA are facially constitutional because neither violates the Separation-of-Powers or Non-Delegation doctrines of the Michigan Constitution.

WHEREFORE, Defendant Michigan Attorney General Dana Nessel respectfully requests that if this Court considers the certified questions, it hold that (1) Governor Whitmer had authority under the EPGA to issue and re-issue emergency orders after April 30, 2020; and (2) neither the EPGA or the EMA violates the Separation-of-Powers or Non-Delegation doctrines of the Michigan Constitution.

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