STATE OF MICHIGAN

IN THE COURT OF APPEALS

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Plaintiffs-Appellants,

v.

GRETCHEN WHITMER, in her Official capacity as Governor for the State of Michigan,

Defendant-Appellee.

Supreme Court No. 161377
Court of Appeals No. 353655
Court of Claims No. 20-000079-MZ

BRIEF *AMICUS CURIAE* IN DEFENSE OF THE US CONSTITUTION, THE MICHIGAN CONSTITUTION, AND THE RIGHTS OF ALL CITIZENS

THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

ORAL ARGUMENT REQUESTED
(CONTINGENT UPON COURT PERMISSION UNDER MCR 7.212(H)(2))

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I. The EMA requires a governor to declare a state of emergency if the conditions warrant it, and to terminate that declaration if the legislature does not extend it beyond 28 days by concurrent resolution. The Governor terminated unextended declarations, but issued new ones instantaneously. Did the Governor act within her EMA statutory authority?

Governor's Answer:	YES
Legislature's Answer:	NO
Interventor's Answer:	NO
Amicus Curiae's Answer:	NO

II. May the legislature constitutionally grant broad authority to the executive branch provided there is "sufficient" guidance?

Governor's Answer:	YES
Legislature's Answer:	NO
Interventor's Answer:	NO
Amicus Curiae's Answer:	NO

III. Does the legislature have standing based on injuries it shares with the general citizenry, or upon their constitutional authority to legislate being affected by this court's decisions?

Governor's Answer:	NO
Legislature's Answer:	YES
Interventor's Answer:	YES
Amicus Curiae's Answer:	YES

INTRODUCTION AND STATEMENT OF INTEREST[1]

These are confusing times. Never before have we had a governor shut down literally every aspect of our lives. The people of Michigan are confused, angry, and needing answers. And why shouldn't they be? Our courts have developed a "vast body of law"[2] unknown to the founding fathers and almost entirely outside of the scope of the language of our state and federal constitutions, which are supposed to be the supreme law of the land. Our legislature has enacted statutes which usurp the rights clearly guaranteed to us in the state and federal constitutions. Our governor, deciding those usurpations do not extend far enough, has both attempted to absorb the lawmaking powers of the legislature and complete the disenfranchisement of the people by denying that the people, in any individual or collective capacities, should have any legal standing to seek judicial remedy for her constitutional and statutory violations.

As both an attorney and a local public official, I have sworn an oath to uphold the Constitution of the United States several times. I was first licensed to practice law in the State of Minnesota. Upon moving in 2008, I became licensed to practice law in the State of Michigan, followed by the Eastern District of Michigan Federal District Court, the Saginaw Chippewa Tribal Court, the Western District of Michigan Federal District Court, and finally in the United States Supreme Court. With the exception of my admission to the Saginaw Chippewa Tribal Court, each of those admission ceremonies required me to swear to uphold and support the Constitution of the United States.

[1] Pursuant to MCR 7.212(H)(3), Amicus Curiae states that neither counsel for a party authored this brief in whole or in part, nor did such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief.

[2] *Home Building v Blaisdell,* 290 US 398, 443 (1934).

Being an attorney licensed in the State of Michigan, I also swore an oath to uphold the Constitution of the State of Michigan. Additionally, I have served on a local downtown development authority and local planning commission. To serve in both of those roles, I swore an oath to uphold the US Constitution and the Michigan Constitution. I take each of these oaths very seriously. Furthermore, in addition to bestowing upon me unalienable rights, such as life, liberty and the pursuit of happiness, God also gave me the gift of oral argument, legal research and writing, and a passion for serving others. Being given these great gifts, it is my duty to use them for the public good. Accordingly, I submit this brief in defense of the United States Constitution, the Michigan Constitution, and the rights of all of my fellow citizens.

ARGUMENT

Everyone across the state, including the named parties, is debating the Governor's use of emergency powers which have now lasted for over 15 weeks. However,

> The question is not whether the constitution ought to have permitted the exercise of this power; but whether, by a fair construction of the language of the instrument, as framed by the convention, and understood and adopted by the people, the power in question has been prohibited. Our province is not to make or modify the constitution, according to our views of justice or expediency, but to ascertain, as far as we are able, the true intent and purpose of the constitution which the people have deemed it just and expedient to adopt. This we, in common with the people and all departments of the government, are bound to obey in all its provisions, however unwise in our opinion they may be, so long as it remains in force. . . . It can never be wise or expedient for the judiciary, however pressing the exigency may appear, to disregard the plain principles of the organic law which the people, in their sovereign capacity, have seen fit to adopt as the great landmarks for the ascertainment and security of public and private rights. The duty, therefore, of the courts of final resort, to declare an act of the legislature [or executive] unconstitutional and void, when it plainly conflicts with the constitution, is clear and imperative.[3]

[3] *Twitchell v Blodgett,* 13 Mich 127, 149-50 (1865).

Thus, amicus curiae requests this court to grant the pending bypass applications and motions for immediate consideration, which would allow this court to take up its clear and imperative duty to declare the unconstitutional acts of government void.

I. Standard of review

Despite the volumes of pleadings in both this case and under 161333, all claims and arguments set forth by the Legislature, Martinko, the Governor, and Intervenors revolve around the emergency powers of the governor, both in terms of the constitutionality of the powers themselves and the legality of the 2020 executive orders under the applicable state statutes. Consequently, a de novo review is necessary, as "[q]uestions of constitutional interpretation and statutory interpretation are questions of law reviewed de novo by this Court."[4] Likewise, this court reviews de novo allegations of ultra vires executive actions.[5] This court presumes that government action is constitutional and the party challenging the validity of the action has the burden of proving a constitutional violation.[6]

An essential element of constitutional analysis, then, is the relationship between the US Constitution and the Michigan Constitution, and between the US and Michigan Constitutions and state statutes. The US Constitution "and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[7] Thus, any "law repugnant to the constitution is void, and . . . courts, as well as other departments, are bound by [the US Constitution]."[8]

[4] *Mich Dept of Transp v Tomkins,* 481 Mich 184, 190 (2008).
[5] *Petition of Cammarata,* 341 Mich 528, 540 (1954).
[6] *People v. Rapp,* 492 Mich 67, 72 (2012).
[7] US Const, art VI.
[8] *Marbury v Madison,* 5 US 137, 180 (1803).

But in our zeal to eloquently describe the complex jurisprudence that culminates in the applicable "standard of review," we often forget that although "interpret[ation] and appl[ication of] the pertinent provisions of our Constitution" is this court's "most solemn responsibility,"[9] a plain reading of the text itself often provides the answer without much debate or interpretation.[10] Indeed, "to read the law consistently with its language, rather than with its judicial gloss, is not to be 'harsh' or 'crabbed' or 'Dickensian,' but is to give the people at least a fighting chance to comprehend the rules by which they are governed."[11] And although courts have, from time to time, argued against the fact that "the Constitution meant at the time of its adoption [what] it means today . . . [and] the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them,"[12] it remains no less true. For

> While men may not always agree in their opinions, there can be but one true meaning to any constitutional provision, and it is the duty of a court to determine, upon its own responsibility, what that true meaning is . . . using all accessible means of enlightenment. The meaning of our constitution was fixed when it was adopted, and the question which is now before us is not different from what it would have been had the constitution been recently adopted. These charters of government are adopted by the people for their own guidance, as well as for the guidance of the governments which they establish. They are designed to provide for contingencies not foreseen as well as those which are foreseen. It usually happens that their founders are more provident than they themselves imagined at the time of their action.[13]
>
> That the constitution means nothing now that it did not mean when it was adopted, I regard as true beyond doubt. But it must be regarded as meant to

[9] *Citizens Protecting Michigan's Constitution v Secretary of State,* 503 Mich 42, 54 (2018).
[10] Cf. *Id.* at n. 63, criticising the Chief Justice's dissent for looking at what cases in general have said about the relevant constitutional terms, instead engaging in a direct examination of the text of the Constitution itself. The majority opinion also criticizes prior constitutional analysis by this court that "did not review the text of the Constitution . . . instead [creating a judicial gloss appearing] more like a spray-on tan. If it is bad to depart from the plain language of our Constitution on the basis of a judicial gloss that is binding precedent, how much worse it must be to do so on the basis of the spotty and inapposite authority the dissent relies upon in this case." Internal citations omitted.
[11] *Id.* (cleaned up).
[12] *Home Building v Blaisdell,* 290 US 398, 442-443 (1934).
[13] *Twitchell v Blodgett,* 13 Mich 127, 138 (1865).

> apply to the present state of things as well as to all other past or future circumstances. . . . The rules of law are supposed to be permanent . . . .[14]
>
> [A] state constitution . . . proceeds from the people in their original capacity, as the source of all power in the government. Their will being the supreme law, and only to be found in the constitution which they ordain, must be fairly and cheerfully enforced according to its terms, and no attempt should be made to evade or defeat it. . . . [I]ts language must receive such a construction as is most consistent with plain, common sense, unaffected by any passing excitement or prejudice.[15]
>
> As the constitution derives its force from its adoption by the people, we should, in its construction, seek only for the sense in which it was understood by them.[16]

II. Governor Whitmer far exceeded the scope of her statutory authority

A. In Pari Materia

The Court of Claims ruled that "the Governor possesses similar, but different, authority under the EPGA than she does under the EMA." However, that is entirely inconsistent with all acceptable methods of statutory interpretation. "Statutes that relate to the same subject matter or share a common purpose are *in pari materia* and must be read together as one law . . . to effectuate the legislative purpose as found in harmonious statutes."[17] "If two statutes lend themselves to a construction that avoids conflict, that construction should control."[18] "When two statutes are *in pari materia* but conflict with one another on a particular issue, the more specific statute must control over the more general statute."[19] "[T]he rules of statutory construction also provide that a more recently enacted law has precedence over the older

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[14] *Id.* at 140.
[15] *Id.* at 141-142.
[16] *Id.* at 154. Further, in matters of constitutional interpretation, this court uses dictionaries from the period of time in which the Constitution was adopted, as thoroughly discussed in *Citizens* at n. 64 and 65. This court also noted "that if doubt remains as to the meaning of a constitutional provision, courts can use anything else that might provide an historical context." *Id.* at n. 184, internal citations omitted.
[17] *Parise v Detroit Entertainment,* 295 Mich App 25, 27 (2011), citing *In re Project Cost & Special Assessment Roll for Chappel Dam,* 282 Mich App 142, 148 (2009). *See* also, *Donkers v Kovach*, 745 NW2d 154, 157 (2007), citing *Aspey v Mem. Hosp.,* 477 Mich 120, 129 n. 4 (2007).
[18] *Parise* at 27. *See* also, *People v. Hall*, 499 Mich 446, 454 (2016), citing *People v Webb,* 458 Mich 265, 274 (1998).
[19] *Parise* at 27-28, citing *Donkers v Kovach*, 277 Mich App 366, 371 (2007). *See* also, *People v Buehler,* 477 Mich 18, 26 (2007).

statute."[20] More specifically, "where two laws in pari materia are in irreconcilable conflict, the one last enacted will control or be regarded as an *exception to or qualification of the prior statute*."[21] Moreover, "when one statute is both the more specific and the more recent,"[22] it will be found particularly controlling.

The Governor has referenced both the Emergency Powers of Governor Act (EPGA) of 1945 and the Emergency Management Act (EMA) of 1976 as sources of authority for her Executive Orders (EOs), making clear how undisputed it is that these two Acts relate to the same subject matter, and are thus *in pari materia*. Additionally, we can't ignore the context of each Act - the EPGA is found in chapter 10 of our state statutes, the chapter on identifying the governor's powers and responsibilities; the EMA is found in chapter 30, covering topics of Civilian Defense in specificity. In viewing the two Acts in context, it is revealed how powers of the governor, of varying sorts, find their original authority in chapter 10, while the corresponding statutes in other chapters, like chapter 30, provide the specifics and context for the exercise of such powers. Thus, they must be read together as one law, and must be read with a construction that avoids conflict between the two.

MCL 10.31 states that during

> times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled . . . the governor may proclaim a state of emergency and designate the area involved. After making the proclamation or declaration, the governor may promulgate reasonable orders . . . necessary to protect life and property or to bring the emergency situation within the affected area under control.

Likewise, MCL 30.403 (3) requires the "governor shall, by executive order or proclamation, declare a state of disaster," or emergency per subsection (4), for a disaster or threat of

[20] *Parise* at 28, citing *Travelers Ins. v U-Haul of Mich.,* 235 Mich App 273, 280 (1999).
[21] *Metropolitan Life Ins v Stoll,* 276 Mich 637, 641 (1936), emphasis added.
[22] *Parise* at 28, citing *Travelers Ins. v U-Haul of Mich.,* 235 Mich App 273, 280 (1999).

disaster. Thus, in determining whether there is a construction of the two statutes that avoids conflict, we must turn to the point of contention between the parties - the issue of when the state of emergency must legally end. While MCL 10.31 states that the state of emergency "shall cease to be in effect upon declaration by the governor that the emergency no longer exists," MCL 30.403 requires that "[a]fter 28 days, the governor shall … declar[e] the state of emergency terminated, unless" the legislature votes to extend it. Therefore, the state of emergency being issued on March 10, 2020, was set to expire as a matter of law on April 7, 2020 until the legislature voted to extend the state of emergency until April 30, 2020. However, the legislature did not vote to extend the state of emergency any further, thus necessitating its termination as a matter of law on April 30, 2020.

In denying this inevitable legal outcome, the Governor claims that the statutes are in conflict on this point because MCL 30.403 requires her to abide by the 28-day limitation while MCL 10.31 does not. However, in looking at the actual text of each statute, we see that MCL 30.403 imposes a 28-day limitation while MCL 10.31 is merely silent on the issue. Thus, the language of both laws reveals that MCL 30.403 is *not in conflict* with MCL 10.31, but rather *supplements* it. Therefore, they can, and must, be read together. But even if they were found to be in conflict, as MCL 30.403 is both the more recent and the more specific statute, it will control or be regarded as an exception to or qualification of the prior statute.

B. Reasonable statutory construction

In her May 4th letter to law enforcement agencies, Attorney General Nessel claims that in EO "2020-66, the Governor terminated the states of disaster and emergency that had been previously declared under EMA, and then, in [EO] 2020-68, reissued a declaration of states of disaster and emergency under the EMA."[23] However, this clear attempt to

[23] Attorney General Nessel Letter May 4, 2020, App. 001c.

circumvent the 28-day requirement does not comport with the notions of statutory construction and interpretation discussed above, or in preserving the separation of powers discussed below. Indeed, the language of the law is very clear. MCL 30.403 contemplates that emergency conditions may very well last beyond the initial 28-day period. The statute specifically says that the *only* way the governor can extend the state of emergency is if she makes a request to the legislature to extend it for a specific number of days *and* both houses of the legislature approve that extension. Moreover, "[s]tatutory language should be construed reasonably, keeping in mind the purpose of the act."[24] Given the explicit 28-day time limit required, it is not reasonable to interpret MCL 30.403 to allow a governor to circumvent the 28-day time limit by simply issuing new orders that address the same emergency conditions of the original order.

Every governor we've had since the EMA was enacted understands the 28-day limitation only gets extended through the legislature. As Speaker Chatfied wrote on April 4, 2020,

> Since 1977, there have been thirty-five [35] states of emergencies and fifty-two [52] states of disaster declared by the governor's office. In total, four [4] states of emergencies and six [6] states of disasters have been extended by the Legislature. None of these emergencies or disasters have been extended unilaterally by the governor, reflecting the twenty-eight day limit written into state law.[25]

Additionally, the history of EOs paints a consistent picture.[26] Of the 605 EOs issued by Michigan Governors between 1993 and 2019, 25 of them were based on the governor's

[24] *Winkler v Marist Fathers of Detroit, Inc.,* 321 Mich App 436, 446 (2017), citing *Twentieth Century Fox Home Entertainment, Inc. v Dep't of Treasury*, 270 Mich App 539, 544 (2006).
[25] Speaker of the House Lee Chatfield Letter to House Minority Leader, April 4, 2020, available at https://wwjnewsradio.radio.com/articles/press-release/read-letters-from-christine-greig-lee-chatfield, last accessed June 2, 2020.
[26] All EOs from 1993 to the present are available at http://www.legislature.mi.gov/(S(tt3o2vnbihwqvp1xgflvtuuu))/mileg.aspx?page=ExecutiveOrders, last accessed June 1, 2020.

emergency powers.[27] In each of these 25 EOs, the EMA is listed as the sole statutory authority for the exercise of the emergency powers. In fact, only one of these orders even references the EPGA. Moreover, in all but one of them, the 28-day limit is expressly recognized (while the remaining one allows the emergency to last only so long as is needed to repair I-75). Of these EOs referencing the EMA as the only source of emergency power authority *and* expressly recognizing the 28-day limit, seven were written by Governor Whitmer herself. Yet, she now claims the EPGA provides "separate authority" for emergency powers, and that the 28-day limit does not apply to her emergency declarations. Thus, the historical context shows how the Governor's position does not comply with the reasonable requirement of statutory construction.

C. MCL 30.417's effect on MCL 10.31

Some argument has been made that the 28-day timeframe of MCL 30.403 does not apply to emergency powers exercised by a governor under MCL 10.31 due to the language in MCL 30.417(d). MCL 30.417 (part of the EMA) states that the EMA "shall not be construed to . . . limit, modify, or abridge the authority of the governor **to proclaim** a state of emergency pursuant to . . . 10.31" or exercise powers under other relevant laws. First, MCL 30.403 and MCL 10.31 clearly refer to the exact same kind of emergency conditions requiring extraordinary government action. Second, MCL 30.403 does not "limit, modify, or abridge the authority of the governor **to proclaim** a state of emergency." In fact, MCL 30.403 bolsters the governor's authority **to proclaim** a state of emergency by giving such proclamations full "force and effect of law," while MCL 30.405 adds "additional powers of governor," and MCL 30.402 (e) and (h) add additional circumstances which may qualify for exercise of these emergency powers.

[27] List of All EOs from 1993-2019, App. 002c. EOs based on EPGA or EMA from 1993-2019, App. 003c.

However, it has been argued that MCL 30.417 (d) "has rendered the entire EMA basically an empty shell because it defers entirely to the coverage of the old law [MCL 10.31]." We must remember, though, that "[s]tatutory language should be construed reasonably, keeping in mind the purpose of the act."[28] It is not reasonable to read MCL 30.417 (d) as rendering the entirety of the EMA "an empty shell deferring completely to the coverage of MCL 10.31." Further, no reasonable court would read MCL 30.417 to mean that the legislature enacted the EMA with the sole purpose of deferring to the EPGA.

Also, it is a long-accepted principle of statutory construction that "[s]tatutes which may appear to conflict are to be read together and reconciled, if possible."[29] Additionally, "[i]f statutes lend themselves to a construction that avoids conflict, that construction should control."[30] Moreover, a "statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme."[31] Thus, you cannot read MCL 30.417 (d) to say that all the other provisions of MCL 30.401 - 30.421 are "basically an empty shell [that] defers entirely to [MCL 10.31]." In other words, despite these absurd claims about MCL 30.417 (d), provisions of MCL 30.401 - 30.421 are still enforceable. After all, it is not reasonable to interpret the new law as saying it has zero force and effect and that it is simply reaffirming every provision of the old law.

III. The constitutional separation of powers unequivocally prohibits the governor from exercising legislative powers outside of mere departmental reorganization

[28] *Winkler v Marist Fathers of Detroit, Inc.,* 321 Mich App 436, 446 (2017), citing *Twentieth Century Fox Home Entertainment, Inc. v Dep't of Treasury*, 270 Mich App 539, 544 (2006).
[29] *People v Bewersdorf*, 438 Mich 55, 68 (1991).
[30] *Walters v Leech*, 279 Mich App 707 (2008), citing *House Speaker v State Admin Bd,* 441 Mich 547, 568-569 (1993).
[31] *Winkler v Marist Fathers of Detroit, Inc.,* 321 Mich App 436, 446 (2017), citing *Walters v Leech*, 279 Mich App 707, 710 (2008), and *Wayne Co. v Auditor General,* 250 Mich 227, 233 (1930).

Separation of powers has also been an issue identified with the Governor's use of her recent EOs. Separation of powers is more than just a mere term of art. In fact, our country was born out of an executive usurpation of legislative authority, namely the tyrannical "suspending [of] our own Legislatures, and declaring themselves invested with power to legislate for us."[32] Indeed, a constitution's "most basic functions are to create the form and structure of government, define and limit the powers of government, and provide for the protection of rights and liberties."[33] A constitution "contains . . . every thing that relates to the complete organization of a civil government, and the principals on which it shall act, and by which it shall be bound."[34] With these interests in mind (organization and limits of government and the protection of rights and liberties), our state constitution was drafted with article III § 2, which not only distinctly separates the powers of government into three separate branches, but also specifically prohibits "any person exercising powers of one branch [from exercising] powers properly belonging to another branch except as expressly provided in this constitution."

Therefore, although the documents filed so far in this case have spent a lot of time analyzing the various kinds of delegation of power, we must remember that we are bound by the text of the Constitution itself. Thus, we need not look beyond the state constitution itself to see that the only authority of the governor to issue EOs exists in article V § 2, which involves the mere organization of the executive branch and the assignment of functions within the branch.[35] This is because "[w]hen the legislative and executive powers are united

[32] Declaration of Independence (1776).
[33] *Citizens* at 80.
[34] *Citizens* at n.90.
[35] The arguments offered by the parties and the lower court seek to apply analysis regarding a *constitutional* delegation of legislative powers to the governor to a *statutory* delegation of legislative powers to the governor. I.e., the "very limited and specific legislative power" discussion came out of analyzing the power delegated to the governor in Const 1963, art V, § 2 (which is constitutional because it is actually in the text of the constitution); then inappropriately applying that analysis to a statutory delegation of legislative authority (which is not written in

in the same person or body . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."[36]

Our state constitution further defines these distinct and separate powers in article IV § 1, article V § 1, and article VI § 1. Specifically, the "legislative power is the power to determine the interests of the public, to formulate legislative policy, and to create, alter, and repeal laws. The governor has no power to make laws. The executive branch may only apply the [public] policy"[37] determined by the legislature, and "cannot exercise legislative power by creating law or changing the laws enacted by the Legislature."[38] Thus, a governor may not use EOs to create law or change laws enacted by the legislature, which is precisely the thing 124 out of the 130 2020 EOs aim to do.[39] [40]

IV. Standing is appropriate for plaintiffs, intervenors and members of the public since there are allegations of grave constitutional violations by the Governor

The Governor challenges the Legislature's standing to bring suit against the Governor for her illegal and unconstitutional use of EOs during COVID19. The analysis on both sides, though, focuses solely on the Legislature's standing to sue as compared to the general public. However, when a Governor's series of actions violate numerous statutory and

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the text of the constitution, and therefore does not have the same basis for constitutionality). See, *Soap and Detergent Assoc. v Natural Resources Comm'n,* 415 Mich 728, 752-753 (1982).

[36] *Soap and Detergent* at 751.

[37] *Taxpayers of Michigan Against Casinos v State of Michigan,* 471 Mich 306, 355 (2004).

[38] *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 98 (2008).

[39] By placing new rules and regulations upon individuals and businesses, and punishing them with various law enforcement tools (jail time, criminal fines, civil fines, and professional licensure revocation), the Governor is attempting to create laws. By setting aside provisions of a plethora of public acts, like FOIA and OMA, the Governor is attempting to change or rescind laws enacted by the legislature.

[40] Although *Amicus* Primus argues that "everyone agrees that the pandemic orders issued prior to April 30 were valid," (p. 1-2) that is not only untrue, but also irrelevant. As Justices Markman, Zahra and Viviano explain (see pp. 18-19 of this brief), the unconstitutionality of the EOs has nothing to do with the date on which they were written, but rather with the manner in which they infringe upon the constitutional rights of Michiganders, and how they violate various constitutional provisions discussed in footnote 41. In other words, *every* EO that violates the footnote 41 restrictions or the rights of Michiganders was unconstitutional from the day each was written.

constitutional provisions,[41] notions of justice require that any of the state's nearly 10 million people, or any groups thereof, should be able to petition their government for a redress of grievances.[42] Indeed, Justice Bernstein pointed out "that this case presents extremely significant legal issues that affect the lives of everyone living in Michigan today," and although "'shelter in place' is no longer mandated in the state of Michigan . . ., not all restrictions have been lessened (and acknowledging the possibility of future restrictions being reimplemented) . . . ."[43] He continues by adding that "[t]he significance of this case is undeniable."[44]

Justice Markman also identified that the Governor's executive orders infringing upon our rights are just as dangerous as COVID19 itself: "both the lives and the liberties of [Michigan's] people are being lost each day."[45] Justice Markman also urges us to recognize that the issues raised in this case

> pertain to an issue of the greatest practical importance to the more than 10 million people in this state: the validity of executive orders declaring a state of emergency and thereby enabling a single public official to restrict and regulate travel, assembly, business operations, educational opportunities, freedoms and civil liberties, and other ordinary aspects of the daily lives of these people, including matters of crime and punishment and public safety. To put it even more specifically, the present [issues] place into question the entirety of the processes and procedures by which the executive orders that have defined nearly every minute, and nearly every aspect, of our lives of 'we the people' of Michigan for more than the past two months were fashioned into law.[46]

Justice Zahra explains that

> This case presents palpable constitutional questions that are of compelling interest to every resident, business, and employer in Michigan. The instant

[41] Our state constitution expressly prohibits the governor from creating laws (art III § 2), let alone in EOs that cover more than one subject (art I § 24), or that modify parts of laws without including the *entire* text of the law as amended (art IV § 25). Our state constitution requires the governor to wait 90 days before enforcing new laws or legally enforceable EOs (art IV § 27). Despite article IV § 39 of our state constitution requiring our state and local governmental operations to continue in "periods of emergency," the Governor has shut down all "non-essential" government services.

[42] See, US Const, Am 1 and Const 1963, art I, § 3.

[43] *House v Governor*, MSC Docket No. 161377, June 4, 2020 Order, concurring opinion, 1.

[44] *Id.*

[45] *House v Governor*, MSC Docket No. 161377, June 4, 2020 Order, dissenting opinion, 7.

[46] *Id.*

> matter is arguably the most significant constitutional question presented to this Court in the last 50 years. . . . [T]his Court [should] put to rest with finality whether and to what extent the legislation on which the Governor relied to issue the serial emergency COVID-19 orders remains a valid course of legal authority for those orders. . . . [E]ach resident's personal liberty is at stake . . . [and] [l]ife for people throughout Michigan was turned on its head when [Governor Whitmer began issuing executive orders that curtailed our liberties]. . . . No issue is of greater public interest or importance than the resolution of whether the Governor was within her constitutional authority to deprive the 10-million-plus residents and the thousands of business owners of Michigan of their personal freedom and economic liberty.[47]

Justice Viviano also recognizes that this case "impacts the constitutional liberties of every one of Michigan's nearly 10 million citizens.[48] Justice Viviano also reminds us that

> This case involves some of the most important legal principles that can arise in a free society. . . . These issues, and how we decide them, will have a direct impact on the constitutional liberties of every person who lives or owns property in, or simply visits, our state while the restrictions are in place. On a fundamental and practical level, they impact how our friends and neighbors live their lives on a daily basis, where they can go, with whom, how and when they can practice their religion, whether they can go out to eat or to the hardware store or to the beach - in short, nearly every decision they make about nearly everything that they do. Our Court exists to vindicate the constitutional rights of our citizens and to be the final expositor of state law; thus, we are uniquely situated to provide a prompt and final resolution of the issues presented in this case.[49]

Let's put the standing issue into context. In 1776, we declared our independence to secure our God-given rights. We are, after all, "endowed by [our] Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."[50] And "in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity,"[51] we created our

[47] *Id.,* dissenting opinion, 8-11.
[48] *Id.,* dissenting opinion, 12.
[49] *Id.,* at 18.
[50] Declaration of Independence (1776).
[51] US Const, Preamble.

form of government through the Constitution. Indeed, we are guaranteed "a Republican Form of Government,"[52] where "the people hold sovereign power and elect representatives who exercise that power."[53]

Furthermore, "[a] constitution is made for the people and by the people. . . . For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people . . . ."[54] Not only is "the Constitution . . . the bulwark and foundation of our laws,"[55] but that very foundation "does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States."[56] Indeed, our state constitution "proceeds from the people in their original capacity, as the source of all power in government. Their will being the supreme law, and only to be found in the constitution which they ordain, must be fairly and cheerfully enforced according to its terms, and no attempt should be made to evade or defeat it."[57]

Not only does our state constitution proclaim that "[a]ll political power is inherent in the people,"[58] but such a proclamation is repeated throughout the constitution by way of article II, § 8 recalls, article IV § 20 open meetings, article V § 10 removal of officers, article V § 30 executive term limits, article IV § 54 legislative term limits, article VI § 2 supreme court justice term limits, article VI § 9 court of appeals term limits, article VI § 12 circuit court term limits, article VI § 16 probate court term limits, article VI § 25 removal of judges, and article XI § 7 impeachment of officers. Likewise, the importance of the people's ability to hold government

[52] US Const, art IV § 4.
[53] *Black's Law Dictionary* (8th ed, 2004).
[54] *Citizens Protecting Michigan's Constitution v Secretary of State,* 503 Mich 42, 61 (2018).
[55] *Id.* at n. 74.
[56] *New York v United States,* 505 US 144, 181 (1992).
[57] *Twitchell v Blodgett*, 13 Mich 127, 142 (1865).
[58] Const 1963, art I, § 1.

accountable can be readily observed in the Freedom of Information Act, Open Meetings Act, Enhanced Access to Public Records Act, and Electronic Open Access to Government Act.

Additionally, “a law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed. It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends.”[59]

V. Times of emergency neither diminish the rights of individuals nor enhance the powers of the government

The entirety of the EPGA and nearly all of the EMA deal with enhanced police powers for times of public crisis or disaster. Nowhere in any of those statutory provisions does it say that these powers may be exercised in such a manner to infringe upon Constitutional rights. But, if we're being honest, that's because it's a given - no statute is allowed to abridge or diminish the freedoms guaranteed to us in either the Michigan or US Constitutions.[60]

But the EMA goes one step further. In MCL 30.421, the legislature anticipated an even more concerning threat to the people of the State of Michigan. This provision gives the governor even greater police powers in some respects. However, even in a "heightened state of alert," of even greater police powers, the legislature made it clear that constitutional protections must still be observed. Moreover, MCL 30.421 decrees that the governor's powers "under this act [the EMA] . . . shall be consistent with the provisions of the state constitution of 1963 and the federal constitution . . . " Furthermore, MCL 30.421 prohibits prosecutors from prosecuting any violations of the EOs in any "manner that violates any

[59] *Home Building v Blaisdell,* 290 US 398, 442 (1934).

[60] There shall be no law “abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” US Const, Am 1. “We, the people of the State of Michigan, grateful to Almighty God for the blessings of freedom and earnestly desiring to secure these blessings undiminished to ourselves and our posterity," established our state Constitution of 1963. Preamble.

constitutional provision." Prosecutors are further prohibited, in the prosecution of violations of EOs, from prosecuting "conduct presumptively protected by the first amendment to the constitution of the United States." This isn't a carveout for certain individual behaviors; this is a stern reminder to prosecutors of the *restraints placed upon the government* in regulating the people, even in the most heightened state of alert our state could ever experience.

We all know what a presumption does - it switches the burden of proof. So, while asserting a defense is typically a burden of proof borne by the defendant, it actually rests on the government to prove that a person "violating" an "emergency powers" executive order is not exercising his religious beliefs, his unabridged freedom of speech, his right to peaceably assemble or his right to petition the government for a redress of grievances. Considering that the main point in all the EOs "is to keep people away from each other,"[61] it's pretty clear that a prosecutor will not be able to meet this burden of proof.

Indeed, our Founding Fathers knew times of disease, famine, hardship and the like when they drafted these provisions to protect our rights. It is also undeniable that the drafters of our state constitution had exigent circumstances in mind when they mandated state and local governments to maintain operations even in times of emergency under article IV § 39. This is because

> Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions placed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency.[62]

[61] Attorney General Nessel Letter May 4, 2020, App. 001c.
[62] *Home Building v Blaisdell,* 290 US 398, 425 (1934).

Likewise, “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States,”[63] including the right to travel, which “is so important that it is assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all.”[64] Since the “claim and exercise of a constitutional right cannot thus be converted into a crime,”[65] every single executive order issued to restrict our movement, thwart our opportunities to peacefully assemble, petition our government for a redress of grievances, or impair our contracts is defunct, along with any statute purporting to provide authority for such usurpations. After all, “[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”[66] Justice Viviano said it best on June 5, 2020:

> It is incumbent on the courts to ensure decisions are made according to the rule of law, not hysteria. . . . Courts decide legal questions that arise in the cases that come before us according to the rule of law. One hopes that this great principle - essential to any free society, including ours - will not itself become yet another casualty of COVID-19.[67]

CONCLUSION

Our very constitution was established to "establish Justice . . . and secure the Blessings of Liberty to ourselves and our Posterity . . . ."[68] Our state constitution was established "to secure [the blessings of freedom from Almighty God] *undiminished* to ourselves and our posterity . . . ."[69] Moreover, "[a]ll political power is inherent in the people."[70]

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[63] US Const, Am XIV.
[64] *Saenz v Roe,* 526 US 489, 498 (1999).
[65] *Miller v US*, 230 F.2d 486, 490 (1956).
[66] *Norton v Shelby Co.,* 118 US 425, 442 (1886).
[67] *Dept of Health and Human Services v Manke*, MSC Docket No. 161394, June 5, 2020 Order, concurring opinion, 2-3.
[68] US Const, Preamble.
[69] Const 1963, Preamble.
[70] Const 1963, art I § 1.

These are not mere words on old documents, and the conclusion is irrefutable: we, the people, received our blessings, especially that of liberty, from Almighty God. We created our state and federal governments to secure those blessings of liberty. The government is only authorized to act in a way that protects those God-given blessings. For we, the people, hold the ultimate authority and power in our government and we have the duty to stand against government actions which trample our rights and extend beyond the constitutional delegation of power.

Likewise, article II § 8 recalls, article IV § 20 open meetings, article V § 10 removal of officers, article V § 30 executive term limits, article IV § 54 legislative term limits, article VI § 2 supreme court justice term limits, article VI § 9 court of appeals term limits, article VI § 12 circuit court term limits, article VI § 16 probate court term limits, article VI § 25 removal of judges, and article XI § 7 impeachment of officers all get to one main point - constitutional restraints are *not* placed upon the people in their exercise of liberty, but *instead* upon the government in any attempt to stop us from enjoying that liberty.

Thus, amicus curiae urges this court to issue immediate injunctive relief from these unconstitutional executive orders, which have abrogated virtually every right guaranteed to us in the state and federal constitution. After all, these liberties are to be exercised by all people unabridged and undiminished, during times of emergency or not.

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Respectfully Submitted: June 24, 2020

STATE OF MICHIGAN

IN THE COURT OF APPEALS

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Plaintiffs-Appellants,

v.

GRETCHEN WHITMER, in her Official capacity as Governor for the State of Michigan,

Defendant-Appellee.

Supreme Court No. 161377
Court of Appeals No. 353655
Court of Claims No. 20-000079-MZ

MOTION OF ATTORNEY KATHERINE HENRY FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Katherine Henry, a nonparty to this action, pursuant to MCR 7.211 and MCR 7.212(H), files this motion seeking leave to file a brief amicus curiae with regard to this matter. In support, Attorney Katherine Henry states the following:

1. Katherine Henry submits this motion and proposed brief, noting the Michigan Supreme Court's preference for, and encouragement of, amicus briefs in appellate cases. See, IOP 7.305A(10) and 7.311A(3).
2. This matter is before this Court on appeal filed by Appellant (Legislature), Appellee (Governor), and Intervenor(s).
3. While Attorney Katherine Henry generally agrees with the position stated by Appellant, several key relevant legal positions have not yet been placed in front of the court, and being an officer of the court, and having sworn an oath to support the US and Michigan Constitutions, Katherine Henry has a duty to bring these legal

matters to the attention of this Court.

4. Given the unique nature of the case, the interests of the people of the State of Michigan are represented vicariously through the legislature, but where the people's interests diverge from the legislature, the voice of the people remains unheard. Attorney Katherine Henry has been communicating daily with thousands of Michiganders for the last three months, explaining the legal aspects of what is happening in our state and answering questions for Michiganders in this uncertain time; therefore, she is uniquely positioned to provide a voice for the people of the State of Michigan, and requests oral argument pursuant to MCR 7.212(H)(2).
5. Given the speed at which this case is moving through the various levels of court, Attorney Katherine Henry has not sought concurrence of the parties before the filing of this motion. However, several parties filed *Amicus Curiae* briefs at the trial court in this matter, and all were accepted by the court. None of the parties objected to the *Amicus Curiae* submissions in the trial court below, to the best of my knowledge. Attorney Katherine Henry also was the sole *Amicus Curiae* permitted to file a brief in this matter at the Michigan Supreme Court.

Therefore, Attorney Katherine Henry respectfully requests this Court to grant this motion and accept for filing the proposed brief *Amicus Curiae* being tendered with this motion.

Dated: June 24, 2020

Respectfully submitted,
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