STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE CERTIFIED QUESTIONS FROM THE U.S. DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

Supreme Court No. 161492

USDC-WD: 1:20-cv-414

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

Plaintiffs,

v

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

Defendants.
_____/

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* PROFESSOR RICHARD PRIMUS IN SUPPORT OF NEITHER PARTY

/s Richard Primus
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Amicus Curiae

Amicus Curiae Professor Richard Primus, in support of his Motion for Leave to File a Brief in Support of Neither Party, states as follows:

1. This Court has invited "persons or groups interested in the determination of the certified questions" to "move the Court for permission to file briefs amicus curiae." In re Certified Questions from the United States District Court, Western District of Michigan opinion of the Michigan Supreme Court, issued June 30, 2020 (Docket No. 161492), p 1.

2. *Amicus* is the Theodore J. St. Antoine Collegiate Professor at the University of Michigan Law School.[1] He has taught constitutional law at the University of Michigan Law School for nineteen years. As a resident of Michigan and a scholar of constitutional law, he has an interest in the correct application of the separation-of-powers principle prescribed by Michigan's Constitution.

3. *Amicus* seeks leave to submit the brief attached as **Exhibit A** in support of neither party. The brief explains why the Executive Orders at issue in this case are not violations of the separation of powers established by the Michigan Constitution.

4. The validity of the Orders is solely a question of the proper construction of the Michigan statutes that the Governor contends provide her with the relevant emergency authority. The brief supports neither party because it takes no position on the proper construction of those statutes. The function of this brief is simply to clear away the constitutional questions.

[1] *Amicus*'s institutional affiliation is provided for identification purposes only. *Amicus* does not represent the University of Michigan Law School as an institution.

5. Because this case involves "questions of important public interest," this Court should grant leave "to file a brief as amicus curiae." City of Grand Rapids v Consumers' Power Co, 216 Mich 409, 414-15, 185 NW 852, 854 (19821) ("This court is always desirous of having all the light it may have on questions before it.").

6. WHEREFORE, amicus respectfully requests that he be granted leave to file the attached Brief of Amicus Curiae in support of neither party.

Dated: August 19, 2020

Respectfully submitted,

/s Richard Primus
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PROOF OF SERVICE

I hereby certify that on August 20, 2020, I electronically filed and electronically served:

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* PROFESSOR RICHARD PRIMUS IN SUPPORT OF NEITHER PARTY

with the Clerk of the Court using the MiFile system which will send notification of such filing to all attorneys of record.

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Dated: August 20, 2020

Exhibit A

STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE CERTIFIED QUESTIONS FROM THE U.S. DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

Supreme Court No. 161492

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Plaintiffs,

v

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

Defendants.
_____/

BRIEF OF PROFESSOR RICHARD PRIMUS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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Dated: August 19, 2020

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QUESTIONS PRESENTED

Amicus curiae Professor Richard Primus files this brief to address the following questions:

1. Whether the Governor's executive orders responding to the COVID-19 pandemic are consistent with the separation of powers.

Amicus answers: Yes.

2. Whether sustaining the Governor's executive orders requires or implies recognizing a general executive power to act in emergencies, without legislative authorization.

Amicus answers: No.

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

1. Plaintiffs challenge the constitutionality of executive orders issued by Governor Gretchen Whitmer in response to the current pandemic (hereinafter collectively the "pandemic orders"). Plaintiffs argue that the pandemic orders violate the separation of powers because they are legislative rather than executive in nature. Plaintiffs further argue that the pandemic orders rest on an unconstitutional conception of executive power to meet emergencies.

2. *Amicus* Richard Primus is the Theodore J. St. Antoine Collegiate Professor at the University of Michigan Law School.[2] He has taught constitutional law at the University of Michigan Law School for nineteen years. As a resident of Michigan and a scholar of constitutional law, he has an interest in the correct application of the separation-of-powers principle prescribed by Michigan's Constitution.

3. Plaintiffs claim that the Governor's pandemic orders are legislative in nature because they extensively reorder the daily lives of Michiganders. That cannot be right. Several pandemic orders in force prior to April 30—for example, Executive Order No. 2020-21, Executive Order No. 2020-42, and Executive Order No. 2020-59—directed at least as great a reordering of daily life as the pandemic orders currently in force. If extensive reordering of daily life required by the current orders makes those orders legislative, then the pre-April 30 pandemic orders would also have been legislative. If so, those pre-April 30 orders were invalid, because the Governor may never exercise legislative power, even by statutory delegation, except as expressly

[2] *Amicus*'s institutional affiliation is provided for identification purposes only. *Amicus* does not represent the University of Michigan Law School as an institution.

provided by the Michigan Constitution. But everyone agrees that the pandemic orders issued prior to April 30 were valid. That reflects general agreement that the content of the orders does not make them legislative.

4. Plaintiffs also suggest that the orders are legislative because they are not limited in time. It is not at all clear, and plaintiffs do not explain, how the passage of time transforms an executive action into a legislative one. Indeed, it is entirely ordinary for executive orders and administrative regulations to stand until repealed, rather than being issued for limited periods of time. Moreover, the Governor's pandemic orders *are* limited in time, albeit not with a specified expiration date. As the statutory scheme requires, the orders can remain in force, at most, during the continuation of the pandemic-related conditions that make the orders reasonable.

5. Plaintiffs argue that separation-of-powers principles must be respected even in times of crisis and that there is no general executive power to meet emergencies. These contentions are true and also beside the point. Sustaining the orders in this case does not entail any violation of separation-of-powers principles or any recognition of general executive power to act in emergencies. It merely requires a judgment about whether existing statutes are fairly read to give the Governor power to meet the current emergency.

6. *Amicus* does not address the questions of statutory interpretation on which the case must ultimately rest. For that reason, this brief is a brief in support of neither party in the litigation. *Amicus* aims only to clear the way for the statutory

analysis by pointing out that Plaintiffs' constitutional contentions described above are flawed or inapposite.

ARGUMENT

I. The Governor's COVID-19 Orders Are Not "Legislative" Acts Violating the Separation of Powers

Under the Michigan Constitution, the Governor may not exercise legislative power, except as the Constitution expressly provides. Const 1963, art 3, § 2. According to the Plaintiffs, the pandemic orders are exercises of legislative power and therefore invalid. See Plaintiffs' Brief at 31, 34-35. But that contention is inadequately supported: Plaintiffs fail to offer good reasons for their view that the pandemic orders must be considered legislative. And when the challenged orders are compared to earlier COVID-19 orders that are conceded to be valid, it becomes clear that nothing about the content of the current orders makes those orders legislative and therefore invalid.

At the civics-book level, the distinction between legislative power and executive power is easy: Legislative power is the power to make law, and executive power is the power to apply it. But actual governance can be more subtle. Carrying out a legislature's instructions often involves a considerable amount of discretionary decisionmaking. Sometimes it includes the making of rules. Indeed, "a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action," *Mistretta v United States*, 488 US 361, 417; 109 S Ct 647; 102 L Ed 2d 714 (1998) (Scalia, J., dissenting) (emphasis in original). Whether and when such

decisionmaking ceases to be executive and instead becomes legislative is not always an easy question. Indeed, it is sometimes a mistake to think that a given exercise of authority is "really" only one kind or the other.

The Framers of the United States Constitution understood this point well. In explaining that constitutional law should not proceed as if the different kinds of power had clear boundaries, Madison cautioned that "[e]xperience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary." The Federalist No. 37 (Madison) (Rossiter ed, 1961), p 228. What's more, Madison was clear that the problem with trying to define a distinction between legislative and executive power is not simply a matter of the limits of language or of human discernment. It is inherent in the subject matter, because in real life the different kinds of power are not always distinct. See *id*. ("[T]he obscurity arises as well from the object itself as from the organ by which it is contemplated."); see also The Federalist No. 75 (Hamilton) (Rossiter ed, 1961), p 451 (noting that some exercises of power cannot be properly labeled "legislative" or "executive" to the exclusion of the other category). Here in Michigan, Thomas Cooley similarly explained that "[e]xecutive power is so intimately connected with legislative, that it is not easy to draw a line of separation." 1 Cooley, Constitutional Limitations (2d ed), p 87.[3]

[3] Plaintiffs quote Cooley as saying that a legislature cannot delegate its lawmaking power to some other body. See Plaintiffs Brief at 31 n 9 (quoting Cooley, Constitutional Limitations (6th ed.), p. 137). But it is a mistake to think that Cooley meant that a legislature cannot empower another body to make discretionary decisions. After all, "a certain degree of discretion, and thus of lawmaking, *inheres*

The fact that it can be hard to label exercises of power as uniquely "legislative," "executive," or "judicial" does not mean that courts should abandon the cause of restricting each branch to its proper set of authorities. On the contrary, ensuring that each institution plays its own proper role is an essential aspect of constitutional law. In the present case, if the Governor exercised a power that does not properly belong to her, her actions are invalid. But the analysis of whether an executive's action must be considered invalid because it is legislative in nature should be conducted with the understanding, noted by Madison and Hamilton and Cooley alike, that differentiating between legislative and executive action is not a simple matter—and that in some cases it cannot be done.

Plaintiffs suggest that the pandemic orders are legislative, and therefore violations of the separation of powers, because those orders are broad, far-reaching,

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in most executive or judicial action," *Mistretta v United States*, 488 US 361, 417; 109 S Ct 647; 102 L Ed 2d 714 (1998) (Scalia, J., dissenting) (emphasis in original), and per the quotation above, Cooley recognized that executive and legislative power are "intimately connected" rather than easy to separate. 1 Cooley, Constitutional Limitations (2d ed), p 87.

Plaintiffs also quote John Locke's statement that a legislative body cannot "transfer their authority of making laws, and place it in other hands." Plaintiffs' Brief at 31 n 9, quoting Locke, Two Treatises on Government § 141. Plaintiffs do not explain why a Constitution written by Michiganders in 1963 should be understood to embody the precise ideas of a theorist who wrote in a different country three centuries earlier. (The answer cannot be that the Michigan Constitution is patterned on the United States Constitution, because the Framers of the United States Constitution, who worked a century after Locke and in considerably different conditions, did not simply adopt and implement Locke's conception of the separation of powers. See, e.g., 1 Goldie, ed, *The Reception of Locke's Politics* (Pickering & Chatto, 1999), pp xlis-lviii; Dunn, *The Politics of Locke in England and America*, 70-80, *in* Yolton, ed, *John Locke: Problems and Perspectives* (Cambridge: Cambridge University Press, 1969)). In any event, Plaintiffs seem to have misunderstood Locke. In writing that a legislature could not "transfer" its authority to another body, Locke meant that a legislature could not convey that power to another body *irrevocably*. So long as the legislature retained the power to resume whatever authority it delegated, it would not, in Locke's terms, have "transferred" that authority. See Mortenson & Bagley, *Delegation at the Founding*, forthcoming Colum L Rev (2021), pp 31-32, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3512154. In the present case, the Michigan Legislature retains the authority to repeal the statutory authorities on whose basis the Governor has acted, and Locke's concern is beside the point.

sometimes invasive, and highly consequential. Plaintiffs' Brief at 34. Which they are. But the fact that a government action is broad, far-reaching, invasive, and highly consequential does not necessarily make it legislative in the constitutionally relevant sense. Orders can be extensive and consequential without ceasing to be executive in nature. General Dwight D. Eisenhower's orders for the D-Day invasion of Normandy were massively extensive and consequential but still executive.

The best evidence that the breadth and extent of the pandemic orders does not make those orders legislative comes from the background of this very case. The Governor's first shelter-in-place order, EO 2020-21, issued on March 24, contained an extensive, complex regime regulating the lives of Michiganders. So did EO 2020-42 on April 9. So did EO 2020-59 on April 24. Each of those orders sharply limited the normal lives of Michiganders. But everyone agrees that those orders were validly within the Governor's authority; Plaintiffs' contention is only that the Governor lacked authority to issue or enforce such orders after April 30. See Plaintiffs' Brief at 12 (acknowledging gubernatorial authority, delegated by statute, to issue emergency orders prior to April 30). In other words, nobody in this litigation contends that the orders issued before April 30 were exercises of legislative power and thus unconstitutional. If the far-reaching restrictions on the daily lives of Michiganders imposed by the first three orders did not amount to exercises of legislative power, then the breadth and impact of the current orders—which impose the same or lesser restrictions as the pre-April 30 orders—do not make those orders exercises of legislative power either.

Perhaps aware of this weakness in the claim that the Governor's orders are legislative in nature, Plaintiffs argue that the lack of a temporal limit makes the current orders legislative. Plaintiffs' Brief at 34-35. In other words, Plaintiffs' position is that the pre-April 30 orders—extensive and invasive as they were—were not legislative, because they came with an expiration date. But Plaintiffs do not explain why an order that constitutes valid executive action if limited to a certain time period becomes legislative in nature if it lasts for some longer amount of time.[4] The Michigan Administrative Code is thick with regulations that remain in force until and unless changed, rather than expiring on a date certain. To be sure, the power to issue an open-ended order is a greater power than the power to issue a short-term one. But that difference is the difference between less executive power and more executive power, not the difference between executive power and legislative power.

Moreover, the pandemic orders *are* limited in time. By the terms of the statute on whose authority they are issued, the pandemic orders can be in effect only as long as the conditions of the pandemic make them reasonable. To be sure, nobody knows exactly how long that will be. Plaintiffs offer no reason to think that the difference between an order marked "Good for 30 days" and an order marked "Good until the present public-health emergency no longer requires it" is the difference between executive action and legislation.

[4] The answer cannot be "Because no statute authorizes the order after the limited time." After all, the Governor's contention in this case is that a statute authorized the current orders, too. Plaintiffs' contention here is that the orders *by their nature* are legislative because they are not time-limited, not that the longer duration of the current orders takes them out of the power validly conferred by existing statutes. Both sides agree that the Governor's orders are not valid unless they are promulgated on the basis of applicable statutory authority.

II. The Governor's Orders Rest on Statutory Authority, Not on a General Executive Power to Act in Emergencies

Plaintiffs attempt to frame their dispute with the Governor as a fundamental clash about the nature of executive power in emergency settings, rather than simply a question about the applicability of previously enacted statutes. As presented in the Plaintiffs' Brief, the Governor claims power to regulate life in Michigan unilaterally, permanently, and in a way not subject to legislative check. See Plaintiffs' Brief 30 n 8 ("The Governor's executive orders suggest that the executive has free-standing power under the Constitution to take unilateral control of the reins of the state in the midst of an emergency.") And that, the Plaintiffs say, cannot be acceptable. Plaintiffs quote the Supreme Court of the United States in *Home Bldg & Loan Ass'n v Blaisdell*, 290 US 398, 425; 54 S Ct 231; 78 L Ed 413 (1934), cautioning that "[e]mergency does not create power." Plaintiffs' Brief at 43, quoting *Blaisdell*, 290 US at 425. In a similar vein, Plaintiffs write that "The Michigan Constitution cannot simply be put on the shelf for several years and then dusted off when the epidemic is over." Plaintiffs' Brief at 36. But this line of argument is beside the point. The pandemic orders at issue in this case do not rest on any claim that the present pandemic warrants the suspension of normal constitutional limits on executive power. All that is necessary to sustain the orders is to conclude that a fair reading of a law previously passed by Michigan's legislature, as applied in the current circumstances, authorizes the Governor to act.

Plaintiffs describe the pandemic orders as "unilateral." Plaintiffs' Brief at 34, 35. But the only sense in which the orders are "unilateral" is the trivial sense in which *all* executive orders are unilateral: at the moment of promulgation, the Governor is the person acting. If Plaintiffs, in describing the pandemic orders as "unilateral," mean to suggest that the Governor claims inherent executive authority to issue those orders, they err: according to the Governor, the orders are issued on the basis of a legislatively enacted statute.[5]

Similarly, Plaintiffs repeatedly assert that the Legislature cannot check the Governor's actions. See Plaintiffs' Brief at 34 (contending that the Governor claims authority under the Emergency Powers of the Governor Act (EPGA) "to continue the state of emergency for as long as the executive deems necessary—even if the Legislature explicitly disagrees"); *id.* at 38 (warning that the Governor's position means that "the Governor's conduct under the EPGA is not subject to review or limitation by either the Legislature or the courts."). The image offered is of an executive who not only wields broad emergency powers but is solely authorized to decide whether and when to surrender those powers. That seems like a bad idea. Plaintiffs quote Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579; 72 S Ct 863; 96 L Ed 1153 (1952), wisely warning that "emergency powers are consistent with free government only when their control is lodged elsewhere that in the Executive who exercises them." Plaintiffs' Brief at 36, quoting *Youngstown*, 343 US at 652. But in reality, the Michigan Legislature does

[5] As noted at the outset, *Amicus* takes no position on the statutory interpretation questions presented here. The function of this brief is only to clear away the constitutional questions.

have the authority to limit or discontinue the Governor's use of emergency powers under the EPGA. It merely needs to amend the statute.

Plaintiffs know that, of course. At one point in their brief, Plaintiffs characterize the Governor as arguing that the Legislature in the EPGA "irrevocably ceded to the executive the authority to continue an emergency declaration indefinitely—and the Legislature may not take that power back, unless it either amends the statute by overriding the Governor's veto or impeaches the executive." Plaintiffs' Brief at 39. Plaintiffs seem to regard that position as absurd, but it is not clear why. It is entirely ordinary that legislation allocating powers creates an arrangement which remains in force until it is changed by further legislation. Plaintiffs' point could accordingly be rephrased as follows: "The EPGA empowered the Governor to take certain actions, and the Legislature retains the authority to modify or eliminate that power in the normal course of legislation."

To be sure, if a Governor were determined to preserve the EPGA, a Legislature seeking to repeal it would need to muster a two-thirds majority in each house. But the Legislature is never entitled to change the law except (a) by concurrent majorities with the Governor's approval, or (b) by majorities sufficient to enact law without the Governor's approval. Const 1963, art 4, § 33. That the Legislature is not entitled to change the law on some lower threshold in this case does not mean that the power that the EPGA confers on the Governor is "irrevocable." It merely means that the Legislature too continues to operate within its normal constitutional limits.

Under present conditions, it seems doubtful that the Michigan Legislature will muster a veto-proof majority to repeal the EPGA while the current pandemic orders are in force. But that fact does not mean that the Legislature is unable to check the Governor's actions. It merely means that a sufficient proportion of the Legislature thinks that the system is functioning well, such that the statute need not be amended. Members of the Legislature are politically accountable for that judgment, whether for good or ill. If a Governor were to abuse the emergency powers of the EPGA, one hopes that the voters of Michigan would elect legislators determined to correct those abuses—and also to vote the Governor out. But if the balance of power in the Legislature prevents the Legislature from amending a statute, it does not mean that the Governor is acting in a way that cannot be checked by the Legislature. It means that the democratically accountable Legislature does not disapprove of the Governor's actions enough to warrant the exercise of its checking power—a power that it undoubtedly retains.

Justice Jackson's *Youngstown* opinion is justly celebrated. But the danger of which he warned—of claims of inherent executive power not dependent on legislation—is not at issue in this case. Plaintiffs' invocation of Jackson's warning, like their invocation of *Blaisdell*'s warning that emergency does not create power, is accordingly offered less as a point of law than as a flourish of rhetoric. (As must be true, given that the present case arises under Michigan's Constitution and statutes rather than the federal Constitution and the U.S. Code.) The rhetoric is intended to convey the general sense that this case is about the dangers of runaway emergency

power. But that is not what this case is about. The case is simply about whether the Legislature has previously enacted one or more statutes from which the Governor can derive the authority to issue the orders that she has deemed appropriate in response to the current pandemic.

Indeed, if *Blaisdell* has any bearing on the present case, it likely cuts in *favor* of the Governor. Plaintiffs quote from *Blaisdell* only the following two sentences: "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved." Plaintiffs' Brief at 43, quoting *Blaisdell*, 290 US at 425. But the full position of the United States Supreme Court in *Blaisdell* was considerably more nuanced. Four sentences after the words that Plaintiffs quote, the Supreme Court wrote as follows: "While emergency does not create power, emergency may furnish the occasion for the exercise of power. 'Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.'" *Blaisdell*, 290 US at 426, quoting *Wilson v New*, 243 US 332, 348; 37 S Ct 298; 61 L Ed 755 (1917). The Court in *Blaisdell* went on to say that a power created for the purpose of meeting an emergency should be understood as a power adequate "to meet that emergency." *Blaisdell*, 290 US at 426. Its example was the federal government's war power, which should be understood as "a power to wage war successfully." *Id*. In other words, the fact of emergency does not create government power where none previously existed, but powers that have been legitimately conferred for the purpose of meeting emergencies should be construed to

enable the duly authorized parties to do what is necessary to meet the relevant emergencies. And having articulated that perspective, the Supreme Court *upheld* the Minnesota measure at issue in *Blaisdell*. *Id.* at 447-48.

So to the extent that *Blaisdell* communicates something about the spirit in which courts should approach questions of power in situations of emergency, it is entirely consistent with a ruling sustaining the pandemic orders. Emergency does not create power. But the Michigan Legislature has previously authorized the Governor to exercise power in emergencies, and the present circumstances "may furnish the occasion for the exercise of [that] power." *Blaisdell*, 290 US at 426. Whether the current pandemic does in fact furnish the occasion for exercising powers specified in Michigan's statutes authorizing the Governor to act in emergencies depends on the content of the statutes, read in a way that fairly lets them accomplish their aim of letting the Governor respond to emergencies "successfully." See *id.* And indeed, the Emergency Powers of the Governor Act expressly directs that it be so construed. See MCL 10.32 ("It is hereby declared to be the legislative intent to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. The provisions of this act shall be broadly construed to effectuate this purpose.").

CONCLUSION

The Court should resolve this case on the understanding that the challenged orders do not violate Michigan's separation of powers and rest on no general claim of unilateral executive authority to act in emergencies.

Respectfully submitted.

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Amicus Curiae

Dated: August 19, 2020

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2020, I filed this document electronically with the Clerk of the Court using the MiFILE system, which will send notification of this filing to all counsel of record.

By: /s Richard Primus
Richard Primus (P70419)