STATE OF MICHIGAN
MICHIGAN SUPREME COURT

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

SC: 161492
USDC-WD: 1:20-cv-414

/

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

Plaintiffs,

v.

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

Defendants.

/

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LONANG INSTITUTE'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

LONANG Institute moves this Court for leave to file a brief as amicus curiae in this Court, and states in support of its motion:

1. LONANG Institute is a Michigan-based, nonprofit and nonpartisan research and educational institute concerned with application of the "Laws Of Nature And Nature's God", a foundation phrase referenced in the United States Declaration of Independence, 1776. The "law of nature" was a common term used by historic legal writers. The framers of the Declaration of Independence made the necessary claim that the laws of nature and of nature's God served as legal authority justifying the people in declaring independence and establishing certain principles of human freedom that preexisted the existence of civil governments. This same law also presupposed that any such government to be created was obliged to secure those freedoms, not infringe or alienate them.

2. LONANG Institute has a deep interest in the outcome of this matter. The Governor's executive orders are *ultra vires* and also violate the separation of powers as constitutionally mandated. They constitute the exercise of legislative power while posing as executive in nature. They trample down the Article I and X rights of the People, and constitute unlawful preventative detention of persons who have done nothing to their neighbor except breathe. They create extensive new rules of conduct where there were none before. They fail the test of Executive Orders adopted in *Youngstown Sheet and Tube*. They impose rules of general applicability to all residents of the state. They introduce new legal terms into the laws of the state. They are regulations having the prolixity of a legal code. They ignore human liberties, impair our freedoms and subject ten million people to the administrative club, fines and the jailhouse for nothing more than the attempted enjoyment of Constitutional rights and basic human freedom.

3. Even if the Governor's Emergency Declarations were legally compliant with these preexisting and Constitutional standards, they nevertheless fail the basics of legislative

construction. Her emergency Declarations, from EO 2020-04 to most recently EO 2020-151, gradually became unsustainable under any construction of the emergency acts of the legislature which the certified questions raise. Her first such declaration was issued March 10, 2020. August 11, 2020, EO 2020-151's effective end day is 154 days after that first declaration.

4. As friend of the Court, LONANG Institute seeks to present to the Court a different perspective regarding the issues in this case than those presented by the parties.

5. Michigan's judicial policy favors amicus filings. *Grand Rapids v Consumers Power Co*, 216 Mich 409, 414-415; 185 NW 852 (1921).

WHEREFORE, LONANG Institute requests that this Court enter an order granting this Motion for Leave to File Amicus Curiae Brief and accept for filing the proposed amicus curiae brief, which is attached as **Exhibit A**.

Date: August 4, 2020.

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EXHIBIT A

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AMICUS BRIEF OF LONANG INSTITUTE

"It then belongs to princes to know how far they may extend their authority, and to subjects in what they may obey them, lest the one encroaching on that jurisdiction, which no way belongs to them, and the others obeying him which commands further than he ought, they be both chastised, when they shall give an account thereof before another judge."
Vindiciae Contra Tyrannos (1579).

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STATEMENT OF QUESTIONS PRESENTED

1. Do the Emergency Powers of the Governor Act ("EPGA") and/or the Emergency Management Act ("EMA") as implemented through more than 150 COVID Related Executive Orders violate the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution?

   Amicus LONANG Institute Answers: "Yes."

Now comes Amicus LONANG Institute, by and through undersigned counsel, and for its Amicus brief, states as follows. [1]

INTRODUCTION AND FACTS

Beginning March 10, 2020, Governor Gretchen Whitmer promulgated Executive Order 2020-04 declaring a state of emergency in Michigan. The order declared simply that "[A] state of emergency is declared across the State of Michigan. The Emergency Management and Homeland Security Division of the Department of State Police must coordinate and maximize all state efforts that may be activated to state service to assist local governments and officials and may call upon all state departments to utilize available resources to assist. The state of emergency is terminated when emergency conditions no longer exist and appropriate programs have been implemented to recover from any effects of the emergency conditions, consistent with the legal authorities upon which this declaration is based and any limits on duration imposed by those authorities." EO 2020-04.

From this humble beginning, the Governor undertook a series of subsequent and calculated actions. As this emergency declaration was set to expire, she rescinded it and then reissued another, more presumptuous, declaration of emergency. At each turn, she grew more comfortable with ordering an ever-broadening scope of subject matter prohibitions stretching the 1945 Emergency Powers of the Governor Act ("EPGA") and the 1976 Emergency Management Act ("EMA") beyond any previously known elasticity. Enforcement of her orders saw an expansion as well, moving from directing the State Police to "assist" local governments and local

[1] The undersigned counsel authored the brief in whole. The undersigned counsel has not made any monetary contribution intended to fund the preparation or submission of the brief. No other person (excluding the amicus curiae, its members, or its counsel) made a contribution for the preparation and filing of this brief.

officials, to commandeering County and local police as her own personal enforcer squad, backed up by the Attorney General's choreographed approbation. Meeting constitutional resistance on that front, she then turned to unleashing the State's Licensing and Regulatory agencies upon the unsuspecting—those who mistakenly believed that employment is preferable to unemployment.

She also *expropriated* private businesses to undertake notice, advice and enforcement action in EO 2020-153. She further directed that every Michigan business engage in the practice of law by ordering them to "instruct[] customers of their legal obligation to wear a face covering while inside", contrary to MCL 600.916. Neither this Court, nor the State Bar of Michigan, took any notice.

EO 2020-04 was rescinded, only to be replaced on April 1, 2020, with EO 2020-33. That order was rescinded on April 30, 2020 and replaced by EO's 2020-67 and 68. The Court of Claims eventually declared 2020-68, invalid as it was based on the 1976 EMA, which carried with it a 28 legislative consent requirement. The Court of Claims, however, sustained the Governor's authority under the 1945 EPGA, as it granted *carte blanche* to the executive branch, rendering the legislature's will irrelevant.

Nevertheless, she rescinded them both and issued another EO 2020-99 on May 22, 2020. That particular order was rescinded on June 18, 2020 by EO 2020-127, which itself was rescinded on July 14, 2020, and replaced by the current order 2020-151. The current order is effective through August 11, 2020. At each turn, she rescinded prior emergency orders and replaced them shifting from a 28-day legal posture to a "28 and unlimited days" legal basis to sustain her asserted authority.

By this methodology, she has transformed her limited constitutionally defined authority, into an *unlimited power to expropriate the rights and property of ten million people for no less*

than 154 days at last count. If she extends order 2020-151 yet again, then by the date of oral argument on September 2, 2020, at 9:30 a.m., she will have exercised her fondness for direct legislation without Constitutional restraint over ten million people for 176 days.[2]

Michiganders have been governed by written constitutions ratified by them since October 1835, even before statehood. Under The Governor's new regime of Government by Order, that 185-year period of government under a written Constitution ratified by the People has transitioned into a combination of the Constitutional form with an autocratic one. On April 30, 2020, with the issuance of the Governor's third emergency declaration, EO 2020-67 this iteration took on an interregnum status. Racking up 151 COVID 19 related orders in 141 days between March 10, 2020 and July 29, 2020, Michiganders are no longer governed solely by a constitution of their own design and consent, but rather also by the serial orders of one person guided only by her revolutionary conscience as to what constitutes a medically safe and scientifically germ free society for 10 million people. It is revolutionary because it effects a change in the form of government. It is guided by her conscience because it lacks any legal basis.

The 1945 EPGA that purports to *statutorily* authorize this result, violates the non-delegation clause of the Michigan Constitution in Article III, Section 2, because the Governor's orders are legislative in nature, and no statute can extend legislative power to the executive branch. "No person exercising powers of one branch shall exercise powers properly belonging to

[2] A review of MCL 10.31-33 as observed by the Court of Claims makes no provision for legislative review. By the same token, neither does it make any provision for judicial review. Having abridged the rights of the People under Article 1, circumvented the power of the legislature under Article IV, commandeered the authority of local governments under Article VII, unilaterally imposed a Roadmap on education without regard to Article VIII, and wildly expropriated property without just compensation contrary to Article X, can this Court assume that its Article VI powers will remain sacrosanct?

another branch except as expressly provided in this constitution."[3]

Moreover, the 1976 EMA also violates the same clause for the same reason. The Legislature may not share its power with the Governor by statute. The Governor's orders as reasoned below, are legislative in character. Such powers may only be shared by a Constitutional provision, if shared at all. Nor does the Act authorize "rescind and replace" Executive Orders. Amicus explains the various tests and their application below.

ARGUMENT

I. STATUTORY CONSTRUCTION IS THE KEY

The beginning point of our inquiry is to determine exactly what the Acts do and do not authorize the Governor to do.

A. The 1945 Emergency Powers of the Governor Act Does Not Confer Power to Regulate the Entire State, Either Uniformly or by Regions.

Governor Whitmer claims, in many of her orders regarding COVID-19, that the 1945 EPGA "vests the governor with broad powers and duties to 'cop[e] with dangers to this state or the people of this state presented by a disaster or emergency,' which the governor may implement through 'executive orders, proclamations, and directives having the force and effect of law.' MCL 10.31(1)." This appears to be a broad grant, but what does the statute actually provide?

[3] The Michigan Constitution Art. V, Sec. 1 declares: "[E]xcept to the extent limited or abrogated by article V, section 2, or article IV, section 6, the executive power is vested in the governor." Likewise, Article IV, Sec. 1 provides that: "[E]xcept to the extent limited or abrogated by article IV, section 6 or article V, section 2, the legislative power of the State of Michigan is vested in a senate and a house of representatives." Article III, Sec. 2 reaffirms the distinctive nature of each power and prohibits power sharing arrangements. It states: "[T]he 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." This is the Constitutional lens through which MCL 30.403(1)-(2) and MCL 10.31(1) must be viewed.

Immediately after the language quoted by the Governor, the same statute says,

> "Those orders, rules, and regulations may include, but are not limited to, providing for the control of traffic, including public and private transportation, within the area or any section of the area; designation of specific zones within the area in which occupancy and use of buildings and ingress and egress of persons and vehicles may be prohibited or regulated; control of places of amusement and assembly and of persons on public streets and thoroughfares." *Id*.

The types of rules and regulations enumerated in the statute, though "not limited" by its express terms, are nonetheless indicative of the types of things the EPGA was intended to allow the Governor to regulate. Traffic control and transportation regulation suggest very reasonably that a regulation of the roads is in view. Ingress and egress of persons and vehicles suggest nothing more than the regulation of public access to an affected area. Places of amusement and assembly and persons in public streets are all suggestive of open public gatherings. The types of administrative authority referenced in the plain language of the statute do not constitute the sharing of legislative powers with the executive.

Thus, everything specified in the EPGA as within the power of the Governor to regulate, once a state of emergency has been declared, relates solely to the public's use of public property. This covers public roads, public access to a restricted zone, and public gatherings on public property, but nothing more. Absolutely nothing in the statute even remotely suggests the Governor can, on her own initiative, regulate either private property or private meetings, whether in private homes and residences, or at private places of business.

Even if, giving the Governor the most extraordinary latitude, she could regulate people using roads and vehicles to come and go to and from private places (homes and businesses), the statute gives her no authority to regulate what people can and cannot do in those private spaces. Such as restricting gatherings to no more than 10 persons, all members of the same household, in any given private property. Imposing face mask requirements when indoors, requiring a

specified "social distancing" between persons, or restricting what types of activities may occur on private premises, do not come within the legislative grant.

Much less does the statute envision the Governor being able to regulate what types of business activities may or may not take place on private property, how many persons can be there, or prescribe in minute detail the conditions and circumstances under which business operations may be conducted--conditions which heretofore never have been attempted to be imposed by any regulatory or licensing agency of the state government. To think the Governor may, under the guise of the EPGA, discriminate between this kind of business and another, allowing one to operate, but not the other, is certainly a form of regulatory chicanery. But it is also an effort to expand the statute beyond any reasonable elasticity of construction.

What the Governor has done, in the present instance, is even much worse. The clear intent of the EPGA is that ingress and egress from a declared disaster zone or state of emergency zone can be regulated. Yet, the entire state has been declared to be in a state of emergency. As a fallback, she divided the state up into regions, but this is not sufficient to escape her Emergency Declarations which treated the entire state as a single unit (See Ex Orders, 2020-04, 33, 67, 68, 99, 127 and 151). The natural question is whether the Governor has, pursuant to that declaration, regulated ingress and egress from Michigan to other states. Has she actually followed the terms of the statute regarding "ingress and egress of persons and vehicles"? No, she has not. Yet, if that is the intent of the statute, to restrict people going into and coming out of a restricted zone (in this case the whole state), she has never bothered to actually follow the order.

Instead, the Governor has restricted the movements and activities of people *within* the restricted zone (the entire state). So, in fact, her orders have nothing to do with the statutory purpose of regulating ingress and egress from a restricted zone. She has, in effect, declared

every private residence, and every private business, to be a separate and independent restricted zone, yet the entire state is one zone. It is the ingress and egress to every individual residence and place of business which has been regulated. This logically requires that every private residence and place of business be declared a separate individual restricted zone.

Far from following the statute, she invents her own idea of internal zones and prohibits unapproved travel and gathering from those zones. The Axis Powers beginning with the invasion of Poland during World War II, set up ghettos across Eastern Europe in order to segregate and confine persons deemed to be a threat to public safety into small sections of towns and cities. There were severe restrictions on entering and leaving these areas. This was a severe form of tyranny. The only analogy Amici wish to draw is that restrictions on entering and leaving one's own home absent government permission (which in the instant case lies within the order itself), smacks of the same kind of control.

Governor Whitmer has not merely declared the entire state to be a restricted zone, her initial stay at home order (EO 2020-21, and all later iterations) was, and is, tantamount to a universal quarantine of all persons in the state. Under this universal quarantine, every private residence and place of business is a separate individual restricted zone.

This is clearly proved by the fact that the Governor has incrementally allowed certain activities to resume - which she alone has specified - not so much based on location as the type of activity involved. It is though she has gone through every block of property in the state, declaring that this building or portion thereof is fit for occupancy and use, and these others are not. Building by building, store by store, residence by residence (depending on whether a home is a first or second home, or whether it is a rental property), etc. Who and how many can go in, what they can do inside, and how they must do it.

When the EPGA gave the Governor authority to designate areas where a state of emergency exists, the legislature never intended that the Governor should be able to do this state wide, building by individual building. Surely the executive orders at issue are the actions of an executive praying on people's worst fears rather than their best interests – actions which are unworthy of approval by this Court.

B. The 1976 Emergency Management Act Does Not Confer Power to Regulate or Control Private Persons and Resources for Private Purposes.

Governor Whitmer has also repeatedly invoked the 1976 EMA, specifically, that it "provides that, after declaring a state of emergency, 'the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control.' MCL 30.403(1)-(2)." Again, let us examine that statute in more detail, to see what specific kinds of actions the legislature had in mind.

The Governor justifies her claimed authority on the basis of MCL 30.403(1)-(2), which is §3 of the EMA. Immediately following, subsections (3) and (4) of that same statute specify the conditions for the Governor to declare a state of disaster, or a state of emergency, respectively. It is these subsections which impose a 28-day limit on such declarations, the legal effect of which is an issue before this Court. Have the actions of Governor Whitmer been in conformity with the EMA?

Section 4 of the EMA deals with cooperation with the federal government and reciprocal aid agreements with other states, so we will disregard it. The operative sections of the statute are §5, which describes the powers of the Governor, and §6, which imposes a public duty to assist in mitigating the effects of a declared emergency or disaster.

Specifically, §5 (MCL 30.405) allows the Governor to suspend the conduct of state

business (other than criminal process), utilize all public resources (state, federal and local), direct the functions of public employees, commandeer private property, and order an evacuation from a "stricken area." It also allows the Governor to control the ingress, egress and occupancy of persons in a stricken area, and to "[d]irect all other actions which are necessary and appropriate under the circumstances."

Section 6 of the EMA provides "[a]ll persons within this state shall conduct themselves and manage their affairs and property in ways that will reasonably assist and will not unreasonably detract from the ability of the state and the public to cope with the effects of a disaster or an emergency." Specifically, these obligations are stated to include "appropriate personal service and the use or restriction of the use of property." The rest of the section describes the circumstances and extent to which people may be compensated for such assistance.

As with the 1945 EPGA, the 1976 EMA is primarily directed to allowing the Governor to deploy public resources, and to mobilize public employees. To the extent private citizens are obligated to assist state efforts to mitigate an emergency, such assistance is limited to personal services and the use of property for *public purposes*. Thus, by commandeering any private property, a public official is, by that act, converting the property from a purely private use to a public use. The provisions concerning compensation for personal services and use of property are an obvious deference to the eminent domain and just compensation clause of the Michigan Constitution, Art. X, § 2.

Thus, fundamentally, nothing in the 1976 EMA authorizes the Governor to regulate or control private persons and resources *for private purposes*. Everything in §5 and §6 assume the Governor's orders are directed towards regulating public resources, public employees, and the personal affairs of ordinary citizens for an established public use. And as provided in the

eminent domain clause of the Michigan Constitution, the burden is on public officials to establish a "public use" - in *each* case, for *each* person, and *each* piece of property. Blanket declarations of a public use are of no effect, not that Governor Whitmer has made any attempt to establish any public use by her executive orders.

Lacking any establishment of a public use, the obligations imposed by §6 of the EMA simply do not apply here. No closing or re-opening of a private business pursuant to an executive order may reasonably be construed as a "personal service" rendered to the state, nor are the services offered or goods sold by state residents done so in furtherance of any public use. Nor has the Governor or any other public official offered, based on available knowledge, to compensate any state resident for having "taken" their business during any shutdown period. The Governor and state officials having utterly failed to establish any public use during the state of emergency and are therefore barred from asserting that any resident of Michigan is under a duty to assist them under §6 of the EMA.

Also, most certainly, the Governor has not ordered any evacuation of any stricken area, because that would require everyone to evacuate the entire state. Under the statewide framework of her own making, if she followed the text of the Act, she could order 10 million Michiganders to leave the state for Ohio, Indiana and Wisconsin, that we all become Buckeyes, Hoosiers and Badgers? Accordingly, the Governor has no basis at all to claim the use of powers to order the movement of people, or restrict the movement of people, or regulate modes of transportation in connection with an evacuation under §5 of the EMA.

Which leaves only the question of whether the Governor may use the EMA to justify controlling "ingress and egress to and from a stricken or threatened area, removal of persons within the area, and the occupancy of premises within the area." But of course, since the entire

state of Michigan is the declared "stricken area," a close reading of the statute would require the Governor, in exercising this specific power, to regulate people coming into and going out of the state, and/or removing people from the state.

However, as has already been pointed out, the Governor's regulations of the movements of state residents *within* the state are what is at issue. And those movements are fundamentally not the kinds of movements the Governor is authorized to regulate under the EMA. Also, for the Governor to even feign a claim to legitimately issue a state wide stay at home order, she would have to designate each private residence and place of business in the state as an individual stricken area, in order to regulate the ingress and egress of each location. That she has not done, nor could she ever do.

C. The "Construction of Act" Clauses is a Rule of Construction, not a Means to Void the Statute's Limitations.

Neither the 1945 EPGA nor the 1976 EMA, on their face, authorize the Governor to issue rules of general applicability binding on the entire state population, to restrict their movements, to close their businesses, specify how many people may meet in their homes, etc. However, the EPGA has a "construction of act" provision, which generally requires that it be "broadly construed." MCL §10.32. The EMA, as noted above, contains a provision which authorizes the Governor to take "all other actions which are necessary and appropriate under the circumstances." MCL 30.405(1)(j).

Thus, the question is whether these specific provisions allow the Governor to regulate and control the movements and activities of private persons in their places of residence or business in ways which go beyond the enumerated powers specified in either statute. In other words, do these provisions effectively remove all constraints or limitations on what persons, properties or activities the Governor may control by executive order? Are they blank checks?

Ejusdem generis says no. If the Court acknowledges the specific types of power explicitly given, it may not obviate those specifics by a broad construction in another part of the statute so as to effectively swallow the rule first laid down. "A catch-all provision is usually inserted into a statute to ensure that the language that immediately precedes it does not inadvertently omit something that was meant to be included." Sebring v. City of Berkley, 247 Mich. App. 666, 674, 637 N.W.2d 552 (2001). Under the doctrine of *ejusdem generis*, courts will interpret a catch-all phrase "to include only those things of the same type as the preceding specific list." *Id*. Hardenbergh v. Dep't of Treasury, 323 Mich. App. 515, 523, 917 N.W.2d 765, 769 (2018).

Suppose the Governor ordered, to prevent the spread of COVID-19, to limit the exposure of persons to disease in hospitals, and to avoid putting a strain on hospital resources (including personnel and equipment), that all state residents should avoid becoming pregnant and/or giving birth, a violation of which is punishable as a misdemeanor. Would such an order be authorized under either the EPGA or the EMA?

Certainly not. But on what basis can such an order be distinguished - legally - from the orders she has already issued?

Perhaps it may be objected that such an order would violate a fundamental or inalienable right. However, many of the Governor's orders have already contained this exact language: "nothing in this order shall be taken to abridge protections guaranteed by the state or federal constitution under these emergency circumstances." Yet, the Governor refuses to recognize any such rights absent judicial involvement.

This boilerplate has not stopped the Governor from: 1) restricting religious worship services in violation of the right of religious freedom; 2) restricting gun shops in violation of the

right to bear arms; 3) restricting the right of citizens to use their own property in violation of the rights of private property; 4) restricting the right of people to engage in lawful, fully registered and/or licensed business activities; 5) the right to peaceably assemble on private property, etc.

If this is what it means for the Governor to *not* abridge guaranteed constitutional protections, then she quite frankly has no conception of what those constitutional guarantees are. Further, her judgment on the matter cannot be trusted to secure the rights of the people. Leaving her to construe the nature and limitations of her powers under the EPGA or EMA is to throw the doors open to rule by a dictator. That reference should not be considered hyperbole. Black's Law Dictionary defines a dictator as "[A] magistrate invested with unlimited power and created in times of national distress and peril. Among the Romans, he continued in office for six months only, and had unlimited power and authority over both the property and lives of the citizens." If the Governor is not acting as a dictator, then neither is she acting as a Governor.[4]

Therefore, first, we argue the Governor does not have the authority to regulate or control private persons, private property or private activities under either of the statutes she claims authority under. Granted, some (but not necessarily all) of the regulations promulgated by the Governor may be appropriate for legislative acts passed by the state legislature. It's just that the Governor is not the one who has been authorized to legislate such things.

We also argue, second, that if such statutes are construed by this Court to empower the Governor to act as she has, then both statutes are unconstitutional as violative of the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution. The reasons for this second argument are explained in the next section.

[4] https://thelawdictionary.org/dictator/

II. WHAT IS THE NATURE OF LEGISLATION?

Obviously, if the recent executive orders of the Governor are not legislative in nature, then there is no state constitutional question. The legitimacy of the orders would be, in that case, merely a matter of statutory construction. So how do we know if the Governor's recent orders are legislative in nature?

A. First Test: Creating New Rules Where There Were None Before.

The nature and differences between executive power and legislative power are well-known, and a citation to various historical sources need not be rehearsed here.[5] Suffice it to say, the nature of legislative power is to make laws, and the nature of executive power is to enforce those laws. The key difference for our purposes being this: *legislative power can create new laws, whereas executive power can only enforce pre-existing laws.*

We know the 1945 Emergency Powers of the Governor Act, the 1976 Emergency Management Act and the Michigan Constitution all pre-exist the Governor's recent executive orders concerning COVID-19, but what about the rules contained in the orders themselves - are they new or pre-existing?

Both the EPGA and the EMA authorize the Governor to declare a state of emergency and to designate the area which is affected or stricken. The only area the Governor has ever designated as being stricken in the statutory sense with respect to COVID-19 is the entire state of Michigan. However, beginning with EO 2020-92, the Governor divided the state into eight regions, never before created in the state. The regional designations were not made for the purpose of declaring a stricken area, for controlling ingress or egress, etc., but were solely for the

[5] See Amicus Brief of the LONANG Institute, MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE v. GRETCHEN WHITMER, Governor of the State of Michigan, Michigan Court of Appeals, Docket No. 353655, filed on June 19, 2020, pp 11-17.

purpose of relieving restrictions imposed by her in some parts of the state, but not others. These regional designations were *new, not pre-existing*.

Beginning with EO 2020-21, the Governor ordered a universal state-wide stay at home order, unrelated to controlling traffic or transportation, controlling ingress or egress from the state itself, and unrelated to public resources, public employees, or public services. There is no authorizing language in the EPGA, EMA or the Michigan Constitution related to a universal executive order binding on all state residents. The stay at home order was *new, not pre-existing*.

Beginning with EO 2020-147, then Order 2020-153, the Governor ordered a universal state-wide requirement to wear a mask in any public space. This order was unrelated to controlling traffic or transportation, controlling ingress or egress from the state itself, and unrelated to public resources, public employees, or public services. There is no authorizing language in the EPGA, EMA or the Michigan Constitution related to a universal executive order binding on all state residents. The universal mask requirement was *new, not pre-existing*.

We could go on, citing example after example of the many varied new rules imposed by the Governor in her spate of orders regarding COVID-19 that never did exist before her actions created them. As of July 29, 2020, with the issuance of EO 2020-161, Governor Whitmer has issued 151 executive orders relating to COVID-19 in 141 days. These many orders contain an almost incomprehensible number of restrictions, regulations, exceptions and specifications that literally change daily, change at press conferences, and change with serial internet postings and interpretations. We move forward. We move backward. But in every case, we move further away from Constitutionally limited government to an autocratic system of government by one person with absolute power. Is this really any way to govern a free people?

B. Second Test: The Governor's Orders Fail Constitutional Process.

It is laughable to conceive that this new state-wide regulatory scheme implemented by the Governor at all hours of the day and night and on weekends was somehow ever in the wildest contemplation of the legislatures that enacted either the EPGA or the EMA. This comprehensive regulatory scheme - and that is exactly what it is - was legislated entirely by the Governor on her own, from whole cloth. There is absolutely nothing *pre-existing* about it.

Again, we are not arguing that such regulations are necessarily unwise or unlawful in every individual particular. We are only arguing that all of such particulars constitute acts of law-making that should - and absolutely must - pass through the hands of the legislature and comply with the specifically defined constitutional procedures relating to how a bill becomes law before they can be considered binding on all state residents. This is taught in every elementary school in this state, at least the ones the Governor permits to reopen.

Michigan's Constitution Article IV, Sections 22, 23, 24, 25 and 26 are there for a reason. Section 22 mandates that "[A]ll legislation shall be by bill and may originate in either house." The Governor enacts legislation from whole cloth and pays no heed to this Constitutional pillar. Section 23 mandates that "[T]he style of the laws shall be: The People of the State of Michigan enact." The Governor's orders simply declare she is implementing them.

If the legislature passed a bill that "embrace[d] more than one object" contrary to Section 25, this Court would have no problem striking it down, but the Governor's legislative maneuvers jump over these Constitutional hurdles uncritically.

"No law shall be revised, altered or amended by reference to its title only" as per section 25, but the Governor simply declares that "[A]ll previous orders that rested on that order now rest on this order" (2020-151). We are left to guess what she is talking about. Perhaps the State's

website will tell us in the Q&A section? Will the Court conclude that these constitutional protections guaranteeing clarity in the legislative process mean nothing when the Governor creates a new "law" out of whole cloth without the need to follow the Constitution's actual requirements? She does in substance without Constitutional restraint what only the legislature may do subject to Constitutional restraint.

Or turn this around. If the legislature simply declared on a voice vote that EO 2020-151 as written was now the law as passed by the legislature (no bill, no title, no attention to sections 22, 23, 24, 25 or 26) would this Court's opinion conclude that the nature of the emergency requires that these Constitutional requirements be "suspended" and thus the "law" constitutionally sufficient? When the executive and/or legislative branches of government lead us down the road of political expediency, shortcutting legal and constitutional protections, society looks to the courts to stand as guardians of a Constitutional government of laws, and not of men.

We live in an age where law is devalued. If this "One Court of Justice" will not value it, we need not look for it in other places, like our schools, streets and communities. President Andrew Jackson underscored this point declaring: "When an honest observance of constitutional compacts cannot be obtained from communities like ours, it need not be anticipated elsewhere. . . And this will be the case if expediency be made a rule of construction in interpreting the Constitution. Power in no government could desire a better shield for the insidious advances which it is ever ready to make upon the checks that are designed to restrain its action."[6]

[6] JAMES D. RICHARDSON, ED., COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897 (Washington, D.C.: Government Printing Office, 1896) 2:491. Veto Messages of Andrew Jackson, May 27, 1830. Jackson also noted: "In no government are appeals to the source of power in cases of real doubt more suitable than in ours. No good motive can be

C. Third Test: The Governor's Orders Fail The *Youngstown* Criteria.

Of course, the question of executive law-making has been tested before, notably in the case of Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

> "We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills. The mill owners argue that the President's order amounts to law making, a legislative function which the Constitution has expressly confided to the Congress and not to the President. The Government's position is that the order was made on findings of the President that his action was necessary to avert a national catastrophe ... and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers." 343 U.S. at 582.

If we make a few key word substitutions - Governor for President; state businesses for Nation's steel mills; and re-regulate businesses instead of possess and operate - it all looks pretty familiar.

The Court quite famously struck down the President's order. In the course of the majority opinion, Justice Black explained exactly what rendered the President's order legislative in nature:

> "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress - it directs that a presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution." 344 U.S. at 588.

Let's use these same tests and apply them to the COVID-19 orders of Governor Whitmer. In particular, let us use EO 2020-114 as an example:

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assigned for the exercise of power by the constituted authorities, while those for whose benefit it is to be exercised have not conferred it *and may not be willing to confer it*." *Id.* at 2:492 (emphasis added).

1. The Preamble States Policy Reasons.

EO 2020-114 has an extensive preamble over two full pages long. In it, the Governor proclaims the many reasons her policies should be adopted. These reasons include the lack of a vaccine, the spread of the virus, an assertion that the "pandemic constitutes a disaster and emergency throughout the State of Michigan," a recitation of the legal bases upon which she claims power to implement the rules contained in the order, a desire to "prevent the state's health care system from being overwhelmed," and to allow time for the production of critical medical equipment, among other reasons.

All of which are very good and solid bases for enacting legislation.

2. Policies Proclaimed as Rules of Conduct.

EO 2020-114 contains a wide variety of new and renewed regulations relating to the conduct of business operations in the state. In particular, employers requiring employees to leave their homes are told to develop a COVID-19 preparedness plan, appoint supervisors to monitor the virus, provide employee training and screening, and to adopt procedures regarding social distancing and face masks. Procedures are mandated for cleaning and disinfecting facilities, and how to handle cases of virus infection. Employers are told not to retaliate against sick employees, to establish a response plan, to restrict employee travel and promote remote working, and to adopt "additional infection-control measures that are reasonable." And all of that is contained in just the first section of EO 2020-114.

Additional sections (there are 18 total) prescribe specialized rules of conduct for businesses conducted primarily outdoors, the construction industry, manufacturing facilities, research laboratories, retail stores, libraries and museums, offices, restaurants and bars, outpatient health care facilities, in-home service businesses, barber, cosmetology, tattoo, tanning

and similar services, sports and entertainment facilities, gymnasiums, and fitness centers and the like.

These rules of conduct are neither sparse nor general. They are numerous and detailed, and not one of them sprang from the mind of any person in the state legislature. The fact that the order is rescinded does not change any of this. Essentially, all of her orders contain similar policy reasons and rules of conduct.

3. Government Officials Authorized to Promulgate Additional Rules.

EO 2020-114 does, in fact, in section 6(c)(2) authorize the director of the Department of Health and Human Services to issue emergency orders.

But more to the point, the Governor's order effectively deputizes every employer in the state, imposing on each of them a duty to develop a COVID-19 preparedness and response plan, to provide COVID-19 training to employees, and to conduct a daily entry self-screening protocol. Where, exactly, are these plans, training materials, and protocols supposed to come from? Apparently, the Governor believes every small business in Michigan already has people on staff, ready, willing and able to prepare such documents, having themselves been fully trained in preparing them.

It's just another in a long list of unfunded liabilities placed on the back of local units of government, and business owners, where each business owner is placed at the beck and call of the Governor. All of which functions very much like typical legislation.

The pattern illustrated by EO 2020-114 has been repeated in the vast majority of the Governor's COVID-19 orders. It is not an aberration. Therefore, the Governor's orders meet the definition of "law making" as used by the U.S. Supreme Court, and this is a sufficient and useful guide in the present case.

D. Fourth Test: Rules of General Applicability.

Another strong indication that the Governor's various COVID-19 related executive orders are legislative in nature is the fact they are generally applicable to all residents and businesses in the state. Executive orders typically relate to public employees, public resources, public areas, and the structure or functioning of state agencies under the executive branch. We have already seen this is the pattern expressly adopted by the EPGA and EMA.

William Blackstone observed, in a statement revered for centuries, that "[M]unicipal law, thus understood, is properly defined to be 'a rule of civil conduct prescribed by the Supreme power in a state commanding what is right, and prohibiting what is wrong.'" *Commentaries on the Laws of England*, Vol. 1, §2 (1765). He further tied the nature of legislation to rules which affect the "community in general."

The nature of *orders*, as such, is that they are directed to specific persons to carry out specific tasks which, when done, are of no further force or effect. The Governor's orders, in contrast, are directed to all residents and/or all businesses in the state.

The orders are framed as temporary, but in fact the Governor keeps extending and renewing them over and over. What is termed a *rescission* or *termination* is merely a technique for continuing her COVID-19 orders indefinitely in the main, while repeatedly modifying them as to particulars. The tasks, or more properly *regulations*, are ongoing and long-term in nature. None of them are *one and done*.

The Governor's COVID-19 orders, taken as a whole, are a comprehensive regulatory scheme binding on all persons in the state. If these orders are not legislative in nature, then nothing is. See Wisconsin Legislature v. Palm, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900 (2020). (Rule which required people to remain within their homes, prohibited non-essential

travel, and required closure of non-essential businesses impinged upon Legislature's constitutional core power under separation of powers doctrine).

E. Fifth Test: The Introduction of New Legal Terms.

In EO 2020-59, the Governor first mandated that every individual in the state must wear a face covering or mask "in any enclosed public space." This requirement has been re-imposed most recently in EO 2020-147 and then EO 2020-153, which requires all persons leaving their place of residence to wear a face covering in "any indoor public space." This use of the phrase "public space" is novel and without precedent.

In a number of prior COVID-19 orders, the Governor specifically directed various rules to be observed in places of "public accommodation." The term "public accommodation" is a well-known phrase having a specific meaning, as it is defined by Michigan statutes. However, places of public accommodation are generally restricted to restaurants and bars, theatres and other places of amusement, hotels & motels, and like places. The concept derives from ancient common law doctrines relating to places holding themselves open to the public and where a stranger may seek refuge, etc.

The point being that many businesses are not within the legal definition of a public accommodation. One can only assume the Governor to be seeking a phrase having a broader meaning than a mere public accommodation. She certainly is not looking for a more restrictive term. Her switch in terminology has every appearance of being a legislative power based on no prior legislative text.

In fact, the term "public space" has no statutory meaning. A search of the online Michigan Compiled Laws maintained by the Michigan legislature reveals that phrase is nowhere used in any state statutes.

Whether the phrase is capable of definition, or whether that definition may be reasonable, is not the issue. The question is who is authorized to introduce a new legal term into the laws of the state of Michigan. Ostensibly, that is a legislative function. If the Governor wishes to introduce a new legal term into the laws of the state, she should have her staff write up a bill and ask her supporters in the legislature to introduce it. Defining new legal terminology is the very antithesis of enforcing or executing pre-defined law.

F. Sixth Test: The Prolixity of a Legal Code.

Chief Justice John Marshall famously observed that a Constitution should not have the "prolixity of a legal code." McCulloch v. Maryland, 17 U.S. 316 (1819). By this, he sought to distinguish the U.S. Constitution from ordinary legislation, which *would* have the characteristic of being a legal code (regardless of whether it was too wordy).

Permit us to observe that an executive order should not have the prolixity of a legal code either. Again using EO 2020-114 as only one example among many, the Governor's order contains so many details, prescribing new policies and procedures down to the smallest detail, she has truly concocted an entirely new regulatory scheme that rivals the licensing policies and procedures already in place for many Michigan businesses.

She has divided the state into previously non-existent regions and dealt with them separately for regulatory purposes. She has subdivided the business community industry by industry, dealing with them separately for regulatory purposes. She has developed separate rules for employees working from home, employees not working from home, renters, residents of long-term care facilities, and all other residents. She has modified or extended lease agreements, protective orders, license renewal procedures and almost every conceivable type of commercial transaction in the state. No detail is too small to escape her notice.

The sheer volume and detail of executive orders, order after order, page after page, rule after rule after rule, convincingly demonstrates that the Governor is engaged in the repeating ongoing act of legislating - of creating new rules of general applicability where none existed before.

III. THE RIGHT SIDE OF HISTORY

One of the oldest questions in Anglo-American jurisprudence is the relationship between any *prince or ruler* (broadly speaking, the chief executive of any nation) and the law of that nation. Specifically, is the ruler above the law, or is the law over the ruler? This matter was considered at least as far back as the *Vindiciae Contra Tyrannos*, ostensibly by Stephen Junius Brutus in 1579, and by Samuel Rutherford in *Lex Rex* (1644). Rutherford in particular addressed the question of "Whether the King has Any Royal Prerogative, or a Power to Dispense with Laws; and Some Other Grounds Against Absolute Monarchy." *Lex Rex*, Question 23.

History, of course, is full of examples where rulers claimed to be above the law, and therefore when they spoke, *their word was law* - no matter what was said, or whether it agreed with the other laws of the nation or not. Historically, this idea that a civil ruler's words were law was known as the *royal prerogative*. According to William Blackstone,

> "one of the principal bulwarks of civil liberty, or (in other words) of the British constitution, was the limitation of the king's prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them, without the consent of the people, on the one hand; or without, on the other, a violation of that original contract, which in all states impliedly, and in ours most expressly, subsists between the prince and the subject [*i.e.*, the Constitution]."
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> Wm. Blackstone, 1 *Commentaries on the Law of England*, ch. 7 (1765).

Of course, one of the chief means of guarding against executive prerogative in the United States is a more strict separation of powers than has ever been implemented in England. This model has, of course, also been built into the Michigan Constitution, Art. III, § 2.

Notwithstanding these safeguards for the security of the people, it is a truth that executive actions in form and substance like a royal prerogative have occasionally reared their heads in America. In times of crisis, public officials have done all kinds of things in the name of protecting the public. Very often, these actions are motivated by fear. But even when fear is reasonable, or justified, fear alone is not a basis for taking state action, especially unilateral state action by a single individual.

Seventy-eight years ago, the country was faced with another national crisis. We were at *war*. The war was real, and the fears were understandable, though those fears were sometimes used to justify government overreach and heavy handedness. Thus, President Franklin D. Roosevelt issued an executive order (No. 9066) in February, 1942 which, by a series of successive orders by military commanders, implemented his unilateral policy. The result was what we know today as the Japanese Internment, although in fact Americans of German and Italian descent were also interned.

Are we intimating that somehow the orders of Governor Whitmer are racially based? No, not at all. But we cannot overlook the parallels between what happened in 1942-45 and how those events unfolded, compared with the current COVID-19 pandemic (which itself has been compared to a war by our Attorney General). For the fact is, there were plenty of other legal issues surrounding order 9066 besides racial discrimination. And those legal issues are present again today.

Because the facts clearly indicate, as we will show, that how federal officials acted back then with respect to only a small part of the population, is very similar to how state officials are acting now with respect to *all* of the population. This makes the current actions *more* odious, not less.

Presidential order 9066 was fairly brief, in itself. It was justified on the premise that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national-defense premises, and national-defense utilities." By its terms, no mention was made of any nation, nationality or ethnic group. It simply authorized the Secretary of War, and military commanders under him,

> "to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion." No. 9066.

In other words, the President issued order 9066 based on the *possibility* of what *certain people* (to be later specified) *might do* to compromise national security. No proof of guilt, or evidence of wrongdoing, was required. No individual responsibility was at issue. Merely being part of a dangerous group - or potentially dangerous, or conceivably dangerous group - was all that was required to be subject to the order.

The order was adopted without the benefit of any legislative review or input. The wisdom or legality of the order was neither debated nor subject to examination either by the people affected or their lawful representatives. The President's word was law. The subsequent orders of the military commanders pursuant to order 9066 were also law. Military commanders were neither elected, nor represented the people, nor subject to any legislative oversight. And this was the case even though martial law had *not* been declared. The commanders had, in very practical terms, the power of royal prerogative.

The people who were subject to order 9066 were excluded from certain military zones designated solely by executive order. Their ingress and egress was restricted. And the military commanders were given broad discretion - prerogative - to declare other restrictions and rules.

As we now know, people who had been incarcerated lost their personal liberties; many also lost their homes, businesses, property, and savings.

That internment was challenged in a series of cases at the U.S. Supreme Court, culminating in Korematsu v. U.S., 323 U.S. 214 (1944). The Supreme Court, to its everlasting shame, upheld the executive order, the military orders and the internments themselves. Today, of course, the Korematsu decision is viewed as odious and repugnant, largely because of the racial discrimination which it upheld. However, the Court, in its majority opinion, expressly denied this was the basis for their ruling.

> "To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war ... [and government authorities] felt constrained to take proper security measures, because they decided that the military urgency of the situation [warranted it]." 323 U.S. at 233.

Elsewhere in the majority opinion, the Court explained what the case was really about, in their mind. Namely, that there were potentially dangerous residents "whose number and strength could not be precisely and quickly ascertained." The Court believed they could not say government officials "did not have ground for believing that, in a critical hour, such persons could not readily be isolated and separately dealt with and constituted a menace" to public safety.

Justice Jackson, in his dissent, laid the legal issues bare.

> "I cannot say, from any evidence before me, that the orders ... were not reasonably expedient military precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court holds, it does follow, then we may as well say that any military order will be constitutional, and have done with it." 323 U.S. at 245, (J. Jackson, dissenting).

In other words, Justice Jackson believed the mere fact we were at war, and genuine military necessity existed, was not enough to justify every executive order. And if he were here

today, he would argue that not every executive order issued today out of genuine necessity is constitutional either, "and have done with it." No, he saw behind the curtain, as it were, and spelled out the true danger.

> "But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle [used to justify the order]. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes." 323 U.S. at 246 (J. Jackson, dissenting).
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> Justice Jackson further observed,
>
> "All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic." [Footnote omitted.] An [executive official] may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image." 323 U.S. at 246 (J. Jackson, dissenting).

Allow us, then, to draw some brief parallels between the current crisis and the situation in 1942-45. Both crises were dealt with via an initial executive order declaring a state of emergency and/or grave public necessity. Both orders were based on the fear of the possibility of what people might do (directly or indirectly) to put the safety of other members of society at risk. After the initial orders, a series of subsequent orders implementing them were issued, by which many specific rules and regulations were imposed on ordinary residents of the nation or state.

Although a war or warlike situation existed, in neither case was martial law imposed. Rules were promulgated in both instances without undergoing any legislative process, public deliberation, or consideration for varying viewpoints. The orders in both cases, though issued by executive officials, were considered criminal laws and imposed criminal punishments. Guilt in

both cases was not conditioned on any finding or evidence of individual wrongdoing (such as actual espionage, or actual spreading of disease), but was directed at entire populations of people solely on the basis of what they might do.

People were criminalized in both cases for refusing to stop engaging in lawful activities, which were only made illegal by temporary executive order. People in both cases were (and are) deprived of the use of property (including homes), the operation of their businesses, their right to freely travel, and in many cases their entire livelihoods. Additionally, other civil liberties and individual rights were (and are) being denied and suppressed.

Decades from now, when the dust has settled, a vaccine is in wide use, and the COVID-19 pandemic is over, people will look back on this time and judge whether, like people two generations ago, we were ruled by fear, and whether the actions of the government, seemingly justified at the time, were in hindsight overplayed and unlawful.

We wants to be remembered as a Court furthering the legacy of Korematsu, by approving a set of executive orders which will be widely regarded as repugnant to civil liberties and individual rights in just a few years. In the alternative, like Mr. Korematsu, we could wait for the decision to be "abrogated" 74 years later in 2094. See Trump v. Hawaii, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018). This Court has to understand that if it gives this Governor the green light to govern as she has, it opens the door for the next few Governors to point back to its opinion for justification of their own sense of emergency action unrestrained by the judiciary and unmolested by legislature. We say the "next few Governors" because not even the People will forever endure a long train of abuses and usurpations, pursuing invariably the same Object--a design to reduce them under absolute Despotism. It is their right, it is their duty, is it not, to throw off such Government, and to provide new Guards for their future security?

The science in the matter of COVID-19 is far from settled. Undoubtedly, at some point in the not too distant future, scientific studies will be undertaken to discover whether lockdown measures and restrictions of the type imposed by Governor Whitmer in fact helped contain the spread of the virus, did little or nothing to stop the progress of the disease, or actually made the pandemic worse.

We are not arguing that the many COVID-19 executive orders issued by the Governor are necessarily wrong, unjust or unwise. Yes, in fact, many of them *do* encroach upon and violate the constitutional rights of the people. The point is, the rules and regulations she has adopted *are not hers to make*. Such things are for the legislature to prescribe, if at all.

Governor Whitmer has deprived the People of that comfortable liberty of being ruled by their chosen representatives, and thereby deprived them of both a democracy and a republican government. How wonderful for her, that she may promulgate voluminous regulations without going through any deliberative process, and without input from opposing views. She has no need to receive input from the voters she serves, nor input from any pesky lobbyists or a bumbling legislature. Instead of a government of laws and not of men, we have the rule of one person.

The damage caused by Presidential order 9066 lasted for more than a generation. People were detained and interned without due process, without any probable cause, and without any right of appeal. They were deprived of the use of their own property, their livelihoods, and their fundamental rights. Although appearing to many at the time as a necessary evil, and therefore justifiable, it was in reality an unnecessary evil. An evil which came into clearer focus as time went by.

Now, we have a Governor issuing executive orders locking down not just a minority of

persons within the state of Michigan, but the entire state population. Submitting residents and businesses to a regulatory scheme invented solely by her. Without due process. Without any probable cause. Without the slightest input from our elected representatives. Deprived of the use of our own property. Deprived of our livelihoods. Deprived of our fundamental rights.

Who is to say, at this point, how long the damage caused not only by COVID-19, but by the Governor's orders, will continue? We have yet to see, and will only know years from now, how many people lost their homes, how many businesses failed, how much the tax revenues dipped, and how many people had to leave the state just to survive *economically*. The public health is being stressed quite enough by COVID-19 already - but one thing we can be assured is that this will pass, and the public health restored. Economic recovery caused by the artificial stress imposed by the autocratic orders of the Governor is much less certain.

Ultimately, Mr. Korematsu in 1944 had no recourse except to appeal to the U.S. Supreme Court. Likewise, the People of Michigan today have no recourse except to appeal to this Court. This Court is the only thing that stands between the People and the royal prerogative of the Governor, a monarch *whose word is law*. Stand with the people, we pray.

CONCLUSION

To address the Certified Question, under the 1976 Emergency Management Act, MCL § 30.401, et seq., Governor Whitmer does not have the authority after April 30, 2020, to issue or renew any executive orders related to the COVID-19 pandemic.

Under the 1945 Emergency Powers of the Governor Act, MCL § 10.31, *et seq*., and the 1976 Emergency Management Act, MCL § 30.401, *et seq*., if they are construed to delegate the Governor any authority over other than the public's use of public property, public roads, public access to a restricted zone, and public gatherings upon public property, they exceed the powers

actually given. They are also unconstitutional because they trample down multiple rights of the People guaranteed under Michigan's Constitution, Article 1 and Article 10, section 2. See also footnote 2 *supra.* Absolutely nothing in the statute even remotely suggests the Governor can, on her own initiative, regulate either private property or private meetings, whether in private homes and residences, or at private places of businesses or religious gathering. Nothing justifies Executive Order 2020-160 or Executive Order 2020-161 banning statewide indoor gatherings of more than 10 people and closing bars for all indoor service across the entire state. Her claims to the contrary are also *ultra vires*.

Moreover, both the Emergency Powers of the Governor Act and/or the Emergency Management Act violate the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution. The Governor, by creating extensive new rules where there were none before, by adopting laws in all by name only, by circumventing the Constitutional criteria of Article IV, by meeting the definition of law making adopted in *Youngstown Sheet and Tube*, by adopting rules of general applicability to all residents of the state, by introducing new legal terms into the laws of the state, and by issuing regulations having the prolixity of a legal code, has engaged in substantial, repeated, and overt acts of making laws for the people of Michigan. These were all done in contravention of the Michigan Constitution's Separation of Powers and Non-Delegation Clauses.

As first noted in this brief with a quotation from *Vindiciae Contra Tyrannos* (1579) which we here modify: It first belongs to Governor to know how far she may extend her authority, and to People in what they may obey, lest she encroach on that jurisdiction which in no way belongs to her, and the People be compelled to obey her commands further than they ought. They both are to be chastised, when they shall give an account thereof before another

judge, that one true Judge of mankind and Nations. Until that day, however, they must give an account to this Court. LONANG's Amicus brief is written to provide tools to aid in that accountability.

Respectfully Submitted,

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