

STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN HOUSE OF REPRESENTATIVES
and MICHIGAN SENATE,

No. 20-000079-MZ

Plaintiffs,

HON. CYNTHIA DIANE STEPHENS

v

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

Defendant.

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**THE MACKINAC CENTER FOR PUBLIC POLICY'S MOTION
FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

The Mackinac Center for Public Policy moves this Court for leave to file a brief as amicus curiae in this Court, and states in support of its motion:

1. The Mackinac Center for Public Policy is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987.
2. The Mackinac Center for Public Policy has a profound interest in the outcome of this matter, because the Governor's executive orders have imposed severe restrictions on the rights and liberties of individuals and businesses in Michigan, as well as significant financial burdens, and because the orders violate the principles of separation of powers.
3. The Mackinac Center for Public Policy hopes to impress upon the Court the significant constitutional defects with the Governor's executive orders

that disregard the Michigan Legislature's decision not to extend the state of emergency, and the data supporting the reopening of Michigan businesses safely and with proper precautions to prevent the transmission of the virus that causes COVID-19.

4. As friend of the Court, the Mackinac Center for Public Policy 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, The Mackinac Center for Public Policy requests that this Court enter an order granting this Motion for Leave to File Amicus Curiae Brief and accept for filing The Mackinac Center for Public Policy's proposed amicus curiae brief, which is attached as **Exhibit A**.

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Dated: May 14, 2020

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EXHIBIT A

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AMICUS BRIEF OF THE MACKINAC CENTER FOR PUBLIC POLICY

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INTRODUCTION

“While the law may take periodic naps during a pandemic, [the courts] will not let it sleep through one.” *Maryville Baptist Church, Inc v Beshear*, __ F3d __, 2020 WL 2111316, at *4 (CA6, May 2, 2020).

No one disputes that, in the early days of March 2020, there was a valid public-health emergency that called for swift executive action. But short-term emergencies pose unique, long-term temptations. When an executive is able to wield swift, unilateral, sweeping power to rapidly respond to an emergency situation, it can be extraordinarily appealing for the executive to continue to take decisive action without being slowed down by the compromise and competing interests that are necessitated by the legislative process. If the executive chooses to continue the emergency indefinitely and sidelines the Legislature in the interim, governance of the State no longer resembles a democracy.

Those dangers are squarely present here. The Michigan Legislature permitted Governor Whitmer to take extraordinary and immediate executive action during the first month of Michigan’s response to the COVID-19 pandemic and even granted a 23-day extension of her initial emergency declaration. But the Michigan Legislature declined to extend Governor Whitmer’s declaration of a state of emergency beyond April 30, 2020. The Legislature’s decision not to extend the state of emergency constituted its determination that, now that Michigan had its bearings about the nature of the pandemic, the Legislature could resume its constitutionally mandated role of legislating based upon policy for what is no longer an emergency but a long-term challenge.

But instead of permitting the Legislature to resume its ordinary policy-setting and law-making role, Governor Whitmer simply re-declared exactly the same state of emergency that Michigan law required—and the Legislature directed—to be terminated. Under Governor Whitmer’s interpretation of the relevant statutes, she may continue to re-declare a state of

emergency serially, for as long as she determines that the pandemic continues to constitute an “emergency.”

That interpretation should be rejected. Indeed, a similar interpretation was rejected by the Wisconsin Supreme Court just yesterday in *Wisconsin Legislature v Palm*, ___ Wis ___ (May 13, 2020) (Case No. 2020AP765-OA). There, after noting that “the executive’s capacities for swift, vigorous, and secretive action are at a premium” where there is no time for “ex ante deliberation, and no metric for ex post assessments,” the Court recognized that the executive’s “emergency powers are premised on the inability to secure legislative approval given the nature of the emergency.” *Id.* at ___; slip op at 22. The Court cited the example of a forest fire, where there is no time for debate and contrasted that with a pandemic, which lasts for months, and concluded that “the Governor cannot rely on emergency powers indefinitely.” *Id.* at ___; slip op at 23.

The COVID-19 pandemic easily could last for years to come. The Governor’s sweeping assertion that she can rule by emergency powers, potentially for years and without any regard for the Legislature, exceeds the scope of her statutory authority and violates the safeguard of the Michigan Constitution’s Separation of Powers clause.

Some may argue that the re-declared state of emergency and the associated executive orders are required to help flatten the curve. That argument should be rejected. The Governor has admitted that the curve has flattened, and the data support this statement.

Some may also suggest that we are faced with a choice between continued law making by executive fiat and another spike in COVID-19 cases. That is a false choice that overlooks the Michigan Legislature. Continued law making by executive order is not necessary, especially where the Legislature presented a bill to the Governor codifying and extending the existing executive orders. (See Senate Bill 0858, attached as **Exhibit 1**). Although the Governor

vetoed that bill on May 4, 2020, its passage in both houses of the Legislature demonstrates that the Legislature is capable of exercising its constitutionally mandated law-making role.

There is no dispute that the risks associated with exposure to the virus that causes COVID-19 require measures to protect public health. Many of those measures have already been implemented voluntarily and scrupulously by millions of Michiganders. Hospitals and health care providers have implemented even more stringent safety measures based upon their vast experience dealing with infectious diseases and separating those who are infected from those who are not. With or without executive orders, it is clear that Michiganders will make decisions guided by their desire to avoid exposure to and spread of COVID-19. It is also clear that health care providers can and will conduct their operations in a manner that will take precautions to prevent the transmission of the virus that causes COVID-19.

Now that Michigan has flattened the curve, and Michiganders understand the risks associated with COVID-19 and the long-term challenges it poses, it is time for law making that strikes a balance between at least two important interests: the protection of the public health and the revival of the economy, including the important health care sector. The Legislature is the proper branch—and indeed the only branch—that is constitutionally equipped to take up that task.

ARGUMENT

I. THE CURVE HAS FLATTENED AND THE DATA NO LONGER SUPPORTS EMERGENCY MEASURES.

Since Governor Whitmer's original declaration of a state of emergency in early March, 2020, the projected impact of the COVID-19 pandemic has changed substantially. Initial projections based on some models projected widespread infection of the population that would overwhelm our hospitals and healthcare systems, resulting in a massive number of deaths. One model from the CDC projected between 160 to 214 million infections and between 200,000 to 1.7

million deaths nationwide.¹ Based upon those projections, government leaders made hard decisions on how to best to protect the health of their citizens, while acting within the bounds of controlling constitutions and established law.

Fortunately, however, the projections upon which the government leaders made their decisions back in March 2020 were grossly inaccurate. Set forth below is a comparison of the projections made by the CDC in early 2020 with the actual data as of May 10, 2020:

Data	CDC Projections	Actual Numbers²	Comparison of Actual Numbers to CDC Projections
Number of people infected nationwide	160 million to 214 million	1,364,061	0.8% to 0.6% of projection
Number of deaths nationwide	200,000 to 1.7 million	82,246	41.1% to 4.8% of projection

During a press conference on Monday, April 27, 2020, Governor Whitmer acknowledged that the curve has flattened in Michigan. Graphics depicted that while Governor Whitmer’s administration anticipated 220,000 patients being hospitalized without social distancing efforts, there had only been 3,000 hospitalizations as of April 27. That is less than 1.4% of the projected COVID-19 hospitalizations underlying the Governor’s declared states of emergency and disaster. Moreover, according to data released by the State of Michigan, hospitals in the state are well-stocked with over 2,400 available ventilators, nearly 1,000 available ICU beds, and more than 7,000 available hospital beds.³

¹ Chas Danner, *CDC’s Worst-Case Coronavirus Model: 214 Million Infected, 1.7 Million Dead*, N.Y. Magazine Intelligencer, updated Mar. 13, 2020, available at <https://nymag.com/intelligencer/2020/03/cdcs-worst-case-coronavirus-model-210m-infected-1-7m-dead.html>.

² <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last updated May 13, 2020; last visited May 13, 2020).

³ <https://www.michigan.gov/coronavirus/0,9753,7-406-98159-523641--,00.html> (last updated May 13, 2020; last visited May 13, 2020).

Meanwhile, medical providers are on the brink of financial ruin, facing extreme revenue shortages caused by the Governor's order forcing the postponement or cancellation of so-called "non-essential" procedures. Thousands of healthcare workers across Michigan have been furloughed or laid off.

The Governor's stated goal of flattening the curve has been achieved, and the dire predictions of overwhelmed hospitals have not come to pass. No one disputes that the challenges surrounding COVID-19 will continue in the months, and quite likely the years, to come. But because we face a long-term challenge, not an emergency, it is the role of the Legislature, and not the Governor, to make laws that keep Michiganders safe while reopening Michigan businesses, including the health care sector.

II. THE LEGISLATURE PROPERLY CURTAILED THE GOVERNOR'S EMERGENCY POWERS, RENDERING LATER EXECUTIVE ORDERS UNENFORCEABLE.

The Governor's sweeping executive orders issued after the Legislature's decision not to extend the state of emergency are unenforceable under both the Emergency Management Act ("EMA"), Mich. Comp. Laws § 30.403, and the Emergency Powers of the Governor Act of 1945 ("EPGA"), Mich. Comp. Laws § 10.31.

The EMA unambiguously states that, unless both houses of the Michigan Legislature approve the Governor's request for an extension of a declared state of disaster or state of emergency with 28 days, then "the governor shall issue an executive order or proclamation declaring the state of disaster [or emergency] terminated." Mich. Comp. Laws § 30.403(3) & (4). That statutorily required declaration terminating the emergency in turn curtails the Governor's emergency powers under the EPGA, which provides that any orders issued by the Governor during the emergency "shall cease to be in effect upon declaration by the governor that the emergency no

longer exists.” Mich. Comp. Laws § 10.31(2). Accordingly, a decision by the Legislature not to extend a state of emergency operates to end the emergency and return law making power to the Legislature.

The clear purpose for the EMA’s 28-day limit on the Governor’s exercise of her emergency powers is to ensure that the Legislature retains the ability to override the Governor’s ability to rule unilaterally without involvement from the Legislature. In essence, the EMA recognizes a period of transition between an emergency and the appropriate time for the Legislature to step in. That period is a maximum of 28 days unless the Legislature agrees to extend the emergency. Under the EMA and EPGA, which should be read together, the Legislature gets to decide whether the emergency continues, or whether the emergency has ended such that the Legislature is prepared to address the situation. Any other reading of the two statutes would render the 28-day limitation meaningless.

The legislative history of the EMA demonstrates this important role of the Legislature in assessing whether an emergency continues. When the Legislature adopted the 28-day limit in 2002, it did so only because “sometimes the legislature may not be in session during the time when a state of emergency or disaster needs extending,” and fully recognized that more lengthy extensions of emergency power could give rise to “abuses of executive power.” Mich. House Fiscal Agency Bill Analysis, H.B. 5496, 1/24/2002. The EMA’s 28-day limit operates as a safety valve to ensure that legislative democracy does not devolve into lengthy unilateral rule by the executive.

CONCLUSION

The Legislature’s decision not to extend the state of emergency operated to end the emergency and curtail the Governor’s emergency powers. Now that the curve has flattened and

the emergency has ended, it is time for the Legislature, and only the Legislature, to take up the important task of making laws that address the long-term challenges posed by COVID-19.

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Dated: May 14, 2020

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EXHIBIT 1

**STATE OF MICHIGAN
100TH LEGISLATURE
REGULAR SESSION OF 2020**

Introduced by Senators Barrett, Theis, Bumstead, Zorn, Victory, Outman, Bizon and MacGregor

ENROLLED SENATE BILL No. 858

AN ACT to amend 1976 PA 390, entitled “An act to provide for planning, mitigation, response, and recovery from natural and human-made disaster within and outside this state; to create the Michigan emergency management advisory council and prescribe its powers and duties; to prescribe the powers and duties of certain state and local agencies and officials; to prescribe immunities and liabilities; to provide for the acceptance of gifts; and to repeal acts and parts of acts,” by amending section 3 (MCL 30.403), as amended by 2002 PA 132.

The People of the State of Michigan enact:

Sec. 3. (1) The governor is responsible for coping with dangers to this state or the people of this state presented by a disaster or emergency.

(2) The governor may issue executive orders, proclamations, and directives having the force and effect of law to implement this act. Except as provided in section 7(2), an executive order, proclamation, or directive may be amended or rescinded by the governor.

(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. The state of disaster shall continue until the governor finds that the threat or danger has passed, the disaster has been dealt with to the extent that disaster conditions no longer exist, or until the declared state of disaster has been in effect for 28 days. After 28 days, the governor shall issue an executive order or proclamation declaring the state of disaster terminated, unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature. An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the disaster, the area or areas threatened, the conditions causing the disaster, and the conditions permitting the termination of the state of disaster. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and shall be promptly filed with the emergency management division of the department and the secretary of state, unless circumstances attendant upon the disaster prevent or impede its prompt filing.

(4) The governor shall, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists. 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. 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. An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the emergency, the area or areas threatened, the conditions causing the emergency, and the conditions permitting the termination of the state of emergency. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and shall be promptly filed with the emergency management division of the department and the secretary of state, unless circumstances attendant upon the emergency prevent or impede its prompt filing.

(5) Notwithstanding the termination of the underlying state of disaster or state of emergency declaration under this act, the following executive orders are incorporated by reference and are hereby extended as follows:

- (a) Executive Order No. 2020-14, through May 30, 2020.
- (b) Executive Order No. 2020-22, through April 30, 2020.
- (c) Executive Order No. 2020-26, through July 31, 2020.
- (d) Executive Order No. 2020-27, through May 5, 2020.
- (e) Executive Order No. 2020-28, through July 30, 2020.
- (f) Executive Order No. 2020-31, through July 30, 2020.
- (g) Executive Order No. 2020-35, through July 30, 2020.
- (h) Executive Order No. 2020-36, through December 31, 2020.
- (i) Executive Order No. 2020-37, through May 30, 2020.
- (j) Executive Order No. 2020-39, through May 30, 2020.
- (k) Executive Order No. 2020-40, through May 30, 2020.
- (l) Executive Order No. 2020-41, through June 30, 2020.
- (m) Executive Order No. 2020-43, through May 15, 2020.
- (n) Executive Order No. 2020-44, through June 30, 2020.
- (o) Executive Order No. 2020-46, through July 30, 2020.
- (p) Executive Order No. 2020-47, through May 30, 2020.
- (q) Executive Order No. 2020-49, through July 30, 2020.
- (r) Executive Order No. 2020-50, through July 30, 2020.
- (s) Executive Order No. 2020-51, through May 30, 2020.
- (t) Executive Order No. 2020-52, through June 29, 2020.
- (u) Executive Order No. 2020-53, through June 30, 2020.
- (v) Executive Order No. 2020-54, through June 30, 2020.
- (w) Executive Order No. 2020-56, through May 30, 2020.
- (x) Executive Order No. 2020-57, through July 30, 2020.
- (y) Executive Order No. 2020-58, through June 30, 2020.
- (z) Executive Order No. 2020-61, through June 30, 2020.
- (aa) Executive Order No. 2020-62, through July 30, 2020.
- (bb) Executive Order No. 2020-63, through June 30, 2020.

(6) Every business, place of public accommodation, and place of public service that is open to the public with face-to-face interaction must do all of the following until May 30, 2020:

(a) Ensure adherence to social distancing and mitigation measures recommended by the Centers for Disease Control and Prevention, including the use of face coverings and individuals remaining at least 6 feet from people from outside the individual's household to the extent feasible under the circumstances.

(b) Adopt heightened standards of facility cleaning and disinfection to limit employee and public exposure to COVID-19, as well as protocols to clean and disinfect in the event of a positive COVID-19 case in the workplace.

(c) Provide personal protective equipment for employees appropriate for the work activity being performed, subject to the availability of personal protective equipment.

(d) Adopt policies to limit the sharing of equipment and tools between individuals.

(e) Promote remote work for employees to the fullest extent practicable.

(f) Adopt policies to prevent workers from entering the premises if they display respiratory symptoms or have had contact with a person with a confirmed diagnosis of COVID-19.

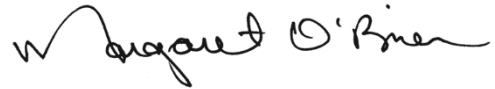
(7) As used in subsection (6):

(a) "Place of public accommodation" means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods,

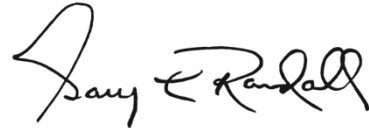
services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public. Place of public accommodation also includes the facilities of the following private clubs:

- (i) A country club or golf club.
- (ii) A boating or yachting club.
- (iii) A sports or athletic club.
- (iv) A dining club.

(b) "Place of public service" means a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of this state, a political subdivision of this state, or an agency of this state or a political subdivision of this state, or a tax-exempt private agency established to provide service to the public, except that a place of public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment.



Secretary of the Senate



Clerk of the House of Representatives

Approved _____

Governor

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PROOF OF SERVICE

Jessica Brickner, states that on May 14, 2020, she served the Mackinac Center for

Public Policy's Motion for Leave to File Amicus Brief via E-mail upon:


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