STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
_____/

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

Plaintiffs,

v.

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

Defendants.

Supreme Court No.161492

USDC-WD: 1:20-cv-414

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SUPPLEMENTAL BRIEF OF
AMICUS CURIAE MICHIGAN HOUSE OF REPRESENTATIVES
AND MICHIGAN SENATE RESPONDING TO SEPTEMBER 9, 2020 ORDER

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QUESTIONS PRESENTED IN SUPPLEMENTAL BRIEF

This Court recently directed the parties and invited amici to address these questions:

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; and

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.

INTRODUCTION

The Court has asked two important follow-up questions. The answer to one is plain: cases, statutes, constitutional provisions, dictionaries, and more establish that the term "public safety" has special meaning when it comes to the state's police power. That meaning does *not* encompass matters of "public health." That answer in turn makes the other question just as easy to resolve. The Emergency Powers of the Governor Act—which empowers the Governor to act only "when public safety is imperiled," MCL 10.31(1)—does not extend to a statewide public-health crises like COVID-19. Thus, the Governor's COVID-19-related declarations of emergency under the EPGA are ultra vires and cannot stand.

ARGUMENT

I. The phrase "public safety" in the EPGA does not encompass "public health" events such as epidemics.

Courts must generally construe statutory "words and phrases …according to the common and approved usages of the language." MCL 8.3a. But phrases that have "acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning." *Id.*; see also, e.g., *Mayberry v General Orthopedics, PC*, 474 Mich 1, 6; 704 NW2d 69 (2005) (holding that "tacking" was a legal term of art that "must be interpreted in a manner consistent with [its] acquired meaning") As shown below, the phrases "public safety" and "public health" are and were legal terms of art. Applying that legal meaning to the term "public safety" in the EPGA shows that the limiting phrase does not encompass "public health."

A. Cases from Michigan and elsewhere differentiate between public safety and public health in the police power context.

Cases from the time that the EPGA was passed treat "public safety" as a term of art focused on violence, force, security, and order. "Where the language used has been subject to judicial interpretation, the Legislature is presumed to have used particular words in the sense in which they have been interpreted." *People v Powell*, 280 Mich 699, 703; 274 NW 372 (1937). "[C]ommon-law meanings are assumed to apply even in statutes dealing with new and different subject matter, to the extent that they appear fitting and in the absence of evidence to indicate contrary meaning." *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 439; 716 NW2d 247 (2006).

Here, this Court had construed "public safety" just over a decade before the Legislature enacted the EPGA. In *Naudzius v Lahr*, the Court explained that laws speaking to "public safety" "are allied in their application and effect to those enacted to promote the public peace, preserve order, and provide that security to the individual which comes from the observance of law." 253 Mich 216, 228; 234 NW 581 (1931), overruled on other grounds by *Manistee Bank & Tr Co v McGowan*, 394 Mich. 655; 232 NW2d 636 (1975). The focus of the "public safety" definition in *Naudzius* rested on objects easily distinguishable from health. Cf. *People ex rel Hill v Bd of Ed of City of Lansing*, 224 Mich 388, 390; 195 NW 95 (1923) (explaining that the state's interest in "public health" justifies rules and regulations to "prevent the spread of [a] dread disease" and not mentioning "public safety").

Other cases of the time distinguish "public safety" from "public health." In *Newberry v. Starr*, for instance, the Court described how school districts had

"important duties relating to preservation of health, and less important duties respecting peace and safety." 247 Mich 404, 411; 225 NW 885 (1929). The Court thus recognized that the interests of public health and public safety are distinct, so that a law or an entity focused on one could not be assumed to embrace the other. Other early cases often spoke of the distinct aspects of the state police power—public health, peace, morals, safety, and welfare; none of these cases suggest that these aspects were synonymous with one another or subsumed within "public safety" in particular. See, e.g., *Todd v Hull*, 288 Mich 521, 529; 285 NW 46 (1939) (listing these objects); *People v Victor*, 287 Mich 506, 512; 283 NW 666 (1939) (same).

Early decisions from other courts construed these interests as distinct, too. The Wisconsin Supreme Court, for example, stressed that "public health and the public safety afford two distinct fields of legislation." *Chicago & NW Ry Co v RR Comm'n of Wis*, 188 Wis 232; 205 NW 932, 934 (1925), rev'd sub nom on other grounds *Napier v Atl Coast Line R Co*, 272 US 605; 47 S Ct 207; 71 L Ed 432 (1926). A justice of the Supreme Court of Louisiana described how a statute "pertain[ed] to the public safety, not public health nor morals," again recognizing that the concepts are not synonymous. See *City of New Orleans v Le Blanc*, 139 La 113, 138; 71 So 248, 258 (1915) (O'Niell, J., concurring); see also *City of Dayton v. Bohachek*, 37 NE2d 972, 973 (Ohio Ct App, 1938) ("[T]here will be no claim that the provision affects public morals or public safety. Our inquiry must necessarily be limited to the question of public health or general welfare."). Even in the famed case of *Lochner v New York*, the Supreme Court took pains to say that the statute under review "involve[d] neither

the safety, the morals, nor the welfare, of the public." 198 US 45, 57; 25 S Ct 539; 49 L Ed 937 (1905), overruled in part by *W Coast Hotel Co v Parrish*, 300 US 379; 57 S Ct 578; 81 L Ed 703 (1937). It asked only whether it could sustain the law as an exercise of the state's police power as a regulation affecting public health. *Id.* That approach would have made little sense if "public health" and "public safety" were the same.

Later cases here and elsewhere apply a similar distinction between public safety and public health. In describing the common-law fireman's rule, for instance, Michigan courts have said that the rule covers "public safety officers"—and those officers are generally police and firefighters. *Miller v Inglis*, 223 Mich App 159, 162; 567 NW2d 253 (1997); see also, e.g., *Winterfield v Town of Palm Beach*, 455 So 2d 359, 361 (Fla, 1984) (explaining that "the public safety purpose of … police and fire projects [were] separate and distinct from the public health purpose of … sewer projects").

B. The Michigan Constitution has long recognized that public safety and public health are different.

The 1908 Michigan Constitution—the constitution in effect when the EPGA was passed—also shows how health and safety are separate public ends. Public safety was mentioned four times. In three of those four instances, public safety was specifically listed with an "or" next to public health. See Const 1908, art 5, § 1 (explaining that the Legislature could give immediate effect to acts "necessary of the preservation of the public peace, health or safety"); Const 1908, art 5, § 21 (same); Const 1908, art 8, § 22 (explaining that local governments could "acquire, own,

establish and maintain … works which involve the public health or safety"). "'Or' is a disjunctive term, used to indicate a disunion, a separation, an alternative." *People v Kowalski,* 489 Mich 488, 499; 803 NW2d 200 (2011) (cleaned up); see also *Thayer Lumber Co v City of Muskegon,* 157 Mich 424, 432; 122 NW 189 (1909) ("The use of the disjunctive 'or' shows that there are two distinct classes of cases[.]"). "Public safety" is used alone only in the constitutional provision permitting the writ of habeas corpus to be suspended "in case of rebellion or invasion." Const 1908, art 2, § 21 ("The privilege of the writ of habeas corpus shall not be suspended unless in case of rebellion or invasion the public safety may require it."). Pairing "public safety" with "rebellion or invasion" implies an exclusively law-and-order notion of "public safety" much like that described in *Naudzius.* A contrary interpretation would have allowed for the writ to be suspended during a public health crisis, which, as far as the Legislature is aware, has never occurred (and for good reason). Meanwhile, the 1908 constitution referred to "public health" alone in a provision permitting the state to aid in "the development, improvement and control of or aiding in the development, improvement and control of rivers, streams, lakes and water levels" when "public health" requires it. Const 1908, art 10, § 14. That purpose—relevant to sanitation, cleanliness, and the like—is much different from police- and fire-related issues.

The 1963 Constitution confirms the same. "The public health and general welfare of the people" are called out as "matters of primary public concern." Const 1963, art 4, § 51. The Constitution tasks the Legislature with passing "suitable laws for the protection and promotion of the public health." *Id.* Nary a mention is made

in that section of "public safety." And the Constitution declares the environment to be a matter of "paramount public concern," too, as it concerns the "the health, safety and general welfare of the people." Const 1963, art 4, § 52. This provision reflects how a subject matter can touch upon multiple public interests at one time. But recognizing that a given problem can touch upon safety and health simultaneously makes them no less distinct. Cf. *Chicago & N W Ry Co*, 205 NW at 934 ("It is true that to some extent regulations promoting public safety also promote public health, but that fact alone cannot make a health regulation of a regulation distinctly in the interest of safety."). Indeed, that the Constitution calls out both when a given subject matter relates to each reaffirms their separateness. Were the words the same, use of both terms would create an impermissible redundancy. See *Syntex Labs., Inc v Dept of Treasury*, 188 Mich App 383, 388; 470 NW2d 665 (1991) (applying presumption against surplusage to constitutional provision).

C. Other Michigan statutes show that public safety and public health are different in most every context.

Reading other statutes of the time confirms that "public safety" and "public health" are separate ends, too. A "statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme." *Potter v McLeary*, 484 Mich 397, 411; 774 NW2d 1 (2009). The 1948 Michigan Compiled Laws—the compilation closest in time to the EPGA's enactment—confirms once more that public health and public safety are different. The public health codes of the time—chapters 325 to 337—did not speak to public safety *at all*. The 1948 laws established a public health commissioner to "have general charge and supervision of

the enforcement of the health laws." See former MCL 325.1-2. Yet a separate commissioner for the Michigan State Police was treated as interchangeable with the "commissioner of public safety." MCL 28.13. For good reason: his department was previously known as the Michigan Department of Public Safety. See *A Brief Administrative History of the Michigan Department of State Police* <https://tinyurl.com/wx9n5k5> (last accessed September 15, 2020). Likewise, the penal code had distinct chapters for "public health," former MCL 750.466-.477a, and "public safety," former MCL 705.493-.502a.

This thread extends through today's statutes. References to "public safety" usually appear in chapters governing the state police, fire prevention, motor vehicles, aviation, environmental dangers, school-related policing, 911 services, and corrections facilities. See generally chapters 28, 29, 256, 259, 324, 380, 390, 484, and 791 of the Michigan Compiled Laws. Each of these subjects presents the kind of acute physical danger or injury that often warrants response from police and fire personnel. In contrast, "public safety" as an object of regulation never appears in the public health laws. See generally chapter 333 of the Michigan Compiled Laws. And when modern statutes specifically define "public safety," they typically concern police and fire matters, not public health. See, e.g., MCL 70.12 (empowering a village to "create a department of public safety and delegate to it all the power, authority, and duties which may be exercised by a fire department or a police department or both"); MCL 380.1606b (explaining that a school "board may grant to the public safety officers the authority of peace or law enforcement officers").

Not one statute provides for a specific "public safety" response to an epidemic. Rather, all describe a response from public *health* officials or the governor. See, e.g., MCL 333.2253 ("The director [of the department of health and human services] 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."); MCL 333.2453 ("[I]f 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[.]"); MCL 333.5111 (tasking a health department with "[e]stablish[ing] requirements for reporting and other surveillance methods for measuring … the potential for epidemics" and "[i]nvestigat[ing] … epidemics"); MCL 333.9621 ("A local health department, a state institution, or a physician may require a microbiological examination and analysis of … [various] substance[s] from a locality where there is an outbreak of a communicable disease or epidemic[.]").

D. Dictionary definitions distinguish public safety from public health.

The Court may also look to "dictionary definitions." *People v Wood*, ___ Mich ___; ___ NW2d ___ (2020) (Docket No. 159063); slip op at 6-7. "The words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted." *Cain v Waste Mgmt, Inc*, 472 Mich 236, 258; 697 NW2d 130 (2005). Thus, "it is best to consult a dictionary from the era in which the legislation was enacted." *In re Certified Question from United States Court of Appeals for Ninth*

Circuit, 499 Mich 477, 484; 885 NW2d 628 (2016). Because "public safety" is a term of art, "resort to a legal dictionary to determine its meaning is appropriate." *People v Jones*, 467 Mich 301, 304; 651 NW2d 906 (2002).

Dictionaries from around 1945, when the Legislature passed the EPGA, reject any notion that "public health" is a mere subset of "public safety." Standard dictionaries of the day did not define "public safety," but legal and political dictionaries did. *White's Political Dictionary*, a 1947 publication, defined "public safety" as "[t]he protection of the local community as a whole, chiefly performed by police and fire departments." Decades earlier, a legal dictionary equated "public safety" with "peace," "quiet[,] and orderly behavior." *A Concise Legal Dictionary* (1909), p 268. An early edition of *Words and Phrases* evidently said that "'[p]ublic safety' means public security[.]" *State v. Stewart*, 57 Mont 144; 187 P 641, 652 (1920). Absent from these early public-safety actors are medical providers or health officers, and absent from the public-safety objects are disease or health. Indeed, *White's Political Dictionary* (1947) defines "public health" as "[t]he science of disease prevention and of promoting physical health through community sanitation, control of infections and epidemics, education of people in principles of hygiene, organization of medical and nursing services, and recognition that maintenance of health is dependent on living standards."

These public-safety definitions have a decided "law and order" bent, equating "public safety" with the functions performed by fire and police first responders. See, e.g., Etzioni, *The Standing of the Public Interest*, 20 Barry L Rev 193, 202 & n 98

(2015) (providing definitions of "public safety" and explaining: "The most basic element of public safety is upholding law and order, the deterrence and prevention of crime.").

* * * *

"Police power" is a broad term that embraces both "public health" and "public safety." See generally *Jacobson v Massachusetts*, 197 US 11; 25 S Ct 358; 49 L Ed 643 (1905). But that is not to say that health and safety are swappable or that one falls under the other. These are distinct aims. And when a statute speaks to only one of them, the Court must draw meaning from that. "Public safety," as used in the EPGA, does not encompass "public health."

II. The Emergency Powers of the Governor Act does not apply in the context of public health generally or an epidemic such as COVID-19 in particular.

A. The EPGA cannot reach COVID-19 because the "public safety" is not "imperiled."

The EPGA contains three conditions that must be met before a governor can properly declare an emergency under that act: (1) there must be "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"; (2) the conditions must be such that the "public safety is imperiled"; and (3) certain specified persons or the governor must start the process. MCL 10.31(1). The statute does not list these conditions in the disjunctive, so all must be met for a declaration to be proper. The Legislature has explained in other briefing why the statewide

response to a COVID-19 epidemic is not the kind of public emergency contemplated by the first condition.

The second condition—the "public safety" condition—likewise cannot be met in a public-health crisis like COVID-19 presents. That outcome follows from the meaning of public safety, which, as explained at length above, does not embrace public health. Given that definition, the Court cannot read "public health" into the statute. "[W]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *In re Estate of Von Greiff*, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 347254); slip op at 8; accord *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 75 n 8; 711 NW2d 340 (2006) ("The expression of one thing is the exclusion of another."). And as should be clear from the preceding discussion, the response to an epidemic like COVID-19 falls squarely within the reach of the state's "public health" power. See, e.g., MCL 333.2253 ("If the director determines that control of an *epidemic* is necessary to protect the *public health* …" (emphasis added)). Indeed, the Court's own order requesting supplemental briefing acknowledges that COVID-19 is a public health matter. There being no "public safety" condition, the Court should hold that the governor had no right to act under the EPGA.

Another court did something similar. In *City of Olivette v St Louis Co*, 507 SW3d 637, 642 (Mo Ct App, 2017), the Missouri Court of Appeals considered a statute that is the converse of the EPGA: the law empowered counties to pass laws to "enhance the public health" but not "public safety." St. Louis County argued that this state law empowered it to pass a county-wide ordinance imposing "minimum police

standards." *Id.* at 638. The Court of Appeals held otherwise, concluding that "[m]inimum standards for law enforcement [are] matters of public safety, not public health." *Id.* at 644. In concluding that "public health" and "public safety" standards were not the same, the court cited some of the same factors present here, including separate state departments for public safety and public health:

> By creating different departments to address 'public safety' and 'public health,' the legislature has indicated that it considers these two different and distinct areas of government authority. In fact, throughout the revised statutes, the legislature has used these terms in a way that demonstrates they are distinct[.]

Id. at 645. The court also recognized that it might not be possible to define "all the actions" embraced in public health. But what mattered was that law enforcement was undeniably not within it. The county could not, then, implement a public-safety ordinance using powers endowed only for public health.

The same result—using the same syllogism—follows here. The EPGA requires public *safety* to be imperiled. COVID-19 threatens public *health*. So COVID-19 does not meet the requirements in the EPGA for declaring an emergency.

This reading fits with the other textual cues that health matters like epidemics were not the focus of this statute. Note who can launch an emergency: a mayor, a sheriff, the commissioner of the state police, or the governor. MCL 10.31(1). Not local and state health officers; the director of the department of health and human services and the state's chief medical executive are absent from the statute. The only *specific* emergency circumstance that the statute lists is "rioting," the quintessential public safety issue. *Id.* The listed measures that the governor may take once he or she

declares a state of emergency are classic public-safety measures, many ill-suited to respond to a public-health crisis. Traffic control, curfews, limits on alcohol, and prohibitions against explosives are all measures intended to maintain the public order in a police-focused calamity. *Id.* Even the provision explaining how the act should be construed says that the power must be broad enough to secure "adequate control over persons and conditions." MCL 10.32. "Control"—and its focus on force and power—bespeaks police action, not medical treatment. *Black's Law Dictionary* (11th ed, 2019) (defining "control" as "[t]o exercise power or influence over.").

All these words crystallize the EPGA's limited meaning. "The principal goal of statutory interpretation is to give effect to the Legislature's intent, and the most reliable evidence of that intent is the plain language of the statute." *Hegadorn v Dept of Human Services Dir*, 503 Mich 231, 245; 931 NW2d 571, 577 (2019). So, the Court's work could begin and end there. The text of the EPGA does not reach statewide public health crises like COVID-19.

B. The EPGA's relationship to earlier and later statutes alike confirms it was not intended to reach "public health" issues like epidemics.

Reading the EPGA with other acts confirms its more limited reach.

First, reading the EPGA to reach public-health emergencies would cause it to irreconcilably conflict with statutes providing local authorities the power to act in public health crises. In construing the statute, "[i]t is necessary to consider other statutes which may have preceded it[.]" *Crawford v Sch Dist No 6*, 342 Mich 564, 568; 70 NW2d 789 (1955). When the EPGA was enacted, it was "a general proposition

that the legislative policy of the state has been to place the burden of epidemics of communicable diseases on the county." *Keho v Bd of Auditors of Bay Co*, 235 Mich 163, 166; 209 NW 163 (1926). The legislature has at times given the responsibility to respond to local health boards of cities, villages, and other municipalities, *id.*, including the responsibility to isolate infected persons, see e.g., former MCL 327.151. Thus, the Legislature expected—and indeed required—local authorities to address epidemics. Yet in *Walsh v City of River Rouge*, this Court held that "local government has no power to act" in a "field of permitted action" covered by the EPGA—regardless of whether a governor actually chooses to uses his or her powers under the EPGA or not. 385 Mich 623, 635; 189 NW2d 318 (1971). So, if the EPGA were to extend to public-health crises, then either (a) *Walsh*'s reading of the statute would be wrong or (b) every understanding of the power of local governments to act would be, and statutes empowering local governments would be repealed by implication. *But see Wayne Co Prosecutor v Dept of Corr*, 451 Mich 569, 576; 548 NW2d 900 (1996) ("Repeals by implication are not favored and will not be indulged in if there is any other reasonable construction."). Nothing in the EPGA shows that the Legislature intended such an extreme outcome. And this is no academic debate, as many counties have continued to exercise emergency powers to address the COVID-19 crisis with the Governor's blessing.

Second, transforming the EPGA into a public-health statute would also render much of the then-existing health code redundant. Those statutes already provided for the response mechanisms for epidemics—mechanisms that would be entirely

duplicative of the Governor's powers under the EPGA. See, e.g., former MCL 329.1 (providing for quarantine and martial law to prevent the spread of "dangerous communicable disease"); former MCL 329.5 (permitting a state health inspector to prohibit the movement of infected goods). The Court cannot construe statutes that way. See *In re COH, ERH, JRG, & KBH,* 495 Mich 184, 197; 848 NW2d 107 (2014) ("Because the Legislature enacted separate statutes that create distinct processes ..., we must interpret those statutes in a way that avoids rendering either statute surplusage."); accord Hessick, *Doctrinal Redundancies*, 67 Ala L Rev 635, 662 (2016) ("When a statute is subject to two different readings, one of which renders the statute redundant with another statute, the presumption is that the interpretation that avoids the redundancy is correct.").

Bear in mind: nothing in the prior public health statutes empowered state authorities to confine the un-infected public at large to their homes. See *County of Butler v. Wolf*, ___ F. Supp. 3d ___, ____ (ED Pa, 2020) (Docket No. 2:20-cv-677), p 44 ("The fact is that the lockdowns imposed across the United States in early 2020 in response to the COVID-19 pandemic are unprecedented in the history of … our Country."). If the Legislature intended the EPGA to provide such extraordinary power, then one would have expected the statute to be more explicit—especially given the historical reluctance of courts to extend public health powers beyond those expressly provided. See, e.g., *Rock v Carney*, 216 Mich 280, 298; 185 NW 798 (1921) (holding that public-health authorities could not confine contagious persons to a hospital where the statute did not refer to that power); *Mathews v Bd of Ed of Sch*

Dist No 1, 127 Mich 530, 539; 86 NW 1036 (1901) (holding that locality could not require vaccination for students where applicable public-health statute did not provide for compulsory vaccination). The Legislature knew how to amend the public health codes, as it in fact did so through *other* acts on the very day that it enacted the EPGA. See 1945 PA 267 (repealing and amending various aspects of the public health code effective May 25, 1945).

Third, reading the EPGA to apply to public-health emergencies would impermissibly render the EMA surplusage. See Legislature's Application for Leave to Appeal, *Mich House of Representatives v. Governor* (Docket No. 161917), p 23-29. When two statutes "relate to the same subject or … share a common purpose," they are *in pari materia* and "must be read together as one." *People v Hall*, 499 Mich 446, 459 n 37; 884 NW2d 561 (2016) (cleaned up); see also *Apsey v Mem'l Hosp*, 477 Mich 120, 129; 730 NW2d 695 (2007) ("[A]ll statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other."). Given that both the EPGA and the EMA concern emergency circumstances, it makes sense to read them together. And here, only the EMA expects that the governor will act to "protect … the public health." MCL 30.402(h). Even more pointedly, only the EMA refers to "epidemics." MCL 30.402(e). Courts "generally presume that when the language of two statutes is different, the drafters acted intentionally and purposely in their inclusion or exclusion." *Wood*, slip op at 9.

So, as Judge Tukel explained, one can presume from the difference here that the Legislature did not intend the EPGA to reach epidemics:

> [A]pplying 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.

House of Representatives & Senate v Governor, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 353655), slip op at 9 (Tukel, J., concurring in part and dissenting in part).

Fourth, stretching the EPGA to apply to public-health emergencies raises delegation problems that the Legislature purposefully avoided in other emergency statutes reaching public health. To the Legislature's knowledge, every emergency management statute concerning public health and gubernatorial power includes a time limit and legislative oversight mechanism. See MCL 10.81, 10.83 (permitting the governor to declare an "energy emergency" where there is a "danger to health … of the citizens," but limiting the emergency to 90 days unless the legislature extends it); MCL 10.122, 10.125 (permitting the governor to declare a "public health state of emergency" when a product proves to be adulterated, but limiting the emergency to 90 days unless the legislature extends it); MCL 30.403 (permitting the governor to declare a state of emergency, but limiting the emergency to 28 days unless the legislature extends it); MCL 287.703a (permitting the governor to declare a state of emergency as to animal disease, but limiting the orders that the relevant agency head

may issue from it to six months). The absence of those checks only makes sense so long as the statute is appropriately confined to "public safety," a traditional prerogative of the executive with far less potential to encroach upon the Legislature's authority. Cf. Const 1963, art 5, § 12 (explaining that the governor may call on the military "to execute the laws, suppress insurrection and repel invasion"). But extending the time-limit-free EPGA statute to "public health"—a legislative prerogative—raises serious separation of powers concerns, as Plaintiffs, the Legislature, and others have already explained. See also *County of Butler*, slip op at 19 ("Courts are generally willing to give temporary deference to temporary measures aimed at remedying a fleeting crisis. … But that deference cannot go on forever."). The Court has a duty to construe the EPGA in a way that would avoid that constitutional problem. It can easily do so given the EPGA's express public safety limitation and its purposeful lack of reference to "public health."

The entire statutory scheme, then, confirms that the EPGA has no role to play in a public-health emergency.

C. The EPGA's history confirms that it was a public-safety statute that was never meant for public-health problems like COVID-19.

Historical context points to the same answer. See *Dep't of Envt'l Quality v Worth Tp*, 491 Mich 227, 241; 814 NW2d 646 (2012) (holding that courts must read statutes "in conjunction with" the "historical context"). "[I]t is important to consider the law as it existed prior to the enactment, and particularly the mischief sought to be remedied by legislation." *People v Arnold*, 502 Mich 438, 454; 918 NW2d 164 (2018).

When the Legislature enacted the EPGA, it did not design the act for epidemics—it designed the act for public-safety issues. The epidemic closest in time to the EPGA had come and gone decades before the act passed. Rioting, on the other hand, was fresh on the legislators' minds. A 1945 *Lansing State Journal* article for example, explained that the EPGA "result[ed] from the 1943 Detroit race riot" and would "give the governor wide powers to maintain law and order in times of public unrest and disaster." *Measure Gives Governor Wide Emergency Powers*, Lansing State Journal (April 6, 1945), p 1; see also Beek, *Emergency Powers Under Michigan Law*, available at <https://bit.ly/2z3f8rC> (last accessed August 27, 2020) (explaining that the EPGA "was enacted in response to race riots in Detroit in 1943," a situation that had required troops and a curfew); *Governor Kelly's Riot Act*, Detroit Tribune (June 2, 1945), p 6 (describing the EPGA as "a new Riot Act" meant to equip the governor to respond to "racial or industrial disturbance"); *Governor Signs Emergency Act*, Lansing State Journal (May 26, 1945), p 1 (saying that the EPGA "grant[ed] powers to suppress civil disorder"). The bill was even "sponsored by the state police," *Riot Bill Passes Senate*, The Herald-Press (April 18, 1945), p 5, after a former Michigan State Police district commander for Detroit, Donald Leonard, wrote it, *Emergency Act Study Ordered*, Lansing State Journal (June 11, 1964), p E-6. It should come as no surprise then that provisions of the EPGA read like riot-control measures. See MCL 10.31(1)

This "local riots" concept was the common understanding of the EPGA for decades. Governor Romney used the statute to stifle riots and quell violent labor

strikes. A massive labor uprising in Hillsdale was the first target. See, e.g., *Near Martial Law Declared in Hillsdale,* Lansing State Journal (May 28, 1964), p 1. But Governor quickly followed that one with declarations addressing other riots in Detroit, Flint, Grand Rapids, and several locales in the Metro Detroit area throughout the tumultuous 1960s.

The public safety focus of the EPGA eventually became part of the impetus for passing the EMA. In the mid-1970s, Governor Milliken worried about the danger presented by high-water levels in the Great Lakes. In a special message to the Legislature on non-manmade disasters in 1973, he reiterated that the EPGA was "pertinent to civil disturbances" and concluded that "[u]nder existing law, the powers of the Governor to respond to disasters is unduly restricted and limited." Exhibit 1, Special Message. Because the EPGA could not address a broader disaster, he asked "that the Legislature give the Governor plenary power to declare states of emergency both as to actual and impending disasters." *Id.* He repeated this same message in 1974 and 1975.

After Governor Milliken's speeches and messages, the Legislature—agreeing with him that the EPGA did not provide the executive "plenary power" for every potential emergency and disaster—passed the EMA to *give* the governor that power, subject to certain checks. See also *Walsh*, 385 Mich at 632–633 (considering gubernatorial statements, including statements from Governor Milliken, in construing the EPGA's reach). Legislators specifically exempted "riots and other civil disorders" from the initial draft of the EMA, implying that those matters were still

left to the EPGA. 1975 HB 5314. That language was almost dropped, but the Michigan State Police objected that doing so would leave the EMA "in conflict with the previous riot and disorder legislation." George Halverson, House Bill No. 5314 (Michigan Department of State Police, July 29, 1975). The exemption therefore lived on until 1990, when it was modified. See 1990 HB 5263.

Other past governors understood the limited nature of the EPGA. To the Legislature's knowledge, no other governor has used the EPGA in at least 30 years (as far back as electronic records are available) for *anything*. The Legislature is unaware of a single use of the EPGA, before the present administration's use over the last six months, to manage a public-health crisis. The act has never been used to manage an epidemic.

The EPGA has not been thought of as a response tool for epidemics even in a hypothetical sense. When the Michigan Department of Community Health conducted an assessment in cooperation with the Centers for Disease Control and Prevention of all laws that might be relevant in responding to a pandemic calling for social distancing, the EPGA barely warranted a mention (particularly as compared to the EMA). See Exhibit 2, Social Distancing Law Project Assessment. The report referenced the EPGA only in noting the Governor's power to impose a curfew. *Id.* at 16. Yet this Governor has invoked the EPGA over 100 times during this epidemic.

The only three cases that even mention the EPGA confirm this public-safety focus. Two discuss the EPGA in the context of local responses to riots. See *Walsh*, 385 Mich at 623; *People v Smith*, 87 Mich App 730; 276 NW2d 481 (1979). The last

touches upon the EPGA's potential preemption of a local law designed to corral college students during "a drunken, raucous semi-annual event." *Leonardson v City of E Lansing*, 896 F2d 190, 192 (CA 6, 1990). None of these concern public-health matters like epidemics.

Every bit of history confirms what the Legislature has been saying all along. See Legislature's Application for Leave to Appeal, *Mich House of Representatives v. Governor* (Docket No. 161917), p 29-31. Wherever the boundaries of the EPGA are, statewide public health matters like an epidemic are not within them. Both by design and constitutional necessity, the EPGA does not apply to the kind of threat that COVID-19 presents.

* * * *

Textual clues, contextual clues, and historical clues all show that this sort of epidemic is not a proper target for the EPGA. The Court should answer the certified questions accordingly.

CONCLUSION

For all these reasons, the Court should rule that the Governor lacks authority under the EPGA to issue emergency orders related to the COVID-19 pandemic. Because the Governor also erred in relying on the EMA to justify any orders extending beyond April 30, the Court should declare all of her declarations and orders ultra vires. The Court should permit the Legislature to reassume the mantle of lawmaker for COVID-19.

Respectfully submitted,

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Dated: September 16, 2020

STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
_____/

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

Plaintiffs,

v.

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

Defendants.

Supreme Court No.161492

USDC-WD: 1:20-cv-414

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INDEX OF EXHIBITS

Exhibit 1

Governor Milliken Special Message

The Honorable William Ryan
Speaker of the House
State Capitol
Lansing, Michigan
Dear Speaker Ryan:

Transmitted to you with this letter is my Special Message on Natural Disasters to the First Session of the Seventy-Seventh Michigan Legislature.

Sincerely,
WILLIAM G. MILLIKEN
Governor

The message was referred to the Clerk and ordered printed in the Journal.

SPECIAL MESSAGE TO THE LEGISLATURE ON NATURAL DISASTERS

I am sending you this message today on a matter of utmost urgency.

Michigan is being threatened by the destructive forces of nature on a scale rarely experienced across the state. Seldom have our citizens been so helpless as individuals in coping with a sustained natural threat.

Waters bordering our shores have reached record high levels, and are going higher.

Wave action accelerated by wind is causing extensive flooding and serious erosion along hundreds of miles of shoreline.

Water that has long been about us is now upon us.

Numerous counties have been declared disaster areas, millions of dollars in property has been destroyed, thousands of people have been forced to evacuate their homes, scores of homes have been toppled into the lakes, and hundreds more are endangered.

Michigan State Police and National Guardsmen from more than a dozen cities, as well as trucks, helicopters and other equipment, have repeatedly been mobilized for emergency services, and prison trustees have provided emergency manpower.

Other steps have been taken to cope with the immediate and long-term effects. But we face a sustained threat and we need sustained efforts at the local, state and federal levels to meet it.

There is a critical need for greater emphasis on pre-disaster action.

Last November, I noted that the federal government had not viewed the Great Lakes problem with the sense of urgency that it deserved.

At that time, I asked for a nine-point program for federal assistance to cope with our shoreline problems. It now appears that a favorable response is developing.

In addition to elaborating today on steps that must be taken at the federal level, I want to outline what steps are being taken at the state level, and what further state action is needed, including prompt legislative action.

This is the situation in Michigan today:

— Lakes Erie and St. Clair are at the highest levels in this century and Lakes Huron and Michigan are near the highest mark for the century. Summer levels are now predicted to be 10 inches higher than last summer on Lakes Michigan and Huron, and five to six inches higher on Lake St. Clair and Lake Erie.
— We have flooding along 140 miles of Michigan shoreline, and there are more than 500 miles with extremely serious erosion problems. A dozen public water supply systems are in jeopardy.
— There are high risk shoreline areas in 35 of our 83 counties.
— About 5100 homes are threatened by flooding.
— Damage to public and private property totals an estimated $30 million from flood-damage alone, and millions more in erosion damage.
— Upwards of 20,000 people have been forced to evacuate their homes.

All indications are that the situation will get worse before it gets better.

Above normal precipitation in recent years has filled our lakes to the brim and left surrounding land so saturated it cannot retain additional water.

There is no immediate hope of controlling the rising lake levels. We have succeeded in getting temporary controls on flow into the lakes from the north. But this will have little immediate effect. Nor would it help greatly to increase the flow from the south. Just as we have had no control over natural events which precipitated the current problem, we have no control over the elements of nature necessary to ease the problem.

I am urging the U.S.—Canadian International Joint Commission to control the regulatory works at Sault Ste. Marie as to provide maximum relief from flooding and erosion along Michigan shores. Changing the regulatory mechanism will help, but it will not result in major lowering of levels.

We cannot turn back Nature, nor can we eliminate all risk for those who live close to some of its greatest wonders. But the State has a responsibility to help its citizens cope with disaster, and to avert it to the extent possible.

While nearly 80 percent of the Great Lakes shoreline is privately owned, the problem is a matter of not only private but public concern. The multiple issues of flooding, public and private property damage, loss of beaches, effect on water quality and loss of tax base require a well-developed, sound program for coastal protection.

State Action

We have taken legislative and other steps to give us a shoreline management program that will help us avoid serious problems in the future.

But we need prompt action, including legislative action, that will provide state assistance for local and individual self-help efforts in the face of a sustained threat of natural disaster.

I am therefore taking and recommending these steps:

1. I have instructed the Michigan State Police, the Michigan National Guard, and other state agencies to develop contingency plans for rescue, evacuation and other emergency services in all shoreline areas. This has been done and plans are being implemented where needed.

2. I have instructed the Emergency Services Division of the Michigan State Police to mobilize a standby force of prison trustees and personnel from voluntary agencies for use where there are urgent manpower needs for diking and other emergency operations. Trucks and other equipment will be provided where needed.

3. I am recommending that an Emergency Contingency Fund, amounting initially to $500,000, be created for allocation by the Governor in emergency situations.

4. I urge the Legislature to expedite consideration of my February 26 request for a $370,000 supplemental appropriation to provide technical assistance for individuals and localities, and to develop a pilot program for shoreline protection. Only the federal government has the resources to provide for substantial construction of protective devices. But we should move ahead with a state demonstration program now to determine feasibility of protection techniques, and with means of providing technical assistance to those who can't wait for federal aid.

5. I urge the Legislature to revise the General Property Tax Act to exempt flood and erosion protective devices from property taxation. Land owners now in effect are penalized for such devices. Under existing law they become capitalized improvements for tax purposes.

6. I urge local tax assessors to act favorably on the March 29 request of the Michigan State Tax Commission, made in response to Senate Concurrent Resolution 74, to review the assessment of property which has been devalued because of natural disaster. The Commission made the request in telegrams to about 560 assessors in counties bordering the Great Lakes.

7. It is essential that local units of government be given legal authority to help themselves to combat natural disasters. The police powers of some political subdivisions are, at best, vague at the present time. We must clarify the role of government at the local level and the use of private property where that is the most appropriate method of dealing with actual or threatened disasters. To that end, I will prepare amendments to existing village, township and county laws that would give local governments the tools to get the job done. Such legislation should have high priority. I also want to work with the Legislature in determining means of giving local communities ability to create special assessment districts which would provide the benefits of long-term financing to those shoreline residents who want to help themselves.

8. The state law is unclear with respect to utilizing the National Guard for pre-disaster assistance. Accordingly, I will recommend legislation which will clearly address itself to the technical problems of the state's ability to deliver services at critical periods without being bound by bureaucratic and administrative red tape.

9. I recommend that the Legislature give the Governor plenary power to declare states of emergency both as to actual and impending disasters.

Under existing law, the powers of the Governor to respond to disasters is unduly restrictive and limited. The existing Civil Defense law which was enacted in 1953 was primarily intended to cover catastrophies that might ensue from military attack. There is a need to clarify and define the types of natural disasters and further to grant extraordinary powers where the imminent and practical threat of disasters is a reality.

While it is possible that many of the special problems created by non-military disasters can be handled by broad interpretation of existing Michigan law, the Governor's emergency powers are not specifically addressed to the imminent potential of disasters.

The existing civil defense powers of the Governor are general in nature and specify that they are to be exercised under conditions of attack. The emergency power of the Governor, set forth in Act 302 of 1945, are pertinent to civil disturbances, and only indirectly relate to natural disasters. The Act is silent with respect to powers necessary to combat imminent disasters.

Because many types of disasters such as floods, winds of varying degrees of velocity and blizzards often can be foretold as to where and when they will strike, it appears prudent to permit the disaster apparatus to function before there is an actual incidence of calamity. This would avert needless loss of life and property and tremendously reduce losses.

Accordingly, I recommend that the Governor have plenary power to declare states of emergency both as to actual and impending disasters and to take certain steps pursuant to that declaration. I will specify these steps in draft legislation that I will forward to you promptly with a request that it receive prompt action.

Local Action

I view the role of the State as secondary to that of local political subdivisions, and as the coordinating entity to maximize full federal participation. That is one reason I recommended the statutory clarification of the role of local government.

Local units of government should make all possible effort, and use all possible resources, prior to seeking state assistance. The State, in turn, uses the Emergency Services Division of the State Police as a clearing center for requests for assistance and for coordinating the state's response.

Federal Action

Congress has recognized that the states are generally unable to commit massive financial resources in disaster situations. In 1970, the Congress passed the Federal Disaster Relief Act, commonly known as P. L. 91-606, as primary mechanism to compensate public and private damaged losses as a result of natural disasters. As Governor, I must certify that the state has expended at least $3.5 million in unreimbursed expenses in the 12 months preceding the disaster. With that certification, I can request that the President designate counties as federal disaster areas, thus making available the full resources of P. L. 91-606.

During the severe ice storm of March 13-15, 1972, we estimated a loss of about $3.5 million dollars in damage to public and private property. I immediately designated 10 counties as disaster areas and requested presidential declarations so that the state and local units could be reimbursed for some of their damages. A presidential declaration was made on April 5 for seven counties and thereafter almost $2 million in federal assistance was forthcoming to reimburse expenditures for public property loss.

On November 14, 1972, exceedingly high winds, coupled with the high lake levels, created disastrous flooding conditions in nine counties causing in excess of $10 million in damages. I immediately designated those counties as disaster areas and authorized the full use of the National Guard where necessary for evacuation and other purposes. I subsequently requested a presidential declaration which the President issued November 20. As of this date, Michigan citizens have received and are still receiving federal assistance, and approximately $5 million in federal loans under the Small Business Administration and the Farmers Home Administration have been disbursed.

The recent storm of March 16 caused extensive flooding again in 12 counties resulting in total property damage approximating $16 million. On March 23, I requested a presidential declaration for assistance to those counties and also for full federal resources for pre-disaster assistance.

Michigan was hit with another storm on April 9 which in some areas caused more extensive flooding than during the previous month. It also accelerated erosion damage to an extent that there is danger of flooding in areas not previously vulnerable to floods.

Since the November storms, our efforts at the state level to minimize future disasters have been a joint undertaking with federal authorities. The Department of Natural Resources was authorized to explore all avenues of federal preventive assistance as a review of state resources recognized our inability to adequately solve the problem. Preventive flood measures require massive financial outlay as well as materials and labor, all of which are beyond the scope of state capabilities.

The U.S. Army Corps of Engineers is authorized by federal law to administer a flood preventive program called Operation Foresight. It is intended to provide temporary protection in low-lying areas for high lake levels and impending storms which pose a threat to life and property. Federal law requires that projects be (1) determined to be beyond state or local capacity, (2) justifiable from economic and engineering standpoints, (3) designed to cope with expected high water levels and solely of a temporary nature, and (4) feasible for timely completion. The federal law does not allow emergency measures to prevent or mitigate shoreline or beach erosion. For this reason, only on-shore protective devices are available.

On December 20, 1972, the Corps of Engineers advised me that it would begin Operation Foresight in Michigan. On January 25, 1973, I advised the Corps, as required by federal law, that the State of Michigan did not have resources to complete the program and designated the Department of Natural Resources and the Emergency Services Division of the State Police as coordinating agencies to work with the Corps of Engineers. We pledge our state resources to assist the Corps in this endeavor.

During January, February and March, 1973, the Corps and state officials conducted over 25 meetings and site inspections in shoreline communities explaining the requirements of Operation Foresight and offering extensive technical assistance.

Over 30 communities have submitted resolutions to the Department of Natural Resources requesting Operation Foresight assistance and the Corps has approved plans in at least 21 of these areas. The Corps of Engineers already has provided about $5 million in construction aid, and has supplied more than 5 million sandbags for Michigan.

We have, then, had federal assistance in the form of President Nixon s responses to my requests for designation of disaster areas, and through the Operation Foresight program.

But more needs to be done for pre-disaster assistance.

I have outlined in this message a state action program which would give the State of Michigan a far greater capacity to deal with impending problems.

We need this further federal action:

1. At the present time Operation Foresight is primarily a diking preventive program. Offshore devices are prohibited under the federal law. I am asking our congressional delegation to press for the passage of federal legislation which would authorize the Corps of Engineers to repair, construct or modify flood and erosion control structures offshore where they will often do more good than onshore devices. This can help prevent erosion that, among other things, can lead to flooding.

I urge that you lend your support and pass appropriate resolutions expressing your support and urge our congressmen and senators to work for these amendments.

2. In the same context, the Federal Disaster Relief Act does not clearly define the areas of pre-disaster assistance that are intended to be covered. We are unable thus far to receive presidential approval for pre-disaster assistance under the Relief Act and I request that you join with me in urging our congressional delegation to work for prompt action on clarifying language that will clearly identify the areas of pre-disaster assistance that should be covered by federal laws.

3. Appropriation of sufficient funds to construct works authorized under Section 111 River & Harbor Act, 1968 PL 90-483.

4. Appropriation of sufficient funds to construct works authorized by Section 14, Flood Control Act of 1946—Construction of emergency works to protect roads, bridges and public works.

5. Amend Section 165 (c) (13) of the Internal Revenue Code of 1954 to allow casualty loss deductions for expenditures to construct protective works or to move homes from their original locations to prevent future storm losses.

6. Clarification by Internal Revenue Service of revenue ruling 79 as it relates to loss of land from erosion as a casualty loss.

7. Federal participation in construction of protective works for both public and private property.

8. Construction of low cost demonstration projects.

9. Provide research funds for lake level forecasting techniques which would be applicable to critical areas for prediction of specific erosion rates and flood damage.

10. Provide additional funding to coastal engineering research center of the Corps of Engineers for erosion-related activities on the Great Lakes.

11. Authorize the use of federal equipment for emergency control programs.

Conclusion

I have in this Special Message on Natural Disasters informed you of the role of the State of Michigan in recent months, and requested your urgently needed assistance in helping us cope with the problems facing us in the months ahead.

We have been effective in reacting to natural disasters.

We must be no less effective in preparing for them. In so doing, we can save lives and property.

From 1955 to 1969, our state suffered losses from flood damages of less than $3 million. Since 1970, we have suffered well over $30 million in damages to property, not to mention countless millions of dollars of damage to our shorelines.

All citizens of Michigan have a stake in the program I have outlined, including those who live far from a shoreline.

Today we are ravaged by one of our most precious resources — our water. We know not the form or the boundary of the natural disasters of tomorrow.

But we know that we must prepare for them.

Introduction of Bills

Rep. F. Robert Edwards introduced

House Bill No. 4535, entitled

A bill to amend chapter 66 of the Revised Statutes of 1846, entitled "Of estates in dower, by the curtesy, and general provisions concerning real estate," as amended, being sections 554.131 to 554.139 of the Compiled Laws of 1970, by adding section 34a.

The bill was read a first time by its title and referred to the Committee on Taxation.

Reps. Geake, Ziegler, Smart and Bennett introduced

House Bill No. 4536, entitled

A bill to amend section 35 of Act No. 331 of the Public Acts of 1966, entitled "Community college act of 1966," being section 389.35 of the Compiled Laws of 1970; to add section 34a; and to repeal certain acts and parts of acts.

The bill was read a first time by its title and referred to the Committee on Colleges and Universities.

Exhibit 2

Social Distancing Law Project: Assessment of Legal Authorities (2007)

Social Distancing Law Project

Michigan Department of Community Health

Assessment of Legal Authorities

Introduction

This report provides an assessment of Michigan's legal readiness to address pandemic influenza. This assessment includes both legal authority for pharmaceutical and non-pharmaceutical (social distancing) measures. As set out in the CDC's *Interim Pre-pandemic Planning Guidance*[1], at the beginning of an influenza pandemic, the most effective mitigation tool (i.e., a well-matched pandemic strain vaccine) will probably not be available. Therefore, Michigan must be prepared to face the first wave of the pandemic without vaccine and, possibly, without sufficient quantities of influenza antiviral medications. Instead, Michigan must rely on an early, targeted, layered application of multiple, partially effective, non-pharmaceutical measures. These include restrictions on the movement of people and "social distancing measures" to reduce contact between individuals in the community, schools, and workplace.

This report focuses on the ability of Michigan to implement social distancing measures to prevent and control the spread of pandemic influenza, both when an emergency has been declared and in the absence of a declared emergency. Communicable disease surveillance, investigation, or outbreak control may involve the following potential public health procedures or social distancing measures, based upon the current Michigan Department of Community Health All Hazards Response Plan and Pandemic Influenza Plan:

- Travel alerts, warnings, or bans
- Communicable disease surveillance at borders
- Border closures
- Individual or group isolation
- Individual or group quarantine
- Altered work schedules or environmental controls to be enacted in workplaces
- Cancellation of public gatherings
- Identification of buildings for community isolation or quarantine
- Monitoring of isolated or quarantined individuals or groups

In its Pandemic Influenza Plan, MDCH addresses social distancing and other measures to be implemented, as appropriate, for each WHO phase / federal government response

[1] *Interim Pre-pandemic Planning Guidance: Community Strategy for Pandemic Influenza Mitigation in the United States – Early, Targeted, Layered Use of Nonpharmaceutical Interventions*, which can be found at http://www.pandemicflu.gov/plan/community/community_mitigation.pdf

stage of a pandemic. MDCH's current plan (Draft 3.1, May 2007) is posted on the Internet at http://www.michigan.gov/documents/mdch/MDCH_Pandemic_Influenza_v_3.1_final_draft_060107_2__198392_7.pdf. Social distancing interventions can and should be undertaken voluntarily. However, this report covers establishment and enforcement of social distancing means by state and local authorities if necessary to protect public health. This report also covers inter-jurisdictional cooperation and mass prophylaxis readiness.

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Assessment of Legal Authorities

The following definitions apply to terms used in this report:

1. "Jurisdiction" refers to Michigan, which is one of the 18 jurisdictions selected for review in the study.
2. "Legal authority" means any provision of law or regulation that carries the force of law.

3. "Procedures" means any procedures established by the jurisdiction relating to the legal question being researched, regardless of whether the procedures have the force of law.
4. "Restrictions on the movement of persons" means any limit or boundary placed on the free at-will physical movement of adult natural persons in the jurisdiction.
5. "Closure of public places" means an instruction or order that has the effect of prohibiting persons from entering a public place. "Public place" means a fixed space, enclosure, area, or facility that is usually available for entry by the general public without a specific invitation, whether possessed by government or private parties.
6. "Curfew" means an order or regulation prohibiting persons from being in certain public places at certain times.
7. "Person" [unless indicated otherwise] means a natural person, whether or not individually identified.
8. "Public health emergency" means any acute threat, hazard, or danger to the health of the population of the jurisdiction, whether specific or general, whether or not officially declared.
9. "Superior jurisdiction" means the federal government in respect to a state, or a state in respect to a locality.
10. "Inferior jurisdiction" means a state in respect to the federal government, or a locality in respect to a state government.

Exclusions:

1. This assessment excludes federal law.
2. This assessment excludes the closure of schools, which will be covered by another project of the CDC Public Health Law Program. However, the issue of school closures will likely come up during discussions at the legal consultation meetings in response to the overall fact pattern. The CDC Public Health Law Program will make the results of the CDC project on school closure available for the Legal Consultation Meeting associated with this project.

I. Restrictions on the Movement of Persons

A. *Legal powers/authorities to restrict movement of persons during a declared public health emergency – What legal powers or authorities exist that could enable, support, authorize, or otherwise provide a legal basis for any restrictions on the movement of persons during a declared public health emergency? List all legal powers, authorities, and procedures (including but not limited to police powers, umbrella powers, general public health powers, or emergency powers or authorities) that could be used to authorize specific movement restrictions. (Examples: state's legal powers, authorities, or doctrines for quarantine (see also subsection I-C below), isolation, separation, or other orders for persons to remain in their homes.)*

The Michigan Emergency Management Act, 1976 PA 390, MCL 30.401 *et seq.*, provides for planning and response to disasters and emergencies within the state. The Emergency Management Act distinguishes between a disaster and emergency as follows: a disaster is defined as "an occurrence or threat of widespread or severe

damage, injury, or loss of life or property resulting from a natural or man-made cause, including but not limited to, …radiological incident, …epidemic, air contamination…." MCL 30.402(e). An emergency is defined as "any occasion or instance in which the governor determines state assistance is needed to supplement local efforts and capabilities to save lives, protect property and the public health and safety, or to lessen or avert the threat of a catastrophe in any part of the state." MCL 30.402(h). The governor is required to issue an executive order or proclamation declaring a state of disaster or emergency if she finds a disaster or emergency has occurred or the threat of a disaster or emergency exists.

This question includes all provisions of law or procedure that:

1. *Regulate the initiation, maintenance, or release from restrictive measures, including, but not limited to:*

   a. *Who can declare or establish such restrictions?*

   In a declared state of emergency the governor "is responsible for coping with dangers to this state or the people of this state presented by a disaster or emergency." MCL 30.403(1). Among the express powers, is the authority to "utilize the available resources of the state and its political subdivisions, and those of the federal government made available to the state, as are reasonably necessary to cope with the disaster or emergency." MCL 30.405(1)(b). The governor is also authorized to "prescribe routes, modes, and destinations of transportation in connection with an evacuation," to "control ingress and egress to and from a stricken or threatened area, removal of persons within the area, and occupancy of premises within the area" and to "suspend a regulatory statute, order or rule prescribing the procedures for conduct of state business…except for criminal process and procedures." MCL 30.405(1)(a), (f), (g). In addition to those powers expressly granted under the Emergency Management Act, the governor may "direct all other actions which are necessary and appropriate under the circumstances." MCL 30.405(1)(j).

   b. *Who can enforce such restrictions?*

   If the declaration is of a public health emergency, the governor may direct the Michigan Department of Community Health (MDCH) to coordinate all matters pertaining to the response of the state to a public health emergency. MCL 30.408. Accordingly, the MDCH director or his or her designee could issue an order for quarantine. In addition, should the governor issue the order, enforcement could be by any law enforcement officer, since a violation of the governor's emergency orders is a misdemeanor. MCL 30.405(2).

   c. *What are the legal powers and authorities for group quarantine?*

   Under the Emergency Management Act, the governor has broad power to issue such orders which are "necessary and appropriate under the circumstances."

Thus, if necessary and appropriate, a group quarantine order may be issued. Anyone violating the order would be guilty of a misdemeanor.

d. What are the legal powers and authorities for area quarantine?

The governor has broad authority under the Emergency Management Act to eliminate any obstacles to implementation of necessary population control measures in a public health emergency.

e. What are the penalties for violating movement restrictions?

A violation of an executive order issued by the governor following the declaration of a disaster or emergency is punishable as a misdemeanor. MCL 30.405(2). In such circumstances, the maximum penalty is 90 days in jail and/or a fine of $500. MCL 750.504.

2. *Provide any due process measures for a person whose movement is restricted.*

   Because a violation of an order is a criminal offense, all due process measures attendant to a deprivation of liberty attach to an individual who violates an executive order restricting movement. In addition, any individual who can demonstrate the requisite standing could bring a civil action to challenge the propriety of the declaration or the application of the executive order to the petitioner.

3. *Relate to how long such measures can last, whether and how they can be renewed, and the authority/process/notice requirements for ending the measures.*

   The Emergency Management Act provides that the governor's declaration of an emergency or disaster can last for up to 28 days. After 28 days, any extension would require a joint resolution of both houses of the legislature. MCL 30.403.

4. *May create liability for ordering the restriction of movement of persons.*

   Any order that results in an illegal arrest or deprivation of civil rights is actionable under state or federal law. As a general rule, civil liability is limited under state law by governmental immunity. Health officials rendering services during a declared emergency are "not liable for an injury sustained by a person by reason of those services, regardless of how or under what circumstances or by what cause those injuries are sustained," willful acts and omissions excepted. MCL 30.411.

5. *Would otherwise tend to limit the legal basis of the jurisdiction.*

   None known.

B. *Sufficiency of powers/authorities – Discuss the sufficiency of the authorities and powers to restrict the movement of persons during a declared emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

   The Emergency Management Act is broad and provides sufficient authority for the governor to issue any order necessary to restrict movement of persons during an emergency or disaster.

2. *Uncertainties?*

   None known.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's legal basis to restrict the movement of persons? (Examples: state administrative practice acts, specific provisions in law related to movement restrictions.)*

   As discussed under "D" (page 7) below, the penalty for violating an order of MDCH's director is a misdemeanor punishable by six months in jail and/or a fine of $200. Violating the governor's order is punishable by 90 days in jail and/or a fine of $500. Michigan's legislature might consider increasing the jail term for violating an order of the governor to six months. In Michigan, if the penalty for a misdemeanor is greater than 92 days imprisonment, law enforcement can arrest based on reasonable cause. If the penalty is 92 days or less, then law enforcement must obtain an arrest warrant or have witnessed the violation. MCL 764.15(1)(d).

C. *Legal powers/authorities specifically related to quarantine enforcement – Specifically related to quarantine orders, identify all state and/or local powers and authorities to enable, support, authorize, or otherwise provide a legal basis for enforcement of quarantines during a public health emergency.*

1. *What are the legal powers and authorities authorizing law enforcement to enforce quarantine orders issued by the jurisdiction?*

   The Emergency Management Act provides criminal penalties for any violation of an emergency executive order. Accordingly, any law enforcement officer may be called upon to enforce the order. In addition the governor may ask the attorney general to seek civil enforcement. State agencies, such as MDCH may be directed to take administrative action to enforce the order.

2. *What are the legal powers and authorities prohibiting or inhibiting the use of law enforcement to enforce a quarantine order issued by the jurisdiction?*

   None known.

3. *What are the legal powers and authorities authorizing law enforcement to enforce a federal quarantine order?*

   If a violation of the federal order is subject to a criminal penalty, law enforcement

officers in the state of Michigan may assist in the enforcement of the order.

4. *What are the legal powers and authorities prohibiting or inhibiting the use of law enforcement to enforce a federal quarantine order?*

   The only question will be whether the officer is enforcing a criminal law of the United States.

5. *What are the legal powers and authorities prohibiting or inhibiting the use of law enforcement to assist the federal government in executing a federal quarantine order?*

   If a violation of the federal order is subject to a criminal penalty, law enforcement officers in the state of Michigan may assist in the enforcement of the order. In this regard, the Michigan Attorney General has opined that peace officers of the state may enforce violations of federal laws and regulations, at least when a criminal penalty attaches. OAG, 1967-1968, No 4631, p 194 (March 5, 1968). However, Michigan law provides no authority for law enforcement officers to enforce federal civil quarantine orders.

   Potentially, if the governor declares a state of emergency or disaster, she can issue an executive order expanding the powers of the various police agencies to assist federal and state agencies in enforcing quarantine and isolation orders (MCL 30.405). Alternatively, this gap might be addressed by developing a process to appoint local and state police federal agents (much as they are sometimes appointed deputy marshals), in which case they would be acting pursuant to their federal appointment and authority. The governor or the MDCH could also accomplish enforcement by issuing quarantine orders that mirror the federal government's. State and local police could then enforce a violation of the governor's or MDCH's orders as a criminal act.

D. *Sufficiency of powers/authorities to enforce quarantine – Discuss the sufficiency of the authorities and powers to enforce quarantine orders and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

   The most prominent gap is the lack of authority by law enforcement to enforce a quarantine order, short of making an arrest. Law enforcement may benefit by the passage of legislation giving law enforcement specific authority to enforce public health orders for communicable diseases. Public health also needs to explore the options available for law enforcement in the manner of enforcement of public health orders. An individual who is ordered into isolation because he is ill would be taken to a treatment facility, however, the noncompliant subject of a quarantine order is another question. If police officers arrest and incarcerate people violating quarantine or round up and detain people who refuse an order not to congregate they will likely undo the effects the social distancing measures were intended to bring about.

2. *Uncertainties?*

   None known.

3. *Are there any other legal provisions not previously listed in I-C above that could inhibit, limit, or modify the jurisdiction's legal basis to restrict the movement of persons? (Examples: state administrative practice acts, specific provisions in law related to quarantine.)*

   None known.

E. *Legal powers/authorities to restrict movement of persons <u>in the absence</u> of a declared public health emergency – What legal powers or authorities exist that could enable, support, authorize, or otherwise provide a legal basis for any restrictions on the movement of persons in the absence of a declared public health emergency? List all legal powers, authorities, and procedures that could be used to authorize specific movement restrictions in the absence of an emergency declaration. (Examples: the state's legal powers, authorities, or doctrines for quarantine, isolation, separation, or other orders for persons to remain in their homes.)*

MDCH has broad and flexible powers to protect the public health, welfare and safety of persons within the state. These powers are set out in the Public Health Code, which is to be liberally construed for the protection of the health, safety, and welfare of the people of Michigan. MCL 333.1111(2). MDCH is required to generally supervise the interests of the health and life of Michigan's residents, implement and enforce public health laws, prolong life, and promote public health through organized programs. It is also specifically responsible for preventing and controlling disease; making investigations and inquiries as to the cause of disease, especially of epidemics; and the causes, prevention, and control of environmental health hazards, nuisances, and courses of illness. MDCH may exercise authority to safeguard properly the public health, prevent the spread of diseases and the existence of sources of contamination, and implement and carry out the powers and duties vested by law in the department. MCL 333.2226(d).

Michigan's Supreme Court has long recognized the authority of health officers to issue reasonable orders or regulations to control the spread of disease under their general statutory authority to prevent the spread of infection. *People v Board of Education of City of Lansing*, 224 Mich 388 (1923) (local board of health has authority to issue regulation to exclude unvaccinated children from schools, over the objection of the school board, while 17 cases of smallpox still existed in the city), *Rock v Carney*, 216 Mich 280 (1921) (health officer has quarantine power when sufficient reasonable cause exists to believe that a person is afflicted with a venereal disease).

In addition to a general grant of authority, the Public Health Code grants the state health director specific power to issue orders to address an emergency, as described in "1" (pages 9-10) below.

Most public health activities, including the prevention and control of communicable diseases, are carried out by Michigan's 45 local health departments. Local health departments, acting through their local health officers, hold the general powers described above. Further, both state and local health departments are granted "powers necessary or appropriate to perform the duties and exercise the powers given by law … and which are not otherwise prohibited by law." MCL 333.2221(2)(g), MCL 333.2433(2)(f). Local health officers are also authorized to issue emergency orders, warning notices, and bring court actions, concerning residents within their jurisdictions. The organization and powers of local health departments are set out in MCL 333.2401 – 333.2498.

This question includes all provisions of law or procedure that:

1. *Regulate the initiation, maintenance, or release from restrictive measures, including, but not limited to:*

   a. *Who can declare or establish such restrictions?*

   If the state health director determines that conditions anywhere in the state constitute a menace to the public health, she is authorized to take full charge of the administration of applicable state and local law, rules, regulations, and ordinances. MCL 333.2251(3). Additionally, the Public Health Code grants the state health director (and local health officers) power to issue the following orders to address an emergency:

   - **Imminent Danger Orders**. Upon determining that an "imminent danger" to the health or lives of individuals exists in this state, the director shall inform the individuals affected by the imminent danger and issue an order. The order shall be delivered to a "person" authorized to avoid, correct, or remove the imminent danger or be posted at or near the imminent danger. MCL 333.2251(1). "Person" includes an individual, any type of legal entity, or a governmental entity. MCL 333.2251(4)(b). "Imminent danger" is defined as "a condition or practice [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 proceedings otherwise provided." MCL 333.2251(4)(a). In her order, the director shall incorporate her 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

   - **Orders to Control an Epidemic.** Upon determining that the 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. MCL 333.2253. "Epidemic" means "any increase in the number of cases, above the number of expected cases, of any disease, infection, or other condition in a specific time period, area, or demographic segment of the population." R 325.171(g).

- **Orders to Abate a Nuisance.** The director may issue an order to avoid, correct, or remove, at the owner's expense, a building or condition that violates health laws or which the director reasonably believes to be a nuisance, unsanitary condition, or cause of illness. MCL 333.2455.

Finally, the Public Health Code provides for the involuntary detention and treatment of individuals with hazardous communicable disease. MCL 333.2453(2). Upon a determination by a representative of MDCH (or the local health department) that an individual is a "carrier" and is "a health threat to others," MDCH's representative shall issue a warning notice to the individual requiring the individual to cooperate with MDCH or the local health department in efforts to prevent or control transmission of "serious communicable diseases or infections." The warning notice may also require the individual to participate in education, counseling, or treatment programs, and to undergo medical tests to verify the person's status as a carrier.

A "carrier" is "an individual who serves as a potential source of infection and who harbors or who the department reasonably believes to harbor a specific infectious agent or a serious communicable disease or infection, whether or not there is present discernible disease." MCL 333.5201(1)(a). "Health threat to others" means that the individual "has demonstrated an inability or unwillingness to conduct himself or herself in such a manner as to not place others at risk of exposure to a serious communicable disease or infection." MCL 333.5201(1)(b).

A warning notice:

- Must be in writing (may be verbal in urgent circumstances, followed by a written notice within 3 days).
- Must be specific and individual, cannot be issued to a class of persons.
- Must require the individual to cooperate with the health department in efforts to control spread of disease.
- May require the individual to participate in education, counseling, or treatment programs, and to undergo medical tests to verify carrier status.
- Must inform the individual that if the individual fails to comply with the warning notice, the health department shall seek a court order.

If the individual fails or refuses to comply with the warning notice, the health department must petition the circuit court (family division) for an order requiring testing, treatment, education, counseling, commitment, isolation, etc., as appropriate.

In an emergency, the health department may go straight to court (without first issuing a warning notice). Upon filing of affidavit by the health department, the court may order that individual be taken into custody and transported to an appropriate emergency care or treatment facility for observation, examination, testing diagnosis, treatment, or temporary detention. The court's emergency order may be issued *ex parte*; however, the court must hold a hearing on the temporary detainment order within 72 hours (excluding weekends and holidays).

b. Who can enforce such restrictions?

MDCH would need to rely on law enforcement and courts to enforce its orders. Violation of an order of the director is a misdemeanor, punishable by six months in jail or $200, or both. MCL 333.2261. In Michigan, if the penalty for a misdemeanor is greater than 92 days imprisonment, law enforcement can arrest based on reasonable cause (i.e., without an arrest warrant or witnessing the violation), pursuant to MCL 764.15(1)(d).

While violation of the director's order is a misdemeanor, there is no parallel provision in the Public Health Code for violation of a local health officer's order. State law provides that a violation of a local health regulation is a misdemeanor. Therefore, this gap can be addressed by each local government adopting a regulation requiring persons to comply with a lawful order of the local health officer. Failure to comply with an order of the local health officer would be a violation of the regulation and punishable as a misdemeanor under state law. In some circumstances, a local health department may be able to seek enforcement under a provision of the Public Health Code that states it is a misdemeanor to willfully oppose or obstruct a representative of MDCH, the state or a local health officer, or any other person charged with enforcement of a health law in the performance of that person's legal duty to enforce that law. MCL 333.1291.

Finally, MDCH (and local health officers) can go to court to seek enforcement of its orders. MCL 333.2251(2), MCL 333.2451(2). The court could punish civilly or criminally via contempt. MDCH (and local health officers) may also maintain injunctive action "to restrain, prevent, or correct a violation of a law, rule, or order which the department [local health officer] has the duty to enforce or to restrain, prevent, or correct an activity or condition which the department believes adversely affects the public health." MCL 333.2255, MCL 333.2465.

c. What are the legal powers and authorities for group quarantine?

"Group quarantine" is not explicitly addressed in the Public Health Code. However, MDCH's director and local health officers have the authority to issue an imminent danger order, and require "group quarantine" as action required to avoid, correct, or remove the imminent danger. Alternatively, the director or local health officer could issue an emergency order to control an epidemic and require group quarantine as a procedure to be followed during the epidemic.

d. What are the legal powers and authorities for area quarantine?

"Area quarantine" is not explicitly addressed in the Public Health Code. However, MDCH's director and local health officers have the authority to issue an imminent danger order, and require "area quarantine" as action required to avoid, correct, or remove the imminent danger. Alternatively, the director or local health officer could issue an emergency order to control an epidemic and require area quarantine as a procedure to be followed during the epidemic.

e. What are the penalties for violating movement restrictions?

Violation of the order of MDCH's director is a misdemeanor, punishable by six months imprisonment, $200 fine, or both.

2. *Provide any due process measures for a person whose movement is restricted.*

Both the U.S. and the Michigan Constitution prohibit depriving a person of liberty without due process of law. Const 1963, Art I, § 17. Due process is flexible; what process is due depends on the nature of the proceedings, the risks and costs involved, and the private and governmental interests affected. *By Lo Oil Co v Dept of Treasury*, 267 Mich App 19 (2005).

There are no statutory provisions, rules, or procedures with regard to the process for review of imminent danger orders or orders to control an epidemic. Fundamental fairness requires that orders directed toward individuals must be served on the individuals and orders directed toward groups or the general public must be sufficiently publicized to provide notice to individuals of required or prohibited conduct.

Violation of an order by MDCH's director is a criminal offense. Thus, all due process measures attendant to a deprivation of liberty attach to a person who violates an order of the director that restricts movement. In addition, any person who can demonstrate the requisite standing could bring a civil action to challenge the propriety of the director's order or the application of the order to the petitioner.

The Public Health Code sets out procedures for enforcement of a warning notice issued by MDCH's director or a local health officer against a carrier who is a health threat to others. The individual has the right to an evidentiary hearing and the health department must prove the allegations by clear and convincing evidence. Before committing an individual to a facility, the court must consider the recommendation of a commitment panel, and the commitment order must be reviewed periodically. An individual who is the subject of either emergency proceedings or a petition on a warning notice has the right to counsel at all stages of proceedings. An indigent individual is entitled to appointed counsel. The

individual also has the right to appeal and review by the Michigan Court of Appeals within 30 days. MCL 333.2453(2), MCL 333.5201 – 333.5207

3. *Relate to how long such measures can last, whether and how they can be renewed, and the authority/process/notice requirements for ending the measures.*

   There is no time limit on any of the state or local health officers' orders; nor is there a renewal requirement. The health officer who issued an emergency order would be responsible for monitoring the conditions that warranted the order, and respond as appropriate by modifying or rescinding the order as conditions change. Notice of any modifications, or rescission, would need to be sufficient to reasonably notify individuals or groups who are subject to the order.

4. *May create liability for ordering the restriction of movement of persons.*

   MDCH and its employees and volunteers have governmental immunity from tort damages when engaged in a governmental function, absent "gross negligence" that is the proximate cause of the injury or damage. MCL 691.1407. Note: this section does not apply with respect to providing medical care or treatment to a patient with some exceptions. However, if an emergency were declared, the Emergency Management Act, MCL 30.411, would provide protection from liability. Additionally, MDCH's director, or an employee or representative of MDCH is not personally liable for damages sustained in the performance of departmental functions, except for wanton and willful misconduct. MCL 333.2228. The same provision applies to local public health. MCL 333.2465(2).

5. *Would otherwise tend to limit the legal basis of the jurisdiction.*

   None known.

F. *Sufficiency of powers/authorities – Discuss the sufficiency of the authorities and powers to restrict the movement of persons <u>in the absence</u> of a declared emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

   Staff from MDCH and local health departments have participated in several activities to evaluate the sufficiency of the authorities and powers to restrict the movement of persons in the absence of a declared emergency. These activities include participation in the Turning Point Collaborative[2], table top and other facilitated exercises, and a roundtable discussion by a group of public health and legal experts on Michigan law. For the most part, the consensus of both state and local public health is that the Public Health Code provides broad and flexible powers that are sufficient for prompt and effective response to a public health emergency. While it is tempting to seek legislation that authorizes specific measures that might be imposed, there is a risk that public health's authority

[2] The Michigan Association for Local Public Health obtained an assessment of Michigan laws through the Turning Point Collaborative.

would be narrowed by too much specificity and detail under the principle *expressio unius est exclusio alterius* (the express mention of one thing implies the exclusion of all others).

As discussed above, one gap in enforcing restrictions of movement is the lack of a criminal penalty for violation of an emergency order of a local health officer. Another potential gap is the absence of provisions for due process where orders issued by MDCH or local health officers deprive individuals of liberty. This could be addressed either through legislation or by MDCH promulgating rules consistent with Michigan's Administrative Procedures Act. MCL 24.231 *et seq*. However, care is essential in establishing procedures to avoid binding the state and local health departments to a process or procedures beyond legal requirements that unnecessarily restrict their ability to act promptly and effectively to protect the public health.

While MDCH has addressed most social distancing measures in its Pandemic Influenza Plan, it has not addressed mass transit usage limits. MDCH needs to review this for inclusion as a potential social distancing measure to reduce spread of disease from close proximity of individuals typical of crowded mass transit.

2. *Uncertainties?*

   Under Michigan's Constitution, Michigan's public universities constitute a "branch" of state government, autonomous within their own spheres of authority. Const 1963, Art VIII, §§ 5, 6, *National Pride at Work, Inc v Governor*, 274 Mich App 147 (2007), and cases cited therein. University governing boards might question whether the state health department has authority to issue orders that affect the operation of the university, such as orders to quarantine dorm students or prohibit class attendance. However, universities are not exempt from all regulation. MDCH needs to obtain advice from the Department of Attorney General regarding the parameters of its authority over university campuses, and the authority (if any) of local health departments. MDCH should engage the universities to develop memoranda of understanding and procedures for coordinating an effective response to pandemic influenza or other disease outbreaks.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's legal basis to restrict the movement of persons? (Examples: state administrative practice acts, specific provisions in law related to movement restrictions.)*

   While MDCH is authorized to implement its police and statutory powers, there are limits on the exercise of these powers. These limitations include constitutional rights to substantive and procedural due process and equal protection under the laws. MDCH must act in good faith, and must not abuse its discretion in restricting the movement of individuals.

In *Rock v Carney*, *supra*, the Michigan Supreme Court upheld the authority of public health boards to determine what constitutes a dangerous communicable disease and take measures to prevent the spread. However,

> the method adopted or exercised to prevent the spread thereof must bear some true relation to the real danger, and be reasonable, having in mind the end to be attained, and must not transgress the security of the person beyond public necessity.

216 Mich 280, 296.

In the *Rock* case, the Supreme Court held that the health officer abused his discretion by refusing home isolation and placard notice for a young woman with venereal disease, and instead removed the woman from her home and committed her to a hospital for twelve weeks.

Other limitations on exercising authority to restrict movement of persons:

Tribal boundaries, tribal entities. MDCH is in the process of drafting provisions for its pandemic influenza plan that address limitations on the exercise of authority on Indian land or concerning federally recognized tribes. Its All Hazards and Pandemic Influenza Plans currently provide:

- **State-Tribal Borders:** Public health emergencies occurring on tribal land are the responsibility of the tribal organization. Some Mutual Aid Agreements (MAAs) have been developed between local or state health or emergency agencies and tribes. In instances where pre-arranged MAAs have not been developed, Local or State Health organizations may provide services on tribal land *upon the invitation of the tribe.* (Emphasis in original).

Foreign Diplomats: In Attachment 18 of its Pandemic Influenza Plan, MDCH addresses its limitations to impose quarantine or other restrictions on foreign diplomats and their families and honorary counsels, and procedures to be followed in the event of a disease outbreak. Attachment 18 is attached to this assessment as Appendix 2.

Federal land, including military bases and V.A. hospitals. MDCH needs to research and address limits on its jurisdiction over federal lands. MDCH needs to coordinate with federal authorities to develop procedures and emergency communications protocol in the event of a pandemic influenza or other disease outbreak.

II. Curfew

A. Legal powers/authorities for curfew during a declared public health emergency – What legal power, authorities, or procedures exist that that could enable, support, authorize, or otherwise provide a legal basis for curfew during pandemics, when a public health emergency has been declared?

1. What are the powers and authorities to institute curfews? Can local governments institute their own curfews under state and/or local law?

The governor is specifically empowered to proclaim a state of emergency and designate the area involved "[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." After making the proclamation or declaration, the governor may promulgate reasonable orders, rules, and regulations necessary to protect life and property or bring the emergency situation with the affected area under control. The orders, rules, and regulations, may include curfew, as well as other measures. MCL 10.31.

Additionally, under the Emergency Management Act the governor has broad power to take any action that is necessary and appropriate during a declared emergency or disaster and may issue a curfew order. Local governmental units may declare a local state of emergency and take action to "provide for the health and safety of persons and property…." Notice is required. The Emergency Management Act provides that the order shall be" disseminated promptly by means calculated to bring its contents to the attention of the general public." MCL 30.403. The order must also be filed with the secretary of state.

2. Who can order curfew, and, if different, who makes the decision to institute curfew?

Under the Emergency Management Act, the governor would issue the order. The chief executive official of the county or municipality would issue local orders. MCL 30.410.

3. What is the process for mobilizing public health/law enforcement of curfew?

There is no process set out in the Emergency Management Act for mobilizing public health/law enforcement of curfew. The director of the State Police is charged with implementing the orders and directives of the governor. MCL 30.407.

4. Who can enforce curfew?

Again, because violations of the governor's emergency orders are misdemeanors, any law enforcement officer may enforce the order.

5. *Penalties for violating curfew?*

   Penalties are 90 days imprisonment, or $500, or both. MCL 10.33, MCL 30.405(2), MCL 750.504.

6. *How long can a curfew last?*

   The curfew order could remain in effect for 28 days unless extended by joint resolution of the legislature.

7. *How can it be renewed?*

   A curfew order can be renewed only by joint resolution of the legislature.

8. *Describe the authority/process/notice requirements for ending a curfew.*

   The governor may rescind the order at any time. This can be done through issuance of an executive order in which case prompt public notice is required.

B. *Sufficiency of powers/authorities – Discuss the sufficiency of the authorities and powers to institute or maintain curfew during a declared emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

   None known.

2. *Uncertainties?*

   None known

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's legal basis to institute or maintain curfew? (Examples: state administrative practice acts, specific provisions in law related to curfew.)*

   None known.

C. *Legal powers/authorities for curfew in the absence of declared public health emergency – What legal power, authorities, or procedures exist that that could enable, support, authorize, or otherwise provide a legal basis for curfew during pandemics, in the absence of a declared public health emergency?*

1. *What are the powers and authorities to institute curfews? Can local governments institute their own curfews under state and/or local law?*

   MDCH's Director, or local health officers within their jurisdictions, could order curfew under their broad authority, provided curfew is a reasonable measure to address an imminent health danger or to control an epidemic. MCL 333.2251, 333.2253, 333.2451, 333.2453. However, a state or local health officer's authority does not include issuing orders (such as curfew) as general safety measures to manage disturbances or protect property.

2. *Who can order curfew, and, if different, who makes the decision to institute curfew?*

   MDCH's director would make the decision to institute curfew, and would issue an order imposing curfew that could cover all or any area of the state. The local health officer would make the decision and issue an order imposing curfew for the local health department's jurisdiction.

3. *What is the process for implementing curfew?*

   The Public Health Code does not set out a process, and one has not been developed by MDCH.

4. *What is the process for mobilizing public health/law enforcement of curfew?*

   The Public Health Code does not set out a process, and one has not been developed by MDCH.

5. *Who can enforce curfew?*

   Any law enforcement officer could enforce curfew imposed by an order of MDCH's director since it is a misdemeanor to violate an order of MDCH. MCL 333.2261. There is no parallel provision for violation of a local health officer's order, so enforcement would most likely depend on local regulations.

6. *Penalties for violating curfew?*

   Violation of an order of MDCH is a misdemeanor punishable by six months in jail, a fine of $200, or both.

7. *How long can a curfew last?*

   There is no time limit on any of the state or local health officers' orders.

8. *How can it be renewed?*

   There is no renewal requirement.

9. *Describe the authority/process/notice requirements for ending a curfew.*

   If the state or a local health officer has the authority to impose curfew, then they have the authority to modify or end curfew. The health officer who issued an emergency order would be responsible for monitoring the conditions that warranted the order, and respond as appropriate by modifying or rescinding the order as conditions change. Notice of any modifications, or rescission, would need to be sufficient to reasonably notify individuals or groups who are subject to the curfew.

D. Sufficiency of powers/authorities – Discuss the sufficiency of the authorities and powers to institute or maintain curfew <u>in the absence</u> of a declared emergency, and any potential gaps or uncertainties in those powers and authorities.

1. *Potential gaps?*

   No known gaps in powers or authorities. However, MDCH does not address the use of curfew as a public health measure in its All Hazards Response Plan or any of its other plans. MDCH's response plans should be reviewed for possible inclusion of curfew.

2. *Uncertainties?*

   None known.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's legal basis to institute or maintain curfew? (Examples: state administrative practice acts, specific provisions in law related to curfew.)*

   As discussed in I above, exercise of state and local health authority must be in good faith, reasonable, and consistent with constitutional rights to substantive and procedural due process and guarantees of equal protection.

III. Inter-jurisdictional Cooperation and Restricting Movement of Persons

A. Legal provisions/procedures for inter-jurisdictional cooperation on restricting the movement of persons during a <u>declared</u> public health emergency – What provisions or procedures under law apply to giving and receiving assistance and otherwise working with other jurisdictions regarding restrictions of movement of persons during a declared public health emergency?

1. *Provisions or procedures governing the relationships among superior jurisdictions? Among inferior jurisdictions?*

   The Michigan Emergency Management Act, and plans thereunder, contain provisions requiring or authorizing inter-jurisdictional cooperation among superior jurisdictions and inferior jurisdictions.

   The Emergency Management Act authorizes the governor to enter into a reciprocal aid agreement or compact with another state, the federal government, or a neighboring state or province of a foreign country, with the following limitations:

   > A reciprocal aid agreement shall be limited to the furnishing or exchange of food, clothing, medicine, and other supplies; engineering services; emergency housing; police services; the services of the national guard when not mobilized for federal

> service or state defense force as authorized by the Michigan military act, … MCL 32.501 to 32.851 … and subject to federal limitations on the crossing of national boundaries by organized military forces; health, medical, and related services; fire fighting, rescue, transportation, and construction services and equipment; personnel necessary to provide or conduct these services; and other necessary equipment, facilities, and services. A reciprocal aid agreement shall specify terms for the reimbursement of costs and expenses and conditions necessary for activating the agreement. The legislature shall appropriate funds to implement a reciprocal aid agreement.

MCL 30.404(3).

The Emergency Management Act requires the emergency management division of the state police to prepare and maintain a comprehensive emergency management plan that covers mitigation, preparedness, response, and recovery for the state. MCL 30.407a. The Emergency Management Act further requires the director of each department of state government to participate in emergency planning for the state, serve as emergency management coordinator for his or her respective department, and provide an annex to the Michigan emergency management plan providing for the delivery of suitable emergency management activities. MCL 30.408. The Michigan emergency management plan describes the roles, responsibilities, and assignments of state departments, and provides the framework for state and local entities to work together under an incident command structure to address various types of emergencies. Under the emergency management plan, MDCH is the lead agency responsible for public health and mental health issues. Assigned responsibilities include:

- Coordinate the investigation and control of communicable disease and provide laboratory support for communicable disease diagnostics.
- Coordinate the allocation of medications essential to public health, including acquisition of medications from federal pharmaceutical stockpiles.
- Issue health advisories and protective action guides to the public.
- Coordinate appropriate medical services, providing support to hospitals, pre-hospital and alternate care settings in the medical management of mass casualty incidents.
- Provide technical assistance in the coordination of emergency medical services.
- Coordinate with local health departments, community mental health agencies, and state operated inpatient facilities.
- Provide liaison to federal emergency health and medical programs and services.
- Coordinate with the National Disaster Medical System.
- Ensure health facilities have emergency procedures.

As required by the Emergency Management Act, MDCH has provided and continuously updates response plans and annexes related to protecting the public's health. With regard to communicable disease, these include the Strategic National Stockpile Support Plan, Mass Fatality Plan, MDCH's All Hazards Response Plan, Communicable Disease Annex, and the Pandemic Influenza Plan. Module IX of the MDCH All Hazards Response Plan, Communicable Disease Annex, and Pandemic Influenza Response Plan address International and Border Travel Issues. Of note, many of the actual actions would be federal, although the MDCH director could implement orders to control intra-state movement, or recommend to the governor various actions. Public health procedures included in the plans include communicable disease surveillance at borders and travel alerts, warnings or bans.

The Emergency Management Act also promotes assistance during a disaster or emergency among local units of government. It provides that municipalities and counties may enter into mutual aid or reciprocal aid agreements or compacts with other counties, municipalities, public agencies, federally recognized tribal nations, or private sector agencies, or all of these entities. A compact entered into under this provision is limited to the exchange of personnel, equipment, and other resources in times of emergency, disaster, or other serious threats to public health and safety. The arrangements shall be consistent with the Michigan emergency management plan. MCL 30.410(2).

There are no provisions or procedures for inter-jurisdictional cooperation that specifically cover restrictions on the movement of persons during a public health emergency. However, there are numerous agreements for mutual aid or assistance that facilitate response to a public health emergency and could provide resources to implement social distancing measures if needed. These include provisions for sharing personnel, equipment, data, providing notification of disease threats, and providing facilities for treatment or mass prophylaxis.

These agreements include:

- **Emergency Management Assistance Compact (EMAC).** In 2001, Michigan adopted EMAC, which allows Michigan to operate as a part of the Interstate Mutual Aid Compact. See MCL 3.1001 (covering personnel) and MCL 3.991 (covering equipment). Consequently, once an emergency has been declared, Michigan has the authority to assist other states in an emergency and seek assistance from other states. This is of particular importance because the Interstate Mutual Aid Compact gives the state providing assistance a right to seek compensation for the services/assistance that it provides to the requesting state.

- **Michigan Emergency Management Assistance Compact (MEMAC).** Under the Emergency Management Act, MCL 30.410(2), Michigan has developed a mutual aid agreement for adoption by local units of governments

known as the Michigan Emergency Management Assistance Compact that may be found at http://www.michigan.gov/documents/MEMACFINAL7-3-03_69499_7.pdf MEMAC is entered into between the Michigan State Police Emergency Management and Homeland Security Division on behalf of the State of Michigan, and by and among each county, municipality, township, federally recognized tribal nation and interlocal public agency that executes the agreement and adopts its terms and conditions. MEMAC is designed to help Michigan's local governments share vital public safety services and resources more effectively and efficiently. MEMAC covers serious threats to public health and safety of sufficient magnitude that the necessary public safety response threatens to overwhelm local resources and requires mutual aid or other assistance. Typically, there would be a local, state or federal declaration of emergency or disaster; however, a declaration is not required.

- There are 1,858 local governments in the State of Michigan.[3] This includes 83 counties, 1,242 townships, 272 cities, and 261 villages. As of July 25, 2007, the number of local governments that have adopted resolutions to participate in MEMAC is 104, including:

  - Counties – 25 (30%)
  - Townships – 41 (3%)
  - Cities – 32 (18%)
  - Villages – 6 (2%)

See Appendix 3 for a list of local jurisdictions within Michigan that participate in MEMAC.

- **Mutual Aid Agreements within Regional Medical Biodefense Networks**. The State of Michigan has organized eight (8) regional medical biodefense networks that include hospitals, medical control authorities, life support agencies, and other health care facilities. As part of their disaster planning objectives, the regions have been working to develop mutual aid agreements. To date, regions 1, 5 and 8 have adopted agreements. The other five regions continue to work on this.

- **Mutual Aid Agreements among Local Health Departments.** There are 45 local health departments in the State of Michigan, including:

  - 30 single-county health departments
  - 14 multi-county, district health departments
  - 1 city health department

In addition to their participation in MEMAC, by virtue of their governing entity's participation, some local health departments have also executed mutual aid

[3] This number excludes school districts, intermediate school districts, planning and development regions and special districts and authorities. This information is from the *Michigan Manual*, p. 711.

agreements with neighboring local health departments. These agreements vary widely in terms of their scope and content. For example, the Southeast Michigan Local Health Department Mutual Aid Consortium Agreement is a relatively comprehensive mutual aid agreement. It was designed for participation by seven single-county health departments and one city health department.

- **Mutual Aid for Police Assistance.** Under MCL 123.811 *et seq*.**,** two or more counties, cities, villages, or townships, whether adjacent to each other or not, may enter into agreements to provide mutual police assistance to one another in case of emergencies. (Individuals preparing this report do not know the extent of agreements between law enforcement agencies under this law).

2. *Provisions or procedures governing the relationships between superior and inferior jurisdictions? (Include relationships among all levels of government and the federal government. See also section I-C above specifically related to quarantine orders.)*

   The Emergency Management Act requires that the Department of State Police establish an emergency management division for the purpose of coordinating within the state the emergency management activities of county, municipal, state, and federal governments. The division is responsible for the Michigan emergency management plan, shall propose and administer statewide mutual aid compacts and agreements, and shall cooperate with the federal government and any public or private agency or entity in achieving emergency management activities. MCL 30.407a.

3. *What is the legal authority of the jurisdiction to accept, utilize, or make use of federal assistance?*

   The Emergency Management Act provides that "upon declaring a state of disaster or emergency, the governor may seek and accept assistance, either financial or otherwise, from the federal government, pursuant to federal law or regulation." MCL 30.404(2). Further, the emergency management division of the State Police "shall receive available state and federal emergency management and disaster related grants-in-aid and shall administer and apportion the grants according to appropriately established guidelines to the agencies of this state and local political subdivisions." MCL 30.407a.

   The Emergency Management Act also states that the governor may enter into a reciprocal aid agreement or compact with the federal government, subject to the limitations described in 1, above (page 20). MCL 30.404(3).

B. *Sufficiency of powers/authorities to cooperate with other jurisdictions during a declared public health emergency – Discuss the sufficiency of the authorities and powers to cooperate with other jurisdictions during a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

   There are liability, workers compensation, and reimbursement questions outstanding. Current emergency response plans for communicable disease do not include provisions for limiting the usage of mass transit.

2. *Uncertainties?*

   Liability, workers compensation, and reimbursement questions.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's legal basis to cooperate with other jurisdictions? (Examples: state administrative practice acts, specific provisions in law related to inter-jurisdictional cooperation.)*

   The approval of the state administrative board is required for the governor to enter into a reciprocal aid agreement or compact under the Emergency Management Act, MCL 30.404(3).

C. *Legal provisions/procedures for inter-jurisdictional cooperation on restricting the movement of persons in the absence of a declared public health emergency – What provisions or procedures under law apply to giving and receiving assistance and otherwise working with other jurisdictions regarding restrictions of movement of persons in the absence of a declared public health emergency?*

1. *Provisions or procedures governing the relationships among superior jurisdictions? Among inferior jurisdictions?*

   Subject to provisions of general law, the Michigan Constitution authorizes the state, any political subdivision, any governmental authority, or any combination thereof to enter into agreements for the performance, financing or execution of their respective functions, with any one or more of the other states, the United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in Michigan's Constitution. Const 1963, Art III, § 5. Additionally, any unit of government is authorized to enter into an interlocal agreement under Michigan's Urban Cooperation Act, MCL 124.501 *et seq*., to exercise jointly with any other public agency of this state, another state, a public agency of Canada, or with any public agency of the U.S. government any power, privilege, or authority that the agencies share in common and that each might exercise separately. MCL 124.504.

   The Public Health Code authorizes both the state and local health departments to "[e]nter into an agreement, contract, or arrangement with governmental entities or other persons necessary or appropriate to assist the department in carrying out its duties and functions." MCL 333.2226(c), MCL 333.2435(c)(e).

Under PA 89 of 1935, MCL 798.101 *et seq*., the governor has the power to enter into interstate compacts with other states to address criminal behavior. The governor is authorized to enter into agreements or compacts with other states, for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of the penal laws and policies of the contracting states and to establish agencies, joint or otherwise, as may be deemed desirable for making effective such agreements and compacts. MCL 798.103. The intent and purpose of this act is to grant to the governor administrative power and authority if and when conditions of crime make it necessary to bind the state in a cooperative effort to reduce crime and to make the enforcement of the criminal laws of agreeing states more effective. Any interstate compact must not be inconsistent with the laws of Michigan, the agreeing states, or of the United States.

Agreements may be developed and implemented under these laws, whether or not an emergency has been declared. Additionally, with the exception of EMAC, all of the agreements described in Section III on inter-jurisdictional cooperation may be implemented in the absence of a declared public health emergency, as well as during a declared emergency. With regard to state and local health departments, declaration of an emergency or disaster does not relieve any state or local official, department head, or agency of its normal responsibilities. Nor does declaration limit or abridge the power, duty, or responsibility of the chief executive official of a county or municipality to act in the event of a disaster or emergency except as expressly set forth in the Michigan Emergency Management Act. MCL 30.417(e),(f). However, if the governor has declared an emergency or disaster, each state department and agency must cooperate with the state's emergency management coordinator and perform the services that it is suited to perform in the prevention mitigation, response to, or recovery from the emergency or disaster, consistent with the state emergency management plan. MCL 30.408.

Current agreements among superior or inferior jurisdictions include:

- **Great Lakes Border Health Initiative (GLBHI).** MDCH is a member of the GLBHI, along with the state health departments of Minnesota, New York, Ohio, Pennsylvania, and Wisconsin, and the Ontario Ministry of Health and Long-Term Care. GLBHI is funded by the Centers for Disease Control and Prevention's Early Warning Infectious Disease Surveillance (EWIDS) project, and aims to formalize relationships between U.S. and Canadian public health and emergency preparedness agencies responsible for communicable disease tracking, control and response. The member jurisdictions of Michigan, Minnesota, New York, Wisconsin, and Ontario have entered into a data sharing agreement, which is intended to improve early warning and infectious disease surveillance by facilitating the sharing of infectious disease information and establishing a protocol for communications. Ohio and Pennsylvania are expected to join the agreement once outstanding questions

have been answered. Mutual assistance agreements for equipment, specialized personnel, and services may be developed in the future.

- **Agreements with Indian Tribes.** A Memoranda of Understanding has been signed between one of Michigan's local health departments and a federally-recognized tribe to use a tribal facility as a Strategic National Stockpile dispensing facility. Two of Michigan's federally recognized tribes (Sault St. Marie Chippewa and Bay Mills Indian Community) have entered into mutual assistance agreements with the Chippewa County Health Department regarding notification of an occurrence of disease that may cause widespread illness. The Chippewa County Health Department and the Sault Ste. Marie Tribe of Chippewa Indians have also signed a mutual aid agreement regarding use of tribal property to provide mass health care in an emergency.

2. *Provisions or procedures governing the relationships between superior and inferior jurisdictions? (Include relationships among all levels of government and the federal government. See also section I-C above specifically related to quarantine orders.)*

   Under the Public Health Code, MDCH and local health departments have concurrent authority over the prevention and control of diseases within the local health department's jurisdiction. Both have powers to issue emergency orders and take other action as appropriate to address an imminent danger, epidemic, or other public health emergency. In exercising their authority, the state and local health departments must cooperate and coordinate their responses. MDCH has jurisdiction statewide. If MDCH's director determines that conditions anywhere in the state constitute a menace to the public health, she has the authority to take full charge of the administration of applicable state and local health laws, rules, regulations, and ordinances. MCL 333.2251(3). Further, while disease prevention and control programs are primarily the responsibility of local public health, MDCH's director can take primary responsibility as warranted by circumstances. MCL 333.2235(2).

3. *What is the legal authority of the jurisdiction to accept, utilize, or make use of federal assistance?*

   MDCH and local health departments are authorized to receive grants from the federal government, in accordance with the law, rules and procedures of the state (and local governing unit with regard to local health departments). MCL 333.2226(e), 333.2435(e). As discussed above, the Public Health Code authorizes both the state and local health departments to enter into an agreement, contract, or arrangement with other governmental entities, which would include the federal government.

D. *Sufficiency of powers/authorities to cooperate with other jurisdictions <u>in the absence</u> of a declared public health emergency – Discuss the sufficiency of the authorities and powers to cooperate with other jurisdictions in the absence of a declared public*

health emergency, and any potential gaps or uncertainties in those powers and authorities.

1. *Potential gaps?*

   None

2. *Uncertainties?*

   With the exception of EMAC, individuals preparing this report do not know whether Congress has given its consent to the state entering into agreements with other states or provinces. Further, it is not always clear when Congressional consent is required.

   Individuals preparing this report do not know the extent of inter-jurisdictional agreements that concern law enforcement and the existence of other agreements not discussed in this report that are relevant to inter-jurisdictional cooperation regarding a serious communicable disease outbreak.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's legal basis to cooperate with other jurisdictions? (Examples: state administrative practice acts, specific provisions in law related to inter-jurisdictional cooperation.)*

   None known.

E. *Interagency/inter-jurisdictional agreements on restricting movement of persons – Where available, identify and provide copies of all interagency and inter-jurisdictional agreements (both interstate and intrastate) relating to restrictions on the movement of persons during public health emergencies and the enforcement of such restrictions*

As discussed above, there are no provisions or procedures for inter-jurisdictional cooperation that specifically cover restrictions on the movement of persons during a public health emergency. However, the laws and agreements discussed above would facilitate response to a public health emergency and could provide resources to support social distancing measures if needed.

IV. Closure of Public Places

A. Legal powers/authorities to order closure of public places during a declared public health emergency – What are the powers, authorities, or procedures to enable, support, authorize, or otherwise provide a legal basis for closure by state or local officials of public places (e.g., public facilities, private facilities, and business) during a declared public health emergency? For each of the jurisdiction's legal powers, authorities, and procedures including, but not limited to, umbrella, general public health, or emergency powers or authorities, that could be used to authorize, prohibit, or limit closure, please address the following issues:

1. *What are the powers and authorities authorizing closure?*

   The governor is empowered to declare a disaster or emergency under circumstances where there is the threat or occurrence of widespread loss of life or injury. If the declaration involves a health emergency, an important component of mitigation would be limiting the exposure of well persons to those carrying the disease. Inasmuch as people may be infectious before they are symptomatic, closing places where large numbers of people gather in close proximity to one another may be the single most effective mitigation measure to be undertaken by the department. Accordingly, the governor, under the authority of the Emergency Management Act to direct such action "which are necessary and appropriate under the circumstances," may order the closure of public places and cancellation of public gatherings if the closures and cancellations are needed to protect the public health from spread of pandemic influenza.

2. *What are the powers and authorities prohibiting closure?*

   None known. But, there may be compensation issues.

3. *Who can declare or establish closure?*

   Under the Emergency Management Act, such orders are issued by the governor.

4. *Who makes the decision to close a public place?*

   Same as above.

5. *What is the process for initiating and implementing closure?*

   No specific process is provided in the Emergency Management Act once a declaration is made.

6. *What is the process for enforcing closure and who enforces it?*

   Violations of executive orders are crimes and may be enforced by any law enforcement officer.

7. *What are the penalties for violating closure?*

   Violation is a misdemeanor punishable by 90 days jail, a $500 fine, or both.

8. *What are the procedural and due process requirements for closure?*

   The requirements depend on whether an order requiring closure is considered a "taking" of property, requiring due process and compensation. See D.1. below (pages 32-33).

9. *Is compensation available for closure? If so, what is it?*

   Not specifically provided. But some question exists. See MCL 30.406, which addresses compensation for property and services, providing "compensation for property shall be paid only if the property is taken or otherwise used in coping with a disaster or emergency and its use or destruction is ordered by the governor or the director. A record of all property taken or otherwise used under this act shall be made and promptly transmitted to the office of the governor."

10. *How long can a closure last?*

    28 days unless extended by joint resolution of the legislature.

11. *How can it be renewed?*

    By joint resolution of the legislature.

12. *Describe the authority/process/notice requirements for ending a closure.*

    If ended by executive order, notice of termination is same as order of closure; by such means calculated to bring it to the attention of the general public.

B. *Sufficiency of powers/authorities to authorize closure of public places during a <u>declared</u> public health emergency – Discuss the sufficiency of the authorities and powers to authorize closure of public places during a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

   Compensation is the main question.

2. *Uncertainties?*

   Same as above.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's authority to close public places? (Examples: state administrative practice acts, specific provisions in law related to closure.)*

   None known.

C. *Legal powers/authorities to order closure of public places <u>in the absence</u> of a declared public health emergency – What are the powers, authorities, or procedures to enable, support, authorize, or otherwise provide a legal basis for closure by state or local officials of public places (e.g., public facilities, private facilities, and business) in the absence of a declared public health emergency? For each of the jurisdiction's legal powers, authorities, and procedures that could be used to authorize, prohibit, or limit closure, please address the following issues: What are the powers and authorities authorizing closure?*

1. *What are the powers and authorities prohibiting closure?*

   None known. There may be compensation issues.

2. *Who can declare or establish closure?*

   MDCH's director and local health officers have the authority to issue an imminent danger order, and require closure of public places as action required to avoid, correct, or remove the imminent danger. Alternatively, the director or local health officer could issue an emergency order to control an epidemic and require closure of public places as a procedure to be followed during the epidemic.

3. *Who makes the decision to close a public place?*

   MDCH's director or the local health officers for their own jurisdictions.

   The MDCH Pandemic Plan as well as the Michigan Pandemic Influenza State Operational Plan addresses the potential closure of public places in a moderate (1957-like) or severe pandemic:

   - School dismissals or closures (including daycares and colleges and universities
   - Faith-based organizations
   - Closure of public and private facilities
   - Dismissal of entertainment activities/sports venues, etc
   - Canceling of public gatherings

4. *What is the process for initiating and implementing closure?*

   No specific process is set out in the Public Health Code. The process is the same as for issuing any other emergency order.

5. *What is the process for enforcing closure and who enforces it?*

   Violation of the orders of MDCH's director is a misdemeanor, enforceable by any law enforcement officer. Additionally, MDCH (and local health officers) can go to court to seek enforcement of its orders. MCL 333.2251(2), MCL 333.2451(2). The court could punish civilly or criminally via contempt. MDCH (and local health officers) may also maintain injunctive action "to restrain, prevent, or correct a violation of a law, rule, or order which the department [local health

officer] has the duty to enforce or to restrain, prevent, or correct an activity or condition which the department believes adversely affects the public health." MCL 333.2255, MCL 333.2465.

6. *What are the penalties for violating closure?*

   Violation of an order of MDCH's director is a misdemeanor, punishable by six months in jail or $200, or both. MCL 333.2261. Enforcement and penalties for violation of a local health officer's order depends on local law.

7. *What are the procedural and due process requirements for closure?*

   As discussed under "gaps" below (pages 32-33), MDCH needs to consult with the Department of Attorney General on constitutional parameters.

8. *Is compensation available for closure? If so, what is it?*

   No. This issue needs to be reviewed and addressed as a legal and a policy issue.

9. *How long can a closure last?*

   There is no time limit on any of the state or local health officers' orders; nor is there a renewal requirement. The health officer who issued an emergency order would be responsible for monitoring the conditions that warranted the order, and respond as appropriate by modifying or rescinding the order as conditions change. Notice of any modifications, or rescission, would need to be sufficient to reasonably notify individuals or groups who are subject to the order.

10. *How can it be renewed?*

    See answer to 9 above. There is no renewal requirement.

11. *Describe the authority/process/notice requirements for ending a closure.*

    Closure is ended the same way it is commenced. An order is issued terminating the prior order closing public places, with notice sufficient to reasonably notify the public.

D. *Sufficiency of powers/authorities to authorize closure of public places <u>in the absence</u> of a declared public health emergency – Discuss the sufficiency of the authorities and powers to authorize closure of public places in the absence of a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

   Closing public places, and related prohibitions on gatherings, raise several issues under the United States and Michigan Constitutions. Under the Michigan Constitution, these include:

- No person shall be deprived of liberty or property without due process of law. Const 1963, Art I, §17.
- Freedom of assembly, free speech, and religion. Art I §§3, 4, 5.
- Eminent domain; private property shall not be taken for public use without just compensation. Const 1963, Art X, §2

MDCH will need to obtain legal advice from the Department of Attorney General on constitutional parameters for closing public places, prohibiting gatherings, and measures to restrict movement. Procedures and process need developed based both on legal and policy considerations.

2. *Uncertainties?*

   See answer above.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's authority to close public places? (Examples: state administrative practice acts, specific provisions in law related to closure.)*

   Only those already noted.

V. Mass Prophylaxis Readiness

A. *Legal powers/authorities for issuance of blanket prescriptions and use of other mass prophylaxis measures during a declared public health emergency – If it became necessary during a declared public health emergency to issue blanket prescriptions or order the use of other mass prophylaxis measures to enable emergency mass distribution of medical countermeasures (e.g., antivirals, vaccines), what legal powers, authorities, and procedures could enable, support, authorize or otherwise provide a legal basis for doing so? List all legal powers and authorities, policies, and procedures that could be used to authorize blanket prescriptions or other mass prophylaxis measures. For each of the powers and authorities listed, please address:*

1. *Who would make the decision to issue the blanket prescriptions or use other mass prophylaxis measures?*

   In a declared state of emergency the governor can suspend the regulatory statutes and regulations that would in any way hinder or delay necessary action in coping with the emergency or disaster. MCL 30.405(1)(a). The governor is further authorized to utilize all available resources of the state government and each political subdivision of the state as reasonably necessary to cope with the emergency or disaster. MCL 30.405(1)(b). Under a declared state of disaster or emergency the governor could authorize a suspension of the statutory and regulatory requirements for prescriptions. The governor could directly authorize for mass prescribing and dispensing of vaccines, antivirals and other medications by others such as nurses, dentists, veterinarians and Emergency Medical Technicians (EMT).

2. *Who has the authority to issue the blanket prescriptions or order the use other mass prophylaxis measures?*

   Under the Emergency Management Act, the power to order the use of mass prophylaxis is given to the governor. Since the governor does not meet the licensing requirements for a "prescriber," she cannot issue blanket prescriptions unless she suspends the statutory and regulatory requirements for prescriptions. The Director of MDCH also has the legal authority to order the use of mass prophylaxis, and the Chief Medical Executive for MDCH has the authority to issue blanket prescriptions. Under the Michigan Emergency Management Plan (MEMP), which is consistent with the National Response Plan, MDCH is the lead agency for Emergency Support Function (ESF) #8. ESF #8 concerns the public health and mental health needs of the community, and includes coordinating the allocation of medications essential to public health and appropriate medical services. Thus, decisions regarding mass prophylaxis will most likely be made by the MDCH Director, with advice from the Chief Medical Executive, in addition consultation from the OPHP Director, the State Epidemiologist, and other Executive Staff or subject matter experts.

3. *How would the countermeasures be distributed?*

   The Emergency Management Act does not specifically address distribution of countermeasures. However, detailed distribution plans for countermeasures for each federal stage/WHO phase are part of the MDCH Pandemic Influenza Plan and the MDCH Strategic National Stockpile Plan. Response includes:

   - Receipt, storage and distribution of Strategic National Stockpile to local jurisdictions (carried out by MDCH's Office of Public Health Preparedness, as set out in the SNS Plan)
   - Coordinating local health department mass vaccination clinics
     Monitoring of antiviral or vaccine administration with the Michigan Care Improvement Registry (MCIR)[4]
     Monitoring of vaccine administration with MCIR
     Monitoring of adverse effects (VAERS, AERS)
   - Dispensing of antibiotics for post-exposure prophylaxis (CME's Standing Orders/ local medical directors Standing Orders) from bioterror or communicable disease agent
   - Dispensing of KI in a nuclear emergency
   - Dispensing chemical or biological agent remedies
     MEDDRUN is a state resource
     Chempack is a federal resource for chemical response

   Distribution will depend upon the event. Mobilization of the SNS requires a

[4] Effective April 4, 2006, Michigan amended its law that created the Michigan Child Immunization Registry to expand it to a "care improvement registry" that could include immunization information on adults and be used during in an emergency to monitor antiviral or vaccine administration. MCL 333.9207.

Governor's Order, but local and state resources have to be depleted first. Before that MEDDRUN and CHEMPACK can be mobilized emergently within the first 24-48hours of an event. SNS Plans and the MEPPP address the procedures for such counter measures. Mass Dispensing Plans and Mass Vaccination Plans are outlined for every Local Health Department. Vaccine and antiviral countermeasure distribution plans are in place within the SNS Plan for Pandemic influenza, and distribution will occur pre-event; that is, in WHO Phases 4 and 5, so as to pre-position resources.

B. *Sufficiency of authorities/procedures to issue blanket prescriptions or order the use of other mass prophylaxis measures during a declared public health emergency – Discuss the sufficiency of the authorities and powers to issue blanket prescriptions or order the use of other mass prophylaxis measures during a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

   None known.

2. *Uncertainties?*

   None known.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's authority to issue blanket prescriptions or order the use of other mass prophylaxis measures? (Examples: state administrative practice acts, specific provisions in law related to blanket prescriptions/mass prophylaxis.)*

   None known.

C. *Legal powers/authorities for issuance of blanket prescriptions and use of other mass prophylaxis measures in the absence of a declared public health emergency – If it became necessary in the absence of a declared public health emergency to issue blanket prescriptions or order the use of other mass prophylaxis measures to enable emergency mass distribution of medical countermeasures (e.g., antivirals, vaccines), what legal powers, authorities, and procedures could enable, support, authorize or otherwise provide a legal basis for doing so? List all legal powers and authorities, policies, and procedures that could be used to authorize such blanket prescriptions or order the use of other mass prophylaxis measures. For each of the powers and authorities listed, please address:*

1. *Who would make the decision to issue the blanket prescriptions or use other mass prophylaxis measures?*

   State and local public health would operate under the authority of the Public Health Code. The director of MDCH, and the local health officers, would make the decision whether to use mass prophylaxis measures, in consultation with the chief medical executive or medical director. If MDCH's director is not a physician, the director must designate a physician as chief medical executive who

is responsible to the director for the medical content of policies and programs. MCL 333.2202(2). Similarly, if a local health officer is not a physician, a physician must be appointed as medical director "responsible for developing and carrying out medical policies, procedures, and standing orders and for advising the administrative health officer on matters related to medical specialty judgments. R 325.13001.

2. *Who has the authority to issue the blanket prescriptions or order the use other mass prophylaxis measures?*

   The director of MDCH, and the local health officer for his or her jurisdiction, have the authority to order the use of mass prophylaxis measures. Most likely, this would be done as an emergency order to respond to an imminent threat or danger to the public health or as an emergency order to address an epidemic. MCL 333.2251, 333.2253, 333.2451, 333.2453. If the state or local health officer is not a physician, blanket prescriptions would need to be issued by the chief medical executive or medical director. Standing orders for prescriptions and protocols for administering are already in place for pandemic influenza for mass dispensing sites. When MDCH approves a mass immunization program to be administered in the state, health personnel employed by a governmental entity who are required to participate in the program, or any other individual authorized by the director or a local health officer to participate in the program without compensation, are not liable to any person for civil damages as a result of an act or omission causing illness, reaction, or adverse effect from the use of a drug or vaccine in the program, except for gross negligence or willful and wanton misconduct. MCL 333.9203(3)

3. *How would the countermeasures be distributed?*

   Mass vaccination clinics, Points of Distribution sites- see local and State Mass Dispensing/ Vaccination and the SNS plans

D. *Sufficiency of authorities/procedures to issue blanket prescriptions or order the use of other mass prophylaxis measures <u>in the absence of</u> a declared public health emergency – Discuss the sufficiency of the authorities and powers to issue blanket prescriptions or order the use of other mass prophylaxis measures in the absence of a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.*

1. *Potential gaps?*

   None known.

2. *Uncertainties?*

   None known.

3. *Legal provisions that could inhibit, limit, or modify the jurisdiction's authority to issue blanket prescriptions or order the use of other mass prophylaxis measures?*

(Examples: state administrative practice acts, specific provisions in law related to blanket prescriptions mass prophylaxis.)

The Public Health Code recognizes the right of individuals to refuse medical treatment, testing, or examination based on religious beliefs. MCL 333.5113. This right is not absolute, however, and a court may impose certain conditions on a carrier of a serious communicable disease who is a health threat to others under Part 52 of the Public Health Code, MCL 333.5201 *et seq.*

Conclusion

Michigan has many laws, response plans, and agreements in place for effective response to pandemic influenza, including pharmaceutical and social distancing measures. Completing this assessment has been valuable to identify areas of law that require further research, discussion, and development of process and procedures. This is especially true for social distancing measures that implicate constitutional rights of due process, freedom of religion, freedom of speech and assembly, and compensation for private property taken for the common good. Participating in this project has also emphasized the importance of policy and ethical considerations, as well as legal issues, in planning/implementing response measures to pandemic influenza. For example, the closure of businesses results in loss of income to the business owner. This raises legal - as well as policy and ethical questions - about the burden on the business owner for the common good. Similarly, the single mother without sick leave bears the burden of loss of income by home quarantine because she happened to be on a plane with sick passengers.

Completing this assessment has also helped identify potential gaps in response plans involving particular measures (such as mass transit limitations and curfew) and highlighted some logistical challenges (such as enforcement of measures). From this assessment it appears that several areas need to be pursued further with other government partners, namely implementation of social distancing measures involving Michigan's constitutionally created universities, on federal lands, and on Indian land.

VI. Other Issues

A. Other resources (legal powers and authorities, plans, policies or procedures, etc.) that your state might employ or rely upon to assist in pandemic response and the implementation of social distancing measures and/or mass prophylaxis readiness?

In addition to resources described above, the Attorney General's Office is completing a bench book covering public health emergencies.

MDCH's Director issued a memorandum in July 2004 explaining to health care providers that the HIPAA privacy rule does not impact state law requiring that identifiable patient information be provided to public health staff related to the prevention and control of serious communicable disease. This memorandum is in both hard copy and electronic form and widely available to assist public health staff address concerns or refusal to provide requested health information based on HIPAA.

B. Other such resources (e.g., laws, regulations, or policies; money, personnel, research, training) you do not currently have but would like to have? If so, what are they?

It appears that all levels of government have concerns about the source(s) of funding to implement restrictions on movement and social distancing measures.

C. Anything unique to your state in terms of pandemic preparedness and response measures related to social distancing or mass prophylaxis?

Michigan has the second highest person volume crossing (after New York) from Ontario to the United States, including three bridges and one tunnel. In addition to entry through the U.S./Canadian border, Michigan has four international airports.

VII. Table of Authorities

Attach a Table of Authorities as an appendix to the report, listing citations for all relevant legal authorities or procedures, including statutes, regulations, case law, Attorney General opinions, etc. Please list the code section or citation, followed by the text and a hyperlink, if available.

A Table of Authorities is provided as Appendix 1.

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions