STATE OF MICHIGAN

IN THE SUPREME COURT

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

Supreme Court No. 161492

USDC-WD: 1:20-cv-414

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

Plaintiffs,

v

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

Defendants.

PLAINTIFFS' REPLY BRIEF

****ORAL ARGUMENT REQUESTED****

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Introduction

Plaintiffs and Defendants agree on a few points. The answers to the certified questions do not hinge on: party preference; this Governor; or this crisis. Whether Governor Whitmer's decisions have been effective or wise has no bearing on the scope of the Executive's power to issue orders, on a purported emergency basis, that have the effect of law. If the Governor's exercise of that power exceeded her statutory authority, or if the enabling statutes are unconstitutional, then the Governor's claim that she acted swiftly or made the right decision does not make the Governor's actions legal.

In addition, all parties agree that the Governor's authority to issue emergency executive orders derives from statutes. The Governor does not attempt to justify the extraordinary series of more than 150 executive orders under any independent executive authority. The only power at issue is a power that the Legislature delegated to the Governor. The Governor may not exceed the limits of that power. Nor may the Governor keep that power indefinitely. And if the delegation is constitutionally deficient, then it is the role of this Court to restore the balance.

Defendants are wrong about the scope of Plaintiffs' argument. Plaintiffs acknowledge that for 51 days following the Governor's first declaration of a state of emergency based on COVID-19, the Governor acted within the bounds of the enabling statutes and the Michigan Constitution. This is no small concession. The Governor's authority under those statutes is broad, and the Governor's executive orders during those 51 days dramatically altered every aspect of life in this state. To answer the certified questions in Plaintiffs' favor would not strip the Governor of all emergency power. It would simply recognize that the Governor's delegated emergency power has a limit.

In this case, that limit arose when the Legislature declined to grant the Governor's request for an extension of the state of emergency beyond April 30, 2020. At that point, the

Legislature determined that the dangers posed by COVID-19 evolved from an emergency to a serious, long-term challenge—a problem calling not for emergency rule, but for a legislative solution. The enabling statutes do not grant the Governor authority to exercise emergency powers indefinitely.

Defendants warn that COVID-19 requires a fast response that the Legislature, following "Robert's Rules of Order," cannot provide. But that ends-justify-the-means rationale finds no support in the Legislature's delegation of emergency powers, and it strikes at the heart of the separation of powers. Defendants' position would turn the bedrock of Michigan's constitutional system into sand. Because the very structure of our government and individual liberties are at stake, this Court should exercise its discretion to answer the certified questions.

Argument

I. Neither the EPGA nor the EMA permits the Governor to wield rule-making authority for a long-term challenge of indefinite duration.

A. Under the EPGA, emergency powers wane with the passage of time.

In interpreting the Emergency Powers of the Governor Act of 1945, the Governor accepts the definition of "emergency" found in the 1942 version of Webster's New International Dictionary. *See* Gov & Dir's Br at 35 ("This is a good definition."); *see also* Att'y Gen's Brief at 27 (arguing that this pandemic fits within the 1942 definition). That definition underscores the time-limited nature of an "emergency." An emergency, Webster's tells us, is "an u*nforeseen* combination of circumstances." It calls for "*immediate* action." But with the passage of time, circumstances that were once "unforeseen" evolve. They may still demand our attention and require difficult decisions, but planning a long-term strategy becomes possible, and the need for "immediate action" diminishes.

Though Defendants accept Webster's definition of "emergency," and appear to accept that *in most cases* an emergency wanes with the passage of time, they reject any time limit in this case. *See* Gov & Dir's Brief at 30 ("While the threat here has not dissipated, in most circumstances, the threat will become less immediate as time passes, making it more difficult to support the finding of an emergency if challenged."); Att'y Gen's Brief at 50 (citing *County of Gloucester v State*, 623 A2d 763, 768 (NJ, 1993), for considering the "passage of time" in review of a governor's emergency executive order). The Governor analogizes the circumstances of this pandemic to the moment "[f]ive minutes after a fire engulfs a city," when, the Governor reasons, the emergency is no longer unforeseen but the need for immediate action persists. *See* Gov & Dir's Brief at 35. No one disputes that an emergency requiring immediate action continued for much longer than five minutes. The Governor acted within the limits of her authority for 51 days.

But we are now well beyond five minutes. We are well beyond 51 days. The Governor has issued more than 150 executive orders over nearly six months. She has unilaterally extended the state of emergency based on COVID-19 through September 4, 2020, and now claims that emergency conditions will continue until "the economic and fiscal harms from this pandemic have been contained." (EO 2020-165.) The Governor appears to have no intention to return the reins to the Legislature any time soon. But as the New Jersey Supreme Court stated in *County of Gloucester v State*, a case embraced by the Attorney General here, the EPGA does not "operate as a vehicle for a permanent wholesale takeover" by the Governor. 623 A2d 763, 767 (NJ, 1993).

The Governor's MI Safe Start Plan illustrates the point. The plan contemplates the Governor continuing to exercise control (and indeed, the Governor has exercised control) during phases of the pandemic that are no longer exigent. The very elements that define these phases demonstrate the diminished need for the Governor to take "immediate action." The plan anticipates

the Governor's continued exercise of police powers during the fourth "Improving" phase, when "[r]obust testing, contact tracing, and containment protocols [are] in place," as well as in the fifth "Containing" phase, when "outbreaks can be quickly contained." (App 69a.) There should be no dispute that during the sixth "Post-pandemic" phase, when we have achieved "high uptake of an effective therapy or vaccine," the EPGA does not apply. No Defendant has explained how the EPGA authorizes the Governor's emergency rule after the pandemic has passed.

The MI Safe Start Plan and executive orders post-April 30 are not the types of executive action that are called for when an emergency takes hold. They are not the "immediate action" that the dictionary definition contemplates. And they are not within the EPGA's contemplated orders that are necessary "to protect life and property or to bring the emergency situation . . . area under control." MCL 10.31(1). Rather, they are a detailed blueprint reflecting the Governor's judgment about the permissible level of business and social activity at various stages of the pandemic. They are the Governor's unilateral attempt to address the public health and economic ramifications of COVID-19—an incursion into the Legislature's policy-setting and law-making province unsupported by the delegation to the Governor under the EPGA.

Emergencies, even those that dramatically change the fabric of daily life, pass with time.[1] While some emergencies dissipate completely, others evolve into long-term challenges. The Legislature delegated only the power to address emergencies and reserved the power to manage the long-term challenges. While Defendants accept that the passage of time would *usually* play a role in curtailing the Governor's emergency powers, they claim that COVID-19 is not the usual, time-limited emergency. They warn that COVID-19 requires the power of the Executive,

[1] While the plain meaning of "emergency" imposes a time limit on the EPGA's delegation, the Legislature also understood the EPGA to be more localized in scope than the EMA. For this point, Plaintiffs refer this Court to the Legislature's briefing at the Court of Appeals in *Michigan House of Representatives v Whitmer*.

unencumbered by the legislative process. That is a dangerous rationale for reading the EPGA to permit the Governor's continued attempt to exercise emergency powers. Where a statute that raises serious constitutional concerns can be read to avoid constitutional infirmity, the interpretation that poses no constitutional question is favored. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (2012), p 247-51. Indefinite unilateral rule by the Executive may seem the convenient choice in many circumstances, but it is fundamentally inconsistent with our constitutional system.

B. The Governor's powers under the EMA expired on April 30, 2020.

The EMA likewise does not support the Governor's continued exercise of emergency power. On this point, the Attorney General agrees. Att'y Gen's Brief at 37-40.

Only the Governor asserts that the EMA grants authority to re-declare a state of emergency after the Legislature decides not to extend it. But that position contradicts the EMA's plain directive that after 28 days, unless the Legislature grants an extension, the Governor "*shall issue* an executive order or proclamation declaring the state of disaster terminated." MCL 30.403(3) (emphasis added). As the Attorney General put it, to allow the Governor to "repeatedly rescind and immediately replace the declared states of disaster and emergency" would "shortchang[e]" the Legislature's plain intent and render the Legislature's role in the extension process "mere surplusage." Att'y Gen's Brief at 40.

The Governor's assertion that requiring her to re-declare a state of emergency places a "true limitation" on her emergency powers ignores reality. *See* Gov & Dir's Brief 29. As the orders' time stamps show, it took all but sixty seconds for the Governor to terminate the state of emergency in one order and re-declare it in another.

And the Governor's argument that the 28-day time limit in the EMA amounts to a legislative veto crumbles under the plain language of the EMA. Unlike in *INS v Chadha*, 462 US 919 (1983), the Legislature retains no right to approve or disapprove the Governor's executive

orders properly issued under the EMA, and the Legislature has not attempted to wield such approval power here. Instead, under the EMA, the Legislature retained the right to decide whether an extension of the Governor's powers past 28 days is warranted. In this case, the Legislature granted the Governor an extension for 23 days, but not beyond. That is not a legislative veto but a properly invoked statutory limit on the delegation of power to the Governor.

C. The expiration of the Governor's emergency power under the EMA curtails the Governor's emergency power under the EPGA.

Under the *in pari materia* canon, the EPGA and the EMA must be read together because they speak to the same subject: the Governor's emergency powers delegated by the Legislature. When read together, the expiration of the Governor's power under the EMA curtails the Governor's emergency power under the EPGA. Defendants resist this interpretation, because the Governor's ongoing exercise of emergency power depends on an inherent clash between the EPGA and the EMA. This Court, however, reads statutes in harmony, and where an unavoidable conflict exists, the more specific statute (in this case, the EMA) controls.[2]

In a glaring contradiction, the Attorney General argues that the Governor's act to re-declare a state of emergency after April 30 violates the EMA but raises no issue under the EPGA. The Attorney General acknowledges that the EMA's 28-day time limit must be respected; otherwise, the Governor's attempt to re-declare the state of emergency would render the EMA "mere surplusage" and amount to an "impermissible incursion into the sphere of authority occupied by the Legislature." Att'y Gen's Brief at 43, 57. Yet the Attorney General disregards these concerns when asserting that the Governor can achieve the same result by simply shifting to

[2] In the context of successive statutes, these canons avoid a reading that nullifies one statute in favor of the other. *See* Scalia & Garner at 181 (describing a court's reading of two sentencing statutes "harmoniously so that one did not nullify the other"); *id.* at 185 ("The specific provision does not negate the general one entirely, but only in its application to the situation that the specific provision covers.").

the delegation of authority under the EPGA, where the Governor's emergency power, so the argument goes, is unchecked. This reading highlights the inherent conflict in the statutes.

To permit the Governor to continue a declaration of emergency under the EPGA after the Legislature refuses an extension would gut the EMA's reservation of power to the Legislature. It would violate the "fundamental" rule of construction that "every word, sentence and section" of a statute should be given effect if possible. *Soap & Detergent Ass'n v Nat Resources Comm'n*, 415 Mich 728, 738; 330 NW2d 346 (1982). It would make the EMA irrelevant. And it would set a troubling precedent. Whenever the Governor and the Legislature disagreed as to the ongoing nature of an emergency, the Governor would have an easy path to circumvent the Legislature, or to disregard the EMA entirely.

Finally, Plaintiffs' reading of the two statutes—so that the 28-day time limit of the EMA restricts the Governor's power under the EPGA—does not "[l]imit, modify, or abridge" the Governor's authority under statute. MCL 30.417(d). Nothing in the EPGA permits the Governor to declare a state of emergency on the basis of COVID-19, terminate that state of emergency to pay lip service to the EMA, then declare that the same state of emergency, based on the same set of facts, continues for purposes of the EPGA. Rather, the Governor's emergency power under the EPGA "shall cease to be in effect upon declaration by the governor that the emergency no longer exists." MCL 10.31(2). That provision of the EPGA controls because as of the April 30, 2020, the Governor was obligated to "issue an executive order or proclamation declaring the state of emergency terminated." MCL 30.403(4). This is not a reading of the EMA that abridges the Governor's powers under the EPGA. Rather, the limit derives from the EPGA itself. Under the EPGA, that the Governor's power ceases when the emergency no longer exists.

II. Because the EPGA contains insufficient standards to restrain the Governor from perpetuating an emergency indefinitely, the delegation is unconstitutional.

If the EPGA does not impose any time limit on the Governor's emergency powers, then the statute impermissibly delegates law-making authority to the executive in violation of the separation of powers and non-delegation doctrine of the Michigan Constitution. Defendants attempt to wave away this argument, claiming, based on some federal cases, that non-delegation is dead letter. Far from it, non-delegation challenges are an "increasingly important part of state constitutional law," in which state courts, since the New Deal era, have consistently invalidated delegations that undermine the separation of powers. Iuliano & Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 Notre Dame L Rev 619, 620 (2017).

Defendants also assert that the standards guiding the Governor's delegation of power under the EPGA—that the orders be "reasonable" and "as he or she considers necessary to protect life and property or to bring the emergency situation . . . under control"—are precise enough. They cite cases in which Michigan's appellate courts have upheld narrow delegations of rule-making authority where the delegations were further limited by words like "necessary."

But none of those statutory delegations involves a delegation of police power with anywhere near the breadth of the EPGA. *See, e.g., Klammer v Dep't of Transp*, 141 Mich App 253; 367 NW2d 78 (1985) (upholding delegation of authority to retirement board to retain state employees past mandatory retirement age if the board deems retention "necessary"); *Blank v Dep't of Corrs*, 462 Mich 103; 611 NW2d 530 (2000) (upholding delegation to the Department of Corrections to promulgate "necessary or expedient" rules "for the effective control and management" of penal institutions). Indeed, it is hard to find a case involving a delegation quite like the "broad grant of extraordinary powers" under the EPGA. *Walsh v City of River Rouge*, 385 Mich 623, 640; 189 NW2d 318 (1971).

The more sweeping the scope of the delegation of power, the more precise the standards must be. *Whitman v Am Trucking Assns*, 531 US 457, 475 (2001). This is especially true where the delegation involves not the authority to address narrow areas within the technical expertise of an agency, but the whole of the state's police powers to regulate every form of activity within the state. That is why this Court upheld a delegation of executive reorganization power to the Governor only where "the area of executive exercise of legislative power" was "very limited and specific" and the Legislature maintained "concurrent power." *Soap & Detergent*, 415 Mich at 752. It is also why a federal appellate court upheld the delegation of broad emergency powers to the President under the Internal Emergency Economic Powers Act, which clearly delineated the "boundaries" of delegated authority and imposed procedural restrictions, including congressional consultation. *United States v Amirnazmi*, 645 F3d 564, 577 (CA3, 2011). In the realm of emergency police powers, strong guardrails are essential to restrain the Executive's "ability to perpetuate emergency situations indefinitely." *Id.* at 577. It is also why the EMA, with its 28-day time limit and the express requirement that the Governor consult the Legislature for any emergency extension, does not disrupt the balance of powers.

Given the extraordinary police power that the Governor wields under the EPGA, the standards of "reasonable" and "necessary" provide no "effective measure" to "check" the Governor's orders or prevent her from following her "own will." *Westervelt v Nat Res Comm'n*, 402 Mich 412, 439, 441; 263 NW2d 564 (1978). The lack of sufficiently precise standards is especially important in the context of COVID-19, where the Governor's actions are subject to the least scrutinizing of judicial review on questions of individual rights (as opposed to structural challenges). *Jacobson v Massachusetts*, 197 US 11, 29 (1905). If the Court determines that the Governor's power under the EPGA is free of any time limit, then there is nothing stopping this

Governor—or any future governor—from "perpetuat[ing] emergency situations indefinitely." *Amirnazmi*, 645 F3d at 577. A requirement that the Governor's orders be "reasonable" and "necessary" may suffice to limit far narrower delegations of rule-making power. They are not sufficient for the "broad grant of extraordinary" police powers under the EPGA. *Walsh*, 385 Mich at 640.

Conclusion

The Legislature delegated emergency power to the Governor on a time-limited basis. The Governor exercised that power for 51 days after an extension of that power granted by the Legislature. But as of April 30, 2020, the Legislature signaled that it would resume its law-making role and that the Governor's emergency powers had ended. The Governor's purported exercise of continued emergency rule after April 30 exceeds her authority under the relevant statutes and offends the separation of powers that undergirds our system of government.

Respectfully submitted,

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By /s/ James R. Peterson

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