SURVEY OF MICHIGAN CASE LAW: POWER OF THE EXECUTIVE

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I. BACKGROUND

On March 10, 2020, the same day that the Michigan Department of Health and Human Services (MDHHS) identified Michigan's first two cases of the COVID–19 virus, Governor Gretchen Whitmer issued Executive Order (EO) 2020-4,[1] declaring a state of emergency under the Michigan Constitution, the Emergency Management Act (EMA), and the Emergency Powers of the Governor Act of 1945 (EPGA).[2] Section 1 of Article 5 of the Michigan Constitution provides that "the executive power is vested in the governor,"[3] which under the EMA and EPGA, specifically includes the power to proclaim states of emergency and to issue "reasonable orders, rules, and regulations as [the governor] considers

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1. Mich. Exec. Order No. 2020-4; *see also Michigan Announces First Presumptive Positive Cases of COVID–19 Governor Whitmer Declares a State of Emergency to Maximize Efforts to Slow the Spread*, MICHIGAN.GOV (March 10, 2020), https://www.michigan.gov/coronavirus/0,9753,7-406-98158-521341--,00.html [https://web.archive.org/web/20220217220620/https://www.michigan.gov/coronavirus/0,9753,7-406-98158-521341--,00.html].

2. MICH. COMP. LAWS § 10.31 (1945), *repealed by* 2021 Mich. Pub. Acts 77.

3. MICH. CONST. art. V, § 1 (1963).

necessary to protect life and property or to bring the emergency situation within the affected area under control."[4]

In the ensuing weeks and months, Governor Whitmer issued numerous additional executive orders in an effort to curb the spread of COVID–19, which was quickly growing into a global pandemic. By executive order, the Governor, among other actions, closed elementary and secondary schools,[5] limited visitation rights at healthcare facilities,[6] closed restaurants and bars,[7] prohibited nonessential medical and dental procedures,[8] imposed a moratorium on evictions,[9] and suspended all "activities that are not necessary to sustain or protect life," including directing all Michigan residents to stay in their homes "to the maximum extent feasible."[10] On April 1, as it was becoming increasingly apparent that the COVID–19 virus was spreading rapidly throughout the state, the

4. MICH. COMP. LAWS § 10.31(1) (repealed 2021); *see also* MICH. COMP. LAWS §§ 30.403(4), 30.4056.

5. Mich. Exec. Order No. 2020-5 (Mar. 13, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521576--,00.html [https://web.archive.org/web/20220117030334/https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521576--,00.html].

6. Mich. Exec. Order No 2020-7 (Mar. 14, 2020), https://www.michigan.gov/documents/coronavirus/EO_2020-7_Emergency_order_-_care_facilities_final_signed_683851_7.pdf [https://web.archive.org/web/20210728191346/https://www.michigan.gov/documents/coronavirus/EO_2020-7_Emergency_order_-_care_facilities_final_signed_683851_7.pdf].

7. Mich. Exec. Order No. 2020-9 (Mar. 16, 2020), https://www.michigan.gov/documents/lara/EO_2020-9_683901_7.pdf [https://web.archive.org/web/20201025193614/https://www.michigan.gov/documents/lara/EO_2020-9_683901_7.pdf].

8. Mich. Exec. Order No. 2020-17 (Mar. 20, 2020), https://www.michigan.gov/whitmer/news/state-orders-and-directives/2020/03/20/executive-order-2020-17. [https://web.archive.org/web/20220217230738/https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522451--,00.html].

9. Mich. Exec. Order No. 2020-19 (Mar. 20, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522509--,00.html [https://web.archive.org/web/20211218055224/https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522509--,00.html].

10. Mich. Exec. Order No. 2020-21 (Mar. 23, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html [https://web.archive.org/web/20220209034553/https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html]. *See also* Mich. Exec. Order No. 2020-42 (Apr. 7, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-525182--,00.html [https://web.archive.org/web/20220105221212/https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-525182--,00.html] (extending stay-at-home order through April 30, 2020); Mich. Exec. Order No. 2020-59 (Apr. 24, 2020), https://www.michigan.gov/whitmer/news/state-orders-and-directives/2020/04/24/executive-order-2020-59. [https://web.archive.org/web/20211211152814/https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-526894--,00.html] (rescinding Executive Order No. 2020-42 and extending stay-at-home order through May 15, 2020).

Governor issued EO 2020-33, which declared, anew, a state of emergency and also declared, for the first time, a state of disaster.[11]

Notably, however, while both the EMA and EPGA grant the governor broad authority to declare states of emergency and disaster and to "issue executive orders, proclamations, and directives having the force and effect of law,"[12] only the EPGA grants this authority *indefinitely*.[13] Under the EMA, the Governor's declaration of a state of emergency or disaster can be effective for no more than twenty-eight days, at which point "the governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature."[14] Accordingly, under the EMA, Governor Whitmer's March 10, 2020 executive order declaring a state of emergency—and all subsequent orders, proclamations, and directives that depended on it for their validity—was set to expire on April 7, 2020.[15]

As the EMA's expiration date neared, Governor Whitmer, in a letter to Republican leaders in the Michigan House and Senate, requested legislative approval of a seventy-day extension of the state of emergency and of her authority to take emergency action to combat the ongoing pandemic.[16] Notably, the Governor asserted that she had "multiple

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11. Mich. Exec. Order No. 2020-33 (Apr. 1, 2020), https://www.michigan.gov/Whitmer/0,9309,7-387-90499_90705-524025--,00.html [https://web.archive.org/web/20220217231739/https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-524025--,00.html]. *See also* MICH. COMP. LAWS § 30.403(3) ("The governor shall, by executive order or proclamation, declare a state of disaster if he or she finds a disaster has occurred or the threat of a disaster exists.").

12. MICH. COMP. LAWS § 30.403(2); MICH. COMP. LAWS § 10.31 (repealed 2021).

13. *Compare* MICH. COMP. LAWS § 10.31(2) (repealed 2021) ("The orders, rules, and regulations [promulgated by the governor] . . . shall cease to be in effect *upon declaration by the governor that the emergency no longer exists*." (emphasis added)) *with* MICH. COMP. LAWS § 30.403(4) ("The state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, *or until the declared state of emergency has been in effect for 28 days*." (emphasis added)).

14. MICH. COMP. LAWS § 30.403(4).

15. *See id.*

16. Jonathan Oosting, *Michigan Gov. Whitmer Asks Legislature to Extend Emergency Powers 70 days*, BRIDGE MICHIGAN (Apr. 1, 2020), https://www.bridgemi.com/michigan-government/michigan-gov-whitmer-asks-legislature-extend-emergency-powers-70-days [https://web.archive.org/web/20220217232419/https://www.bridgemi.com/michigan-government/michigan-gov-whitmer-asks-legislature-extend-emergency-powers-70-days]; Gretchen Whitmer, *Extension of Emergency and Disaster Declaration in Executive Order 2020-33* (Apr. 1, 2020), https://content.govdelivery.com/attachments/MIEOG/2020/04/

independent powers" with which to continue taking emergency action, but that acting in compliance with the EMA's requirement of legislative approval "provides important protections to the people of Michigan."[17] Though unwilling to extend the Governor's emergency powers for an additional seventy days, the Michigan Legislature acted on the request and on April 7, 2020 adopted Senate Concurrent Resolution No. 24, which approved an extension of the state of emergency through April 30, 2020 "to protect the health and safety of Michigan's citizens."[18]

As the new April 30, 2020 deadline approached, Governor Whitmer once again sought legislative approval of an extension, this time for an additional twenty-eight days.[19] However, again the Governor asserted that such approval was ultimately unnecessary:

> I have multiple distinct independent authorities of constitutional and statutory power to keep people safe as the governor of Michigan . . . . The emergency powers that I have as governor do not depend on an extension from the Legislature, but the protections for our health care workers do. So it's better for everyone if we work together to get this right.[20]

While acknowledging that "any governor . . . needs to have the ability to maneuver [and] act quickly in a state of emergency," Senate leadership insisted that "there also is no question that we have a representative democracy and that after some time the legislature needs to be involved in the execution and response to those kinds of emergencies."[21] Accordingly, the Legislature declined the Governor's request and instead passed 2020 S. 858, which sought to amend the EMA to, in effect, excuse several of the Governor's existing executive orders from the twenty-eight-day expiration and to set forth specific expiration dates for each executive

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01/file_attachments/1417048/Letter,%20Gov.%20Whitmer%20to%20Speaker%20Chatfield%20and%20Leader%20Shirkey%20%284.1.20%29.pdf [https://web.archive.org/web/20210910202850/https://content.govdelivery.com/attachments/MIEOG/2020/04/01/file_attachments/1417048/Letter,%20Gov.%20Whitmer%20to%20Speaker%20Chatfield%20and%20Leader%20Shirkey%20%284.1.20%29.pdf].

17. *Id.*

18. S. Con. Res. 24, 100th Leg. (Mich. 2020).

19. Riley Beggin, *Michigan Gov. Gretchen Whitmer Wants 28-Day Extension of Emergency Powers*, BRIDGE MICH. (Apr. 27, 2020), https://www.bridgemi.com/michigan-government/michigan-gov-gretchen-whitmer-wants-28-day-extension-emergency-powers [https://web.archive.org/web/20220217232944/https://www.bridgemi.com/michigan-government/michigan-gov-gretchen-whitmer-wants-28-day-extension-emergency-powers].

20. *Id.*

21. *Id.*

order to which the exception would apply.[22] The amendment also provided that "[e]very business, place of public accommodation, and place of public services that is open to the public with face-to-face interaction" would be required to implement certain safety precautions "until May 30, 2020."[23] The bill was presented to the Governor on April 30, 2020, which she subsequently vetoed on the grounds that "the provisions of the bill run contrary to the recommendations of public health experts," "constrain my ability to protect the people of Michigan from a deadly pandemic in a timely manner," and are "ineffective," as the bill was not given immediate effect.[24]

Instead, on April 30, 2020, at 7:29 p.m., the day her prior executive orders were set to expire under the EMA and the April 7, 2020 legislative extension, Governor Whitmer issued EO 2020-66, terminating the states of emergency and disaster.[25] However, just one minute later, at 7:30 p.m., the Governor issued EO 2020-67, providing that "[a] state of emergency *remains declared* across the State of Michigan under the [EPGA]," to take immediate effect and continue through May 28, 2020.[26] At the same time, Governor Whitmer issued EO 2020-68, stating, "I *now declare* a state of emergency and a state of disaster across the State of Michigan under the [EMA]," also to take immediate effect and continue through May 28, 2020.[27]

Litigation immediately ensued resulting in numerous decisions, concurring opinions, and dissents—not least of which an opinion from the Michigan Supreme Court issued in answer to a certified question from a federal court sitting in Michigan—which, together, exhaustively set forth the numerous legal and practical issues that arose in the course of litigating

22. S. 858, 101st Leg., Reg. Sess., § 3(5) (Mich. 2020).

23. *Id.* at § 3(6).

24. S. Journal, 101st Leg., Reg. Sess. 655 (Mich. 2020).

25. MICH. COMP. LAWS § 30.403(3), (4) ("*After 28 days, the governor shall issue an executive order or proclamation declaring the state of emergency terminated*, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature." (emphasis added)); Mich. Exec. Order No. 2020-66 (Apr. 30, 2020) ("[W]hile I have sought the legislature's agreement that these declared states of emergency and disaster should be extended, the legislature—despite the clear and ongoing danger to the state—has refused to extend them beyond today.").

26. Mich. Exec. Order No. 2020-67 (Apr. 30, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-527717--,00.html [/web/20220222203319/https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-527717--,00.html] (emphasis added).

27. Mich. Exec. Order No. 2020-68 (Apr. 30, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-527716--,00.html [/web/20220222203512/https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-527716--,00.html] (emphasis added).

the power of the executive branch to effectively make law in the midst of a global pandemic.

II. HOUSE OF REPRESENTATIVES & SENATE V. GOVERNOR[28]

A. Court of Claims Decision

Governor Whitmer's first challenger was the Michigan Legislature itself. In *Michigan House of Representatives v. Whitmer*, the state's House of Representatives and Senate sued in their institutional capacities for a declaratory judgment, challenging the Governor's authority to issue the April 30, 2020 Executive Orders 2020-67 and 2020-68, which purported to extend the states of emergency and disaster (and all other orders that rested upon them) without legislative approval.[29] The Legislature also argued, in the alternative, that the EPGA violates separation of powers principles to the extent that it would authorize the Governor to exercise statewide emergency powers indefinitely.[30] Such unconstrained authority to make law, the Legislature argued, would amount to an unconstitutional delegation of legislative power to the Governor.[31]

The court of claims concluded that while the Governor did lack authority to issue EO 2020-68 under the EMA, the Legislature's "challenges to the Governor's authority to declare a state of emergency under the EPGA and to issue Executive Orders in response to a statewide emergency situation under the EPGA are meritless."[32]

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28. In addition to the central question whether the Governor had statutory and constitutional authority to take the actions described above, this line of cases also presents interesting questions of standing. However, those issues will not be addressed here as they have, at best, only a tangential relationship to the question of executive power. Suffice it to say that while some courts simply assumed without deciding that the Legislature had standing to sue the Governor for declaratory relief, no court determined that the Legislature lacked standing. *See, e.g.*, House of Representatives & Senate v. Governor, 333 Mich. App. 325, 343; 960 N.W.2d 125 (2020).

29. Mich. House of Representatives v. Whitmer, No. 20-000079-MZ, 2020 WL 3979949, at *1 (Mich. Ct. Cl. May 21, 2020).

30. *Id.* at *7.

31. *Id.*; *see also* MICH. CONST. art. 3, § 2 (1963) ("The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.").

32. *Mich. House of Representatives*, 2020 WL 3979949, at *9.

B. Statutory Interpretation of the EPGA

The court turned first to the Legislature's arguments concerning the scope of the EPGA and, specifically, whether it contemplates *statewide* declarations of emergency, or "only confers upon the Governor the authority to issue a local or regional state of emergency."[33] The Legislature pointed to specific provisions of the EPGA that they argued suggested a narrow scope. For example, MCL 10.31(1) contemplates the governor proclaiming a state of emergency upon application of "the mayor of a city [or] sheriff of a county," among others, and that once a state of emergency is declared, the governor is charged with designating the area involved."[34] The statute also repeatedly utilizes the word "within," which the Legislature argued demonstrates that the governor may only exercise emergency powers over a defined area "*within the state*," and not over the state as a whole.[35]

However, as the court recognized, the statute expressly provides that the Governor may declare a state of emergency "upon his or her own volition"—not only upon the request of a local official.[36] Indeed, "the commissioner of the Michigan state police," is included among the officials who may apply to the governor to declare a state of emergency, further undermining the argument that such an emergency must pertain solely to a *local*—and not a statewide—crisis.[37] What is more, "within" is merely "a function word" commonly used "to indicate enclosure or containment."[38] Therefore, "within" simply "refers to the jurisdictional bounds of the state"—the area over which the Governor has authority to declare a state of emergency.[39]

The Legislature next argued that when the EPGA and EMA are read together—as they must be—"it is apparent that the EPGA is not meant to address matters of statewide concern."[40] According to the Legislature, the EPGA and the EMA concern the same subject matter, viz. the authority of the Governor to declare states of emergency and to issue executive orders

33. *Id.* at *5.

34. *Id.* at *6 (citing MICH. COMP. LAWS § 10.31(1) (repealed 2021)).

35. *Id.* ("During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency *within the state* . . . ." (quoting MICH. COMP. LAWS § 10.31(1) (repealed 2021))).

36. MICH. COMP. LAWS § 10.31(1) (repealed 2021).

37. *Id.*

38. Mich. House of Representatives, 2020 WL 3979949, at *6. (quoting MERRIAM-WEBSTER'S ONLINE DICTIONARY).

39. *Id.*

40. *Id.*

in response to the emergency.[41] And it is a basic principle of statutory construction that such provisions "should be construed harmoniously to avoid conflict."[42] But the EMA imposes an express, temporal limitation on the governor's authority to declare a state of emergency, whereas the EPGA has no such limitation.[43] Therefore, the Legislature argued, it is only by limiting the scope of the EPGA to *local* emergencies that the court can avoid bringing the two statutes into direct conflict.[44]

The court found this argument equally unpersuasive, reasoning that although both statutes do indeed apply to statewide emergencies, they could nevertheless be harmonized "by recognizing that while both statutes permit the Governor to declare an emergency, the EMA equips the Governor with more sophisticated tools and options at her disposal."[45] What distinguishes the two statutes, then, is that under the EMA "[t]he *use of these enhanced features* . . . is subject to the 28-day time limit . . . whereas an *emergency declaration* under the less sophisticated EPGA has no end date."[46] Moreover, the court stressed, the EMA expressly *disclaims* any conflict between the two statutes, providing in the section titled "Construction of [A]ct":

> This [A]ct shall not be construed to . . . [l]imit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to [the EPGA], or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of this state independent of, or in conjunction with, this [A]ct.[47]

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41. *Id.*

42. *Id.* (quoting Kazor v. Dep't of Licensing & Regul. Affs., 327 Mich. App. 420, 427; 934 N.W.2d 54 (2019)).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* (emphasis added). The court also considered, but summarily dismissed, the Legislature's argument that the legislative history of the EPGA further demonstrates that it was intended to apply solely to local emergencies. *Id.* at *7 (holding that "the legislative history of an [A]ct and the historical context of a statute . . . are generally considered to have little persuasive value," and, in any event, "the EPGA presents no ambiguity requiring explanation through extrinsic historical commentary"). For an in-depth discussion of the legislative history surrounding passage of the EPGA in 1945, *see* Justice Viviano's dissenting opinion in *In re Certified Questions From United States Dist. Ct., W. Dist. of Michigan*, 506 Mich. 332, 387–408; 958 N.W.2d 1 (2020), discussed *infra* at Part III(C).

47. *Michigan House of Representatives*, 2020 WL 3979949, at *6; *see also* MICH. COMP. LAWS § 30.417(d).

Therefore, "the EMA explicitly recognizes the EPGA and it recognizes that the Governor possesses similar, but different, authority under the EPGA than she does under the EMA."[48]

C. Constitutionality of the EPGA

Having determined that the EPGA grants the Governor the authority to proclaim states of emergency over the entire state, the court next considered whether the Legislature's conferral of such broad authority violates separation of powers principles and amounts to an unconstitutional delegation of legislative power to the executive branch.[49] The Michigan Constitution divides the "powers of government" among three co-equal branches: the legislative, executive, and judicial, and expressly provides that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch . . . ."[50] Nevertheless, the constitution does not demand *total* separation between the branches. Indeed, as the court explained, the constitution's prohibition against one branch delegating its "powers of government" to another branch "does not prevent the Legislature 'from obtaining the assistance of the coordinate branches.'"[51]

Of course, any "assistance" the Legislature obtains from the executive or judicial branches in carrying out its law-making function must not amount to a wholesale delegation of legislative authority. Thus, the Legislature must "channel the agency's or individual's exercise of the delegated power," by fashioning "reasonably precise" standards according to which the agency or individual must act.[52] When considering constitutional challenges to the delegation of legislative authority, therefore, Michigan courts must observe three "guiding principles": (1) the challenged statute must be read as a whole, (2) the standards according to which the agency or individual is to act must be "as reasonably precise as the subject matter requires or permits," and (3) "if possible the statute must be construed in such a way as to render it valid, not invalid, as conferring administrative, not legislative power and as vesting discretionary, not arbitrary, authority."[53]

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48. *Michigan House of Representatives*, 2020 WL 3979949, at *6.

49. *Id.* at *7.

50. *Id.* (quoting MICH. CONST. art. 3, § 2 (1963)).

51. *Id.* (quoting Taylor v. Smithkline Beecham Corp., 468 Mich. 1, 8, 658 N.W.2d 127, 131 (2003)).

52. *Id.* (quoting State Conservation Dep't v. Seaman, 396 Mich. 299, 309, 240 N.W.2d 206, 210 (1976)) (internal quotations omitted).

53. *Id.*

The Legislature argued that what minimal standards the EPGA does impose on the governor's exercise of emergency powers are far too ambiguous, and empower the governor to exercise far too much discretion, to satisfy these "guiding principles."[54] Specifically, the EPGA provides that once the governor has declared a state of emergency, he or she "may promulgate *reasonable* orders, rules, and regulations as he or she considers *necessary* to protect life and property or to bring the emergency situation within the affected area under control."[55] Thus, the Legislature argued, the governor's authority to declare an emergency and to issue executive orders under the EPGA is constrained by nothing more than the abstract and ultimately meaningless limitation that such actions be "reasonable" and considered "necessary" by the governor.[56]

The court disagreed, holding that "when viewing the EPGA in its entirety . . . the Act contains sufficient standards" and therefore does not offend separation of powers principles.[57] First, in addition to limiting the governor's powers to what is "reasonable" and "necessary," the EPGA establishes "when an emergency declaration can be made in the first instance."[58] The governor is only permitted to declare an emergency and exercise emergency powers "[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 . . . ."[59] Second, the court disagreed that the terms "reasonable" and "necessary" were so empty as to provide no meaningful limitation.[60] Indeed, "[r]ather than being mere abstract concepts that fail to provide a meaningful standard, the terms 'reasonable' and 'necessary' have historically proven to provide standards that are more than amenable to judicial review."[61] And, finally, the EPGA

54. *Id.* at *8.
55. MICH. COMP. LAWS § 10.31(1) (repealed 2021) (emphasis added).
56. *Mich. House of Representatives*, 2020 WL 3979949, at *8.
57. *Id.*
58. *Id.*
59. *Id.* (quoting MICH. COMP. LAWS § 10.31(1) (repealed 2021)).
60. *Id.*
61. *Id.* (citing MICH. COMP. LAWS § 500.3107(1)(a) ("describing, in the context of personal injury protection insurance, 'allowable expenses' that consist of 'reasonable' charges incurred for 'reasonably necessary products, services and accommodations[.]'")); *Klammer v Dep't of Transp.*, 141 Mich. App. 253, 367 N.W.2d 78 (1985) (concluding that a delegation of authority which permitted an administrative body to continue to employ an individual for such a period of time as was necessary provided a sufficient standard, under the circumstances); *Blank v Dep't of Corr.*, 462 Mich. 103, 611 N.W.2d 530 (2000) (finding a constitutionally permissible delegation of authority, in part, based on the fact that the enabling legislation constrained rulemaking authority to only those matters that were necessary for the proper administration of this act).

sets forth numerous examples of affirmative acts that the governor *may* take as well as acts that the governor expressly *may not* take.[62] Therefore, the court concluded, "the EPGA contains some restrictions on the Governor's authority and it provides standards for the exercise of authority under the Act."[63]

D. The EMA

Although the court found that Governor Whitmer's executive orders were valid under the EPGA, it concluded that her apparent attempt to circumvent the EMA's requirement that she obtain legislative approval in order to continue a state of emergency beyond the twenty-eighth day was "unwarranted."[64] The court began by noting that the EMA confers "sweeping" and "awesome" powers upon the Governor "to issue executive orders and directives that have the force and effect of law" in order that he or she may effectively "cope with 'dangers to this state or the people of this state presented by a disaster or emergency.'"[65] However, as the court recognized, under the EMA, this enormous power may only be exercised in "extraordinary circumstances *and for a finite period of time*."[66] Indeed, the EMA is "replete" with limitations on how long the governor may act without legislative authorization.[67] The EMA plainly provides that after a "state of disaster" or a "state of emergency" has been in effect for twenty-eight days, "the governor shall issue an executive order or proclamation declaring the state of disaster [or emergency] terminated, unless a request by the governor for an extension . . . is approved by resolution of both houses of the legislature."[68] But, as the court noted, the Governor's April

62. *Id.* (citing MICH. COMP. LAWS § 10.31(1) ("providing a non-exhaustive, affirmative list of subjects on which an order may be issued); MICH. COMP. LAWS § 10.31(3) ("containing an express prohibition on orders affecting lawfully possessed firearms")).

63. *Id.*

64. *Id.* at *9.

65. *Id.* (quoting MICH. COMP. LAWS § 30.403(2)).

These powers include the authority to issue executive orders and directives that have the force and effect of law . . . '[s]uspend a regulatory statute, order, or rule prescribing the procedures for conduct of state business, when strict compliance with the statute, order, or rule would prevent, hinder, or delay necessary action in coping with the disaster or emergency'. . . issue orders regarding the utilization of resources . . . transfer functions of state government . . . seize private property—with the payment of 'appropriate compensation'—evacuate certain areas; control ingress and egress; and take 'all other actions which are necessary and appropriate under the circumstances.

Id. (citing MICH. COMP. LAWS § 30.405(1)(a)–(j)).

66. *Id.*

67. *Id.*

68. *Id.* at *9–10 (quoting MICH. COMP. LAWS § 30.403(3), (4) (2002)) (emphasis omitted).

30, 2020 executive order purports to terminate the previously issued states of emergency and disaster *not* because the emergency had passed—indeed, EO 2020-66 expressly states that "the disaster and emergency conditions . . . still very much exist"—but because "[t]wenty-eight days . . . have elapsed" since EO 2020-33 was issued, which had expanded and re-declared the state of emergency first declared on March 10, 2020.[69]

Nevertheless, the Governor argued that her subsequent executive orders purporting to re-declare states of emergency and disaster under the EMA were a lawful exercise of emergency power—despite the lack of legislative authorization—because the Legislature *failed to act* when it knew that the COVID–19 pandemic was still raging.[70] According to the Governor, although the House and Senate passed a bill purporting to embody many of the emergency measures contained in her prior executive orders,[71] the Legislature failed to give that bill immediate effect.[72] Therefore, she had "a duty to act to address the void."[73] What is more, the Governor argued, the EMA actually *compelled* her to act under the circumstances,[74] as it expressly mandates that if the governor finds that a disaster or emergency exists, "[t]he governor *shall* . . . declare a state of disaster [or emergency] . . . ."[75] Therefore, according to the Governor, "when the 28-day emergency and disaster declarations ended, but the disaster and emergency conditions remained, the Governor was compelled, irrespective of legislative approval, to re-declare states of emergency and disaster."[76]

Here, the court found that the Governor was failing to read the statute in its entirety. Indeed, if the Governor's interpretation prevailed, the provision requiring legislative approval after twenty-eight days would be rendered effectively meaningless.[77] As the court reasoned, while the Governor focused on the mandate that she "shall" declare states of emergency and disaster, she ignored "the other crucial 'shall' in the statute," viz. that after the twenty-eight days expire, "the governor '*shall'*

69. *See id.* at *10; *see also* Exec. Order No. 2020-66 at 4. April 30, 2020 is also the date that the Governor's declaration of a state of emergency and disaster was set to expire pursuant to Senate Concurrent Resolution 24. However, Exec. Order 2020-66 makes no mention of the Legislature's deadline. *See* Mich. S. Con. Res. 24 at ¶ 18.

70. *Mich. House of Representatives*, 2020 WL 3979949, at *10.

71. *See* S. B. 858, 100th Leg., Reg. Sess. (Mich. 2020).

72. *See Mich. House of Representatives*, 2020 WL 3979949, at *10.

73. *Id.*

74. *See id.*

75. MICH. COMP. LAWS §§ 30.403(3)–(4) (2002) (emphasis added).

76. *Mich. House of Representatives*, 2020 WL 3979949, at *10.

77. *See id.* at *11.

terminate the state of emergency or disaster *unless* the Legislature grants a request to extend it."[78] Therefore, under the EMA, the Governor must either obtain legislative authorization to extend the state of emergency or else terminate it. "There is no third option for the Governor to continue the state of emergency and/or disaster on her own, absent legislative approval. Nor does the statute permit the Governor to simply extend the same state of disaster and/or emergency that was otherwise due to expire."[79] The court acknowledged that there may be merit to the Governor's position "as a matter of policy," but held that such considerations could not overcome "the plain statutory language" requiring legislative approval, which "should not so easily be cast aside."[80]

Nevertheless, the court denied the Legislature's motion for immediate declaratory judgment and upheld the Governor's executive orders, concluding that "[w]hile the Governor's action of re-declaring the same emergency violated the provisions of the EMA, plaintiffs' challenges to the EPGA and the Governor's authority to issue Executive Orders thereunder are meritless."[81]

III. COURT OF APPEALS DECISION[82]

The Michigan Court of Appeals affirmed, holding that the EPGA comports with separation of powers principals and—notwithstanding the

78. *Id.* (citing Smitter v. Thornapple Twp., 494 Mich. 121, 136, 833 N.W.2d 875, 884 (2013) (explaining that the term "shall" indicates a mandatory directive)).

79. *Id.*

80. *Id.*

81. *Id.* at *12.

82. Although the Michigan Court of Appeals was first to issue a substantive appellate decision on the merits of Governor Whitmer's executive orders, it is perhaps worth addressing the Legislature's bypass application to the Michigan Supreme Court, which preceded it, and which involved some controversy. The Legislature appealed the court of claims decision denying their declaratory judgment action, and although it filed a notice of appeal in the Michigan Court of Appeals, it also sought immediate review by the Michigan Supreme Court. *See* House of Representatives v. Governor, 943 N.W.2d 365 (2020) (mem.). This request—a so-called "bypass application"—was summarily denied by the supreme court on the ground that "we are not persuaded that the questions presented should be reviewed by this [c]ourt before consideration by the [c]ourt of [a]ppeals." *Id.* at 365. However, the court's terse, three-sentence disposition of the bypass application is accompanied by no less than two concurrences and three separate dissenting opinions. *See id.* at 365–79.

According to Michigan Court Rules, "to grant a bypass application, '[t]he application must show' either that 'delay in final adjudication is likely to cause substantial harm' or that 'the appeal is from a ruling that . . . any . . . action of the . . . executive branch[] of state government is invalid[.]" *Id.* at 366 (Clement, J., concurring) (quoting Mich. Ct.

EMA's provisions seeming to require legislative approval—grants the Governor "the authority to declare a statewide emergency and to promulgate reasonable orders, rules, and regulations during the pendency of the statewide emergency as deemed necessary by the [G]overnor, and

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R. 7.305(B)(4) (1985)). The Legislature argued that "the 'substantial harm' prong" was satisfied here, because "'Michiganders . . . are living under a cloud of ambiguity' given the debate over whether the Governor's executive orders responding to the COVID–19 pandemic are actually legal." *Id.* Further, according to the Legislature, the "invalidity of executive action" prong is also satisfied because their appeal "involves a ruling that" declared EO 2020-68 invalid under the EMA. *Id.* at 366. However, as Justice Clement noted in her concurring opinion, while Michiganders could arguably be "substantially harmed" by delay, this is a suit brought on behalf of *the Legislature*—"not a class action" brought in the name of *Michiganders*—and "[t]he Legislature shows no substantial harm *to the Legislature* caused by going through the ordinary appellate process." *Id.* at 366 (emphasis in original). And as for the fact that the court of claims held EO 2020-68 invalid under the EMA, "the Legislature does not appeal *that* ruling—rather, it appeals the ruling that Executive Order No. 2020-67 and its successors *are* valid." *Id.* at 366 (emphasis in original).

Moreover, both Justices Bernstein and Clement argued that the undeniable significance of the issues presented, along with the relative dearth of prior precedent, weighed in favor of giving "full appellate consideration" to the underlying merits. *Id.* at 365 (Bernstein, J., concurring) ("[t]he significance of this case is undeniable. And with many of the restrictions on daily life having now been lifted, our eventual consideration of these issues must receive full appellate consideration before our [c]ourt can most effectively render a decision on the merits of this case."); *see also id.* at 368 (Clement, J., concurring) ("[t]he statutes at issue have seen very little litigation arise under them, meaning there is little on-point authority. Moreover, the theory by which the Legislature asserts standing to bring this suit in the first place is entirely novel in Michigan. Further appellate review and development of the arguments will only assist this [c]ourt in reaching the best possible answers.").

Although Justice Viviano does substantively address the requirements of Michigan Court Rule 7.305(B)(4), concluding that they are easily satisfied, the three dissenters, Justices Markman, Zahra, and Viviano, direct the great majority of their respective arguments to emphasizing the gravity of the constitutional issues involved, which, in their view, made them all the more ripe for immediate consideration by the court. *See, e.g.*, *id.* at 369–70 (Markman, J., dissenting) (stating that he "would grant the applications because they pertain to an issue of the greatest practical importance to the more than 10 million people of this state . . ."; that the applications "implicate a 'case or controversy' of the greatest historical consequence between the two representative and accountable branches of our state government"; and that "this case cries out for the most expedited and final review of the highest court of this state") *Also see id.* at 373 (Zahra, J., dissenting) ("[n]o 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."); *id.* at 374 (Viviano, J., dissenting) ("[t]he [c]ourt today turns down an extraordinary request by the leaders of our coequal branches of government to immediately hear and decide a case that impacts the constitutional liberties of every one of Michigan's nearly 10 million citizens.").

which the [G]overnor can amend, modify, or rescind."[83] Additionally, once declared, a state of emergency "only ends upon the [G]overnor's declaration that the emergency no longer exists."[84]

A. Executive Power Under the EPGA

Like the court of claims, the court of appeals concluded that the plain language of the EPGA could not bear the Legislature's interpretation that it limited the Governor's authority to declaring solely local—and not statewide—emergencies.[85] Further, as the court explained, "the Legislature specifically declared that its intent was 'to invest the governor with sufficiently *broad power of action* in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster.'"[86]

Even so, the Legislature argued, the EPGA and the EMA concern the same subject matter and, therefore, must be harmonized.[87] To support the argument that the EMA (and its requirement of legislative approval) controls—and invalidates—the Governor's unilateral declarations of statewide emergencies, the Legislature relied on two doctrines of statutory construction: (1) that the more specific provision controls over the more general,[88] and (2) that "a later-enacted specific statute operates as an exception or a qualification to a more general prior statute covering the same subject matter."[89] The court agreed that the EMA is "much more comprehensive, specific, and detailed" than the EPGA, and that the EPGA is the older, more general legislation.[90] However, it declined the Legislature's invitation to apply these "well established" doctrines of statutory construction, since to do so "would effectively be limiting, modifying, and abridging the EPGA"—a result that is expressly prohibited

83. House of Representatives v. Governor, 333 Mich. App. 325, 349, 960 N.W.2d 125, 139 (2020).

84. *Id.*

85. *See id.* ("There is nothing in the plain and unambiguous language of this provision that limits or restricts the use of orders, rules, and regulations to solely confront local emergencies; the language is broad enough to include statewide emergencies.").

86. *Id.* at 349–50, 960 N.W.2d at 139 (emphasis in original) (quoting MICH. COMP. LAWS § 10.32 (1945)). MICH. COMP. LAWS § 10.32 (1945) has since been repealed by 2021 Mich. Legis. Serv. P.A. 77 (Initiation of Legislation).

87. *See id.* at 350, 960 N.W.2d at 140.

88. *See id.* at 351, 960 N.W.2d at 140 (citing Donkers v. Kovach, 277 Mich. App. 366, 371, 745 N.W.2d 154, 157 (2007)).

89. *Id.* (quoting *In re* Midland Publishing Co., 420 Mich. 148, 163, 362 N.W.2d 580, 588 (1984)).

90. *Id.*

by the EMA itself.[91] As discussed previously, section 17 of the EMA expressly provides that:

> [t]his act shall not be construed to . . . [l]imit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to [the EPGA], or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of this state independent of, or in conjunction with, this [A]ct.[92]

Therefore, the court held, the EMA itself "does not permit us to use language in the EMA to diminish the reach and scope of the EPGA," and the court "cannot employ statutory-construction principles or doctrines used to discern legislative intent to produce an interpretation that conflicts with an *explicit declaration* of the Legislature's intent."[93] As to why, as a practical matter, the Legislature would limit the duration of the Governor's authority to take emergency actions without legislative approval under the EMA if the Governor "can take the very same measures under . . . the EPGA,"[94] which has no such limitations, the court provided little explanation:

> Perhaps the Legislature desired an executive-legislative partnership in confronting a public emergency but also wished to avoid a political impasse and inaction in the face of an emergency should the partnership fail. Whatever the reason, we now simply read these statutes as required and accept the Legislature's explicitly articulated decision to retain the EPGA as a source of gubernatorial power during an emergency notwithstanding its subsequent enactment of the EMA.[95]

B. Constitutionality of the EPGA

Having concluded that the Governor may lawfully take emergency action under the EPGA without legislative approval, the question whether the Governor acted within the scope of her authority under the EMA was rendered moot.[96] Therefore, the only remaining question was whether in

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91. *See id.* at 351–52, 960 N.W.2d at 140 (citing MICH. COMP. LAWS § 30.417(d) (1990)).
92. *Id.* (quoting MICH. COMP. LAWS § 30.417(d)).
93. *Id.*, 960 N.W.2d at 140–41.
94. *Id.* at 354, 960 N.W.2d at 142.
95. *Id.* at 355, 960 N.W.2d at 142.
96. *See id.* at 362, 960 N.W.2d at 146.

granting such broad authority, the EPGA ran afoul of the separation of powers established by the Michigan Constitution.[97]

Like the court of claims before it, the court of appeals emphasized that "[w]hile the [c]onstitution provides for three separate branches of government, . . . the separate powers were not intended to operate with absolute independence."[98] Instead, the "true meaning" of the non-delegation doctrine is that "the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free [c]onstitution."[99] Therefore, although "for many years" Michigan courts had decided unconstitutional delegation cases according to whether the power delegated was fundamentally "legislative" versus "administrative" in nature, that analysis has since been supplanted by the "standards" test, i.e., whether in delegating to the executive branch, the Legislature had established "sufficient standards and safeguards" that "directed and checked the exercise of delegated power[.]"[100]

The court concluded that the EPGA did, in fact, satisfy the "standards" test.[101] Like the court of claims below, it emphasized the EPGA's limitations on when a governor may declare a stake of emergency (during a "great public crisis" that imperils public safety, etc.) as well as the standard that any "orders, rules, and regulations" must meet ("[r]easonableness and necessity")—standards that the court concluded "constitute appropriate limits . . . that prohibit and can prevent the exercise of uncontrolled and arbitrary power, yet are sufficiently broad to permit a governor to carry out the legislative policy of protecting life and property during an emergency and controlling a great public crisis."[102] The court also noted the numerous examples of permissible orders set forth in the EPGA, as well as the prohibition against any order that would purport to "authorize the seizure, taking, or confiscation of lawfully possessed firearms, ammunition, or other weapons."[103] Finally, the court noted that

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97. *See id.* at 355–62, 960 N.W.2d at 142.

98. *Id.* at 357, 960 N.W.2d at 143 (quoting Makowski v. Governor, 495 Mich. 465, 482, 852 N.W.2d 61, 71 (2014)).

99. *Id.* at 357–58, 960 N.W.2d at 143 (quoting *Makowski*, 495 Mich. at 482–83, 852 N.W.2d at71).

100. *Id.* at 358, 960 N.W.2d at 144 (quoting Blue Cross & Blue Shield v. Governor, 422 Mich. 1, 51–52, 367 N.W.2d 1, 27 (1985)).

101. *Id.* at 359, 960 N.W.2d at 144.

102. *Id.* at 359–61, 960 N.W.2d at 144–45.

103. *Id.* at 361, 960 N.W.2d at 145 (quoting MICH. COMP. LAWS § 10.31(1), (3) (2006) (repealed 2021)).

the governor's authority to act under the EPGA ends "when it is determined 'that the emergency no longer exists.'"[104]

Accordingly, having exercised "extreme caution" and after "indulging every reasonable presumption in favor of the constitutionality of the EPGA," the court held that the EPGA did not unlawfully delegate excessive power to the Governor, and was therefore constitutional.[105]

C. In re Certified Questions

In the end, these issues were resolved by the Michigan Supreme Court in response to two certified questions from the United States District Court, Western District of Michigan.[106] There, the court was hearing a challenge by medical services providers to Governor Whitmer's executive order prohibiting them from performing certain nonessential procedures during the pendency of the COVID–19 pandemic.[107] The federal district court asked that the Michigan Supreme Court answer the following two questions: "(1) whether, under the EMA or the EPGA, the Governor has had the authority after April 30, 2020, to issue or renew any executive orders related to the COVID–19 pandemic; and (2) whether the EPGA and/or the EMA violate the Separation of Powers and/or the Nondelegation Clauses of the Michigan Constitution."[108] The supreme

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104. *Id.* (quoting MICH. COMP. LAWS § 10.31(2) (2006)). It is tempting here to conclude that the court deliberately cast this final provision in the passive voice, since the full text makes clear that the emergency orders promulgated by the governor only "cease to be in effect *upon the declaration by the governor* that the emergency no longer exists." MICH. COMP. LAWS § 10.31(2) (2006) (repealed 2021) (emphasis added). Therefore, whether an emergency no longer exists and, therefore, whether the governor's authority to take emergency action under the EPGA has ended would appear to be left entirely to the discretion of the governor.

105. *House of Representatives*, 333 Mich. App. at 362, 960 N.W.2d at 146. This decision was peremptorily reversed in part by the supreme court on October 12, 2020. *See House of Representatives*, 506 Mich. 934, 949 N.W.2d 276 (2020). However, the court reversed "for the reasons stated in . . . *In re Certified Questions*." *See generally In re* Certified Questions, 506 Mich. 332, 958 N.W.2d 1 (2020).

106. *See generally In re* Certified Questions, 506 Mich. 332, 958 N.W.2d 1; Midwest Inst. of Health, PLLC v. Whitmer, No. 1:20-cv-414, 2020 WL 3248785, at *3 (W.D. Mich. June 16, 2020) ("[t]he factors for certification set out in Local Rule 83.1 are met. And the principle of federalism virtually requires this Court to certify these questions to the Michigan Supreme Court."); *see also In re* Certified Questions, 944 N.W.2d 911 (2020) (mem.) (ordering that the certified questions will be considering and inviting the Michigan House of Representatives and Senate to file briefs as amicus curiae).

107. *See Midwest Inst. of Health*, 2020 WL 3248785, at *1; *see also In re Certified Questions*, 506 Mich. at 339–40, 958 N.W. 2d at 7; Exec. Order No. 2020-17 (Mar. 20, 2020).

108. *In re Certified Questions*, 506 Mich. at 340, 958 N.W. 2d at 7; *see also Midwest Inst. of Health*, 2020 WL 3248785, at *1.

court, in an opinion by Justice Markman, answered both in the negative, effectively reversing in part the court of appeals in *House of Representatives v. Governor*.[109]

In a departure from the court of appeals analysis in *House of Representatives*, the court began by considering whether the Governor had continuing authority under the EMA to declare states of emergency and disaster.[110] Again, the Governor argued that because the EMA provides that the Governor "shall" declare a state of emergency or disaster if he or she finds that one has occurred or is imminent, she "had no choice here but to redeclare a state of emergency and state of disaster."[111] However, just as the court of appeals found in *House of Representatives*, the court held that the Governor's interpretation could not be reconciled with the language of the EMA imposing the twenty-eight-day limitation, which makes clear that "the Governor only possesses the authority or obligation to declare a state of emergency or state of disaster *once* and then must terminate that declaration after 28 days if the Legislature has not authorized an extension."[112] Therefore, the court held, the Governor had no authority under the EMA to terminate and then immediately "redeclare" the very same emergency, effectively circumventing the express limitation on her authority set forth in the statute.[113]

The court then turned to the scope of the Governor's authority under the EPGA, concluding that the statute granted very broad powers indeed—powers sufficient to support the Governor's emergency actions.[114] The court rejected as "unreasonable" readings of the EPGA various arguments made by plaintiffs, the Legislature, and Justice Viviano in dissent that, for example, the EPGA contemplates only local—but not statewide—emergencies, or that its omission of the term "epidemic" and its use of the phrase "public safety" renders it inapplicable to public *health* emergencies.[115] Indeed, the court stressed that such interpretations serve only to render the statute practically incomprehensible, and "[w]hen the words of the law bear little or no relationship to what courts say the law means . . . then the law increasingly becomes the exclusive province of

109. *See In re Certified Questions*, 506 Mich. at 385, 958 N.W.2d at 31.

110. *See id.* at 342, 958 N.W.2d at 8. Recall that the court of appeals held that the question whether the Governor exceeded her authority under the EMA was rendered moot by its determination that, in any case, she had authority to continue the state of emergency and to take emergency action under the EPGA. *See House of Representatives*, 333 Mich. App. At 362, 960 N.W.2d at 146.

111. *In re Certified Questions*, 506 Mich. at 344–45, 958 N.W. 2d at 10.

112. *Id.* at 345, 958 N.W.2d at 10 (emphasis added).

113. *See id.*

114. *See id.* at 356, 958 N.W.2d at 16.

115. *Id.* at 349–54, 958 N.W.2d at 12–15.

lawyers and judges."[116] Accordingly, the court concluded, "there is one predominant and reasonable construction of the EPGA—the construction given to it by the Governor."[117]

And yet, it is the very fact of the Legislature's delegation of such staggeringly broad authority that would ultimately be the statute's downfall: "while the EPGA purports to grant the Governor the power to proclaim a state of emergency based on the COVID–19 pandemic, and accordingly to exercise broad emergency powers, *the EPGA by that very construction stands in violation of the Michigan Constitution*."[118] Citing such weighty authorities as Locke, Montesquieu, and Madison, the court concluded that the EPGA lacked sufficient standards to direct the executive's exercise of authority and failed to adequately limit its scope and duration.[119] According to the court, such seemingly unlimited legislative power placed in the hands of the executive "may justly be pronounced the very definition of tyranny."[120]

First, as to scope, the court found the EPGA "remarkably broad" insofar as it authorizes the Governor to issue executive orders that "encompass a substantial part of the entire police power of the state"—a power that is, by its very nature, legislative.[121] Second, regarding duration, the court held under the EPGA, the Governor appears to have the authority to effectively exercise her emergency powers "indefinitely"[122]—far different from the EMA, which requires legislative authorization after just twenty-eight days have elapsed.[123] And finally, with respect to the standards contained within the EPGA to limit or channel the Governor's exercise of authority, the court concluded that the terms "reasonable" and "necessary" amounted to nothing more than an "illusory limitation upon

116. *Id.* at 354, 958 N.W.2d at 15 (quoting Garg v. Macomb Cnty. Cmty. Mental Health Servs., 472 Mich. 263, 284 n.10, 696 N.W.2d 646, 659 n.10 (2005)).

117. *Id.* at 356, 958 N.W.2d at 16.

118. *Id.* at 356–57, 958 N.W.2d at 16 (emphasis added).

119. *See id.* at 357–63, 958 N.W.2d at 16–20 ("[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, 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.") (quoting BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 216 (J. Nourse & P. Vaillant eds., 1758)).

120. *Id.* at 357, 958 N.W.2d at 16–17 (quoting 46th Circuit Trial Court v. Crawford Co., 476 Mich. 131, 141, 719 N.W.2d 553, 559 (2006) (quoting THE FEDERALIST NO. 47 (James Madison))).

121. *Id.* at 363–64, 958 N.W.2d at 20.

122. *Id.* at 385, 958 N.W.2d at 31.

123. *See id.* at 365–66, 958 N.W.2d at 21.

the Governor's discretion . . . ."[124] Indeed, neither "limitation," in the court's view, "supplies genuine guidance to the Governor as to how to exercise the authority delegated to her by the EPGA nor constrains her actions in any meaningful manner."[125]

Accordingly, the court struck down the EPGA as unconstitutional, holding that "the delegation of power to the Governor to 'promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property,' constitutes an unlawful delegation of legislative power to the executive," which cannot be saved by the "illusory 'non-standard' standards" of "reasonableness" and "necessity."[126]

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124. *See id.* at 367–68, 958 N.W.2d at 22 (finding that the "the Legislature is *presumed* not to delegate the authority to act unreasonably in the first place," which renders the word "'reasonable' . . . essentially surplusage" (emphasis added)).

125. *Id.* at 369, 958 N.W.2d at 23.

126. *Id.* at 371–72, 958 N.W.2d at 24. Although not directly relevant to the question of *executive* power, Chief Justice McCormack's dissenting opinion introduces the fascinating issue of the power and propriety of *judicial* intervention in what has arguably become "an emotionally charged *political* dispute" in order to strike down an enactment of the people's representatives that has existed, without challenge, as good law for the better part of a century. *See id.* at 421–23, 958 N.W.2d at 51 (McCormack, C.J., concurring in part and dissenting in part) (emphasis added). As the Chief Justice recognized, the EPGA, while delegating concededly broad powers to the Governor, "does not insulate the Governor's exercise of that authority from checks and balances." *Id.* at 421, 958 N.W.2d at 50. Indeed, there are numerous ways—through the judiciary, the legislature, and the ballot box—"to test the Governor's response to this life-and-death pandemic." *Id.* at 422, 958 N.W.2d at 50. The EPGA itself permits legal challenges to the Governor's emergency declaration on the grounds that, e.g. there is no "great public crisis" that "imperil[s] public safety" necessary to trigger the Governor's authority in the first instance; or that the Governor executive orders are not "reasonable" or "necessary" in order to "protect life and property". *Id.* (quoting MICH. COMP. LAWS § 10.31(1) (1945)). And the Legislature, of course, always retains the power to amend or abolish the EPGA. *See id.*, 958 N.W.2d at 51. Moreover, Michiganders unhappy with the Governor's emergency actions can amend the statute directly by petition, and "with or without a citizens' petition, the Governor undoubtedly will be politically accountable to voters for her actions in our next gubernatorial election, the ultimate check." *Id.* Indeed, one such effort to recall the Governor through a recall petition "because of executive orders that she signed that were intended to minimize the impact of the COVID–19 pandemic on the State of Michigan" is described in *Whitmer v. Board of Canvassers*, No. 354474, 2021 WL 2171162, at *1 (2021)). Readers interested in further exploring the question of *when* it is proper, in a constitutional democracy, for the judiciary to review—and even *strike down*—legislative acts might consult John Hart Ely's seminal work *Democracy and Distrust*, which advocates an approach to judicial review that is "representation-reinforcing"—an approach that might not be so easily applied in a case like this one involving alleged *usurpation* by the executive of the powers of the representative branch. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).