STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE CERTIFIED QUESTION FROM THE U.S. DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN.

Supreme Court No. 161492

USDC-WD: 1:20-cv-414

MIDWEST INSTITUTE OF HEALTH, PLLC, D/B/A GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, and JEFFREY GULICK,

Plaintiffs,

v

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

Defendants.
_____/

The appeal involves a question that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

SUPPLEMENTAL BRIEF OF GOVERNOR AND DIRECTOR OF DEPARTMENT OF HEALTH AND HUMAN SERVICES

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STATEMENT OF QUESTIONS PRESENTED

On September 9, 2020, this Court requested additional briefing on two questions:

I. Whether the Emergency Powers of the Governor Act (EPGA), MCL 10.31 *et seq.*, applies in the context of public health generally or to an epidemic such as COVID-19 in particular.

The Governor and Director answer: Yes, and yes.

Plaintiffs answer: No, and no.

II. Whether "public safety," as that term is used in the EPGA, is a term of ordinary meaning or has developed a specialized legal meaning as an object of the state's police power, and whether "public safety" encompasses "public health" events such as epidemics.

The Governor and Director answer: Ordinary meaning, and yes.

Plaintiffs answer: Term of art, and no.

INTRODUCTION

The language of the Emergency Powers of the Governor Act (EPGA) is unambiguous. It empowers the Governor to protect life and property when the public safety is imperiled by a "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." MCL 10.31(1). This pandemic presents such an emergency, by imperiling the safety of Michigan's residents. In their briefing, the Plaintiffs here have conceded as much. There are two points here in response to this Court's questions.

First, the EPGA encompasses public health crises generally when they jeopardize public safety, and the COVID-19 pandemic presents exactly this sort of crisis. The public's safety is threatened by a widespread, highly contagious, as-yet untreatable virus that has killed thousands. That is why every state, like Michigan, faces a state of emergency.[1] And it is why the Plaintiffs in this case, like the plaintiffs in many other cases, have never questioned that this pandemic can create, and has created, the emergency circumstances contemplated under the EPGA. Nothing in the EMA or in the public health laws of 1945 or today undermines this conclusion, or purports to preclude the Governor from responding to public health crises that imperil public safety, such as COVID-19.

[1] See https://www.nga.org/state-covid-19-emergency-orders/ (last accessed September 15, 2020) (designated as a state of "emergency," state of "public health emergency," or state of "disaster").

Second, the term "public safety" was not used as a term of art in the EPGA, and it should be given its ordinary meaning and application. And as the Plaintiffs have conceded, the "public safety" is imperiled by the widespread risk of death and significant harm posed by a pandemic such as COVID-19. Michigan courts, the U.S. Supreme Court, and contemporary ordinary usage all recognize that the dangers of epidemics can, and do, affect "public safety," and the use of the EPGA by Governors in the past comports with this understanding of the statute's scope by applying to circumstances beyond quelling a riot. The deadly epidemic of COVID-19 imperils public safety, and the Governor has properly invoked the EPGA to protect the people of this State from it.

ARGUMENT

I. The Emergency Powers of the Governor Act applies in the context of public health generally and to an epidemic such as COVID-19 when it imperils the safety of Michigan's residents.

The text of the EPGA is unambiguous and requires no further construction. It empowers the Governor – during an emergency – to take action to protect the public in Michigan when their safety is imperiled. The COVID-19 pandemic presents such an emergency. The Plaintiffs have expressly recognized as much in their briefing. Moreover, the fact that the Emergency Management Act expressly references an "epidemic" does not foreclose the EPGA from addressing it as well. As the EMA made clear, the Legislature intended the two emergency acts would act side-by-side, and the EMA would not work to limit the EPGA. And the fact that the public health laws, both in 1945 and now, conferred authority on other executive agencies to respond to communicable diseases or epidemics does not limit the Governor's authority under the EPGA.

A. The COVID-19 pandemic is a public emergency under the EPGA that imperils the safety of Michigan's residents by threatening their lives.

This Court's canons of constructions place the statutory text – and its plain meaning – at the center of understanding the intent of the Legislature in enacting a law. Legion are the cases that provide that a statute must be applied as written when unambiguous and that no construction is permitted. See, e.g., *McQueer v Perfect Fence Co*, 502 Mich 276, 286 (2018) ("The primary rule of statutory construction is that, where the statutory language is clear and unambiguous, the statute must be applied as written"). Such is the case here.

As this brief more fully presents below, the phrase "when public safety is imperiled" (MCL 10.31(1)) includes the circumstance in which a pandemic jeopardizes the lives of Michigan residents, as reflected in both Michigan law and federal law. See *In People ex rel Hill v Bd of Ed of City of Lansing*, 224 Mich 388, 393 (1923) ("of paramount necessity, a community has the right to protect itself against an epidemic of disease which *threatens the* ***safety*** of its members.") (emphasis added); *Jacobson v Commonwealth of Massachusetts*, 197 US 11, 37 (1905) ("It seems to the court that an affirmative answer to these questions would practically strip the legislative department of its function to care *for the public health* ***and the public safety*** *when endangered by epidemics of disease*.") (emphasis added). See Issue II, below.

The Plaintiffs have expressly agreed on this point that the Governor acted appropriately in addressing the COVID-19 pandemic under the EPGA. In fact, the Plaintiffs stated this point twice. Initially, the concession appeared in the introduction. See Plaintiffs' Reply, p 1 ("Plaintiffs acknowledge that for 51 days following the Governor's first declaration of a state of emergency based on COVID-19, *the Governor acted within the bounds of the enabling* ***statutes*** and the Michigan Constitution. *This is no small concession*.") (emphasis added). And then the Plaintiffs reiterated the point in the body of the reply brief in addressing the authority of the Governor under the EPGA. See *id.* at 3 ("The Governor acted within the limits of her authority for 51 days.").

In the usual case, this agreement would operate as a waiver and would foreclose the ability of the Plaintiffs to argue otherwise. See, e.g., *People v Carter,* 462 Mich 206, 215 (2000). And indeed, that conclusion would seem to hold even more strongly in this certified-question context, where this Court is acting in a very specific capacity, i.e., to guide a federal court's adjudication of the particular questions of state law that have been put before this Court.[2] Regardless, it is telling that the Plaintiffs have understood the EPGA to cover epidemics such as COVID-19.

[2] As noted in earlier briefing, this Court should decline to answer these questions, given the significant immunity and justiciability issues. And, on this point, at argument the undersigned counsel was asked whether this Court's answers to certified questions created binding precedent in the state courts, see MCR 7.308(A)(2), and he responded yes, but that he had not examined the issue. After further research, the answer to that question is more nuanced. Strictly speaking, the answer to the question does not appear to bind the requesting court. See, e.g., *In re Certified Questions from U.S. Court of Appeals for Sixth Circuit*, 472 Mich 1225, 1229 (2005) (Young, J., concurring) ("We have absolutely no authority to force a federal court, sister state court, or tribal court to adopt our answer to a certified question.") But the federal courts are bound to the construction of state law set by that state's highest court. *Montana v Wyoming*, 563 US 368, 377 n 5 (2011) ("The highest court of each State, of course, remains 'the final arbiter of what is state law.' "), quoting *West v American Telephone & Telegraph Co*, 311 US 223, 236 (1940). See also *Grover by Grover v Eli Lilly and Co*, 33 F3d 716, 719 (CA 6, 1994) ("When a state supreme court accepts a certified question, it voluntarily undertakes a substantial burden and its resolution of the issue must not be disregarded."). And Michigan's appellate courts have apparently treated this Court's decisions in certified questions as binding, as exampled by a case in which that court did not follow it as precedent because the specific proposition was not essential to the resolution of the issue. See *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 270 (2003) ("In addition, the Supreme Court stated that mutual insurance company policyholders 'would be in a better position to assert a property interest in the surplus....' *In re Certified Question (Fun 'N Sun RV, Inc. v Michigan)*, 447 Mich 765, 791 n 34 (1994), after remand 223 Mich App 542 (1997). *However, this statement was not essential to the determination of that case and, thus, is not binding precedent.*") (emphasis added).

The same basic point is true of the Legislature in their amicus brief, see p 22, which argues the same in substance as their brief in the Court of Appeals in their own case, because they do not contest that the EPGA could cover local public health emergencies. See *House of Rep v Governor,* ___ Mich App ___ (2020), slip op, p 15 ("Although it is the Legislature's position that the EPGA does not encompass statewide epidemics, it did not contend in its brief on appeal that the EPGA did not cover localized or regional epidemics or epidemics in general. Indeed, as noted earlier, the Legislature conceded that the parties agreed that *the two acts 'cover the same subject matter.'* This is akin to a waiver of the issue.") (emphasis added). The fact that the two key parties who have been litigating the breadth of the EPGA have in substance agreed that the EPGA governs this pandemic as a public health emergency strongly supports the natural, plain reading of this statute.

B. The fact that the EPGA does not list "epidemic" – in contrast to the Emergency Management Act – does not limit the general terms or the authority of the Governor under the EPGA.

Unlike the EPGA that uses general terms to encompass its breadth, the EMA provides a specific definition of "disaster" that expressly includes an "epidemic":

> (e) "Disaster" means an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to, fire, flood, snowstorm, ice storm, tornado, windstorm, wave action, oil spill, water contamination, utility failure, hazardous peacetime radiological incident, major transportation accident, hazardous materials incident, *epidemic*, air contamination, blight, drought, infestation, explosion, or hostile military action or paramilitary action, or similar occurrences resulting from terrorist activities, riots, or civil disorders. [MCL 30.402(e) (emphasis added).]

At oral argument, there was a suggestion that the inclusion of the term "epidemic" here meant that the EPGA did not also encompass a public crisis that resulted from an epidemic. Judge Tukel had reached that conclusion in his dissent in the Legislature's suit. See *House of Rep,* ___ Mich App ___, slip op p 9 (dissenting).[3]

This argument suffers from at least two fatal flaws.

First, the EMA makes clear that it does not "limit, abridge, or modify" the EPGA. MCL 30.417(d). As noted above, the ordinary understanding of a "public emergency" that imperils the safety of the public by threatening their lives would include an "epidemic of disease" such as COVID-19. See *Hill,* 224 Mich at 393. As previously briefed by the Governor and the Director of the Department of Health and Human Services in their principal filing here, § 17(d) ensures that the EMA does not limit the Governor's ability to proclaim an emergency under the EPGA:

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

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[3] Judge Tukel's dissent reasoned as follows:

> Thus, applying the rules of construction in a straightforward manner, it is readily apparent that the inclusion of the word "epidemic" in the definition of disaster under the EMA means that the Legislature did not understand any of the EPGA's triggering events to include an epidemic; if the EPGA applied to an epidemic, there would have been no reason to include it in the EMA definition, as it would be a redundancy, contrary to how we construe statutes, because the governor can impose all of the same relief under the EPGA as may be imposed under the EMA. [Slip op, p 9.]

Thus, any effort to narrow the construction of the EPGA by the EMA is expressly foreclosed by the plain terms of § 17(d), whether examining the Governor's power to proclaim a state of emergency or the Governor's powers more generally. In short, nothing in the EMA constrains the Governor's powers, including under the EPGA.

Second, insofar as this argument is advanced as one of mere statutory construction, such a claim is unavailing. Both the EMA and the EPGA cover "disaster[s]," with the EMA expressly defining the term but the EPGA not. If the EMA's definition is treated as some sort of limitation on the EPGA, such that whatever is included in the former must be excluded from the latter, there would be nothing left to the EPGA. The definition of "disaster" in the EMA encompasses "an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause." MCL 30.402(e). If all such circumstances were excised from the scope of the EPGA, what threats to public safety would be left? Indeed, even the one kind of event that appears to be indisputably within the EPGA's scope – rioting – is expressly included in the EMA:

> (e) "Disaster" means an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to . . . hostile military action or paramilitary action, *or similar occurrences resulting from terrorist activities, **riots**, or civil disorders*. [MCL 30.402(e) (emphasis added).][4]

Under this view, even the "riot statute" does not address riots – only the EMA does.

[4] As noted at oral argument, the EMA was passed in 1976 with an express exclusion of riots: "Riots and other civil disorders are not within the meaning of this term unless they directly result from and are aggravating element of the disaster." See Public Act 390 of 1976. The current language was passed in 1990. See PA 50 of 1990.

There is no sound reason to construe the EMA and the EPGA in this fashion. Rather, this Court should give the Legislature's words their plain meaning. The Legislature made clear that the EMA was designed to be, among other things, an additional power, not one that displaced or cabined the Governor's other powers.

Canons of statutory construction are tools to divine legislative meaning, not obscure it. Here, the Legislature, in enacting the EMA, made certain that the reader would not be left to guess at its intentions, and it included § 17(d) to ensure that a reviewing court would not attempt the very thing attempted here – to use the EMA to limit the Governor's other authorities, including under the EPGA. It is no wonder that the Plaintiffs and the Legislative plaintiffs in *House of Representatives* did not advance this argument previously.

C. Nothing in the public health laws of 1945 or the laws present today impinges on the Legislature's broad grant of authority to the Governor to combat emergencies under the EPGA.

The laws governing public health in Michigan, in 1945 or today, do nothing to limit the Governor's authority under the EPGA. The power of the executive branch of government is vested in the Governor. Mich Const, art 5, § 1. And, unless otherwise provided by the state constitution, the Governor supervises each principal department to ensure that "the laws be faithfully executed." Art 5, § 7. In some circumstances, the state constitution further provides the Governor with "concurrent legislative authority" over the executive branch. See *House Speaker v Governor,* 443 Mich 560, 579 (1993) (evaluating the Governor's power "to reorganize the executive branch" under art 5, § 2).

In enacting laws pertaining to the public health, the Legislature has, at times, conferred authority on various executive departments and agencies to respond to communicable diseases or epidemics, including in emergency circumstances. But none of these grants of authority has purported to limit the substantial authority that the Governor has over the executive branch in general, or the specific authority that the Governor has under the EPGA to respond to emergencies "when the public safety is imperiled." MCL 10.31(1). For the authority conferred by the Legislature on public health authorities, these laws did not purport to be exclusive of any powers conferred by law on the Governor. This is true of the laws from both 1945 and now.

For the public health laws that were in place when the EPGA was passed, those laws – much as the current ones – provided authority to the state board of health (later replaced by the state health commissioner) to respond to communicable diseases:

> Whenever it shall be shown to the satisfaction of the state board of health, that cholera, diphtheria, or other dangerous communicable disease exists in any foreign country, neighboring state, or locality within this state whereby the public health is imperiled, and it shall be further shown that immigrants, passengers or other persons seeking to enter this state, or to travel from place to place within this state, are coming from any locality where such dangerous communicable disease exists, the state board of health shall be authorized to establish a system of quarantine for the state of Michigan *and the governor shall have authority to order the state militia to any section of the state on request of the state board of health to enforce such quarantine.*
>
> [Public Act 230 of 1885; CL 1948, 329.1 (emphasis added).][5]

[5] In Public Act 146 of 1919, the powers and duties to the state public health board were transferred to the state health commissioner. See CL 1948, 325.4.

In the same vein, the Legislature provided to the state health commissioner the ability to bar public meetings to prevent the spread of epidemics, extending to the entire state if "countersigned" by the Governor:

> In case of an epidemic of any infectious or dangerous communicable disease within this state or any community thereof, the state health commissioner may, if he deem it necessary to protect the public health, forbid the holding of public meetings of any nature whatsoever except church services which may be restricted as to number in attendance at 1 time, in said community, or may limit the right to hold such meetings in his discretion. Such action shall not be taken, however, without the consent and approval of the advisory council of health. Any order made pursuant to this section shall be published in such manner as the advisory council of health may direct and shall become effective at a date specified in said order. *Such order shall be signed by the health commissioner and if applicable to the entire state be countersigned by the governor.*
>
> [Public Act 146 of 1919; CL 1948, 325.9 (emphasis added).]

These provisions enabled the state board of health (commissioner) to respond to "dangerous communicable disease[s]" by "establish[ing] a system of quarantine," or by "forbid[ding] the holding of public meetings." CL 1948, 329.1, 325.9. See also *Rock v Carney,* 216 Mich 280, 295 (1921) ("There is power to protect the public health; it is vested by law in public health boards to be exercised through reasonable rules and regulations duly promulgated").[6]

Also, the same substantive provision regarding communicable diseases appears in the 1929 compiled laws. See CL 1929, Ch 114, 6600, sec. 1. It is worth noting in passing that this Court rejected an improper delegation challenge to this law. See *Hurst v Warner,* 102 Mich 238, 246 (1894) ("the statute is constitutional"). The health code in CL 1948 was outlined by Department in Chapter 325, 325.1 to 325.307, and by communicable disease in Chapter 329, 329.1 to 329.405.

[6] The public health laws also invested the local public health officials a role in addressing communicable diseases. See CL 1948, 327.1 *et seq.* See also *Keho v Bd of Auditors of Bay Cty*, 235 Mich 163, 166 (1926).

These statutory provisions extant in 1945 did not, however, bar the Governor from taking action in response to such diseases. To the contrary, the decision making regarding its enforcement under these provisions was expressly reserved to the Governor. And there is nothing to suggest that, by expressly reserving a role for the Governor in the state board's (commissioner's) exercise of these laws, the Legislature intended that to be the *only* role the Governor could or would play in protecting the public from dangerous communicable diseases.

Indeed, the authority conferred on the Governor by the EPGA enabled the Governor to provide such protections in a broader and more flexible manner. These old public health laws did not enable the response action to be tailored in form and type to what is "reasonable" and "necessary" under the particular circumstances presented by the dangerous communicable disease. MCL 10.31(1). Simply put, there is no reason to conclude that the Legislature intended to deprive the Governor of the ability to act under the EPGA in response to diseases, merely because it vested the state board of health (commissioner) with authority as well.

The same point applies to the current laws governing emergencies and public health. For emergencies that require the protection of "public health, safety, or welfare," the Administrative Procedures Act provides agencies with the authority to promulgate "an emergency rule without following the notice and participation procedures" normally required by the APA, so long as the Governor "concurs in the finding of emergency." MCL 24.248(1). The rule can last up to six months, with the Governor authorized to extend its duration by another six months upon filing a

"certificate of the need for the extension." *Id.* As with the laws discussed above, there is nothing to suggest that, by creating this tool of emergency response – in which executive agencies are authorized to act, but only upon the Governor's approval – the Legislature intended to supplant, repeal, or limit any authority otherwise vested in the Governor, including under the EPGA.

So too under the Public Health Code. The key provision to address epidemics and the emergency powers of the Director of DHHS states:

> If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code. [MCL 333.2253(1).][7]

[7] See also MCL 333.2251:

> (1) Upon a determination that an imminent danger to the health or lives of individuals exists in this state, the director immediately shall inform the individuals affected by the imminent danger and issue an order that shall be delivered to a person authorized to avoid, correct, or remove the imminent danger or be posted at or near the imminent danger. The order shall incorporate the director's findings and require immediate action necessary to avoid, correct, or remove the imminent danger. The order may specify action to be taken or prohibit the presence of individuals in locations or under conditions where the imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove the imminent danger.
>
> (2) Upon failure of a person to comply promptly with a department order issued under this section, the department may petition the circuit court having jurisdiction to restrain a condition or practice which the director determines causes the imminent danger or to require action to avoid, correct, or remove the imminent danger.
>
> (3) If the director determines that conditions anywhere in this state constitute a menace to the public health, the director may take full charge of the administration of applicable state and local health laws, rules, regulations, and ordinances in addressing that menace.

Nothing in these provisions, or elsewhere in the Public Health Code, purports to limit the Governor's authority under the EPGA, or deprive the Governor of the ability to act in response to epidemics that imperil the public safety. The Governor is not identified, and the laws make no reference to the EPGA (or the EMA), let alone claim to displace or otherwise limit the Governor's authority under either of those statutes. Rather, the Public Health Code expressly states that it is "intended to be consistent with applicable federal and state law and shall be construed, when necessary, to achieve that consistency." MCL 333.1111(1).

> (4) If the director determines that an imminent danger to the health or lives of individuals in this state can be prevented or controlled by the promulgation of an emergency rule under section 48(2) of the administrative procedures act of 1969, 1969 PA 306, MCL 24.248, to schedule or reschedule a substance as a controlled substance as provided in part 72,1 the director shall notify the director of the department of licensing and regulatory affairs and the administrator of his or her determination in writing. The notification shall include a description of the substance to be scheduled or rescheduled and the grounds for his or her determination. The director may provide copies of police, hospital, and laboratory reports and other information to the director of the department of licensing and regulatory affairs and the administrator as considered appropriate by the director.
>
> (5) As used in this section:
>
> (a) "Administrator" means that term as defined in section 7103.2
>
> (b) "Imminent danger" means a condition or practice exists that could reasonably be expected to cause death, disease, or serious physical harm immediately or before the imminence of the danger can be eliminated through enforcement procedures otherwise provided.
>
> (c) "Person" means a person as defined in section 11063 or a governmental entity.

See also MCL 333.5501 *et seq*. (governing prevention and control of diseases).

Indeed, when the Legislature enacted the Public Health Code, it made the effect of that enactment on existing law clear, repealing many laws the Code was intended to supplant. See Strichartz, *Michigan Public Health Code,* (ICLE, 1982), p 896. It left the EPGA, however, fully intact. There is no basis, express or implied, to read the Public Health Code to limit the scope of the EPGA. Cf *Staiger v Madill*, 328 Mich 99, 112 (1950) (the principle that repeal by implication is disfavored "is of especial application in the case of an important public statute of long standing which should be shown to be repealed either expressly, or by a strong and necessary implication").

Correspondingly, consistent with this grant of authority under the Public Health Code, the Director of the Department has issued sixteen orders in response to the COVID-19 pandemic, twelve of which remain in place, and some of which govern similar subjects as the Governor's orders.[8] And the Governor has exercised authority under both the EPGA and the EMA that goes beyond the emergency powers contemplated under the Public Health Code, issuing orders that fall outside of the powers of the Director along with orders that overlap with those powers. (See list of Governor's executive orders.)[9]

[8] See https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-533660--,00.html (last accessed September 14, 2020). The four rescinded orders were dated April 2, 2020 (the order at issue in this case) as well as May 18, 2020, May 27, 2020, and June 10, 2020.

[9] See https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html (last accessed September 14, 2020).

As with the statutory provisions discussed above, this overlap in authority does not demand a strained reading of the EPGA. As noted already, the Governor is the chief executive and is granted authority constitutionally over the principal departments. See art 5, § 7. She stands at the top of the pyramid of authority in the executive branch and is the official of that branch most politically accountable to the people. The idea that statutory grant of authority to a department or agency, simply by virtue of its existence, limits or displaces a statutory grant of authority to the Governor would turn this pyramid upside down.

Meanwhile, it makes eminent sense that, even when executive departments and agencies are authorized to act in certain areas and ways, the Governor would retain broad authority to make decisions and act as well, particularly as to crises that threaten the safety of the public whose State she has been elected to govern. Accordingly, some of the responsibilities in responding to a public health emergency overlap between the Governor and the Director, but the Governor has additional powers in both the EPGA and the EMA, which are not contemplated by the public health emergency laws. Compare, e.g., MCL 333.2251 and .2253 with MCL 10.31(1), MCL 30.303, and MCL 30.305. As a matter of both interpretation and governance, this overlap is unexceptional and perfectly sound.

In the end, the plain language of the EPGA is clear and requires no further construction. The Governor has properly acted to protect Michigan's residents from this pandemic, which presents an ongoing threat to their safety.

II. An epidemic in general, and COVID-19 in particular, implicates public safety as that term is used and understood in the EPGA.

For the second question, this Court asked "whether 'public safety,' as that term is used in the EPGA, is a term of ordinary meaning or has developed a specialized legal meaning as an object of the state's police power, and whether 'public safety' encompasses 'public health' events such as epidemics."

"Public safety" as a concept embedded in the police power does not have a settled, defined meaning. But whether or not "public safety" is a term of art, it encompasses public health events like epidemics. In early 20th century cases discussing the breadth of the State's police power in combating outbreaks of disease, both this Court and the U.S. Supreme Court understood that epidemics implicate "public safety." Contemporary lay understanding is in concert as confirmed by dictionary definitions. And the prior invocations of the EPGA by Michigan Governors further reinforce the breadth of scope that the statute's plain language reflects. Accordingly, an epidemic such as COVID-19 falls within the scope of the EPGA.

A. A legal term of art is one that has a settled, definite, and well-known meaning at common law.

This Court is tasked with determining the Legislature's intent, with the presumption "that the Legislature intended the meaning clearly expressed – no further judicial construction is required or permitted and the statute must be enforced as written." *People v March*, 499 Mich 389, 398 (2016) (citation and internal quote omitted).

Thus, when, as here, a statute fails to define a term, "we presume that the Legislature intended for the words to have their ordinary meaning." *March,* 499 Mich at 398; MCL 8.3a. Only when an undefined term "has 'a settled, definite, and well known meaning at common law,'" will the Court adopt that meaning over the plain and ordinary understanding. *March*, 499 Mich at 398, quoting *People v Covelesky,* 217 Mich 90, 100 (1921) (subsequent history omitted). Such "technical words and phrases . . . shall be construed and understood according to [their] peculiar and appropriate meaning. MCL 8.3a; see also *March*, 499 Mich at 398.

B. "Public safety" has no discrete, settled legal meaning in the context of the police power, which does not demarcate a line between "public safety" and "public health."

The four corners of the police power are not clearly defined. As the U.S. Supreme Court long ago described it, the police power, "whether called 'police,' 'governmental,' or 'legislative,' exists in each state, by appropriate enactments not forbidden by its own constitution or by the constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good." *Lake Shore & M S R Co v State of Ohio*, 173 US 285, 297 (1899).

Although its breadth is unquestionable, the State's police power has been described in myriad ways and "is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest." *Jaarda v Van Ommen*, 265 Mich 673, 684 (1934).

In fact, this Court has described the police power as "somewhat vaguely termed" and noted that "the exact description and limitation of which have not been attempted by the courts." *Withey v Bloem*, 163 Mich 419, 423 (1910). See also *Hamilton v Vaughan*, 212 Mich 31, 43 (1920) (Fellows, J., dissenting) ("[A] hard and fast definition of the police power, inclusive and exclusive, has not been generally attempted by the courts . . . ."). The police power constitutes a package of authority that has no concrete formulation. Reviewing the multiplicity of definitions confirms this, and only highlights that "public safety," a constituent part of the "vaguely termed" police power, *Withey v Bloem*, 163 Mich at 423, has no "settled, definite, and well known meaning at common law," *March*, 499 Mich at 398.[10]

But it is not as if the police power ebbs and flows with each case. It remains the same, though the words used to describe it may vary. As such, one cannot reasonably interpret that litany of objects as having no overlap. In some formulations, for example, "public health" is listed side-by-side with "public safety," see n 10, and in others, it is defined as a part of "public safety." In *Clements v McCabe*, 210 Mich 207, 215 (1920), this Court stated that the police power "operates

[10] See, e.g., *Mooney v Vill of Orchard Lake*, 333 Mich 389, 392 (1952) ("The test of legitimacy [of the exercise of police power] is the existence of a real and substantial relationship between the exercise of those powers in a particular manner in a given case and *public health, safety, morals or the general welfare*."); *Cady v City of Detroit*, 289 Mich 499, 504–505 (1939) ("The sovereign power of the state includes *protection of the safety, health, morals, prosperity, comfort, convenience and welfare of the public*, or any substantial part of the public."); *People v Brazee*, 183 Mich 259, 264 (1914) ("It is an attribute of sovereign power to enact laws for the exercise of such restraint and control over the citizen and his occupation as may be necessary to promote the *health, safety, and welfare of society*. This power is known as the police power.").

in a conceded sphere relating to public safety, order, and morals *for the protection of* health, person, and property, which is never questioned." *Id.* (emphasis added).

The takeaway from these various recitations of the police power is that the constituent phrases necessarily overlap. For example, the public "welfare" can no doubt be impacted by concerns of public safety. So too can the public "safety" be affected by epidemics that threaten the public health. Given the varied and inconsistent formulations, it is difficult to see how these intertwining and overlapping phrases – and "public safety" in particular – have "a settled, definite, and well known meaning at common law," let alone a meaning that permits no overlap between them. *March*, 499 Mich at 398.

One thing is clear, though. The concept of "public safety" has long been understood to encompass epidemics.

C. At the time of the EPGA's enactment, it was well understood that epidemics endanger public safety as well as public health.

At the time of the EPGA's enactment, the phrase "public safety" included dangers stemming from epidemics. In the early twentieth century, the U.S. Supreme Court and this Court both understood that epidemics in particular threaten "public safety." And during that era, the Legislature granted authority to certain cities to combat contagious diseases "when the public safety may so require."

Jacobson v Commonwealth of Massachusetts, is the lodestar case regarding the permissible scope of a State's emergency response to an epidemic. 197 US 11 (1905). *Jacobson* is the genesis of the broad latitude afforded the State in

responding to public health emergencies, and that case has played a critical role in guiding courts across the country in their consideration of challenges to the States' responses to COVID-19. See, e.g., *South Bay United Pentecostal Church v. Gavin Newsom, Governor of California*, 509 U.S. ___ (2020) slip op., p. 2 (summary order issued May 29, 2020) (Roberts, C.J., concurring); *League of Independent Fitness Facilities and Trainers, Inc v Governor Gretchen Whitmer*, 814 Fed Appx 125, 127 (2020) ("All agree that the police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts. [citing *Jacobson*.] This century-old historical principle has been reaffirmed just this year by a chorus of judicial voices, including our own.")

Jacobson concerned Massachusetts' delegation of authority to localities to permit mandatory vaccinations during a public health crisis. *Id.* The state law at issue specifically granted the authority to localities to impose mandatory vaccinations, and Cambridge exercised it during a smallpox outbreak. *Id.* at 12–13. A resident refused, was charged, and pled that the U.S. Constitution protected him against mandatory vaccination. *Id.* at 13. In rejecting his theory, the U.S. Supreme Court made clear that an epidemic endangers "public safety":

> It seems to the court that an affirmative answer to these questions would practically strip the legislative department of its function to care *for the public health* ***and the public safety*** *when endangered by epidemics of disease*. Such an answer would mean that compulsory vaccination could not, in any conceivable case, be legally enforced in a community, even at the command of the legislature, however widespread the epidemic of smallpox, and however deep and universal was the belief of the community and of its medical advisers that a system of general vaccination was *vital to the safety of all*. [*Jacobson*, 197 US at 37 (emphasis added).]

In *People ex rel Hill v Bd of Ed of City of Lansing*, 224 Mich 388 (1923), this Court followed the same path, quoting *Jacobson* at length and defending the right of the State to guard against pandemics: "of paramount necessity, a community has the right to protect itself against an epidemic of disease which *threatens the safety* of its members." *Id.* at 391 (emphasis added). Moreover, this Court in *Hill* cited *Jacobson* for the proposition that "it cannot be adjudged that the present regulation of the board of health was not necessary *in order to protect the public health* ***and*** *secure the public safety*." 224 Mich at 391 (emphasis added). See also *In re Jeffries Homes Housing Project*, 306 Mich 638, 646 (1943) (characterizing as matters of "public safety" actions "diminish[ing] the potentialities of epidemics" and "prevent[ing] the spread of . . . disease"). In a similar vein, this Court has recognized that communicable diseases are "dangerous" and present a "danger." *Hill,* 224 Mich at 392–393 ("[a] child afflicted with leprosy, smallpox, scarlet fever, or any other disease which is both *dangerous* and contagious"), *id.* at 393 ("So a child recently exposed to such a disease may be denied the privilege of our schools until all *danger* shall have passed") (emphases added), quoting *In the Matter of Viemeister*, 179 NY 235 (1904).

This Court has thus treated public health and public safety not as separate silos of concern. Rather, it has recognized that both are implicated by epidemics. To sever these symbiotic concepts would tear at the fabric of long-held understanding and tradition about police power to protect the public in a crisis.

Common understanding by reference to a contemporary dictionary definition confirms this. "Safety" contemplates the keeping of others free from danger, hazard, and disease. Webster's New Collegiate Dictionary (1949) defines "safety" to mean "1. Condition of being safe; freedom from danger or hazard," or alternatively, "4. A keeping of oneself or others safe, esp. from danger of accident *or disease*." (Emphasis added.)[11] While this definition does not contemplate every malady or health issue one might experience, no matter how small, it plainly encompasses disease (and, therefore, epidemics).

This definition also makes sense in the context of the statute. *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 59 (2014) ("Individual words and phrases are not read in a vacuum . . . ."). The Governor's authority actuates only when "public safety is *imperiled*." MCL 10.31(1). As a result, it is not so broad as to grant the Governor authority to combat, for example, a widespread contraction of the common cold. While that would surely be a "public health" concern, it would not be one of "public safety," because the public would not be in need of protection from a widespread risk of significant harm or death.

11 **safe'ty** (sāf'tĭ), *n.* **1.** Condition of being safe; freedom from danger or hazard. **2.** Quality of being devoid of whatever exposes one to danger or harm; safeness. **3.** *Rare.* Close custody. **4.** A keeping of oneself or others safe, esp. from danger of accident or disease. **5.** A protective device, as on a firearm, to prevent accidental discharge. **6.** *Amer. Football.* Any act resulting in the ball's being declared dead on, above, or behind the goal line, in the possession of a player guarding his own goal, provided the impetus which sent the ball to or across the line was given by the side defending the goal; also, a score (2 points) so made. **7.** *Baseball.* A safe hit. —*adj.* **1.** Made or planned so as to ensure the safety of the user, operator, etc., as in **safety glass.** **2.** Of or pertaining to the safeguarding of the public, or of a group of employees, or the like, from accident; as, *safety* measures, rules; *safety* engineers.

Trying to read "public safety" narrowly to exclude all matters of public health – for instance, as comprising only matters requiring law-enforcement actions – would not only contravene the phrase's plain meaning, but would also conflict with the types of "public emergenc[ies]" detailed in the EPGA.

Along with other limitations, the Governor may only proclaim a state of emergency under the EPGA "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency," or during "reasonable apprehension of immediate danger of" such an emergency. MCL 10.31(1). This list certainly includes events that may require law-enforcement actions to protect the public safety, such as riots. But it also includes events whose threats to public safety predominantly, if not entirely, call for other forms of police-power intervention, such as "disaster[s]" and "catastrophe[s]." Both the "broad power of action" explained in MCL 10.32 and the types of "public emergencies" in MCL 10.31(1) signal that a law-enforcement limitation should not be read into "public safety." Instead, the phrase should be read with the breadth its plain meaning requires. And when so read, it is clear that epidemics such as COVID-19 can, and do, imperil public safety.

D. Prior invocations of the EPGA confirms that it covers more than simply law enforcement response to civil unrest.

While the applicability of EPGA to this epidemic is settled by the plain language of the statute, it bears mention that this conclusion comports with how prior Governors have read and used the statute.

In questioning whether the EPGA can be used in response to an epidemic, the Legislature asserts that the EPGA has only ever been invoked twice, once for a riot and another occasion for an ice storm in 1985. (Amicus Br, p 28.) This claim is mistaken. In fact, the EPGA has been invoked multiple times since its enactment, at least three of which involved emergencies well beyond what a law-enforcement-limited reading of "public safety" would countenance.

In 1946, Governor Harry Kelly, the year after he signed into law the EPGA, he invoked it to declare a state of emergency "throughout the entire state" based on a critical coal shortage caused by a strike:

> WHEREAS, it has been represented to me by the Federal Solid Fuels Administration and Captain Donald S. Leonard, State Fuel Administrator, that the strike in the bituminous coal mines of the nation and the drastic curtailment of fuel supplies coming into the state, caused by the subsequent embargo on railroad transportation, have created *a public crisis within the State of Michigan endangering the health, safety, property and general welfare of the people of the State*. [Appendix A (emphasis added).]

With the recently enacted EPGA, Governor Kelly imposed restrictions to conserve coal and transfer it from some communities to others "in dire need."[12]

In 1950, Governor G. Mennen Williams encountered the same kind of crisis, and issued the same basic proclamation under the EPGA: "the shortage of coal has created a public crisis with the State of Michigan endangering the health, safety, property and general welfare of the people of the State." (Appendix B, p 3.)

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[12] *Michigan Declares Emergency Exists*, New York Times, December 7, 1946, available at https://timesmachine.nytimes.com/timesmachine/1946/12/07/98603154.html?pageNumber=2

For this declaration, Governor Williams also issued regulations regarding the delivery of coal and the establishment of "certificates of necessity" for the use of coal that would become effective once the local chief executive certified the existence of "emergency conditions":

> 1. The coal stocks in wholesale and retail yards be frozen and no deliveries be made therefrom except as authorized through certificates of necessity . . .
> 2. That certificates of necessity shall be issued by the local fuel administrator only to persons, agencies, institutions and utilities upon the basis of need and essential use in the following classifications . . . [Appendix B, p 1.]

On a third occasion, in 1970, Governor William Milliken invoked the EPGA as a tool for "proper safeguarding of the public health, safety, and welfare" by prohibiting certain fishing in Lake St. Clair and the St. Clair River for a duration of over 20 months.[13] Governor Milliken issued Executive Order 1970-6, which found "a state of reasonable apprehension of immediate danger to the public health, safety and welfare" and barred fishing, on threat of a misdemeanor, in Lake St. Clair and the St. Clair River. (E.O. 1970-6, Appendix C.) Apparently, there was a

[13] In addition to the executive orders discussed here, several others appear to have been issued pursuant to the EPGA apparently addressing civil unrest. See, e.g., Executive Orders 1964-02 (state of emergency in Hillsdale); 1967-3 (Flint); 1967-4 (Detroit), 1967-5 (Grand Rapids); 1968-1 (Wayne County); 1968-2 (Mt. Clemens); 1970-9 (Ypsilanti). Executive orders from 1955 to present are available at the Library of Michigan online. https://bit.ly/3hnn7jV. Executive orders and proclamations prior to that time are housed at the Archives of Michigan but are not organized or held in a single, accessible location, and many are not indexed.

contamination of fish in those bodies of water, and Canada had ordered a similar measure the week prior.[14]

On April 29, 1970, Governor Milliken also proclaimed, "a state of reasonable apprehension of immediate danger to the public health, safety, and welfare from the species, Walleye," in Lake Erie. (E.O. 1970-7, Appendix D). On May 20, 1970, the Governor reiterated the "reasonable apprehension of immediate danger to the public health" by certain species of fish, and continued the prohibition on commercial fishing in Lake Erie, but dialed back the full ban on fishing in the St. Clair River and Lake St. Clair, amending E.O. 1970-6 to permit only catch-and-release recreational fishing in those bodies of water. (E.O. 1970-11, Appendix E.)[15] Again, violations of the order constituted misdemeanors. (*Id.*)[16]

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[14] *St. Clair Fishing Banned By Michigan's Governor*, New York Times, April 11, 1970, available at https://www.nytimes.com/1970/04/11/archives/st-clair-fishing-banned-by-michigans-governor.html

[15] The order also expanded the catch-and-release requirement to the Detroit River, and Lake Erie, for certain species of fish. (E.O. 1970-11, ¶¶ 2–3.) The expansion of the area covered by the executive order was linked to the discovery that contaminated fish may have migrated from Lake Erie. *Sports Fishing Ban at Michigan Lake Ends After 5 Weeks*, New York Times, May 24, 1970, available at https://www.nytimes.com/1970/05/24/archives/sports-fishing-ban-at-michigan-lake-ends-after-5-weeks.html

[16] Of note, a legal challenge was mounted against the ban that reached this Court. But it was promptly turned away. On August 12, 1970, the Court disposed of the "complaint of plaintiff for superintending control . . . for the reasons that said complaint is without merit." See *Lake St. Clair Advisory Comm v Milliken*, Order issued Aug 12, 1970 (Docket No 52968). According to press reports, there were successful challenges to the validity of these executive orders, or pieces thereof, in trial courts. See *Gov. Milliken Bans Fishing*, Mackinac Center for Public Policy, Aug 31, 2020, available at https://www.mackinac.org/27988. The attorneys for the State Defendants have not been able to identify the nature of these challenges or located any additional appellate authority pertaining to these executive orders.

These restrictions on fishing continued under the Governor's EPGA authority for over 20 months. On December 20, 1971, the Governor found the condition supporting the emergency declaration "no longer exists" and rescinded 1970-6 and 1970-11 "pursuant to . . . the provision of Act 302 of the Public Act of 1945," which is the EPGA. (E.O. 1971-10, Appendix F.)

These prior invocations of the EPGA only confirm what the statute's plain text makes clear: "public safety" in MCL 10.31(1) contemplates matters well beyond civil unrest, and it overlaps with public health. The statute requires this reading of "public safety." Where an immediate danger to public safety exists – whether in the streets through lawlessness, in our water through contaminated fish, or in the air as COVID-19 spreads aggressively throughout the state – the EPGA offers the Governor emergency authority. Contortions of canons of construction should not stand in the way of such sound, sensible, and settled executive authority. The canons exist so that the law can be used to good effect in the real world. The EPGA has been put to such use for 75 years, and the Governor here has put it to such use in response to this pandemic – just as the statute contemplates, and just as the public safety has required.

* * *

Not all public health issues are public safety issues, and not all public safety issues are public health issues. But one thing is for certain: an epidemic such as COVID-19 is both.

A virus that is novel, airborne, highly contagious, potentially fatal, and as-yet untreatable has been menacing our State. The thousands of lives it has taken, and the countless more it has harmed, leave no doubt that it has imperiled the safety of the public. The Governor is taking the immediate action necessary to combat the virus's rampant spread and protect life. This is the greatest public health crisis of our age. And it is an emergency under the EPGA.

CONCLUSION AND RELIEF REQUESTED

This Court should conclude that the Emergency Powers of the Governor Act empowers the Governor to address public health emergencies that imperil the public safety, including the COVID-19 pandemic.

Respectfully submitted,

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