UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

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

Defendants.

No. 1:20-cv-00414

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

DEFENDANTS WHITMER AND GORDON'S BRIEF REGARDING CERTIFICATION

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Dated: June 5, 2020

CONCISE STATEMENT OF ISSUES PRESENTED

1. Plaintiffs' state law claims are moot or otherwise non-justiciable and should be dismissed with prejudice. In the alternative, this Court should decline supplemental jurisdiction over the state law claims and dismiss Counts I and II without prejudice. A final alternative is to hold the state law claims in abeyance pending the outcome of several matters already pending in Michigan's state courts. In any instance, this Court should decline to certify the state law claims to the Michigan Supreme Court.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority: Western District Local Rule 83.1

INTRODUCTION

This case presents two distinct categories of claims – federal civil rights claims and state law claims of statutory interpretation and state constitutional law. The federal civil rights claims raise constitutional challenges under the United State Constitution and are unambiguously within the federal question jurisdiction of this Court. But the state law claims are of a different breed all together.

These questions regard the scope and state constitutionality of two Michigan statutes – the Emergency Powers of the Governor Act, Mich. Comp. Laws § 10.31, *et seq*. (EPGA), and the Emergency Management Act, Mich. Comp. Laws § 30.401, *et seq*. (EMA). Identical questions about the scope of the EMA and EPGA are being litigated in Michigan's state courts, and there is scant Michigan authority interpreting or applying the statutes. Nevertheless, this case is not a good candidate for certification of the issues to the Michigan Supreme Court.

In *Michigan House and Senate v. Gov. Whitmer*, the scope of permissible action under the EMA and EPGA is being litigated, as is whether the EPGA is an impermissible delegation of legislative authority to the Governor. The constitutional delegation question regarding the EPGA is also being litigated in in *Michigan United for Liberty v Gov. Whitmer* and *Ostergren, et. al. v. Governor*

Whitmer, et. al.[1] All of these cases are currently pending in the Michigan Court of Appeals.

As briefed in Governor Whitmer and Director Gordon's motion to dismiss, all of Plaintiffs' claims are moot or otherwise non-justiciable. (R. 24-2, pp. 13-18, Page ID# 1119-24). Alternatively, as briefed in that motion to dismiss, this Court should abstain from and otherwise decline supplemental jurisdiction over Plaintiffs' state law claims. (R. 24-2, pp. 21-32, Page ID# 1127-38). This Court should dismiss the entire case (including the state law claims in Counts I and II) based on any of these bases rather than certifying issues to the Michigan Supreme Court. It would be inappropriate and a waste of judicial resources to certify questions for claims that are non-justiciable. If the claims are justiciable, the legal issues should be developed in the lower state court prior to consideration by Michigan's appellate courts.

Should this Court reach the merits of the certification question, the factors for certification are not met. While Counts I and II of the complaint present unsettled issues of state law, the state law issues to be certified may not control the outcome of this litigation. Rather than certification, this Court should dismiss the state law claims or, if this Court disagrees that dismissal is warranted, should hold

[1] *See Michigan United for Liberty v. Governor Whitmer*, Michigan Court of Claims Case No. 20-61-MZ, Michigan Court of Appeals No. 353643; *Michigan House and Senate v. Gov. Whitmer*, Michigan Court of Claims Case No. 20-79-MZ, Michigan Court of Appeals No. 353655, Michigan Supreme Court No. 161377; *Ostergren, et. al. v. Governor Whitmer, et. al.*, Michigan Court of Claims Case No. 20-53-MZ, Michigan Court of Appeals Case No. not assigned yet.

them in abeyance pending the outcome of several already-pending Michigan state court matters.

ARGUMENT

I. This Court should dismiss Counts I and II with prejudice as moot or otherwise non-justiciable. In the alternative, this Court should abstain and otherwise decline supplemental jurisdiction over Counts I and II and dismiss those claims without prejudice.

In their motion to dismiss, Governor Whitmer and Director Gordon have briefed at length the issues of mootness, abstention, and declination of supplemental jurisdiction. The Governor and Director has also raised other serious questions about the justiciability of Plaintiffs' claims, including ripeness and standing considerations. (R. 24-2, pp. 12-32, Page ID# 1118-38). Those arguments need not be repeated in full here.

Regarding mootness, there is no longer any live controversy underlying Plaintiffs' challenges to the EMA and the EPGA, and Plaintiffs have no legally cognizable interest in the outcome of the litigation. This Court should not certify a question to the Michigan Supreme Court that is moot or otherwise non-justiciable. Instead, Plaintiffs' state law claims should be dismissed with prejudice.

If this Court is not inclined to dismiss Plaintiffs' claims as moot (or otherwise not justiciable), this Court should dismiss the state law claims without prejudice, and Plaintiffs would be free to re-file their claims in a Michigan court of proper jurisdiction, where the claims may proceed in due course. This would allow for the legal issues in Plaintiffs' claims to be developed by a lower court prior to consideration by Michigan's appellate courts in which these issues are currently

pending.[2] In either instance, this Court should dismiss Counts I and II rather than certifying issues to the Michigan Supreme Court.

II. The Court should not certify the state law questions in the complaint to the Michigan Supreme Court.

The district court local rules, Western District LR 83.1, provide the standard for certification. That Rule states:

> LR 83.1 - **Certification of Issues to State Courts**
>
> Upon motion or after a hearing ordered by the judge sua sponte, the court may certify an issue for decision to the highest court of the state whose law governs any issue, claim or defense in the case. An order of certification shall be accompanied by written findings that: (a) the issue certified is an unsettled issue of state law; (b) the issue certified will likely affect the outcome of the federal suit; and (c) certification of the issue will not cause undue delay or prejudice. The order shall also include citation to authority authorizing the state court involved to resolve certified questions. In all such cases, the order of certification shall stay federal proceedings for a fixed time, which shall be subsequently enlarged only upon a showing that such additional time is required to obtain a state court decision. In cases certified to the Michigan Supreme Court, in addition to the findings required by this rule, the court must approve a statement of facts to be transmitted to the Michigan Supreme Court by the parties as an appendix to briefs filed therein.

While Counts I and II of the complaint present unsettled issues of state law, the issues are already pending before Michigan's appellate courts in multiple cases, and the state law issues to be certified may not control the litigation's outcome.

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[2] On June 4, 2020, in *Michigan House and Senate v. Gov. Whitmer*, the Michigan Supreme Court denied the parties' cross-bypass applications for leave to appeal, based in part on the lack of a fully developed appellate record. (Attached as Exhibit A). This action by the Michigan Supreme Court is strong evidence that even if this Court certifies the questions, that the Court may not decide the issues in the absence of a developed Michigan appellate court record.

A. The questions presented by Counts I and II of the complaint are unsettled issues of state law, but those issues are better resolved by cases already pending in Michigan's state courts.

The questions raised in Counts I and II regard the scope and state constitutionality of the Michigan Emergency Powers of the Governor Act (EPGA) and the Michigan Emergency Management Act (EMA). The law is unsettled in these areas and these same legal issues are currently pending before the Michigan Court of Claims and the Michigan Court of Appeals. And while Counts I and II present novel questions of state law, and federal courts have an "interest in avoiding the unnecessary resolution of state law issues," *Hankins v. The Gap, Inc.*, 84 F.3d 797, 803 (6th Cir. 1996), this case is not a good candidate for certification.

The primary relief sought in this case—nullification of the executive actions concerning non-essential medical procedures and the corresponding limitation on travel—is simply no longer available because the executive orders no longer exist. Serious questions of mootness, standing, and ripeness pervade this case. With this serious problem of justiciability, certification within this case is simply unnecessary, and a poor vehicle for resolving the foundational issues regarding the Governor's authority.

B. The state law issues to be certified are unlikely to affect the outcome of this suit.

If this Court certifies the issues, there is only one potential outcome in the Michigan Supreme Court that will control the outcome in this case. In Count I, Plaintiffs maintain (incorrectly) that the Governor's executive orders are not authorized by the EMA or the EPGA. In Count II, Plaintiffs assert (again,

incorrectly) that the EMA and EPGA are impermissible delegations of legislative authority to the Governor.

These state-law questions will only matter in the unlikely scenario that the Plaintiffs win on their challenges to *both* the EPGA and the EMA, since each of the Governor's executive orders challenged in Counts III, IV, V and VI was issued under both statutes. Should this one scenario come to pass, the Court would not need to reach the federal constitutional questions raised in those Counts.

But a more likely scenario is that the Governor's position will carry the day as to one or both statutes – that the Governor's executive orders are within the scope of the EMA and/or the EPGA, and that there is no constitutional delegation problem with the EMA and/or the EPGA.[3] Under those circumstances, the decision of the Michigan Supreme Court will not control the outcome of this case, and this Court will be required to take up the federal constitutional questions raised in Counts III, IV, V and VI. And of course, for there to be any need for this Court (or

[3] Claims similar to those raised by Plaintiffs have already been evaluated and rejected as unlikely to be successful on the merits in the Michigan Court of Claims. *See Martinko, et. al. v. Governor Whitmer, et. al.,* Michigan Court of Claims Case No. 20-62-MM, April 29, 2020 Opinion and Order Denying Plaintiffs' Motion for a Preliminary Injunction, (Attached as Ex. B); *Michigan United for Liberty v. Governor Whitmer*, Michigan Court of Claims Case No. 20-61-MZ, May 19, 2020 Opinion and Order Denying Plaintiff's Motion for a Preliminary Injunction (Attached as Ex. C), leave granted by the Michigan Court of Appeals on May 29, 2020 (COA No. 353643); *Michigan House and Senate v. Gov. Whitmer*, Michigan Court of Claims Case No. 20-79-MZ, May 21, 2020 Opinion and Order of Dismissal (Attached as Exhibit D), claim of appeal pending in Michigan Court of Appeals (COA No. 353655); *Ostergren, et. al. v. Governor Whitmer, et. al.*, Michigan Court of Claims Case No. 20-53-MZ, Opinion and Order Granting Summary Disposition (Attached as Exhibit E), claim of appeal pending in the Michigan Court of Appeals (COA No. not assigned).

any other court) to reach the merits of Plaintiffs' state or federal claims, those claims must be justiciable – which, as discussed, they are not.

In sum, there is a chance that certification will control the outcome of this case – but it is a slim chance. Certification is not warranted.

III. Another option is to hold the state law claims (or the entire case) in abeyance pending the outcomes of the cases already pending in Michigan's state courts.

The final option would be to hold the state law claims in this case in abeyance pending the resolution of *Michigan House and Senate v. Gov. Whitmer* in the Michigan appellate courts, or any other cases concerning questions presented in Counts I and II. This Court could decide the federal questions raised in Counts III, IV, V and VI now, and later decide the state law questions in Counts I and II following the resolution of the issues by the state's appellate courts. Or it could hold all of Plaintiffs' claims in abeyance pending that resolution.

There is a risk of inconsistent results if this Court decides the state law issues on the merits. There is potential that this Court could reach one conclusion on the state law questions, only to have the Michigan appellate courts reach a different conclusion. Abeyance will avoid the potential for inconsistent results altogether, as Michigan's state courts are the proper forum to decide these issues of state law.

CONCLUSION AND RELIEF REQUESTED

The question of the scope and state constitutionality of the EMA and EPGA are ultimately questions of state law. And there is no question that the highest court of the state is the final arbiter of such state law issues. But there are cases

already pending in Michigan's courts that raise these claims, thus making it unnecessary for this Court to certify the questions based on executive orders that have already been rescinded. Instead, this Court should dismiss Plaintiffs' claims as non-justiciable or, failing that, should allow Plaintiffs to refile their state law claims in state court or hold them (or this case) in abeyance pending the resolution of the already-pending state-court cases that present those same legal issues.

Governor Whitmer and Director Gordon respectfully request that this Court:

1. Dismiss Counts I and II of Plaintiffs' Complaint with prejudice as moot or otherwise non-justiciable; or

2. Decline jurisdiction over Counts I and II and dismiss those state law claims without prejudice; or

3. Hold Counts I and II (or the entire case) in abeyance pending the resolution of the legal issues presented in Counts I and II in one of the already-pending state-court cases that present them.

Respectfully submitted,

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Dated: June 5, 2020

CERTIFICATE OF SERVICE

I certify that on June 5, 2020, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system, which will provide electronic copies to counsel of record, and I certify that my secretary has mailed by U.S. Postal Service the papers to any non-ECF participant.

/s/ *Joseph T. Froehlich*
Joseph T. Froehlich
Assistant Attorney General
Attorney for Defendants
Whitmer & Gordon
State Operations Division

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

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Defendants.
/

No. 1:20-cv-00414

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

EXHIBIT A

Order

June 4, 2020

161377 & (7)(13)(14)(15)(18)

HOUSE OF REPRESENTATIVES and SENATE,
Plaintiffs-Appellants/
Cross-Appellees,
and

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

v

SC: 161377
COA: 353655
Court of Claims: 20-000079-MZ

GOVERNOR,
Defendant-Appellee/
Cross-Appellant.
_____/

On order of the Court, the motions for immediate consideration and the motion to file brief amicus curiae are GRANTED. The application for leave to appeal prior to decision by the Court of Appeals and the application for leave to appeal as cross-appellant are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court before consideration by the Court of Appeals. The prospective intervenors' motion to docket is DENIED.

BERNSTEIN, J. (*concurring*).

I agree with my fellow Justices that this case presents extremely significant legal issues that affect the lives of everyone living in Michigan today. And that is exactly why I join the majority of this Court in denying the parties' bypass applications—*because* I believe that a case this important deserves full and thorough appellate consideration.

Additionally, with the issuance of Executive Order No. 2020-110, "shelter in place" is no longer mandated in the state of Michigan. While recognizing that not all restrictions have been lessened (and acknowledging the possibility of future restrictions being reimplemented), I believe the parties and this Court would benefit most from having the vital constitutional issues of this case fully argued in the Court of Appeals before receiving a final determination from our Court. See *League of Women Voters v Secretary of State*, 505 Mich 931 (2019) (denying the plaintiffs' bypass application). Cases of the ultimate magnitude, such as this one, necessitate the complete and comprehensive consideration that our judicial process avails.

The significance of this case is undeniable. And with many of the restrictions on

daily life having now been lifted, our eventual consideration of these issues must receive full appellate consideration before our Court can most effectively render a decision on the merits of this case.

CLEMENT, J. (*concurring*).

In this case, the Legislature advances several arguments asking us to hold that a law it enacted 75 years ago, 1945 PA 302, codified at MCL 10.31 *et seq.*, is unconstitutional or the Governor's actions are beyond the statutory authority contained in that statute, and that the Governor's executive orders issued under that statute in response to the COVID-19 pandemic are consequently invalid. Contrary to what is suggested by the dissents from the Court's order today, the Legislature is not litigating the civil liberties of all Michiganders. Moreover, to read the dissents, one might be left with the impression that this Court has declined altogether to decide this case. It has not—it has only declined to decide the case before the Court of Appeals does. I believe this is both compelled by our court rules and advisable as a matter of prudence. Because I believe the Court neither can nor should review this case before the Court of Appeals does, I concur with the Court's order denying these bypass applications.

I believe, first, that the rules governing bypass applications are not satisfied here. Given that "the supreme court shall have . . . appellate jurisdiction as provided by rules of the supreme court," Const 1963, art 6, § 4, whether the rules have been satisfied is seemingly of its own jurisdictional and constitutional significance. Our rules provide that, to grant a bypass application, "[t]he application must show" either that "delay in final adjudication is likely to cause substantial harm" or that "the appeal is from a ruling that . . . any . . . action of the . . . executive branch[] of state government is invalid[.]" MCR 7.305(B)(4)(a) and (b). I do not believe the Legislature satisfies either requirement. In its bypass application, the Legislature argues that the "substantial harm" prong is satisfied because "Michiganders . . . are living under a cloud of ambiguity" given the debate over whether the Governor's executive orders responding to the COVID-19 pandemic are actually legal. But this case is not a class action filed on behalf of all Michiganders to litigate their civil liberties—it is a suit filed by the Legislature asserting that certain of its institutional prerogatives have been infringed by the Governor's actions. The Legislature shows no substantial harm *to the Legislature* caused by going through the ordinary appellate process. As an institution, it is exactly as free to enact legislation—whether responsive to this pandemic or otherwise—as it was before any of the Governor's executive orders were entered.[1] As to the "invalidity of executive action"

[1] Justice VIVIANO argues that the Legislature's separation-of-powers argument, if vindicated, would be a "substantial harm," and that "[a]t the bypass stage, we need not decide the merits of the Legislature's separation-of-powers argument." I agree that we need not decide those merits, and we are not by denying this bypass application. Given the novelty of the Legislature's standing argument, however, I do not believe it can show

prong, the Legislature argues that "this appeal involves a ruling that has already declared" Executive Order No. 2020-68 invalid. However, the Legislature does not appeal *that* ruling—rather, it appeals the ruling that Executive Order No. 2020-67 and its successors *are* valid. In my view, the Legislature's inability to satisfy MCR 7.305(B)(4) is fatal to its bypass application.[2] Since the Michigan Constitution commits to us the ability to prescribe our own appellate jurisdiction, we are obliged to scrupulously adhere to the restrictions we have imposed on ourselves if we are to sit in judgment of the constitutionality of 1945 PA 302 and the Governor's actions under it.[3]

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that it has suffered a substantial harm at this point with the certainty required to justify the extraordinary act of granting a bypass appeal. After Court of Appeals review, the Legislature would need to show only that either "the issue involves a substantial question about the validity of a legislative act," "the issue has significant public interest and the case is one . . . against . . . an officer of the state . . . in the officer's official capacity," or that "the issue involves a legal principle of major significance to the state's jurisprudence." MCR 7.305(B)(1) through (3). I predict these showings will be much easier to make.

[2] Justice ZAHRA argues that "even assuming there is a shortcoming in the Legislature's application, that defect is cured by the Governor's" bypass cross-appeal, but I disagree. The court rules list what an application for leave to appeal "must show," MCR 7.305(B), and the Legislature's application does not make the required showing. There is no indication under the rule that a party who fails to make a required showing can have its application rehabilitated by the other side. I am also unpersuaded by Justice VIVIANO's citation of the rules of the Supreme Court of the United States. Justice VIVIANO does not deny that the language used there is different from our rules and requires a showing only "that the case is of such imperative public importance as to justify deviation from normal appellate practice . . . ." Sup Ct Rule 11. Our general rules governing leave to appeal require a similar showing, see MCR 7.305(B)(1) through (3), but for a bypass application our rules require the *additional* showing, beyond the importance of the issues, of either substantial harm or that the case is an appeal from a ruling that certain legislative or executive actions are invalid, MCR 7.305(B)(4). I do not believe such a showing is made here. Nor do I believe that the decisions of other state supreme courts, with different court rules, should control our application of our court rules.

[3] Justice VIVIANO asserts that "[i]t is indisputable that our Court has jurisdiction over this case," but with a plurality of this Court concluding otherwise, it is plainly disputable. An application "must show" the items included in the list. MCR 7.305(B). Echoing that language, commentary on our rules also characterizes it as mandatory. See Gerville-Réache, *Expediting Review*, § 7.23, p 199 in Michigan Appellate Handbook (Shannon & Gerville-Réache eds, 3d ed, January 2018 update) (remarking that a bypass application "must show" the grounds listed in MCR 7.305(B)(4)). Moreover, the original form of the rule provided only that bypass applications show that "delay in final adjudication is likely to result in substantial harm"; the additional option in MCR 7.305(B)(4)(b) that a bypass

I also concur with denying the Governor's bypass cross-appeal. "It is a general rule in this state . . . that only a party aggrieved by a decision has a right to appeal from that decision," meaning that " '[a] party who could not benefit from a change in the judgment has no appealable interest.' " *Ford Motor Co v Jackson (On Rehearing)*, 399 Mich 213, 225-226 (1976) (citation omitted). It is, at minimum, uncertain to me whether the Governor is aggrieved by the decision of the Court of Claims such that she would have appellate standing at this juncture. On the one hand, the Court of Claims ruled that EO 2020-68 was an invalid evasion of the requirement under MCL 30.403(3) and (4) of the Emergency Management Act (EMA), MCL 30.401 *et seq*., that the Legislature approve disaster and emergency declarations after 28 days; invalidating EO 2020-68 falls within the terms of MCR 7.305(B)(4)(b) and is arguably the sort of appealable interest an appealing party must possess. However, the Court of Claims also ruled that MCL 10.31(1) was an adequate basis for all of the Governor's substantive orders that have purported to regulate much of life in Michigan after April 30, 2020.[4] Because no substantive regulation issued by the Governor has been held invalid, I question whether the Court of Claims' ruling that EO 2020-68 invalidly evaded the EMA is anything more than an advisory opinion.[5] And, because "it is only opinions issued by the Supreme

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application can also show that it is an appeal from a ruling that various forms of law or government action are invalid was added in 2002. See 466 Mich lxxxvi, lxxxix (2002). Since such a judicial declaration would already have fallen within the grounds listed in MCR 7.305(B)(1) through (3), the fact that MCR 7.305(B)(4)(b) was added to MCR 7.305(B)(4) indicates that we understood it to be mandatory for bypass applications; otherwise, it would be redundant of what is already stated in MCR 7.305(B)(1) through (3). Our past practice also indicates it is mandatory, as we have denied bypass applications on the basis that the grounds in the rule were not satisfied. See *White v Detroit Election Comm*, 495 Mich 884 (2013); *Barrow v Detroit Election Comm*, 495 Mich 884 (2013). (Note that at the time *White* and *Barrow* were decided, this requirement was found at MCR 7.302(B)(4). It was moved to MCR 7.305(B)(4) as part of a general rewrite of the rules governing practice in this Court. See 497 Mich xcxi, cxcv (2015).)

[4] The Legislature approved an extension of the Governor's initial emergency declaration under the EMA until April 30, see 2020 SCR 24, but did not adopt further extensions.

[5] On the other hand, the Governor may have a viable *contingent* cross-appeal, in which she challenges the decision of the Court of Claims to the extent that the appellate courts reverse the Court of Claims' decision upholding her executive orders under MCL 10.31(1). If "the cross-appellant, like any appellant, must be an aggrieved party in some respect, meaning it must be able to identify a concrete and particularized injury that can be redressed in the context of the cross-appeal," Rose, *Appeals of Right in the Court of Appeals*, § 4.46, p 100, in Michigan Appellate Handbook (Shannon & Gerville-Réache eds, 3d ed, January 2018 update), it may be that the Governor's interest in maintaining any cross-appeal would be contingent on the outcome of the Legislature's appeal. Given

Court and published opinions of the Court of Appeals that have precedential effect under the rule of stare decisis," *Detroit v Qualls*, 434 Mich 340, 360 n 35 (1990), the Court of Claims' remarks about EO 2020-68 will not control future litigation over the propriety of the Governor's actions under the EMA—even future COVID-19 litigation.[6] The Governor appears aware of this reality, because when she announced a subsequent extension of the COVID-19 state of emergency in Executive Order No. 2020-99, she continued to declare emergencies under both MCL 10.31(1) and—"[s]ubject to the ongoing litigation"—the EMA. Given my qualms, I am not convinced that Justice ZAHRA is correct to allege that the Governor's bypass cross-appeal "cure[s]" any defects in the Legislature's application. I am also unmoved by the fact that both parties ask us to grant these bypass applications. This Court writes the court rules; I do not believe the parties can rewrite the rules for us by their mutual agreement so as to bootstrap their way to jurisdiction.

I also do not believe it would be prudent to hear this case at this juncture. The statutes at issue have seen very little litigation arise under them, meaning there is little on-point authority. Moreover, the theory by which the Legislature asserts standing to bring this suit in the first place is entirely novel in Michigan. Further appellate review and development of the arguments will only assist this Court in reaching the best possible answers.[7] Until a vaccine for COVID-19 is invented, our society will be living with the

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these uncertainties, however, at minimum I do not believe it would be wise to exercise any discretion we may have to hear this case without allowing it full appellate review. For all these reasons, I do not think the Governor's bypass cross-appeal rehabilitates the Legislature's defective initial bypass application.

[6] Justice VIVIANO questions whether my reasoning renders the bypass appeal provision nugatory given that, in bypassing the Court of Appeals, a party will necessarily "be appealing a nonbinding decision." But this is clearly incorrect. Had the Governor been told that her substantive executive orders were invalid, she would have been ordered by a court to stop doing something she was doing, and exposed to contempt sanctions if she did not, without regard to whether the reasoning was binding on future disputes. I question whether the Court of Claims' ruling here aggrieved the Governor because it essentially answered the hypothetical question of whether her executive orders *would* be valid *if* MCL 10.31(1) were not an adequate basis for them. Such a ruling does not appear to control her current orders, nor is its reasoning binding on future disputes. It is, at minimum, a sufficiently uncertain question that I do not believe this Court can properly predicate its review of this case on this foundation.

[7] As Justice VIVIANO points out in his dissent, there are numerous cases relating to COVID-19 making their way through our state and federal courts. While many of these cases raise issues distinct from those raised by the Legislature in this case, in at least one, the Court of Appeals has granted leave to appeal on a very similar issue—"whether the trial court abused its discretion in ruling that plaintiff's claim regarding the

risk of the spread of this disease and the argued necessity of emergency measures to mitigate that spread. There is little prospect of these disputes being rendered moot, and I have little doubt that the Court will take them up in the future.

I also disagree that this Court should heavy-handedly direct the Court of Appeals in its management of this litigation. First of all, if there is a need for expedited consideration, the parties are free to request it from the Court of Appeals, which is better positioned to know how best to balance the need for expeditious review with the resources it has available to scrutinize the arguments being made. I disagree with Justice VIVIANO that the Court of Appeals will simply put this case on any "conveyor belt," and I believe they will recognize "this is no ordinary case." Second, the cases in which we most often direct expedited review are election cases in which the parties have externally imposed deadlines they must satisfy to submit paperwork or print ballots. See, e.g., *League of Women Voters v Secretary of State*, 505 Mich 931 (2019). Third, I believe many of the observations that justify denying this bypass application also justify declining to order an extraordinary schedule in the Court of Appeals. Justice ZAHRA argues that "the people of this state have a great interest in the final disposition of these issues," but the people of this state are not a party to the case—the Legislature is, suing in its institutional capacity and arguing that its prerogatives are being violated. Until a final judicial resolution of these issues is reached, the Legislature is free in the interim to avail itself of the ordinary legislative process under the Constitution. That this Court has resolved this bypass application in less than two weeks is, I believe, evidence enough that we are treating these issues with appropriate urgency.

As noted, the issue before us is not whether we will *ever* decide these issues, but rather whether we will decide them before the Court of Appeals has considered them. Because I conclude that we neither can nor should grant these bypass applications, I concur with our order denying them.

MCCORMACK, C.J., and CAVANAGH, J., join the statement of CLEMENT, J.

MARKMAN, J. (*dissenting*).

I dissent from the majority's decision to deny the parties' applications to bypass the Court of Appeals in order to expedite the final resolution of the present dispute. Indeed, in all likelihood, the consequence of our decision today will be to ensure that this Court never issues a meaningful decision concerning the nature and required procedures of the emergency authority of this state. For the following reasons, I would grant these

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unconstitutionality of the [emergency powers of the governor act], MCL 10.31 *et seq*., was unlikely to succeed." *Mich United for Liberty v Governor*, order of the Court of Appeals, entered May 29, 2020 (Docket No. 353643).

applications.

First, I would grant the applications because they pertain to an issue of the greatest practical importance to the more than 10 million people of this state: the validity of executive orders declaring a state of emergency and thereby enabling a single public official to restrict and regulate travel, assembly, business operations, educational opportunities, freedoms and civil liberties, and other ordinary aspects of the daily lives of these people, including matters of crime and punishment and public safety. To put it even more specifically, the present applications place into question the entirety of the processes and procedures by which the executive orders that have defined nearly every minute, and nearly every aspect, of the lives of "we the people" of Michigan for more than the past two months were fashioned into law.

Second, I would grant the applications because, notwithstanding their vast differences in apprehending the legal and constitutional preconditions required of an emergency order, the parties *commonly* argue that this Court should grant their bypass applications in light of the profound significance and practical impact of the present emergency orders.

Third, I would grant the applications because they implicate a "case or controversy" of the greatest historical consequence between the two representative and accountable branches of our state government: each in concurrence seeking the counsel of the third branch as to what is demanded by the constitutional charter that has guided the people's government for the past 185 years. The Governor contends that her office possesses the authority to issue the executive orders in response to the present emergency, while the Legislature in response contends that her office lacks such authority absent its own participation. Put simply, what is at issue is how the extraordinary emergency powers of government are to be invoked and how the decision-makers of our two most fundamental constitutional institutions are respectively to be engaged.

Fourth, I would grant the applications because time is an altogether relevant consideration to what is required of this judiciary. Our state continues in the midst of an emergency in which both the lives and the liberties of its people are being lost each day. By today's action, it is unlikely that this Court will ever decisively resolve the present dispute and thus that whatever errors or excesses may have been made in the course of the present emergency will never be pronounced or remedied but left only to be repeated on the occasion of what inevitably will arise some day as our next emergency.

Fifth, I would grant the applications because this case cries out for the most expedited and final review of the highest court of this state. If there is a matter, if there is an obligation, that compels the most urgent action of this Court, it is the present matter, our present obligation. This case defines the very purpose and the fundamental

responsibility of a supreme court of this union of states. By our decision to deny the applications for bypass, we bypass an exercise of authority to decide what is perhaps the most substantial dispute ever presented to this Court, not only diminishing our standing among the judicial institutions of our federal system but diminishing our relevance within the judicial institutions of this state itself.

ZAHRA, J., joins the statement of MARKMAN, J.

ZAHRA, J. (*dissenting*).

I dissent from this Court's order denying both litigants' applications for leave to appeal from the Court of Claims, thereby leaving intact without immediate review the Governor's various emergency orders issued in response to the COVID-19 pandemic and the Court of Claims order ruling in part that the Governor acted erroneously under MCL 30.401 *et seq.* I would grant the applications and decide the matters forthwith. I also dissent from this Court's inexplicable failure to direct the Court of Appeals to hear this case on an expedited basis. This case presents palpable constitutional questions that are of compelling interest to every resident, business, and employer in Michigan. The instant matter is arguably the most significant constitutional question presented to this Court in the last 50 years. By granting both applications, this Court could put to rest with finality whether and to what extent the legislation on which the Governor relied to issue the serial emergency COVID-19 orders remains a valid source of legal authority for those orders. Admittedly, deciding these difficult questions is no easy task. But the people of this state rightly demand that this Court resolve such difficult questions. Because each resident's personal liberty is at stake, it is emphatically our duty to decide this case. I dissent from the Court's failure to immediately undertake this duty.

Life for people throughout Michigan was turned on its head when on March 10, 2020, in response to the COVID-19 pandemic that threatened widespread contagion, serious and sometimes fatal illness, and a critical overload to our health system, the Governor issued Executive Order No. 2020-4, declaring a state of emergency under the authority of two separate statutory delegations of emergency authority: 1945 PA 302, known as the "emergency powers of the governor act" (EPGA), MCL 10.31 *et seq.*; and the Emergency Management Act (EMA), MCL 30.401 *et seq*. The EMA carries a 28-day limit on the amount of time in which the Governor can issue orders under a state of emergency before the act requires the Governor to declare an end to the emergency, unless both houses of the Legislature extend the period through a resolution.[8]

[8] MCL 30.403(3). The Governor, however, argues that the Court of Claims erred by concluding that she cannot issue new orders reinstituting the effect of her prior orders at the end of each order issued under the EMA.

Over the next several weeks, the Governor issued numerous additional statewide orders generally requiring people to stay at home unless their departure from home was essential, closing all nonessential[9] businesses, closing all schools before the end of the school year, and seriously restricting travel, assembly, and other aspects of daily life. Law and nonemergency medical offices throughout Michigan were closed indefinitely. Both houses of the Michigan Legislature granted the Governor an extension of authority to April 30, 2020, but neither the House of Representatives nor the Senate passed a resolution to grant any further extension. On the day the EMA expressly required the declaration of emergency to be rescinded, the Governor rescinded the declaration and, within minutes, declared another statewide emergency on the basis of COVID-19, ordering that all the previous orders should now be considered effective under the new order. The Governor separately declared a state of emergency under the EPGA and ordered that all previous orders should be considered effective under that declaration as well.

People throughout Michigan were understandably frustrated over their inability to leave home to, among other things, work, engage in commerce, obtain preventative health care, visit friends and family, and maintain their personal appearance with salon and grooming services. Sporadic peaceful protests broke out throughout the state in which some residents practiced civil disobedience. The political branches of government divided over the issue. The Legislature believed it should be permitted a seat at the table in crafting emergency orders, and the Governor proclaimed unilateral authority to act.

The Michigan House of Representatives and the Michigan Senate sued the Governor in the Court of Claims, seeking a declaratory ruling that the Governor's authority under the EMA had expired and that the EPGA pertained only to local matters and did not authorize a statewide declaration of emergency. The Governor responded that each source of statutory authority continued to provide her with the power to issue orders for the protection of the public health. The Court of Claims agreed with the Legislature that the Governor's authority under the EMA had expired, but held that the EPGA granted the Governor independent authority to issue orders that would protect lives and control the emergency situation created by COVID-19. That same day, the Legislature filed an application for leave to appeal in the Court of Appeals and filed in this Court an application for leave to appeal under MCR 7.305(B)(4), which permits "an appeal before a decision of the Court of Appeals."

The Governor filed a brief in response to the Legislature's application in this Court as well as an application for leave to appeal challenging two holdings of the Court

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[9] Many of the Governor's orders distinguished essential from nonessential activity. Still, in other areas, the people were left to wonder whether certain activities in which they wished to engage were permitted under the various orders. See note 3 of this statement.

of Claims: (1) the conclusion that the Legislature has standing to bring a declaratory action, and (2) the holding that Executive Order No. 2020-68 was invalid because the Governor's authority to act under the EMA had expired.

Significantly, both of our coequal branches of government (the parties to this litigation) recognize the gravity of this matter and have asked this Court to resolve the constitutional questions before the Court without the benefit of intermediary (and prolonged) review from our Court of Appeals. Because MCR 7.305(B)(4) is perfectly satisfied,[10] this Court should forthwith decide the following three questions:

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[10] Not only would I accept the parties' olive branch and address this matter to maintain comity within our state government, our court rules, namely MCR 7.305(B)(4), emphasize this Court's defined role to determine matters in which:

> (a) delay in final adjudication is likely to cause substantial harm, or
>
> (b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branches of state government is invalid[.]

My concurring colleagues, by contrast, believe a bypass of the Court of Appeals is not warranted because the Legislature has failed to satisfy the requirements of MCR 7.305(B)(4). In arguing its case to bypass the Court of Appeals, the Legislature asserts:

> Delaying final adjudication would do "substantial harm," as citizens and lawmakers would be left in a state of uncertainty at a time when confident decision-making is a requirement for survival. Michiganders are living under and attempting to interpret orders that never should have been implemented over their Legislature's objection; at the very least, they are living under a cloud of ambiguity that can be rectified by this Court. MCR 7.305(B)(4)(a). The *ultra vires* nature of the Governor's actions puts at risk people who are relying on governmental direction to guide their conduct. Lastly, this appeal involves a ruling that has already declared one related "action of the . . . executive branch[] of state government invalid." MCR 7.305(B)(4)(b). [Alterations in original.]

I am persuaded that the requirements of MCR 7.305(B)(4) are satisfied. As representatives of the people, the Legislature clearly has an interest in providing certainty "at a time when confident decision-making is a requirement for survival." It is no secret that many residents and businesses have struggled to understand the Governor's emergency executive orders related to the COVID-19 virus. See DesOrmeau, *After 102 Executive Orders, Confusion is Commonplace on What's Allowed in Michigan and What Isn't* <https://www.mlive.com/public-interest/2020/05/after-101-executive-orders-confusion-is-commonplace-on-whats-allowed-in-michigan-and-what-isnt.html> (accessed June 2, 2020) [https://perma.cc/K5WK-4RCY]. Further, the Governor makes

(1) whether the Michigan Senate and the Michigan House of Representatives have standing in this case to seek declaratory relief in the Court of Claims,

(2) whether the Governor has continuing authority under the Emergency Management Act (EMA), MCL 30.401 *et seq*., to issue emergency executive orders related to the COVID-19 virus, and

(3) whether the Governor has continuing authority under the emergency powers of the governor act (EPGA), MCL 10.31 *et seq*., to issue emergency executive orders related to the COVID-19 virus.

The members of this Supreme Court, Michigan's court of last resort, have been elected to serve as the final arbiters of law and constitutional questions that are of significant public interest and importance to our state. No issue is of greater public interest or importance than the resolution of whether the Governor was within her constitutional authority to deprive the 10-million-plus residents and the thousands of business owners of Michigan of their personal freedom and economic liberty. Unlike the legislative and executive branches of government, which make and enforce laws through a political process, the judiciary is the nonpolitical branch of government charged with the extremely limited but all-important role of interpreting only those laws and constitutional questions presented in cases and controversies brought to the Court by adversaries in litigation. It is exactly because this Court is the pinnacle of the apolitical branch of government and limited in the scope of its duties that the people trust and accept our resolution of disputes, even when we are sharply divided when rendering our opinions. This is all the more true where, as here, the case presents a constitutional question of significant magnitude that divides our political branches of government. The people of Michigan expect this Court to resolve this dispute. We should do so.

And yet, beyond declining to grant the Legislature's application, the Court's majority also fails to order the Court of Appeals to hear and resolve these issues on an expedited basis. I make no attempt to explicate this failure. Again, both of our coequal branches of government have asked for these significant constitutional questions to be answered as soon as possible. And the people of this state have a great interest in the final disposition of these issues as soon as possible. To the extent a majority of this Court

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no attempt to rebut the Legislature's assertion that it has been particularly harmed by the Governor's usurpation of Legislative power through her emergency executive orders.

Moreover, even assuming there is a shortcoming in the Legislature's application, that defect is cured by the Governor's application, which expressly invites a challenge to the Court of Claims' holding that the Governor's actions were invalid under the EMA. See MCR 7.305(B)(4)(b). Again, both of our coequal branches of government want these questions answered. We should honor their requests.

has concluded that the wisdom of our intermediate appellate court is essential to our resolution of these weighty issues, there is no reason why this Court should not order the Court of Appeals to hear and decide these questions forthwith. The Court's failure to, at a minimum, require the Court of Appeals to decide these cases on an expeditious basis fails to accord the respect due to our coequal branches of government and displays insensitivity to the people of this state who are entitled to know with certainty whether the constraints of liberty imposed by the emergency orders under which they labor are constitutionally permissible.

MARKMAN, J., joins the statement of ZAHRA, J.

VIVIANO, J. (*dissenting*).

The Court today turns down an extraordinary request by the leaders of our coequal branches of government to immediately hear and decide a case that impacts the constitutional liberties of every one of Michigan's nearly 10 million citizens.[11] See *Walsh v River Rouge*, 385 Mich 623, 639 (1971) ("The invocation of a curfew or restriction on the right to assemble or prohibiting the right to carry on businesses licensed by the State of Michigan involves the suspension of constitutional liberties of the people."). Because I believe we are duty-bound to give our immediate attention to this case, I cannot join an order that nonchalantly pushes it off for another day.

The Governor and the Legislature do not seem to agree on many things these days, but they both agree that this case merits our immediate attention. In addition, since they individually and collectively represent every single resident of our state, one can surmise that the views of the Governor and Legislature represent the diverse views of large numbers of our citizens. They are crying out to this Court for help because there is a significant amount of confusion in our state over what the Governor's executive orders mean and whether they are enforceable.[12] And the instant case is not the only one involving questions regarding the validity of the Governor's actions to combat COVID-

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[11] Justice CLEMENT is of course correct that this case does not involve a direct claim of a constitutional rights violation. But, since the validity of the Governor's executive orders are at stake, and it is indisputable that those orders impinge on the constitutional liberties of our citizens, it is rudimentary logic—not hyperbole—to say that the case impacts the civil liberties of our citizens.

[12] See, e.g., DesOrmeau, *After 102 Executive Orders, Confusion is Commonplace on What's Allowed in Michigan and What Isn't* <https://www.mlive.com/public-interest/2020/05/after-101-executive-orders-confusion-is-commonplace-on-whats-allowed-in-michigan-and-what-isnt.html> (accessed June 2, 2020) [https://perma.cc/K5WK-4RCY].

19.[13] A substantive ruling on the merits of this case by our Court would not only provide clarity to the Governor, the Legislature, and the public, but it would also assist the lower courts as they continue to address these issues in other matters.

I agree with Justice ZAHRA that both applications easily satisfy the requirements of our bypass rule, MCR 7.305(B)(4). As an initial matter, it is clear that our Court has jurisdiction here under MCR 7.303, which governs the jurisdiction of the Supreme Court. Under MCR 7.303(B)(1), we have discretion to "review by appeal a case pending in the Court of Appeals or after decision by the Court of Appeals (see MCR 7.305)." Contrary to JUSTICE CLEMENT's suggestion, we have never held that the grounds for discretionary appeal are jurisdictional—I see no reason to do so now. It is indisputable that our Court has jurisdiction over this case, if we choose to assert it.

The Legislature's bypass application clearly shows that a "delay in final adjudication is likely to cause substantial harm.]" MCR 7.305(B)(4)(a). The second question presented in the application is "whether the Emergency Powers of the Governor Act [MCL 10.31 *et seq*.] is consistent with the separation-of-powers doctrine in the Michigan Constitution, where the act . . . results in the usurpation of the Legislature's role in formulating public policy[.]" The Legislature further asserts that "COVID-19 presents real problems that call for a comprehensive and deliberative governmental response. The Court should restore the proper constitutional order and allow the branches to get to work—together."[14] In short, the Legislature is arguing that because the

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[13] There are at least five other cases involving challenges to COVID restrictions in the lower courts: *Martinko v Governor* (Docket No. 353604); *Slis v Michigan* (Docket No. 351211); *Dep't of Health & Human Servs v Manke* (Docket No. 353607); *Mich United for Liberty v Governor* (Docket No. 353643); and *Associated Builders & Contractors of Mich v Governor* (Docket No. 20-000092-MZ). Cases concerning the restrictions are also proliferating in the federal courts. See *Mitchell v Whitmer* (Case No. 1:20-cv-00384) (WD Mich); *League of Indep Fitness Facilities & Trainers, Inc v Whitmer* (Case No. 1:20-cv-00458) (WD Mich); *Allen v Whitmer* (Case No. 2:20-cv-11020) (ED Mich); *Mich United Conservation Clubs v Whitmer* (Case No. 1:20-cv-00335) (WD Mich); *Mich Nursery & Landscape Ass'n v Whitmer* (Case No. 1:20-cv-331) (WD Mich); *Beemer v Whitmer* (Case No. 1:20-cv-323) (WD Mich); *VanderZwaag v Whitmer* (Case No. 1:20-cv-325) (WD Mich); *Martinko v Whitmer* (Case No. 2:20-cv-10931) (ED Mich); *Thompson v Whitmer* (Case No. 1:20-cv-00428) (WD Mich); *Midwest Institute of Health, PLLC v Whitmer* (Case No. 1:20-cv-00414) (WD Mich); *Otworth v Whitmer* (Case No. 1:20-cv-00405-PLM-RSK) (WD Mich); *Signature Sotheby's Int'l Realty, Inc v Whitmer* (Case No. 1:20-cv-00360) (WD Mich). More are sure to follow.

[14] See also Michigan Legislature's Emergency Bypass Application for Leave to Appeal, p 27 ("In effectively exercising standardless lawmaking authority to formulate public policy rather than the democratic process, the Governor has usurped the Legislature's

Governor has claimed the authority to exercise core legislative powers for an indefinite period, the Legislature has been displaced from its normal constitutional role as the branch with "the authority to make, alter, amend, and repeal laws." *Harsha v Detroit*, 261 Mich 586, 590 (1933). See Const 1963, art 4, § 1 (stating that with certain exceptions not relevant here, "the legislative power of the State of Michigan is vested in a senate and house of representatives"); Const 1963, art 4, § 51 ("The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health."). At the bypass stage, we need not decide the merits of the Legislature's separation-of-powers argument. It is enough to recognize the obvious, substantial, and ongoing institutional harm that is being caused if the Legislature's claim has merit.

Justice CLEMENT asserts, not incorrectly, that the Legislature still has the power to enact laws. But that misses the point of the Legislature's claim. Absent the Governor's extraordinary exercise of core legislative powers during the pandemic, the normal constitutional order would prevail and the Governor and the Legislature would be compelled to work together to shape the public policy of our state. Instead of needing a supermajority vote to override the Governor's veto and restore the *status quo ante*, the Legislature could enact laws and present them to the Governor by a simple majority vote of each house. And the Governor would have an incentive—the one our founders built into our system of government—to work with Legislature to develop bills that she found acceptable and would be willing to sign into law. The Legislature's position, in short, is that by her ongoing and broad exercise of the legislative power, the Governor has usurped its power and diminished its institutional role. Being sidelined from its role in shaping public policy during this pandemic is undoubtedly a substantial harm to the institutional prerogatives of the Legislature.

The concurring justices give even shorter shrift to the Governor's bypass application. For one thing, Justice CLEMENT's concurrence never mentions or purports to apply our bypass rule with regard to the Governor's application. Instead it offers a series of suppositions on topics other than whether the Governor is appealing the invalidation of executive action, which is all that MCR 7.305(B)(4)(b) requires and which is precisely what the Governor seeks to appeal here. The Court of Claims invalidated an executive order, No. 2020-68, which the Governor issued under the Emergency Management Act (EMA), MCL 30.401 *et seq.*

Justice CLEMENT seems to agree that the Governor has met the requirements of MCR 7.305(B)(4)(b). The thrust of Justice CLEMENT's argument is that the Governor

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power."); *id.* at 33 ("Nor can the Governor usurp the lawmaking power merely because she disagrees with the Legislature's response to the COVID-19 crisis.").

might not be an aggrieved party because, even though the court struck down her order under the EMA, she was able to retain all her substantive regulations in an identical order under the emergency powers of the governor act (EPGA). But the Governor has good reason for feeling that she is aggrieved even if her regulations remain standing at this point in the proceedings. "[T]o have standing on appeal [i.e., to be an aggrieved party], a litigant must have suffered a concrete and particularized injury" arising from the judgment below. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291 (2006).[15] The Governor argues that the "EMA provides for a more extensive structure of governmental action in response to an emergency, and a more detailed set of powers for the Governor to implement in that response." A comparison of the two statutes at issue displays the EMA's more elaborate provisions. Compare MCL 10.31 (setting forth the Governor's general authority to promulgate orders after proclaiming a state of emergency) with, e.g., MCL 30.408 and MCL 30.409 (establishing emergency manager coordinators across various institutions and entities) and MCL 30.411 (providing limited immunity). And, importantly, the Governor contends that the EMA not only empowers her to act but affirmatively *requires* her to declare an emergency or disaster. Whether these provisions and others differentiate the EMA from the EPGA, so that the statutes do not conflict, goes to the merits of the statutory issue in this case, and thus I would not now suggest an answer. It is enough here that the Governor has raised a colorable argument that the decision below struck down her executive order, effectively cabined her statutory tools, and required her to disregard statutory obligations. This constitutes a concrete and particular injury.

Moreover, consider the implications of Justice CLEMENT's hunch about the Governor's aggrieved-party status. If the Legislature successfully appealed its claims—either here or in the Court of Appeals—and the EPGA no longer authorized Executive Order No. 2020-68, then the Governor would need to fall back on the EMA. But by that point it would doubtless be too late for her to appeal.[16] In other words, the Governor would become aggrieved only when it would be too late for her to do anything about it.[17]

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[15] See also *Attorney General v Bd of State Canvassers*, 500 Mich 907, 908 n 6 (2016) (ZAHRA and VIVIANO, JJ., concurring) (" 'Aggrieved' is a term of art defined as 'having legal rights that are adversely affected; having been harmed by an infringement of legal rights.' An 'aggrieved party' is 'a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment.' Thus, to be 'aggrieved,' a party must demonstrate that it has been harmed in some fashion.") (citations omitted).

[16] Under Justice CLEMENT's logic, it would not be enough for the Governor that the Legislature could satisfy the bypass rule in order for her to bring her appeal.

[17] In addition, Justice CLEMENT's reminder that the Court of Claims' decision is not binding is irrelevant: it would seemingly always be the case that a party seeking to bypass

In sum, because the Governor is appealing the invalidation of her executive actions, her bypass application satisfies MCR 7.305(B)(4)(b). And she also has claimed sufficient injury from the judgment below. If the majority wishes to deny the application on other grounds, so be it. But it should not pretend the Court's hands are tied by our procedural rules.[18]

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the Court of Appeals will be appealing a nonbinding decision. If this is a meaningful consideration in rejecting a bypass, then one wonders why we have the rule at all.

[18] By denying the bypass, the majority has not only written the bypass court rule out of the rulebook, it has also put us at odds with the highest courts of many other states who have not faltered in their responsibility to timely address the significant legal issues arising from their states' responses to the COVID-19 pandemic. The Pennsylvania Supreme Court, exercising immediate jurisdiction in a challenge to executive orders, said it well: "[T]his case presents issues of immediate and immense public importance impacting virtually all Pennsylvanians and thousands of Pennsylvania businesses, and that continued challenges to the Executive Order will cause further uncertainty." *Friends of Danny DeVito v Wolf*, ___ Pa ___, ___ (2020) (Docket No. 68 MM 2020), slip op at 17. In a similar case, the Kansas Supreme Court exercised expedited original jurisdiction, explaining that such jurisdiction lay when the court "determine[s] the issue is of sufficient public concern. Under the circumstances our state faces, we easily do." *Kelly v Legislative Coordinating Council*, ___ Kan ___, ___ (2020) (Docket No. 122765), slip op at 9 (citation omitted). See also *In re State of Texas*, ___SW3d___ (2020) (Docket No. 20-0394) (addressing whether COVID-19 justified voting by mail); *Seawright v New York City Bd of Elections*, ___ NY2d ___ (2020) (Slip Op No. 02993) (addressing election requirements in light of COVID-19); *Wisconsin Legislature v Palm*, ___ Wis 2d___, ___; 2020 WI 42, ¶ 10 (Wis, May 13, 2020) (exercising original jurisdiction—which covered cases " 'that should trigger the institutional responsibilities of the Supreme Court' "—over the legislature's challenge of executive orders because the "order . . . impacts every person in Wisconsin, as well as persons who come into Wisconsin, and every 'non-essential business' ") (citation omitted); *Cal Attorneys for Criminal Justice v Newsom*, order of the California Supreme Court, entered May 13, 2020 (Case No. S261829), p 1 ("This mandate proceeding, like others that have recently come before this court, raises urgent questions concerning the responsibility of state authorities during the current pandemic to protect the health and safety of inmates . . . in light of the spread of the novel coronavirus . . . ."); *id.* at 4 (Liu, J., dissenting) ("As a prudential matter, we exercise [original mandamus] jurisdiction 'only in cases in which "the issues presented are of great public importance and must be resolved promptly." ' If there is any case where exercising our mandamus jurisdiction is appropriate, this is it.") (citations omitted); *Comm for Pub Counsel Servs v Chief Justice of the Trial Court*, 484 Mass 1029, 1029 (2020) (denying reconsideration of earlier holding that the court had superintending authority "to stay a final sentence that is being served, absent a pending

appeal or a motion for new trial"); *Goldstein v Secretary of the Commonwealth*, 484 Mass 516 (2020) (addressing an election-signature requirement in light of COVID); *In re Abbott*, ___SW3d___, 63 Tex Sup Ct J 909 (2020) (holding that trial judges lacked standing to challenge an executive order applying to bail decisions); *Comm for Pub Counsel Servs v Chief Justice of the Trial Court*, 484 Mass 431, 446 (2020) (exercising general superintendence, under which the court could "remedy matters of public interest 'that may cause further uncertainty within the courts' ") (citation omitted); *Christie v Commonwealth*, 484 Mass 397 (2020) (hearing petition for immediate release from custody due to COVID-19 concerns under the court's general superintendence power); *In re Interrogatory on House Joint Resolution 20-1006*, ___P3d___, ___; 2020 CO 23, ¶ 28 (Colo, 2020) ("We conclude that the interrogatory [by the General Assembly asking for guidance in light of conditions posed by COVID-19 on a constitutional requirement] now before us presents an important question upon a solemn occasion. Accordingly, we exercise original jurisdiction. The General Assembly and the public at large urgently need an answer to the interrogatory to avoid uncertainty surrounding the length of the remaining regular session and its impact on pending bills and bills yet to be introduced."); cf. *Strizich v Mont Dep't of Corrections*, order of the Montana Supreme Court, entered May 5, 2020 (Case No. OP 20-0225) (declining to consider petition for injunctive relief because the case, involving COVID-19 and state correctional facilities, was fact-intensive); *Disability Rights Mont v Mont Judicial Districts 1-22*, order of the Montana Supreme Court, entered April 14, 2020 (Case No. OP 20-0189) (denying petition to exercise mandamus power because the request involved factual issues and the legal contention failed on the merits).

It is noteworthy, too, that in the United States Supreme Court, the significance of the issues would alone justify bypassing the court of appeals. See also Sup Ct Rule 11 ("A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such *imperative public importance* as to justify deviation from normal appellate practice and to require immediate determination in this Court.") (emphasis added). Indeed, "[t]he writ . . . has been granted in some of the most important cases in [the last] century." Lindgren & Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup Ct Rev 259, 259 (1986); see *Dames & Moore v Regan*, 453 US 654, 667-668 (1981) ("Arguing that this is a case of 'imperative public importance,' petitioner then sought a writ of certiorari before judgment. Because the issues presented here are of great significance and demand prompt resolution, we granted the petition for the writ, adopted an expedited briefing schedule, and set the case for oral argument on June 24, 1981.") (citations omitted).

* * *

This case involves some of the most important legal principles that can arise in a free society. The parties' briefs reverberate with weighty assertions about our constitutional structure, as well as the need for and the scope of the Governor's emergency powers. These issues, and how we decide them, will have a direct impact on the constitutional liberties of every person who lives or owns property in, or simply visits, our state while the restrictions are in place. On a fundamental and practical level, they impact how our friends and neighbors live their lives on a daily basis, where they can go, with whom, how and when they can practice their religion, whether they can go out to eat or to the hardware store or to the beach—in short, nearly every decision they make about nearly everything that they do. Our Court exists to vindicate the constitutional rights of our citizens and to be the final expositor of state law; thus, we are uniquely situated to provide a prompt and final resolution of the issues presented in this case.

The leaders of our state government believe we should hear this case now. I agree. But instead of rising to the occasion, the majority order dodges these issues for now and defers them to the lower courts so they can weigh in first. Ordinarily, I would agree with this approach. But this is no ordinary case. It should not simply go on the conveyor belt with all of the others. Because my colleagues have decided to put it there at least for the time being, I respectfully dissent.

s0601

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 4, 2020

Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

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

Defendants.
/

No. 1:20-cv-00414

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

EXHIBIT B

STATE OF MICHIGAN

COURT OF CLAIMS

STEVE MARTINKO, et al,

Plaintiffs,

OPINION AND ORDER REGARDING PLAINTIFFS' APRIL 23, 2020 MOTION FOR A PRELIMINARY INJUNCTION

v

Case No. 20-00062-MM

Hon. Christopher M. Murray

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, DANIEL EICHINGER, in his official capacity as Director of the Michigan Department of Natural Resources, and DANA NESSEL, in her official capacity as the Attorney General for the State of Michigan,

Defendants.
_____/

I. INTRODUCTION

This matter was filed by five Michigan residents who claim that three of Governor Whitmer's executive orders, Executive Orders 2020-21 and 2020-42,[1] and now Executive Order 2020-59, infringe on their constitutional rights to procedural due process and substantive due

[1] Plaintiffs recognize that EO 2020-21 was rescinded by EO 2020-42, and they claim that EO 2020-42 "extended the timeline originally set by [EO] 2020-21 and grossly expands its restrictions on businesses' and individuals' fundamental rights." After the verified complaint was filed, EO 2020-42 was rescinded by EO 2020-59, which (among other things) eliminated the prohibitions on traveling intrastate to another residence, from not using motorized boats on the waterways, and to an extent allows the re-opening of some businesses and state parks. Although plaintiffs challenge the same restrictions set forth in EO 2020-42, the Court will for clarity sake refer to the restrictions within the current executive order, EO 2020-59, unless the timing period is relevant to any issue.

process. Specifically, plaintiffs' verified complaint alleges that the "mandatory quarantine" imposed by EO 2020-59 violates their right to both procedural due process (Count I) and substantive due process (Count II), and that the intrastate travel restrictions contained in EO 2020-42 also violate their rights to procedural due process (Count III) and substantive due process (Count IV). They also allege in Count V of their verified complaint that the Emergency Management Act, MCL 30.401 *et seq*., is an unconstitutional delegation of legislative power to the Governor. Plaintiffs have requested the Court issue a preliminary injunction—but not a permanent one—restraining these defendants from continuing to implement the provisions of EO 2020-59.[2] Once restrained, plaintiffs seek a declaration that the challenged restrictions and the EMA are invalid.[3]

II. JURISDICTION

Defendants first argue that this Court lacks subject matter jurisdiction because plaintiffs seek only injunctive relief based upon federal constitutional claims, which deprives the Court of jurisdiction to decide the matter. Defendants rely upon MCL 600.6440, which provides:

> No claimant may be permitted to file claim in said court against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts, but it is not necessary in the complaint filed to allege that claimant has no such adequate remedy, but that fact may be put in issue by the answer or motion filed by the state or the department, commission, board, institution, arm or agency thereof.

[2] On April 23, 2020, the Court denied plaintiffs' motion for an *ex parte* temporary restraining order on the ground that plaintiffs had not shown the threat of immediate and irreparable harm of physical injury or loss of property.

[3] The Court appreciates the speed at which counsel submitted briefs, and for the high caliber of the briefs submitted.

Because a federal court can exercise jurisdiction against state officers in their official capacity when seeking only prospective injunctive relief, defendants argue, MCL 600.6440 applies and the Court lacks jurisdiction to decide the matter.

The legal principles put forward by defendants are sound, but they do not apply to plaintiffs' case. First, the statute refers to claims filed in the Court of Claims against the state, its departments, agencies, etc., and does not pertain to claims brought in this Court against individuals, as plaintiffs have done here. Thus, it is irrelevant whether claims against state officers in their official capacity brought in federal court might essentially be considered claims against the state. Second, with respect to defendants' argument, plaintiffs seek declaratory rulings on each of their three challenges, and one of those challenges—the claim that the EMA violates the separation of powers doctrine—is based upon state law. So too is their challenge to the intrastate ban on travel to vacation rentals. Additionally, in their complaint plaintiffs seek "other and further relief as the Court deems appropriate," which whatever that could end up being, it would go beyond the declaratory and limited injunctive relief requested in the complaint, and could include damages, even if only nominal. Because plaintiffs' claims and forms of relief do not meet all the requirements of MCL 600.6440, this Court does not lack subject matter jurisdiction.

III. MOOTNESS

Defendants also argue that plaintiffs' case is moot because they only challenge EO 2020-21 and EO 2020-42, which have been rescinded, and EO 2020-59 is the only existing executive order containing these restrictions. True enough, but as defendants seem to recognize, it was *after* plaintiffs' filing last week that the Governor issued EO 2020-59, and plaintiffs have not had time to seek to amend their complaint, and several of plaintiffs' challenges to the prior EOs—the stay-at-home provision and the ban on intrastate travel to vacation rentals—remain within EO 2020-

59. Those two challenges are therefore not moot, as the Court can still render complete relief against those provisions. See *CD Barnes Assoc, Inc v Star Haven, LLC*, 300 Mich App 389, 406; 834 NW2d 878 (2013). The remainder of the challenges to EOs 2020-21 and 2020-42, as well as to the Department of Natural Resources rule[4], have been removed by EO 2020-59, and are now moot.

The Court therefore concludes that the only remaining ripe challenges to the executive orders are (1) the stay-at-home provision, (2) the prohibition of traveling to a third-party vacation rental, and (3) the limited public access to certain public land. And, of course, plaintiffs' challenge to the constitutionality of the EMA remains a live controversy.

IV. STANDARDS FOR A PRELIMINARY INJUNCTION

"The objective of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights." *Alliance for the Mentally Ill of Mich v Dep't of Community Health*, 231 Mich App 647, 655–656; 588 NW2d 133 (1998). The status quo has been defined as " 'the last actual, peaceable, noncontested status which preceded the pending controversy.' " *Buck v Thomas Cooley Law School*, 272 Mich App 93, 98 n 4; 725 NW2d 485 (2006), quoting *Psychological Services of Bloomfield, Inc v Blue Cross & Blue Shield of Michigan*, 144 Mich App 182, 185; 375 NW2d 382 (1985). In *Mich AFSCME Council 25 v Woodhaven–Brownstown Sch*

[4] Specifically, plaintiffs challenge a Department of Natural Resources rule, implemented in furtherance of EO 2020-42, that "restricts the use of powerboats on public waterways yet allows sailboats and kayaks." Plaintiffs likewise question a DNR rule, also implemented in furtherance of EO 2020-42, that "further restricted access to public lands, parks and trails to residents of 'local communities.' " Much to the pleasure of outdoor enthusiasts, EO 2020-59 seems to have eliminated the restrictions on use of powerboats and use of state parks during certain hours of the day.

Dist, 293 Mich App 143, 146; 809 NW2d 444 (2011), the Court of Appeals instructed that, "[w]hen deciding whether to grant an injunction under traditional equitable principles,

> a court must consider (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.[5]

Not surprisingly, the Court will first turn to the initial consideration, i.e., whether plaintiffs have shown a likelihood of prevailing on the merits. Though plaintiffs do not have to prove they *will* succeed on the merits, they do have to prove that they have a *substantial likelihood* of success on the merits. *Int'l Union v Michigan*, 211 Mich App 20, 25; 535 NW2d 210 (1995).

V. THE MERITS

A. BACKGROUND AND FACTS

Michigan residents, like all other Americans, cherish their liberty. We always have, though the liberties and freedoms we seek to protect have changed over time. At and before our founding, our forefathers fought for the inalienable right to own property, freely engage in commerce, represent ourselves through our own elected representatives, worship where and how we wanted, etc. The Declaration of Independence's list of grievances against the King of England prove as much, as do several of the amendments to the United States Constitution, and in particular, the Fifth and Fourteenth Amendments.

[5]Quoting in part *Alliance for the Mentally Ill*, 231 Mich App at 655–656.

Today we have all the freedoms and liberties that the founders fought for, and our branches of government exist in large part to ensure that those rights remain intact. See Declaration, ¶ 2.[6] The liberty and freedoms at stake in this matter do not in large part involve those rights and liberties the founders fought so hard for; instead, plaintiffs focus on the right to freely move about one's community and state, to do commerce when one pleases, and to travel about the state for vacation purposes. It is the restrictions to those activities within EO 2020-59 that plaintiffs challenge here.

As any reader of this opinion knows, the challenged executive orders were issued to address the public health crisis occasioned by the world-wide spread of the novel coronavirus, which hit our great state in early March. Specifically, on March 10, 2020, was when the first two cases of the virus were diagnosed in our state[7], while the first death resulting from the virus occurred on March 18, 2020.[8] As a result of the quick spread of the virus within our state borders, and to meet the myriad challenges that immediately arose Governor Whitmer issued numerous executive orders, including EO 2020-21, EO 2020-42 and EO 2020-59. The main element of the executive

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[6] The Court realizes that the Declaration is a political document, not a legal one, but it is good evidence of the founding political theories and objectives. See *Troxel v Granville*, 530 US 57, 91; 120 S Ct 2054; 147 L Ed 2d 49 (2000)(SCALIA, J., dissenting)("The Declaration of Independence ... is not a legal prescription conferring powers upon the courts[.]"); *Derden v McNeel*, 978 F2d 1453, 1456 n4 (CA 5, 1992)("[G]eneral statements about inalienable rights ... tell us little about the prerogatives of an individual in concrete factual situations."); *Coffey v United States*, 939 F Supp 185, 191 (EDNY, 1996)("While the Declaration of Independence states that all men are endowed certain unalienable rights including 'Life, Liberty and the pursuit of Happiness,' it does not grant rights that may be pursued through the judicial system." (citation omitted)).

[7] Executive Order No, 2020-21; Detroit Free Press, *Coronavirus Timeline* https://www.freep.com/story/news/local/michigan/2020/03/18/coronavirus-timeline-first-case-michigan-first-death/5069676002/ (accessed April 28, 2020). This article contains a compilation of information from the state Department of Health and Human Services.

[8] Detroit Free Press, *First Michigan Death Due to Coronavirus is Southgate Man in his 50s* https://www.freep.com/story/news/local/michigan/wayne/2020/03/18/coronavirus-deaths-michigan/5054788002/ (accessed April 28, 2020).

orders is the requirement that most residents remain in their home unless engaging in certain essential activities, or certain limited outdoor activities. The result of the order, from an economic standpoint, was thousands of Michigan residents being unable to work unless they could do so remotely, the closing of all restaurants, bars, and other small and large businesses.[9]

At the time the first stay-at-home order was issued on March 23, 2020—only 13 days since the first confirmed case in this state—there were already 1,328 confirmed cases and 15 deaths.[10] Today, just over one month later, Michigan has over 36,000 confirmed cases of the virus and over 3,000 related deaths.

B. THE MERITS

In their complaint, plaintiffs do not challenge the Governor's authority to issue the executive orders on this subject-matter. Instead, plaintiffs challenge the scope of the order through separate claims based on procedural due process and substantive due process. Although these claims entail different considerations and standards, see *In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App 562, 573-574; 892 NW2d 388 (2016), the Court will address the claims together since, under these circumstances, each protected right is subject to the same overriding principle. In other words, the constitutional right asserted does not make a difference when considering this issue, because both are subject to a balancing with the state's interest to protect the public health. This holds true because, and perhaps contrary to common knowledge, most, if not all, individual constitutional rights are not absolute and are subject to a balancing with the

[9] Michigan was not alone in this regard. The Court takes notice that the worldwide economy has come to a virtual standstill as a result of state and national actions taken to control the virus.

[10] Detroit Free Press, *Michigan Coronavirus Cases, Tracking the Pandemic*, https://www.freep.com/in-depth/news/nation/coronavirus/2020/04/11/michigan-coronavirus-cases-tracking-covid-19-pandemic/5121186002/ (accessed April 28, 2020).

countervailing state interest. See *New Rider v Board of Ed of Independent School Dist No 1*, 480 F2d 693, 696 (CA 10, 1973) ("Constitutional rights, including First Amendment rights, are not absolutes.") and *In re Abbott*, 954 F3d 772, 784 (CA 5, 2020) (Recognizing, when addressing Texas emergency rules during the coronavirus pandemic, that individual rights secured by the Constitution could be reasonably restricted during a health crisis).

As can be seen, then, there are two competing constitutional principles at play. First, as plaintiffs note in their verified complaint, in *Ex Parte Milligan*, 71 US 2, 120-121; 18 L Ed 281 (1866), the United States Supreme Court recognized—in a case that arose during the height of the Civil War—that our rights enshrined in the Constitution do not become less important or enforceable because of exigent circumstances:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Though our individual constitutional rights cannot be suspended or eliminated, they are, as noted, subject to reasonable regulation by the state. And, when it comes to the power of the state to act in the best interests of the public health when faced with a serious contagious disease, which is the state interest acted upon by the Governor,

> "[w]e are plowing no virgin field in considering the questions here involved. Numerous decisions, both federal and state, have considered the questions now before us. They are not all in accord and in some instances are not reconcilable. There is, however, a very marked trend in them in one direction, that which upholds the right of the state, in the exercise of its police power and in the interest of the public health, to enact such laws, such rules and regulations, as will prevent the spread of this dread disease." [*People ex rel Hill v Lansing Bd of Ed*, 224 Mich

> 388, 390; 195 NW 95 (1923). See, also, *Jacobsen v Commonwealth of Mass*, 197 US 11, 25-26; 25 S Ct 358; 49 L Ed 643 (1905) (upholding state's power to require vaccination over plaintiff's Fourteenth Amendment liberty interest to not be told what to do), and *In re Abbott*, 954 F3d at 784-785.]

As noted earlier, plaintiffs' due process claims set out in Counts I and III are challenges to the quarantine[11] requirement and (as amended by the changes contained in EO 2020-59), the prohibition on intrastate travel to a vacation rental. Plaintiffs' specific assertion is that, although the state may have the ability to quarantine those who are infected with the virus, the state cannot quarantine everyone without some showing that the individual(s) are infected. Because EO 2020-59 does so, the executive order violates their right to procedural due process. The same holds true, they argue, for the prohibition of intrastate travel to a third parties' vacation home.[12]

In addressing this argument, it is imperative to recognize the limited question the Court is empowered to decide. Except in limited circumstances mentioned later, it is not for the courts to pass on the wisdom of state action that is granted to it by the general police power or by statute. Certainly the state cannot simply ignore the individual rights enshrined in our federal (or state) constitution in the name of a public health threat. Judicial review of state actions is therefore (and quite obviously) appropriate and necessary. But the *depth* of that review is limited, and does not include delving deep into the pros and cons of what is the better plan of action between two reasonable alternatives. This point was well-made by three concurring Justices in *Rock v Carney*,

[11] Plaintiffs characterize the "stay-at-home" provision as a quarantine, which defendants quarrel with, but quarantine is defined as "a restraint upon the activities or communications of persons … designed to prevent the spread of disease or pests." Merriam-Webster's Collegiate Dictionary (11th Ed).

[12] Plaintiffs have not asserted that they own a second home in Michigan or that they had rented a third parties' vacation home for use during a time in which any executive order remained in place.

216 Mich 280, 283; 185 NW 798 (1921), a case involving the state's response to the spread of venereal diseases during World War I:

> The questions involved in this litigation are of supreme importance, not only to the individuals composing this commonwealth, but also to the numerous boards of health and to the state itself. We approach their consideration with a due regard of their importance. Neither a desire to sustain the state, nor a supersensitiveness prompted by the delicacy of the examination here involved, should in any way enter into or control our decision. Policies adopted by the legislative and executive branches of the state government are not submitted to this branch for approval as to their wisdom. They stand or fall in this court because valid or invalid under the law, and their wisdom or want of wisdom in no way rests with us. If valid, they must be upheld by this court; if invalid, they must be so declared by this court. If these defendants have transcended their power, they must be held liable, and they may not be excused from liability by the fact that their motives were of the highest. If they had not transcended their power, they are not liable, and supersensitiveness or preconceived notions of proprieties, no matter of how long standing, do not render them liable. The case must be determined by the application of cold rules of law.

Thus, whether and to what extent this Court agrees with policy implemented in the executive orders is of no moment or consideration. Instead, the Court must dutifully apply the "cold rules of law" to determine the validity of the challenged provisions of the executive order.

Binding authority from the United States Supreme Court and the Michigan Supreme Court compels this Court to conclude that plaintiffs do not have a substantial likelihood of success on the merits. This is not because the rights asserted by plaintiffs are not fundamental—being forced (with some important exceptions) by the state to remain in one's home, in turn causing many residents to be unable to work, visit elderly relatives, and to generally move about the state. But those liberty interests are, and always have been, subject to society's interests—society being our fellow residents. They—our fellow residents—have an interest to remain unharmed by a highly communicable and deadly virus, and since the state entered the Union in 1837, it has had the broad

power to act for the public health of the entire state when faced with a public crisis. As the *Jacobsen* Court so aptly held:

> The defendant insists that his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. *But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.* This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.' In *Crowley v Christensen*, 137 US 86, 89; 34 L Ed 620, 621; 11 S Ct 13 (we said: 'The 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. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.' [*Jacobson*, 197 US at 26; citations omitted in part; emphasis supplied.]

The role courts play under *Jacobson* and *Lansing Bd of Ed* is not to "second-guess the state's policy choices in crafting emergency public health measures," *In re Abbott*, 954 F3d at 784, but is instead to determine whether the state regulation has a "real or substantial relation to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.' " *Id*., quoting in part *Jacobson*, 197 US at 31. Part of this review includes

looking to whether any exceptions apply for emergent situations, the duration of any rule, and whether the measures are pretextual. *Id*. at 785.[13]

Turning to plaintiffs' specific challenges, the stay-at-home provision, the most restrictive portion of the executive order, was first implemented by the Governor on March 23, 2020, thirteen days after the first case of COVID-19 was diagnosed in the state. Though there were at that point approximately 1,328 cases in the state and 15 reported deaths, Governor Witmer was not acting on a blank slate. Instead, it was common knowledge that the virus had already rapidly spread throughout the state of Washington, was prevalent in several other states, and was devastating parts of Italy, China, and other countries. Indeed, the speed at which the virus spread was well known at the time the stay-at-home provision was implemented. It is true that this measure is a severe one, and greatly restricts each of our liberties to move about as we see fit, as we do in normal times. But the governor determined that severe measures were necessary, and had to be quickly implemented to prevent the uncontrolled spreading of the virus. As noted, Michigan was not alone in this regard:

> To be sure, [the order] is a drastic measure, but that aligns it with the numerous drastic measures Petitioners and other states have been forced to take in response to the coronavirus pandemic. Faced with exponential growth of COVID-19 cases, states have closed schools, sealed off nursing homes, banned social gatherings, quarantined travelers, prohibited churches from holding public worship services, and locked down entire cities. These measures would be constitutionally intolerable in ordinary times, but are recognized as appropriate and even necessary responses to the present crisis. [*In re Abbott*, 954 F3d at 787.]

[13] Plaintiffs' correctly note that *Jacobson* did not involve a state-wide requirement to stay at home, and instead addressed an involuntary vaccination program. But most cases have different facts, and it is the legal principle set forth in the decision that guides future courts. Thus, despite some factual differences, the Court relies (as did the *In re Abbott* court) upon *Jacobson* as it is the most relevant decision on this issue from the Supreme Court.

Plaintiffs suggest that the better—and more constitutionally sound decision—would have been to quarantine only those who have the virus. It may have been a better option to some, as doing so may have had a less severe impact on the movement of the Michigan population, and may have reduced unemployment. Or, as plaintiffs argue, a more narrowly tailored order by region may have been more reasonable for the entire state. But some of that is simply hindsight, and to accept it would be to impermissibly delve too deep into the choices made. Additionally, the Governor's concerns were not limited to what was most convenient or palatable at the time, as she also had to protect, to the extent possible, the health and safety of all Michigan residents and to not overburden the health care system. The introduction to EO 2020-59 outlines some of the other serious considerations that went into issuing the stringent order:

> To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible.

And, contrary to plaintiffs' arguments, the Supreme Court has upheld, against a constitutional challenge, a state's quarantine of individuals even when they are *not* infected with the disease being controlled. See *Compagnie Francaise de Navigation a Vapeur v Louisiana*, 186 US 380, 393; 22 S Ct 811; 46 L Ed 1209 (1902).

As noted, the Court's role is not to pick which alternative may be more reasonable, more preferential, or more narrowly tailored, as the latter is in deciding some constitutional cases. Monday morning quarterbacking is the role of sports fans, not courts reviewing the factual basis supporting executive action to protect the public health. Instead, it is the role of the executive and legislative branches to determine what *steps* are necessary when faced with a public health crisis.

In re Abbott, 954 F3d at 792 ("Such authority [to determine what measures are best to take] properly belongs to the legislative and executive branches of the governing authority"); *Rock,* 216 Mich at 296; *Lansing Bd of Ed*, 224 Mich at 397.[14] Under federalism principles, it is the States that retained the police power, and that power—though not unlimited—is quite broad. See *Nat'l Federation of Independent Business v Sebelius*, 567 US 519, 536; 132 S Ct 2566; 183 L Ed 2d 450 (2012) ("The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the "police power") and *Blue Cross & Blue Shield of Mich v Governor*, 422 Mich 1, 73; 367 NW2d 1 (1985) (discussing the scope of the police power and how that power extends to enacting regulations to promote public health, safety, and welfare, and providing that regulations "passed pursuant to the police power carry with them a strong presumption of constitutionality.").

What the Court must do—and can only do—is determine whether the Governor's orders are consistent with the law. *Rock*, 216 Mich at 283. Under the applicable standards, they are. The undisputed facts known at the time the first stay-at-home order was made, and the undisputed facts known today, compel the conclusion that the order had a real and substantial relation to the public health crisis. The challenged measures relate to limiting human interaction which helps control the spread of a virus considered to be extremely communicable. To make it voluntary, or more limited in scope, were perhaps other avenues to pursue, but even accepting that proposition does

[14] As will be discussed shortly, the Legislature has also spoken on the issue of how to address emergent situations. MCL 10.21; MCL 30.401 *et seq*. Additionally, the Court takes notice that the Legislature recently established an oversight committee to review the measures implemented through the Governor's various executive orders.

not make what the Governor reasonably chose to do invalid. Instead, the Governor's determination as to the speed and ease with which the virus spreads, and the potential impact that spread would have on the health care system, and the threat it had to the lives of thousands of Michigan residents in a short period of time, allows for the conclusion that the two challenged provisions had a real and substantial relation to the public health crisis. *Jacobson*, 197 US at 31. There is nothing presented to the Court to draw any other legal conclusion.[15]

Nor is there any evidence (or even a suggestion) that the stay-at-home provision was a pretext to accomplish some other objective. Additionally, the record is clear that these measures are temporary, and limited in time to address the speed at which the virus spreads, the status of the available health care system, and the need to get Michigan residents back to enjoying their liberties. Indeed, since this lawsuit was filed last week, the Governor issued EO 2020-59, easing some of the very restrictions challenged by plaintiffs, and has indicated more lifting of restrictions are imminent. Plaintiffs have not shown a substantial likelihood of success on the merits in their challenge to the executive order restrictions.

C. CONSTITUTIONALITY OF THE EMA[16]

Turning again to *In re Forfeiture of 2000 GMC Denali and Contents*, the Court set forth the rather difficult standards governing a challenge to the constitutionality of a state statute:

> A party challenging the constitutionality of a statute has the burden of proving the law's invalidity. *Gillette Commercial Operations North America & Subsidiaries v*

[15] Plaintiffs submitted documentary evidence which, if believed, could allow a governor to issue a more narrowly tailored order. But because this Governor made a different conclusion that was likewise based on other supporting evidence related to the virus, her decision had a real and substantial relation to the public health crisis.

[16] Plaintiffs do not challenge the Governor's exercise of authority under either statute, nor whether she needs legislative approval to continue her emergency declaration.

> *Dep't of Treasury*, 312 Mich App 394, 414-415; 878 NW2d 891 (2015). The challenging party must overcome a heavy burden because "[s]tatutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 516; 857 NW2d 529 (2014). When interpreting a statute, our primary goal is to "give effect to the intent of the Legislature." *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621, 628; 765 NW2d 31 (2009). To do so, we examine the plain language of the statute itself, and "[i]f the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). [*In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App at 569.]

As far as the Court can discern, plaintiffs' challenge to the EMA is an as-applied one:

> A constitutional challenge to the validity of a statute can be brought in one of two ways: by either a facial challenge or an as-applied challenge. This is an as-applied challenge, meaning that claimant has alleged " 'a present infringement or denial of a specific right or of a particular injury in process of actual execution' of government action." *Bonner v City of Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014), quoting *Village of Euclid v Ambler Realty Co*, 272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926). "The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative." *Ada v Guam Society of Obstetricians & Gynecologists*, 506 US 1011, 1012; 113 S Ct 633; 121 L Ed 2d 564 (1992) (SCALIA, J., dissenting). See also *United States v Frost*, 125 F3d 346, 370 (CA 6, 1997). [*In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App at 569-570.]

Plaintiffs' challenge to the delegation of power from the Legislature to the executive will likely not succeed. It is certainly true that the Legislature cannot grant some vague, unfettered discretion to the executive to carry out what is a legislative function. But if the challenged legislation contains sufficient guidance to the executive on how to execute the law to further the Legislature's policy, it does not violate the non-delegation doctrine. *City of Ann Arbor v Nat'l Ctr for Mfg Sciences, Inc*, 204 Mich App 303, 308; 514 NW2d 224 (1994) ("[T]he standards must be sufficiently broad to permit efficient administration so that the policy of the Legislature may be complied with, but not so broad as to give uncontrolled and arbitrary power to the administrators.").

As defendants point out, plaintiffs allege in their complaint that the powers granted to the Governor are "limited," and none of the provisions in the act are such that the executive would have "uncontrolled, arbitrary power." *Dep't of Natural Resources v Seaman*, 396 Mich 299, 308; 240 NW2d 206 (1976). The provisions of the EMA are not vague, and contain specific procedures and criteria for the Governor to declare a state of disaster or emergency, and what conditions qualify as a disaster or emergency. See MCL 30.402(e) and (h); MCL 30.403(3) and (4). The EMA also grants the Governor additional, specific duties and powers when addressing any declared disaster or emergency, MCL 30.405, and sets for a comprehensive state and local jurisdictional system to address declared state-wide disasters or emergencies. MCL 30.407-MCL 30.411. As a result, plaintiffs are unable to establish a likelihood of success on the merits on this claim.

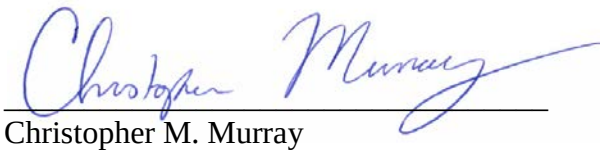
D. HARM TO THE PUBLIC INTEREST

Finally, and for many of the same reasons, the Court concludes that entry of a preliminary injunction would be more detrimental to the public than it would to plaintiffs. Although the Court is painfully aware of the difficulties of living under the restrictions of these executive orders, those difficulties are temporary, while to those who contract the virus and cannot recover (and to their family members and friends), it is all too permanent. That is not to say that every new virus will require the action taken here, but given the authority of the Governor to do so in the face of these circumstances, the Court must conclude issuing injunctive relief would not serve the public interest, despite the temporary harm to plaintiffs' constitutional rights.

VI. CONCLUSION

For these reasons, plaintiffs' motion for a preliminary injunction is DENIED.

Date: April 29, 2020



Christopher M. Murray
Judge, Court of Claims

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

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

Defendants.
/

No. 1:20-cv-00414

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

EXHIBIT C

STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN UNITED FOR LIBERTY,

Plaintiff,

OPINION AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

v

Case No. 20-000061-MZ

GOVERNOR GRETCHEN WHITMER,

Hon. Michael J. Kelly

Defendant.
_____/

Pending before the Court is plaintiff's motion for preliminary injunction.[1] For the reasons that follow, the motion is DENIED.

I. BACKGROUND

Plaintiff's complaint and motion for preliminary injunction challenge the authority of defendant Governor Gretchen Whitmer to issue executive orders in response to the COVID-19 pandemic. Defendant cited two acts, the Emergency Management Act (EMA), MCL 30.401 *et seq.*; and the Emergency Powers of Governor Act (EPGA), MCL 10.31 *et seq.* when issuing the orders at the heart of this case. At this juncture, the facts underlying the complaint are well known to the parties and their recitation in this opinion would serve no meaningful purpose. The Court will instead constrain its time and attention to the legal issues presented in plaintiff's pleadings

[1] The Court notes and appreciates the parties' compliance with the expedited briefing schedule ordered in this case.

and briefing. Distilled to the most basic level, plaintiff is asserting that the EMA and the EPGA are unconstitutional because they represent an impermissible delegation of legislative authority to the Governor. Plaintiff has asked the Court to issue a preliminary injunction enjoining defendant from enforcing and issuing any orders under the EMA or EPGA.

II. ANALYSIS

Injunctive relief "represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Davis v Detroit Fin Review Team*, 296 Mich App 568, 613; 821 NW2d 896 (2012) (citation and quotation marks omitted). The Court utilizes four factors in determining whether to issue this extraordinary remedy:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Id*. (citation and quotation marks omitted).]

A. PLAINTIFF HAS NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS

Turning first to the likelihood of success on the merits, the Court begins by noting that plaintiff asserts facial challenges to the validity of the EMA and the EPGA. This type of challenge presents significant obstacles a litigant must overcome in order to succeed. Initially, statutes are presumed to be constitutional, and a court has a "duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Oakland Co v State*, 325 Mich App 247, 260; 926 NW2d 11 (2018). A court must "exercise the power to declare a law unconstitutional with extreme caution," and the court must not exercise that power if serious doubt exists as to the alleged constitutional invalidity. *Id*. (citation omitted). Instead, "[e]very reasonable presumption or

intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity." *Id*. (citation and quotation marks omitted).

Moreover, plaintiff's facial challenge to the constitutionality of the statutes at issue requires a particularly difficult showing. A facial challenge considers the plain language of the statute at issue and it involves a "claim that the law is invalid in toto—and therefore incapable of any valid application." *League of Women Voters of Mich v Secretary of State*, __ Mich App __, __; __ NW2d __ (Docket Nos. 350938; 351073), slip op at p. 10 (citation and quotation marks omitted). "To make a successful facial challenge to the constitutionality of a statute, the challenger must establish that no set of circumstances exists under which the act would be valid." *Oakland Co*, 325 Mich App at 260 (citation and quotation marks omitted).

Here, in order for plaintiff to demonstrate a likelihood of success on the merits of the claims asserted in its briefing, it must demonstrate that the challenged statutes contain constitutionally infirm delegations of legislative authority to the Governor. In general, the principle of separation of powers, see Const 1963, art 3, § 2, precludes the legislative branch from delegating its law-making authority to the executive or judicial branches of government, *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8; 658 NW2d 127 (2003). However, the separation of powers does not preclude this state's Legislature from "obtaining the assistance of the coordinate [b]ranches." *Id*. at 8-9, quoting *Mistretta v United States*, 488 US 361, 371; 109 S Ct 647; 102 L Ed 2d 714 (1989). Caselaw counsels that "when properly prescribed standards exist, the Legislature has not abdicated its law-making or legislative power because the agency to which the power is delegated is limited in its action by the Legislature's prescribed will; it cannot follow its own

uncircumscribed will." *Westervelt v Nat Resources Comm*, 402 Mich 412, 441; 263 NW2d 564 (1978) (opinion by WILLIAMS, J.) (quotation marks omitted). In *Taylor*, the Supreme Court remarked that, historically, these types of challenges "have been uniformly unsuccessful" across federal and state jurisprudence. *Taylor*, 468 Mich at 9.

In order to determine whether the challenged statutes at issue in this case contain sufficient standards to survive a constitutional challenge, the Court's analysis must be guided by the following criteria:

> 1) the act must be read as a whole; 2) the act carries a presumption of constitutionality; and 3) the standards must be as reasonably precise as the subject matter requires or permits. The preciseness required of the standards will depend on the complexity of the subject. [*Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 51; 367 NW2d 1 (1985).]

The Court will first address plaintiff's challenges to the EMA, which makes the Governor "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 permits the Governor to issue orders to implement the act and it empowers her to issue emergency and disaster declarations. MCL 30.403(3)-(4). That authority is not unchecked, however, as the statute sets forth definitions for "emergency," and "disaster" that provide some measure of guidance for the Governor's use of authority under the Act. See MCL 30.402(e); MCL 30.402(h). Furthermore, the EMA goes on to describe the authority and duties of the Governor under the Act, with MCL 30.405(1)(a)-(j) detailing ten subjects (nine particular subjects and one catch-all provision) on which the Governor can issue orders under the Act. Those orders can only be issued "upon the declaration of a state of disaster or a state of emergency . . . ." MCL 30.405(1).

When viewing the statute as a whole and considering the complexity of the subject sought to be addressed, plaintiff cannot demonstrate a substantial likelihood of success on the assertion that the EMA is an unconstitutional, standard-less delegation of legislative authority to the Governor. See *Blue Cross & Blue Shield*, 422 Mich at 51. At the outset, the Court's analysis on this issue must be informed by the notion that the EMA's very purpose is to permit the Governor to deal with a highly complex emergency or disaster situation. Caselaw cautions that the more difficult a particular subject-matter is to regulate, the more impractical it is for the Legislature to provide specific, exacting standards for the delegation of authority. *State Conservation Dep't*, 396 Mich at 309. Thus, generalized standards can be appropriate. *Id*. And here, the Court concludes that the parameters and standards set forth in the EMA, at least at this stage, are of the type that pass constitutional muster. The EMA is not an unfettered, unchecked grant of power to the Governor. Rather, the statute specifies that the Governor, in emergency or disaster situations, is to be given certain, defined authority. The fact that this authority is limited to statutorily defined "emergencies" or "disasters" provides some measure of standards. Additionally, the Legislature imposed regulations on the subject-matter to be reached by the Governor's orders, as well as with respect to the duration of the orders. See MCL 30.405(1) (prescribing the subject-matter that can be regulated by way of executive order); MCL 30.405(3)-(4) (placing a 28-day limit on certain orders issued by the Governor). The Legislature also implemented a method by which the Governor can work with the Legislature after a certain period of time. See MCL 30.403(3)-(4). In sum, while the Court acknowledges that the authority granted under the EMA is undoubtedly broad in some respects, the grant of authority does not sound in the nature of statutes that have run afoul of the non-delegation doctrine. Cf. *Blue Cross & Blue Shield*, 441 Mich at 55 (finding an impermissible delegation of authority where the statute contained a "lack of standards defining

and directing" the delegated authority). A plain reading of the EMA does not support the notion that the statute contains the kind of "uncontrolled, arbitrary power" that our Supreme Court has cautioned against in non-delegation cases. See *State Conservation Dep't*, 396 Mich at 308-309.[2]

Plaintiff's ability to succeed on its challenge to the delegation of authority contained in the EPGA is no less dubious. While the EPGA is a much less detailed act than its subsequently enacted counterpart, it nonetheless sets some standards for the Governor's exercise of authority. The authority exercised by the Governor under the EPGA can only be invoked if public safety is or will be imperiled. MCL 10.31(1) makes clear that authority under the Act is only bestowed on the Governor. "[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 statute continues by describing that any rules or regulations imposed by the Governor must be "reasonable" and "necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1). The Court concludes that the terms "reasonable" and "necessary" carry more significance than plaintiff assigns to them, particularly when they are read in light of the statute's goals of protecting life and property and combating an emergency or disaster scenario. See *Klammer v Dep't of Transp*, 141 Mich App 253, 262; 367 NW2d 78 (1985) (concluding that a delegation of authority that empowered the decisionmaker to take action that was deemed "necessary" in response to a particular situation was a sufficiently precise standard in the context of the statute at issue). Moreover, when scanning the EPGA for additional criteria, the Court notes

[2] The Court notes that Judge Murray reached a similar decision when denying injunctive relief in the case of *Martinko v Whitmer*, Docket No. 20-00062-MM (issued April 29, 2020).

that the statute contains a list of subjects over which the Legislature granted the Governor authority, as well as one area where the Legislature expressly stated that the Governor was not permitted to act. See MCL 10.31(1) & (3) (permitting the Governor to control matters such as traffic, transportation, places of amusement and assembly, and to establish curfews, but expressly declaring that the Governor cannot seize, take, or confiscate lawfully possessed firearms or other weapons). Finally, the Act specifies that the Governor is to exercise the state's police power in order "to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster." MCL 10.32. The Court concludes at this stage of the litigation that the phrase, "adequate control," and the reference to that control lasting only for periods of public crisis or disaster guides the Governor's exercise of authority. Hence, the plain language of the act, contrary to plaintiff's contentions, describes standards and limitations on the Governor's exercise of authority under the EPGA. While the level of authority conferred upon the Governor may be broad—and at times frustrating in practice—it does not appear on plaintiff's motion to be the type that would warrant relief under the non-delegation doctrine.

Furthermore, in evaluating the EPGA, just as it did when evaluating the EMA, the Court must remain cognizant that the situation sought to be controlled by the EPGA is an unpredictable, dangerous emergency or disaster situation. A disaster or emergency is almost assuredly a dynamic, unpredictable situation fraught with complexity. It is unreasonable to expect a demanding or precise set of legislative standards be incorporated into the EPGA in order to deal with such a demanding scenario. See *State Conservation Dep't,* 396 Mich at 309 (explaining that "[t]he preciseness of the standard will vary with the complexity and/or the degree to which subject regulated will require constantly changing regulation.").

B. PLAINTIFF'S ALLEGED IRREPARABLE HARM FALLS SHORT AS WELL

Although the above analysis in and of itself would cause the Court to deny injunctive relief, the Court finds plaintiff's assertion of irreparable harm falls short of that which is required to demonstrate entitlement to preliminary injunctive relief. A "particularized showing of irreparable harm . . . is . . . an indispensable requirement to obtain a preliminary injunction." *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008) (citation and quotation marks omitted). The harm must be particularized; a "generalized argument that a constitutional violation would result in harm is insufficient because it is not particularized." *Hammel v Speaker of House of Representatives*, 297 Mich App 641, 652; 825 NW2d 616 (2012). The problem in the instant case is that plaintiff has only generally asserted the harm it allegedly suffered by generically alleging constitutional violations. Plaintiff has not articulated particularized, individual harm. Furthermore, caselaw again cautions that, in the absence of bad faith on the part of a public body—which has not been alleged in this case—"there is no real and imminent danger of irreparable injury requiring issuance of an injunction." *Davis*, 296 Mich App at 621. Plaintiff's failure to assert a particularized irreparable injury in the absence of injunctive relief represents an independent reason to deny the motion for preliminary injunction.

III. CONCLUSION

Both the EMA and the EPGA confer broad authority upon the office of the Governor. History will determine whether the Governor is judiciously exercising this authority in response to the COVID-19 pandemic. But, for the reasons stated herein:

IT IS HEREBY ORDERED that plaintiff's motion for preliminary injunction is DENIED.

This is not a final order and it does not resolve the last pending claim or close the case.

May 19, 2020

Michael J. Kelly
Judge, Court of Claims

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

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

Defendants.
/

No. 1:20-cv-00414

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

EXHIBIT D

STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN HOUSE OF REPRESENTATIVES, and MICHIGAN SENATE,

Plaintiffs,

v

GOVERNOR GRETCHEN WHITMER,

Defendant.
_____/

OPINION AND ORDER

Case No. 20-000079-MZ

Hon. Cynthia Diane Stephens

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

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

I. BACKGROUND

The Court will dispense with a lengthy recitation of the pertinent facts and history and will instead jump to the Governor's declaration of a state of emergency[1] as well as a state of disaster[2] under the EMA and the EPGA on April 1, 2020, in response to the COVID-19 pandemic. Executive Order No. 2020-33. Both chambers of the Legislature adopted Senate Joint Resolution No. 24 which approved "an extension of the state of emergency and state of disaster declared by Governor Whitmer in Executive Order 2020-4 and Executive Order 2020-33 through April 30, 2020. . . ." The Senate Concurrent Resolution cited the 28-day legislative extension referenced in MCL 30.403 of the EMA.

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

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

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

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

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

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

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

COMPLIANCE WITH MCL 600.6431

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

STANDING

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

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS OF AUTHORITIES CITED IN THE CHALLENGED EXECUTIVE ORDERS

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

ARTICLE 5 OF THE MICHIGAN CONSTITUTION

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

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

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

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

Turning first to the scope of the EPGA, the Court notes that the statute bestows broad authority on the Governor to declare a state of emergency and to take necessary action in connection with that declaration. See MCL 10.31(1). Under the EPGA, the Governor "may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Furthermore, the EPGA provides standards on what a Governor can, and cannot, do after making an emergency declaration. As for what she can do, the Governor may "promulgate *reasonable* orders, rules, and regulations as he or she considers *necessary to protect life and property or to bring the emergency situation within the affected area under control*." MCL 10.31(1) (emphasis added). The Legislature's use of the terms "reasonable" and "necessary" are not trivial expressions that can be cast aside as easily as plaintiffs would have the Court do. Rather than being mere abstract concepts that fail to provide a meaningful standard, the terms "reasonable" and "necessary" have historically proven to provide standards that are more than amenable to judicial review. See, e.g., MCL 500.3107(1)(a) (describing, in the context of personal injury protection insurance, "allowable expenses" that consist of "reasonable" charges incurred for "reasonably necessary products, services and accommodations . . . ."). Thus, the Court rejects any contention that these terms are too ambiguous to provide meaningful standards. See *Klammer v Dep't of Transp*, 141 Mich App 253, 262; 367 NW2d 78 (1985) (concluding that a delegation of authority which permitted an administrative body to continue to employ an individual for such a period of time as was "necessary" provided a sufficient standard, under the circumstances). See also *Blank v Dept' of Corrections*, 462 Mich 103, 126; 611 NW2d 530 (2000) (opinion by Kelly, J.) (finding a constitutionally permissible delegation of authority, in part, based on the enabling legislation constrained rulemaking authority to only those matters that were "necessary for the proper administration of this act."). Finally, in addition to the above standards, the EPGA goes on to expressly list examples of that which a Governor can and cannot do under the EPGA. See MCL

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

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

EXECUTIVE ORDER 2020-68 WAS NOT AUTHORIZED BY THE EMA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Dated: May 21, 2020

Cynthia Diane Stephens, Judge
Court of Claims

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

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

Defendants.
/

No. 1:20-cv-00414

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

EXHIBIT E

STATE OF MICHIGAN

COURT OF CLAIMS

ERIC OSTERGREN, and JASON GILLMAN, JR.,

Plaintiffs,

v

GOVERNOR GRETCHEN WHITMER, and STATE OF MICHIGAN,

Defendants.
_____/

OPINION AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND GRANTING SUMMARY DISPOSITION TO DEFENDANTS

Case No. 20-000053-MZ

Hon. Cynthia Diane Stephens

Pending before the Court is plaintiff Jason Gillman Jr.'s motion for preliminary injunction, as well as the parties' competing motions for summary disposition. For the reasons that follow, the motion for preliminary injunction and plaintiffs' motion for summary disposition will be DENIED, and summary disposition will be GRANTED in favor of defendants.

I. BACKGROUND

A. EXECUTIVE ORDER NO. 2020-38

At the heart of this matter is Executive Order No. 2020-38 by the Governor in response to the COVID-19 pandemic. The order, which cited the authority of the Governor under the Emergency Management Act (EMA), MCL 30.401 *et seq.*, as well as the Emergency Powers of Governor Act (EPGA), MCL 10.31 *et seq.*, pertained to deadlines associated with response times

for requests made under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* The order provides, in pertinent part:

> To mitigate the spread of COVID-19, protect the public health, and provide essential protections to vulnerable Michiganders, it is crucial that all Michiganders limit in-person contact to the fullest extent possible. This includes practicing social distancing and restricting in-person work and interaction to only that which is strictly necessary. At the same time, and as memorialized by Michigan's Freedom of Information Act ("FOIA"), 1976 PA 442, as amended, MCL 15.231 et seq., it remains the public policy of this state—and a priority of my administration—that Michiganders have access to "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees," so that they "may fully participate in the democratic process." MCL 15.231(2). To balance this core priority with the steep and urgent demands posed by the COVID-19 pandemic, *it is reasonable and necessary to provide limited and temporary extensions of certain FOIA deadlines*, so that Michiganders may remain informed and involved in their government during this unprecedented crisis without unduly compromising the health and safety of this state and its residents. [Executive Order No. 2020-38 (emphasis added).]

The order applies to all "public bodies" as that term is defined in FOIA; pertinent to the instant case, "public body" refers to local public health departments. See MCL 15.232(h).

B. PLAINTIFFS' FOIA REQUEST

According to plaintiffs' allegations, plaintiff Jason Gillman, Jr. filed a FOIA request with the Kent County Health Department for three categories of records: (1) all communications and responsive records relating to a certain, petition filed by Kent County Health Officer Adam London; (2) a copy of the petition; and (3) an order issued in response to the petition by a Kent Circuit Judge. Plaintiff sent the request on or about April 18, 2020. Within one business day of receiving the request, the Kent County Health Department responded with an estimate regarding the time it would take to comply. The response stated that plaintiff Gillman's request had been uploaded and that "The court records are available through the court and communication will be

gathered but in accordance with the extended timelines" in EO 2020-38 because the request required on-site work.

On or about April 7, 2020, plaintiffs filed a complaint challenging the validity of EO 2020-38 as it concerned FOIA requests. The complaint alleges that EO 2020-38 "ordered massive suspensions and alterations of" FOIA and that these alterations and suspensions ran contrary to this state's Constitution and FOIA. Plaintiffs further allege that neither the EMA nor the EPGA provide the Governor with authority to issue EO 2020-38.

Shortly after submitting his FOIA request plaintiff Gillman moved this Court for a preliminary injunction and show-cause order. The Court notes that at no time did plaintiff Gillman pursue a FOIA claim in Kent Circuit Court as the Act required him to do in the event he believed his rights had been violated with respect to a particular request. See MCL 15.240(1)(b). He asserts that MCL 15.235(2) requires a public body to either grant or deny a FOIA request within 5 business days of receiving the request—unless it requests a one-time, 10-day extension as permitted under MCL 15.235(2)(d). He contends that there is no exception contained within the statute for a pandemic. Plaintiff Gillman contends he has been harmed by Kent County's decision to rely on EO 2020-38 to delay its response to his request. His motion for preliminary injunction asked the Court to enjoin "the effectiveness of Executive Order No. 2020-38 . . . as to the *Freedom of Information Act* abridgement as outlined herein."

The Court held a hearing on the motion for preliminary injunction on May 8, 2020. With respect to the particular harm asserted by plaintiff Gillman, plaintiffs' counsel conceded that his client's access to Kent Circuit Court to challenge the timeliness of Kent County's response was in no way hindered by the issuance of EO 2020-38. Plaintiffs' counsel argued that the ability to

access Kent Circuit Court to redress the particular FOIA violation alleged by plaintiff Gillman was irrelevant, however, because the irreparable injury alleged by plaintiff Gillman was a general interference with his rights under FOIA.

II. ANALYSIS—MOTION FOR PRELIMINARY INJUNCTION

A trial court must consider four factors when determining whether it is appropriate to issue preliminary injunctive relief:

> (1) harm to the public interest if the injunction issues; (2) whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted; (3) the likelihood that the applicant will prevail on the merits; and (4) a demonstration that the applicant will suffer irreparable injury if the relief is not granted. [*Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998).]

Injunctive relief represents "an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Davis v Detroit Fin Review Team*, 296 Mich App 568, 613; 821 NW2d 896 (2012) (citation and quotation marks omitted).

The extraordinary remedy of preliminary injunctive relief is not warranted in the matter at hand. Overlooking for now plaintiff Gillman's ability or inability to succeed on the merits, the Court concludes that plaintiff Gillman's request for preliminary injunctive relief is not ripe. The record before the Court reveals that Kent County granted plaintiff Gillman's request, stating that it would gather the records sought. On the surface at least, this response was permitted by MCL 15.234(8), which permits a public body to give a best-efforts estimate regarding the time it will take the public body to fulfill the request. There is thus no apparent, let alone irreparable, injury to plaintiff Gillman, because he cannot establish that there was a FOIA violation, let alone a FOIA violation brought on by EO 2020-38. "The doctrine of ripeness is designed to prevent the

adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim that rests on contingent future events is not ripe." *Shaw v City of Dearborn*, __ Mich App __, __; __ NW2d __ (2020) (Docket No. 341701), slip op at 8. Plaintiff Gillman's conjecture about whether the fulfillment of his request will be delayed such that it amounts to a denial of the request, see *King v Mich State Police Dep't*, 303 Mich App 162, 189; 841 NW2d 914 (2013) (explaining that a court will look past a public body's labeling of its FOIA response), does not amount to a live controversy. Plaintiffs' contention rests on speculation. and he has not presented a colorable claim of a FOIA violation based on EO 2020-38. Furthermore, any assertion by plaintiff Gillman that Kent County violated FOIA could have been, and should have been, pursued in Kent Circuit Court. Plaintiff Gillman failed to pursue vindication of his rights under the statute in Kent Circuit Court, as specified in MCL 15.240(1)(b). Nor was he prevented from doing so by anything in EO 2020-38 or otherwise. Preliminary injunctive relief is not warranted on the record before the Court.

Additionally, and for the reasons stated below, plaintiff Gillman's request for preliminary injunctive relief fails because he has no likelihood of success on the merits of his claim regarding EO 2020-38.

III. DEFENDANTS ARE ENTITLED TO SUMMARY DISPOSITION

The parties' have, also filed competing requests for summary disposition. Plaintiffs argue that neither the EMA nor the EPGA provided the authority for the Governor to issue EO 2020-38. With respect to the EPGA in particular, plaintiffs argue that the statute would be an unconstitutional delegation of legislative authority if it permitted the Governor to suspend or alter portions of FOIA.

The Court rejects plaintiffs' contentions because, at a minimum, the EPGA authorized and continues to authorize the issuance of EO 2020-38 and because the EPGA is not an unconstitutional delegation of legislative authority. Turning first to the issue of whether the EPGA authorized the issuance of EO 2020-38, the statute provides that:

> 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. [MCL 10.31(1).]

When the Governor proclaims a state of emergency based on great public crisis, public emergency, or upon the imperiling of public safety, she "may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1). The EPGA states that the Legislature's intent in passing the Act was:

> to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. The provisions of this act shall be broadly construed to effectuate this purpose. [MCL 10.32.]

Citing public health concerns, the benefits of social distancing, and the highly communicable nature of COVID-19, defendants' briefing argues that EO 2020-38 was, consistent with MCL 10.31(1), reasonable and necessary to protect public health and safety. Plaintiffs have not seriously challenged the existence of the Covid-19 pandemic, but instead argue that the EPGA does not, and cannot, as a matter of constitutional law, grant the Governor authority to "amend" FOIA. This assertion is unavailing. EO 2020-38 requires a response "within 10 business days" of actual receipt of a written request at the public body's physical address. The order modifies the FOIA time line with the insertion of "actual receipt". Presumptively this change reflects the effects

of the stay at home order which has closed the offices of many public body's, reduced staff in others and delayed ordinary mail service. Under FOIA, a public body already had the right to request a one-time, 10-business day extension under MCL 15.235(2)(d). While EO 2020-38 eased response times and compliance times under FOIA, it did not eliminate or fundamentally alter a public body's FOIA obligations. Thus, in light of the unchallenged public health concerns cited by defendants, the Court concludes that the order was within the scope of the Governor's authority granted by the EPGA because it was reasonable and necessary for the protection of life and/or to bring the spread of COVID-19 under control.

On the question of whether the EPGA occasions an unconstitutional delegation of legislative authority, the Court once again disagrees with plaintiffs. For the reasons articulated more fully in the simultaneously issued decision in *Mich House of Representatives v Governor*, (Docket No. 20-000079-MZ), the delegation of authority to the Governor under the EPGA withstands constitutional muster. The Court adopts its pertinent analysis from the *Mich House of Representatives* decision and incorporates it herein.

IV. CONCLUSION

IT IS HEREBY ORDERED that plaintiffs' motion for preliminary injunction is DENIED.

IT IS HEREBY FURTHER ORDERED that defendants' motion for summary disposition is GRANTED pursuant to MCR 2.116(C)(8) and (C)(10), and plaintiffs' competing motion for summary disposition is DENIED.

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

Dated: May 21, 2020

Cynthia Diane Stephens, Judge
Court of Claims