STATE OF MICHIGAN
IN THE SUPREME COURT

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

Supreme Court No. 161492

USDC-WD: 1:20-cv-414

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

v

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

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

SUPPLEMENTAL BRIEF OF MICHIGAN ATTORNEY GENERAL DANA NESSEL

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Dated: September 16, 2020

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STATEMENT OF JURISDICTION

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

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STATEMENT OF QUESTIONS PRESENTED

1. 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.

Plaintiffs' answer:	Have not yet answered as framed in the Court's order.
Governor's answer:	Has not yet answered as framed in the Court's order.
Attorney General's answer:	The EPGA does not apply to public health generally but only to public health emergencies, which encompass epidemics.

2. 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.

Plaintiffs' answer:	Have not yet answered as framed in the Court's order.
Governor's answer:	Has not yet answered as framed in the Court's order.
Attorney General's answer:	"Public safety" is used in the EPGA as a term of ordinary meaning, and thus encompasses epidemics and other public health events that constitute emergencies as that term is understood under the plain language of the statute.

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STATUTES INVOLVED

MCL 333.2221. Duties of department; prevention of disease, prolongation of life, and promotion of public health; programs and services

Sec. 2221. (1) Pursuant to section 51 of article 4 of the state constitution of 1963, the department shall continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including prevention and control of environmental health hazards; prevention and control of diseases; prevention and control of health problems of particularly vulnerable population groups; development of health care facilities and agencies and health services delivery systems; and regulation of health care facilities and agencies and health services delivery systems to the extent provided by law.

(2) The department shall:

(a) Have general supervision of the interests of the health and life of the people of this state.

(b) Implement and enforce laws for which responsibility is vested in the department.

(c) Collect and utilize vital and health statistics and provide for epidemiological and other research studies for the purpose of protecting the public health.

(d) Make investigations and inquiries as to:

(*i*) The causes of disease and especially of epidemics.

(*ii*) The causes of morbidity and mortality.

(*iii*) The causes, prevention, and control of environmental health hazards, nuisances, and sources of illness.

(e) Plan, implement, and evaluate health education by the provision of expert technical assistance and financial support.

(f) Take appropriate affirmative action to promote equal employment opportunity within the department and local health departments and to promote equal access to

governmental financed health services to all individuals in the state in need of service.

(g) Have powers necessary or appropriate to perform the duties and exercise the powers given by law to the department and which are not otherwise prohibited by law.

(h) Plan, implement, and evaluate nutrition services by the provision of expert technical assistance and financial support.

MCL 333.2251. Imminent danger to health or lives; informing individuals affected; order; noncompliance; petition to restrain condition or practice; conditions constituting menace to public health; duty of director; notification to schedule or reschedule a substance

(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.

(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

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provided in part 72, [ ] 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.

MCL 333.2253. Epidemics; issuance of emergency orders by director; cooperation by department of agriculture

(1) 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.

(2) If an epidemic described in subsection (1) involves avian influenza or another virus or disease that is or may be spread by contact with animals, the department of agriculture shall cooperate with and assist the director in the director's response to the epidemic.

(3) Upon request from the director, the department of agriculture shall assist the department in any review or update of the department's pandemic influenza plan under section 5112. [footnote omitted]

MCL 333.2453. Epidemics; emergency orders; involuntary detention

Sec. 2453. (1) If a local health officer determines that control of an epidemic is necessary to protect the public health, the local health officer may issue an emergency order to prohibit the gathering of people for any purpose and may establish procedures to be followed by persons, including a local governmental entity, 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.

(2) A local health department or the department may provide for the involuntary detention and treatment of individuals with hazardous communicable disease in the manner prescribed in sections 5201 to 5238.[1]

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

Sec. 1. During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled, either upon application of the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police or upon his or her own volition, the governor may proclaim a state of emergency and designate the area involved. After making the proclamation or declaration, the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control. Those orders, rules, and regulations may include, but are not limited to, providing for the control of traffic, including public and private transportation, within the area or any section of the area; designation of specific zones within the area in which occupancy and use of buildings and ingress and egress of persons and vehicles may be prohibited or regulated; control of places of amusement and assembly and of persons on public streets and thoroughfares; establishment of a curfew; control of the sale, transportation, and use of alcoholic beverages and liquors; and control of the storage, use, and transportation of explosives or inflammable materials or liquids deemed to be dangerous to public safety.

MCL 10.32. Powers of governor; legislative intent

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

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INTRODUCTION

Following oral argument on September 9, 2020, and based on questions that arose during argument, this Court asked for supplemental briefing on two issues: First, 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; and second, 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 plain language of the EPGA answers both questions.

With respect to the first question, the EPGA gives the governor power only over emergencies, not over broad areas of public concern; therefore, the EPGA does not apply to public health generally but only to public health emergencies. And an epidemic is unquestionably a public health emergency, so the EPGA necessarily encompasses epidemics. To address epidemics such as COVID-19, like all other emergencies, the Legislature wisely vested the authority to coordinate and integrate public health measures with all other emergency measures designed to "protect life and property or to bring the affected area under control" in the governor. MCL 10.31(1).

With respect to the second question, "public safety" may be used either as a term of ordinary meaning or as a term with specialized legal meaning as an object of the state's police power. Based on its context within the EPGA, where it is not

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preceded by a definite article, it is used as a term of ordinary meaning and encompasses events such as epidemics.

These answers to these two questions are important in understanding the scope of the EPGA. The first underscores the relative narrowness of the EPGA, despite the "sufficiently broad power" it confers on the governor. MCL 10.32. The EPGA was not designed to displace the entirety of the Public Health Code, but instead to coordinate with the Public Health Director and others where that coordination is necessary because the State is faced with a great public crisis, disaster, or catastrophe.

The second ultimately demonstrates the same relative narrowness of the EPGA. Although a plain language analysis yields the conclusion that the term "public safety" is broad because it should be given its ordinary meaning, the term nevertheless is placed in a modifying phrase that works as an overall limitation on the governor's authority. The governor can exercise authority during a great public crisis, disaster, or catastrophe *only* when "public safety is imperiled."

In the end, under the plain language of the EPGA, Governor Whitmer had and has the authority to act to address the public health emergency presented by the COVID-19 crisis.

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ARGUMENT

I. Because the EPGA applies only to emergencies, it does not apply to public health generally, but only to public health emergencies, which encompass epidemics.

Despite the relatively broad authority that the EPGA grants the Governor, she can exercise that authority only during limited and specific emergency circumstances. MCL 10.31(1); MCL 10.32. Since the area of public health is wide-ranging and includes many facets that do not touch on emergencies, the Legislature clearly did not intend the EPGA to apply to public health generally. Nevertheless, because some emergencies *are* health-related, and because the EPGA contains no words that would exclude public-health-related emergencies from those circumstances over which the governor may exercise her emergency authority, the EPGA, by its plain language, encompasses public health emergencies—a category into which epidemics surely fall.

A. By its plain language, the EPGA does not apply to the entire gamut of public health.

Although the EPGA gives the governor "sufficiently broad power," MCL 10.32, that authority is cabined by the fact that it may be exercised only "*during* such periods of impending or actual public crisis or disaster." *Id.* (emphasis added). Indeed, the statute comes into play only during an emergency, and even then, only "when public safety is imperiled" as a result of the emergency. MCL 10.31(1). And we do not have to guess what qualifies as an emergency, because the statute tells

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us: it is a time "of great public crisis, disaster, rioting, catastrophe, or similar public emergency." *Id*.

These words and phrases of limitation preclude the EPGA from encompassing *any and all* areas of concern to the State—including the entire area of public health. Public health, which is broadly defined as "the science and art of preventing disease, prolonging life, and promoting health," is multifaceted.[1] It includes, among other things, "prevention and control of environmental health hazards; prevention and control of diseases; prevention and control of health problems of particularly vulnerable population groups; development of health care facilities and agencies and health services delivery systems; and regulation of health care facilities and agencies and health services delivery systems." MCL 333.2221(1). Many of these facets—in particular, functions related to prevention, regulation, and education—are unrelated to emergencies.

Indeed, the Preamble to Public Health Code reiterates the expansiveness of its purpose as:

> [a]n Act to protect and promote the public health; to codify, revise, consolidate, classify, and add to the laws relating to public health; to provide for the prevention and control of diseases and disabilities; to provide for the classification, administration, regulation, financing, and maintenance of personal, environmental, and other health services and activities; to create or continue, and prescribe the powers and duties of, departments, boards, commissions, councils, committees, task forces, and other agencies; to prescribe the powers and duties of governmental entities and officials; to regulate occupations, facilities, and agencies affecting the public health; to regulate health maintenance organizations and certain third party administrators and

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[1] CEA Winslow, available at https://www.cdc.gov/publichealth101/public-health.html.

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> insurers; to provide for the imposition of a regulatory fee; to provide for the levy of taxes against certain health facilities or agencies; to promote the efficient and economical delivery of health care services, to provide for the appropriate utilization of health care facilities and services, and to provide for the closure of hospitals or consolidation of hospitals or services; to provide for the collection and use of data and information; to provide for the transfer of property; to provide certain immunity from liability; to regulate and prohibit the sale and offering for sale of drug paraphernalia under certain circumstances; to provide for the implementation of federal law; to provide for penalties and remedies; to provide for sanctions for violations of this act and local ordinances; to provide for an appropriation and supplements; to repeal certain acts and parts of acts; to repeal certain parts of this act; and to repeal certain parts of this act on specific dates. [1978 PA 368 (Preamble)].

Given the Public Health Code's expansiveness (it contains approximately 86 parts and over 1,500 individual statutes) and the fact that public health is a "matter[ ] of primary public concern," Const 1963, art 4, § 51, the EPGA—which, again, applies only in the context of emergencies—cannot be read broadly to encompass public health generally.

B. The EPGA gives the governor authority to address a public health emergency, because the terms "emergency," "great public crisis," "disaster," and "catastrophe" encompass a public health emergency.

The conclusion that the entire field of public health is not encompassed within the EPGA does not mean that *no* public health matter falls within the statute's purview. To the contrary, for the three reasons discussed below, public health emergencies—assuming they imperil public safety under MCL 10.31(1)—do fall within the scope of the EPGA.

First, the plain language of the EPGA contains no words that would exclude public health emergencies from the general understanding of what constitutes an

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emergency, crisis, disaster, or catastrophe. See MCL 10.31(1). And even if one resorts to contemporaneous dictionary definitions of these terms, no definition can be read as providing such an exclusion. *Webster's New International Dictionary* 837 (2d ed 1942) defines "emergency" as an unforeseen combination of circumstances which calls for "immediate action." And *Webster's Dictionary of Synonyms* (1st ed 1942) lists the words "exigency, contingency, crisis, pass, juncture, pinch, strait" as synonyms for "emergency"[2]—all of which are applicable to public health emergencies.

Second, the Public Health Code contains no provision that indicates—expressly or impliedly—that the Legislature intended the Code to provide the sole source of authority in the context of a public health emergency. Quite the opposite is true. The Code specifically states that it is "intended to be consistent with applicable . . . state law" and that it "shall be construed, when necessary, to achieve that consistency." MCL 333.1111(1).[3] Based on this language, the Public Health Code should not be read as being the only or the last authority on public health emergencies. Its plain language certainly does not indicate this. In fact, it suggests otherwise. Despite the Code's expansiveness, it is relatively narrow with regard to emergencies. Of its some 1,500 statutes, only about twenty address an emergency

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

[3] The Code also points out that it "shall be liberally construed for the protection of *the health, safety, and welfare of the people of this State,*" MCL 333.1111(1) (emphasis added), not that it should be liberally construed as addressing all emergency instances in which "public safety is imperiled."

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or epidemic in some way.[4] And the Code's provisions related to epidemics expressly provide that "[e]mergency procedures shall not be limited to this code." MCL 333.2253(1); MCL 333.2453(1).

And *third*, there is no significant overlap between MDHHS's authority under the Public Health Code and the governor's authority under the EPGA, such that the governor's emergency powers under the EPGA are rendered unnecessary or redundant in the context of a public health emergency. Again, only about twenty out of over 1,500 statutes in the Public Health Code address an emergency or an epidemic, demonstrating that the Legislature did not intend the MDHHS to be solely responsible for a public health emergency such as an epidemic.

The Public Health Code does provide MDHHS and local health departments with *some* power in a public health emergency, though that power is limited. For example, and particularly relevant here, in the context of an epidemic (which, as demonstrated in Argument I.C below, qualifies as a public health emergency), the Director of MDHHS or a local health officer "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." MCL 333.2253(1). See also MCL 333.2453(1). By the plain language of these provisions, while the prohibition of gatherings may be "for any purpose," any

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[4] See MCL 333.2221; MCL 333.2226; MCL 333.2251; MCL 333.2253; MCL 333.2451; MCL 333.2453; MCL 333.5112; MCL 333.5115; MCL 333.5117; MCL 5201; MCL 333.5203; MCL 5204; MCL 333.5207; MCL 333.5209; MCL 333.20168; MCL 3333.20190; MCL 333.20910; MCL 333.20967; MCL 333.20975.

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other procedures established to combat an epidemic must be related to health services and health laws. *Id.*

In contrast, the governor's authority under the EPGA is not limited to simply "insur[ing the] continuation of essential public health services and enforcement of health laws." MCL 333.2253(1); MCL 333.2453(1). Rather, the governor may "promulgate reasonable orders . . . 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). Thus, in the context of an epidemic, the governor's authority under the EPGA—*i.e.*, to issue reasonable orders that broadly protect life and property or bring the emergency situation under control—is more comprehensive than the authority granted to MDHHS and local health departments—*i.e.*, to issue orders that broadly prohibit gatherings, but narrowly continue public health services and enforce health laws.

Because the authority to address public health emergencies is not limited to the provisions of the Public Health Code, the governor's powers under the EPGA extend to those public health emergencies in which public safety is imperiled. And in its wisdom, the Legislature delegated to one person—the governor—the coordination and integration of *all* aspects of a public health emergency. During the COVID-19 pandemic, for example, Governor Whitmer has been able to coordinate the public health measures with other aspects of the pandemic that flow from the central health concerns. The governor, in turn, is directly accountable to the people of the State.

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C. An epidemic—and particularly the COVID-19 crisis—constitutes a public health emergency that implicates the powers granted to the governor under the EPGA.

Finally, an epidemic undoubtedly qualifies as a public health emergency to which the EPGA extends. An epidemic is defined as "an outbreak of disease that spreads quickly and affects many individuals at the same time."[5] More precisely, it is "an increase, often sudden, in the number of cases of a disease above what is normally expected in that population in that area."[6] These definitions fall neatly within the confines of the contemporaneous dictionary definition of "emergency" that Plaintiffs themselves espouse: an unforeseen combination of circumstances which calls for "immediate action." (Plaintiffs' opening brief, p 18, citing *Webster's New International Dictionary* 837 (2d ed 1942).) Consequently, an epidemic constitutes an emergency as that term is used in the EPGA. MCL 10.31(1).

Moreover, an epidemic—and, in particular, the COVID-19 crisis—causes public safety to be imperiled. *Id.* (See also Argument II below.) To date, COVID-19 has infected at least 124,978 individuals and caused at least 6,933 deaths.[7] As noted in the Attorney General's principal brief, those numbers alone demonstrate the significant threat COVID-19 presents to public safety. Given the significant danger that epidemics, including the COVID-19 pandemic, pose to public safety, the

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[5] *Merriam-Webster's Dictionary*, available at https://www.merriam-webster.com/dictionary/epidemic.

[6] *Principles of Epidemiology in Public Health Practice* (3d ed), available at https://www.cdc.gov/csels/dsepd/ss1978/lesson1/section11.html.

[7] https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html, last accessed 9/16/2020.

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gubernatorial emergency powers granted within the EPGA extend to such circumstances.

II. Under the plain language of the EPGA, "public safety" encompasses public health emergencies such as epidemics.

The plain language of the EPGA demonstrates that the Legislature intended that the term "public safety" in MCL 10.31 be given its ordinary, and broad, meaning—safety of the public. Even when the statute is read as a whole, as is required, nothing—including the reference to the state's police power in MCL 10.32—dictates a narrower reading of the term. And under the term's broad meaning, it encompasses public health emergencies such as epidemics. Nevertheless, despite the broad meaning of the term "public safety," it occurs in a phrase that places a reasonable limit on the governor's authority by mandating that only an emergency that imperils public safety qualifies as an emergency—i.e. a great public crisis, disaster, or catastrophe—under the statute.

A. "Public safety," as that term is used in the EPGA, must be given its ordinary meaning.

By its plain language, the EPGA may be utilized only "when public safety is imperiled." MCL 10.31(1). As used within the Act, "public safety" is phrased as a general term and therefore must be given its ordinary meaning. The ordinary meaning of "public safety" is, naturally, safety of the public. And in 1941, the word "public" was defined as "[o]f or pertaining to the people; relating to, belonging to, or affecting a nation, state, or community at large;--opposed to *private*;" and the word

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"safety" was defined as "[c]ondition of being safe; freedom from danger or hazard," or "[k]eeping of oneself or others safe, especially from danger of accident or disease." *Webster's Collegiate Dictionary* (5th ed 1941).[8] As such, the EPGA provides a source of emergency authority to the governor when the public is at risk of not being protected from "danger"—a situation that undoubtedly exists when the public is confronted with a widespread, deadly disease such as COVID-19.

The generality of "public safety"—and the concomitant obligation to apply its ordinary meaning, rather than any "specialized legal meaning as an object of the state's police power," (9/9/20 Order)—is evident from the lack of a definite article preceding the term. That is, the authority under the EPGA is not limited to instances where "*the* public safety is imperiled." In contrast, the definition of police power regularly includes such a definite article. See *Cady v City of Detroit*, 289 Mich 499, 504–505 (1939) (defining police power as "protection of *the* safety, health, morals, prosperity, comfort, convenience and welfare of the public, or any substantial part of the public." (emphasis added)); *Blue Cross & Blue Shield of Michigan v Milliken*, 422 Mich 1, 73 (1985) ("It has been long recognized that the state, pursuant to its inherent police power, may enact regulations to promote *the* public health, safety, and welfare." (emphasis added)); *Mich Canners & Freezers Ass'n, Inc v Agricultural Mktg & Bargaining Bd*, 397 Mich 337, 343 (1976) ("The police power, an attribute of state sovereignty, may be properly exercised through regulations which tend to foster *the* health, order, convenience and comfort of the

[8] Available at https://archive.org/details/websterscollegia00webs

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people and to prevent and punish injuries and offenses to the public." (emphasis added)); Police Power, *Black's Law Dictionary* (11th ed 2019) ("The inherent and plenary power of a sovereign to make all laws necessary and proper to preserve *the* public security, order, health, morality, and justice." (emphasis added)).

Use of a definite article such as "the" has a "specifying or particularizing effect." *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 139 (2014) (Viviano, J.). And, as this Court has repeatedly found, the presence of a definite article, or the lack thereof, is significant when interpreting statutory language. *Id* ("We find it significant that the phrase 'relief in *the* action' employs the definite article, 'the.' "); *Robinson v City of Detroit*, 462 Mich 439, 461 (2000), quoting *Hagerman v Glencorp Automotive*, 457 Mich 720, 753 (1998), quoting *Random House Webster's College Dictionary* 1382 (" 'The' is defined as 'definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an'."); *Robinson v City of Lansing*, 486 Mich 1, 14 (2010) (Markman, J.) (same); *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 36 (2016) (McCormack, J.) (same); *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 369 n 18 (2018) (Bernstein, J.) ("We have also repeatedly recognized the significance of using a definite article to indicate the inverse—that a word should be read restrictively."). The lack of a definite article preceding "public safety" within the EPGA removes that term from any "specialized legal meaning" that it is given within the definition of "police powers." Indeed, had the Legislature intended to

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give "public safety" the more specific meaning that it has within the definition of police power, it would have included "the" prior to that term in the EPGA. See *Nation v WDE Electric Co*, 454 Mich 489, 494–495 (1997) ("This Court will presume that the Legislature of this state is familiar with the principles of statutory construction." (quotations omitted)).

The Legislature's use of "public safety" as a more comprehensive term is not unusual. In the health context, public safety is often used in its ordinary sense. For instance, the website for MDHHS contains a "Public Safety and Environmental Health" page, which includes a link to the MDHHS Bureau of EMS, Trauma and Preparedness.[9] Case law further demonstrates this broad use of "public safety" in the health context: In *Michigan State Chiropractic Ass'n v Kelley*, 79 Mich App 789, 791 (1977), the Michigan Court of Appeals indicated that the "unlawful practice of medicine [is] harmful to public safety." And in *Scott v City of Detroit*, 107 Mich App 194, 200 (1981), *on reh'g*, 113 Mich App 241 (1982), the court found that a coordinated system of sewage disposal was in "the interests of public safety and pollution control."

At bottom, the use of "public safety" rather than "*the* public safety" within the EPGA necessitates the application of the ordinary meaning to that term. And that ordinary meaning plainly encompasses public health emergencies such as epidemics.

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[9] Available at https://www.michigan.gov/mdhhs/0,5885,7-339-71548_54783---,00.html.

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B. The EPGA's mandated broad construction provides further support for the application of a broad meaning of "public safety."

Under its ordinary meaning, "public safety" is susceptible to only one broad construction. As such, there is no need to resort to MCL 10.32, which mandates that the provisions of the EPGA be "broadly construed to effectuate [its] purpose." MCL 10.32. Still, reference to MCL 10.32 bolsters the conclusion that "public safety" must have a broad meaning that encompasses public health emergencies such as an epidemic.

The purpose of the EPGA is 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." *Id.* To broadly construe the provisions of the EPGA to effectuate this purpose as MCL 10.32 requires, the definition of "police power"—and the terms, ideas, and references encompassed within that definition, *i.e.*, *the* public health, *the* public safety, and *the* public welfare—must be given their broadest meaning. And "public safety," as that term is used in MCL 10.31, must be given the same broad meaning that the term "*the* public safety" is given within the definition of "police power." See *People v Kowalski*, 489 Mich 488, 498 (2011) ("Statutory language must be read in the context of the act as a whole, giving every word its plain and ordinary meaning.") As such, to the extent "*the* public safety" has developed a specialized legal meaning when paired with "*the* public health," "*the* public welfare," and "*the* public morals" within the oft-recited definition of police

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power, that meaning is sufficiently broad to encompass public health emergencies such as epidemics.

In fact, courts often reference both "the public health" *and* "the public safety" as being implicated when reviewing governmental action taken to address emergencies related to epidemics. For example, in *Jacobson v Massachusetts*, the United States Supreme Court, in analyzing a compulsory vaccination law intended to "meet and suppress the evils of a smallpox epidemic that imperiled an entire population," indicated that the law was intended to protect the public health *and* the public safety. 197 US 11, 25–32, 37–39 (1905). And some courts, including this Court, have used the terms interchangeably: In *In re Edward J. Jeffries Homes Housing Project, City of Detroit*, 306 Mich 638, 645–646 (1943), for example, this Court used the phrases "public welfare" and "public safety or morals"—but, interestingly, not public health—when discussing "the razing of insanitary dwellings," which this Court found "tends to diminish the potentialities of epidemics, crime and waste." See also *Tenn v City of Knoxville*, 80 Tenn 146, 156–157 (1883) (finding no nuisance where clothing and bedding infected by an epidemic-causing disease was burned "for the public safety"). And even our own Constitution, in Article 4, § 51, references the public health and the general welfare as "matters of primary public concern" without expressly referencing public safety. Surely our Framers did not mean to suggest that public safety was not a matter of primary public concern, or that our Legislature could not pass laws in that arena.

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Consequently, even if this Court reads a definite article into the Legislature's use of "public safety" in MCL 10.31, thus giving "public safety" a "specialized legal meaning as an object of the state's police power,"[10] (9/9/20 Order), a broad construction of that meaning encompasses action taken to address the COVID-19 pandemic.

C. The ordinary meaning of "public safety" is not tantamount to unbridled authority because it is limited by its textual context.

Though the meaning of "public safety" within the EPGA is broad, it does not confer upon the governor unrestrained authority over emergency situations because that term is cabined by its textual context. Under the EPGA, the governor may only act "[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." MCL 10.31. By setting off "when public safety is imperiled" with commas, the Legislature made clear its intent that the phrase modify the types of circumstances in which the governor may act. Thus, even with a broad construction of "public safety," the governor may only act when 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(2), places the public at risk of not being "free[ ] from danger or hazard" or

[10] It should not do so, because "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp,* 466 Mich 57, 63 (2002).

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protected from “danger of accident or disease,” *Webster’s Collegiate Dictionary* (5th ed 1941). In other words, while “public safety,” standing alone, is broad, its use and applicability within the EPGA nevertheless serve to limit the governor’s authority—and it is but one of the many words and phrases that does so.

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CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, this Court should conclude (1) that the EPGA does not apply to public health generally but only to public health emergencies, which encompass epidemics; and (2) that “public safety” as used in the EPGA, because it is not preceded by a definite article, is therefore used as a term of ordinary meaning, as opposed to a term with specialized legal meaning as an object of the state’s police power, and that such a term encompasses public health events such as epidemics.

Respectfully submitted,

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Dated: September 16, 2020