

IN THE STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN HOUSE OF
REPRESENTATIVES
and MICHIGAN SENATE,

Plaintiffs,

Case No. 20-

-MZ

v.

Hon.

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

Defendant.

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VERIFIED COMPLAINT FOR IMMEDIATE DECLARATORY RELIEF

There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.

Plaintiffs, the Michigan House of Representatives and the Michigan Senate (together, “the Legislature”), through their attorneys and for their complaint against Defendant Governor Gretchen Whitmer, state the following:

INTRODUCTION

1. The Michigan Legislature seeks to defend Michigan’s constitutional system and the Legislature’s role as the sole lawmaking body in that system. Defendant, the head of the executive branch, has the power to execute Michigan’s laws, not usurp them.

2. In response to the ongoing COVID-19 pandemic, Defendant Gretchen Whitmer has asserted vast executive-branch power to implement sweeping orders.

3. Expressly and publicly refusing to collaborate with the Legislature, Defendant has unilaterally crafted and implemented public policies governing almost every aspect of life in Michigan. These include restrictions on how every person in Michigan may work, go to school, worship, exercise legal rights, socialize, and live hour-by-hour.

4. Ever since COVID-19 came to Michigan, Defendant has insisted that she need not even consider the Legislature’s input. Indeed, not only has the Governor announced that she will veto any efforts to implement *any* limits on her otherwise unbridled powers—no matter how reasonable—but she has also vetoed even the Legislature’s attempt to codify her exact orders through the legislative process.

5. In asserting these powers, the Defendant has ignored the State Constitution and relied on erroneous readings of certain emergency management laws, namely the 1945 Emergency Powers of the Governor Act (“EPGA”), MCL 10.31–.33; and the 1976 Emergency Management Act (“EMA”), MCL 30.401–.421. See EO 2020-4.

6. The Governor is wrong to do so. One of those statutes reaches only local emergencies—not the sort of statewide concern that COVID-19 presents. The other includes express restrictions on the Governor’s limits—limits that the Governor has blatantly sought to evade.

7. Statutory authority aside, the Michigan Constitution requires a separation of powers among co-equal branches of government. Yet Defendant’s recent actions seize lawmaking power from the Legislature in service of a new executive-domineered legal regime. In doing so, Defendant takes control of matters at the core of the Legislature’s constitutional mandate. And she does so under no discernible standards or time limits, save vague insistences that an “emergency” requires them.

8. Contrary to express legislative intent and the most basic understanding of checks and balances, the Governor’s actions would leave Michigan in a state of emergency indefinitely, with no real constraints on the Governor’s vast emergency powers during that time.

9. Especially during times of crisis, the law warrants respect.

10. COVID-19 presents real problems that call for a comprehensive and deliberative governmental response. But that response must be consensus-based and developed through cooperation between the legislative and executive branches—not through go-it-alone absolutism that ignores our State’s most democratic institutions and offends the rule of law.

11. The Court should enter a declaratory judgment in favor of the Michigan Legislature holding that Defendant’s ongoing “emergency” orders are improper and invalid as a matter of Michigan constitutional and statutory law.

PARTIES, JURISDICTION, AND VENUE

12. Plaintiff the Michigan House of Representatives is the lower chamber of the Michigan Legislature, created by Article 4, § 1, of Michigan’s 1963 Constitution.

13. Plaintiff the Michigan Senate is the upper chamber of the Michigan Legislature, created by Article 4, § 1, of Michigan’s 1963 Constitution.

14. Article 4, § 16 of Michigan’s 1963 Constitution says that each legislative chamber has plenary authority to “determine the rules of its proceedings.” The Michigan House has adopted rules that appoint the Speaker of the House as chief administrator of the House. The Michigan Senate has adopted rules that appoint the Senate Majority Leader as chief administrator of the Senate. The Speaker and the Majority Leader have each retained General Counsel for their chamber and delegated to General Counsel the power to speak for and make legal decisions on behalf of the respective chambers. The Senate General Counsel and House General Counsel have both authorized this action and retained the undersigned counsel to pursue it.

15. Defendant Gretchen Whitmer is being sued in her official capacity as Michigan’s Governor, an office created by Article 5, § 1, of Michigan’s 1963 Constitution.

16. The Court of Claims has “exclusive” jurisdiction to “hear and determine any claim or demand, statutory or constitutional,” or any demand for “equitable[] or declaratory relief . . . against the state or any of its departments or officers.” MCL 600.6419(1)(a).

17. Because the Legislature raises statutory and constitutional claims, and seeks equitable and declaratory relief, against the Governor, this Court has jurisdiction to hear these claims.

18. For the same reason, venue is appropriate in this Court.

DECLARATORY RELIEF UNDER MCR 2.605 IS APPROPRIATE

19. Under *Lansing Sch Ed Ass’n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010), “whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment.” *Id.*

20. MCR 2.605(A)(1) states that, “[i]n a case of *actual controversy* within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment.” (emphasis added)

21. To show an “actual controversy,” the plaintiffs need only “plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised.” *Lansing Sch Ed Ass’n*, 487 Mich at 372 n 20, quoting *Associated*

Builders & Contractors v Director of Consumer & Industry Servs, 472 Mich 117, 126; 693 NW2d 374.

22. Michigan’s legislative and executive branches disagree sharply over whether the Governor’s recent actions addressing the COVID-19 pandemic are lawful. The Legislature asserts that certain actions of the Governor are not authorized by statute and that they violate the separation of powers by impermissibly encroaching on the Legislature’s lawmaking power. The Governor disagrees.

23. A declaratory judgment is necessary to sharpen issues raised and to clarify whether the Governor’s orders are invalid because they violate statutes and the Michigan Constitution’s delegation of the lawmaking function to the legislative branch.

24. Therefore, the Legislature requests a declaratory judgment under MCR 2.605.

FACTUAL BACKGROUND

25. On March 10, 2020, Michigan recorded its first COVID-19 case.

26. That same day, Governor Whitmer declared a state of emergency, relying on three legal authorities: Article 5, § 1, of Michigan’s 1963 Constitution; the 1945 Emergency Powers of the Governor Act (“EPGA”), MCL 10.31–.33; and the 1976 Emergency Management Act (“EMA”), MCL 30.401–.421. EO 2020-4.

27. Article 5, § 1, says: “Except to the extent limited or abrogated by article V, section 2, or article IV, section 6, the executive power is vested in the governor.”

28. The EPGA says in relevant part:

During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled, either upon application of the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police or upon his or her own volition, the governor may proclaim a state of emergency and designate the area involved. After making the proclamation or declaration, the governor may promulgate reasonable orders, 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. 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; establishment of a curfew; control of the sale, transportation, and use of alcoholic beverages and liquors; and control of the storage, use, and transportation of explosives or inflammable materials or liquids deemed to be dangerous to public safety. [MCL 10.31(1).]

29. The EMA says, in relevant part:

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 [MCL 30.403(3).]

30. The EMA's next section—MCL 30.403(4)—uses verbatim language to allow the Governor to declare a state of emergency.

31. For the next two weeks, the Governor issued 17 executive orders on numerous topics. Among other things, these orders closed all Michigan K-12 schools, limited groups to 250 and then 50 or fewer, and restricted visitors to residential and health care centers. The Governor also issued orders against price gouging, and she closed restaurants, cafes, bars, taverns, wineries, clubs, theaters, libraries, museums, gyms, spas, casinos, racetracks, salons and tattoo parlors, and any other place of public amusement. She expanded unemployment eligibility and eased several categories of licensure restrictions. Further, she suspended certain provisions of the Open Meetings Act and cancelled all non-essential medical and dental procedures.

32. During that time, the Legislature passed \$150 million in funding for the COVID-19 public health efforts. See 2019 HB 4729 and 2019 SB 151. The Legislature continued to cooperate with the Governor, even as her public statements made it clear she views Michigan's response to COVID-19 as a one-person show, declaring that, "[a]s the chief executive of this state[,] it is [her] responsibility to make these decisions and keep our state safe." David Jesse, *Gov. Gretchen Whitmer: All Michigan K-12 schools must close until April 5*, Detroit Free Press <<https://bit.ly/2Wou6Aq>> (March 12, 2020).

33. On March 23, 2020, the Governor issued her first stay-at-home order, instituting social distancing, suspending non-essential businesses' non-basic operations, and forbidding people to leave their homes except for a few exceptions, all regardless of whether the prohibited activities could be performed without spreading the virus. EO 2020-21.

34. Over the next week, the Governor issued 12 more executive orders. She postponed election-administration deadlines, changed unemployment-compensation hearings, extended tax return filing and payment deadlines, and allowed the May 5 election to be conducted primarily by absentee ballot. She required utilities to reverse water shut-offs, changed MDOC visiting and early-release rules, and lifted regulations on a bevy of services.

35. On March 30, 2020, the Legislature and the Governor signed a statement saying that “the Executive and Legislative branches of state government are working together to do whatever is necessary to ensure an effective response to COVID-19.” *Joint Statement from Governor Whitmer and Legislative Leaders* <<https://bit.ly/2zUtwTn>> (March 30, 2020).

36. On April 1, 2020, the Governor issued EO 2020-33, titled “Expanded emergency and disaster declaration,” relying again on Article 5, § 1, the EPGA, and the EMA.

37. Over the next week, she suspended K-12 school through the rest of year, issued an order requiring employers to accommodate employees who are sick or whose family is sick, loosened FOIA requirements, lifted more regulatory mandates, and encouraged electronic signatures and remote notarization and witnessing.

38. On April 7, 2020, the Legislature voted to extend the declaration to April 30. 2020 SCR 24.

39. On April 9, 2020, the Governor issued a second, more restrictive stay-at-home order. EO 2020-42. That order included restrictions against travelling

between residences and limiting both the number of customers and the products sold in stores (such as paint, plants, and other items). Under the orders, a customer could buy hundreds of consumer products in one store aisle but find the garden plants roped off and prohibited in another.

40. Over the next few weeks, the Governor issued many other orders, including orders buying back spirits, extending validity of drivers' licenses and state ID cards, lifting various regulations, and suspending the statute of limitations and expiration of personal protection orders. The Governor also rescinded, restated, and corrected many of her former orders.

41. The speed, breadth, and number of the Governor's executive orders have confused many of the Legislature's constituents, many whom have never before reached out to a legislator. Largely in response to the Legislature's official and unofficial inquiries, the Governor has had to issue over 200 FAQs clarifying her various orders and even revise certain orders to cure identified errors. These errors included accidentally prohibiting agricultural veterinarian services and criminalizing not wearing a mask in a grocery store.

42. In addition to corrections, the Legislature has also used its expertise in crafting public policy to make suggestions, a small number of which the Governor has adopted; these range from protecting houses of worship from criminal penalties to allowing curbside product sales and deliveries so that small businesses can more fairly compete with large retailers that have remained open.

43. In addition to trying to make sense of the executive orders, the Legislature has introduced almost 100 bills on COVID-19-related issues. These bills include tax deductions for first responders, directing universities to refund boarding, and many other helpful policy solutions. The Legislature has also passed a bill seeking to codify almost all the Governor's executive orders (though not her stay-at-home order). The Governor has vetoed that bill.

44. On April 24, 2020, the Legislature passed a concurrent resolution to form a bipartisan Joint Select Committee on the COVID-19 Pandemic. 2020 HCR 20.

45. That same day, the Governor issued her third stay-at-home order. EO 2020-59.

46. On April 27, 2020, the Governor requested that the Legislature extend her EO 2020-33 declaration of disaster and emergency.

47. Although the Legislature carefully considered the question, it determined not to extend the Governor's declaration of disaster and emergency.

48. On April 30, 2020, at 7:29 p.m., as required by the Emergency Management Act, the Governor issued EO 2020-66, which terminated her declarations of the COVID-19 disaster and emergency.

49. Just one minute later, notwithstanding the clear constraints of the EMA, the Governor issued EO 2020-68, which redeclared the COVID-19 disaster and emergency through May 28, 2020 as though the Legislature had approved her requested extension. This is believed to be the first instance in Michigan history that

the Governor has unilaterally extended an emergency declaration under the EMA without legislative approval.

50. The Governor simultaneously declared that the state of emergency under the EPGA “remains declared” through May 28. EO 2020-67.

51. On May 2, the Governor issued her fourth stay-at-home order—EO 2020-70—which cites Article 5, § 1, the EPGA, and the EMA. That order carries forward her previous stay-at-home orders’ core requirements, including social-distancing and essential-businesses-only rules, until May 15, 2020.

COUNT I
VIOLATION OF THE EMERGENCY MANAGEMENT ACT

52. The Legislature incorporates the allegations of the foregoing paragraphs as if fully stated herein.

53. The Governor’s COVID-19 executive orders have relied, in large part, on the EMA, MCL 30.401–30.421.

54. Under the EMA, the Governor may unilaterally declare an emergency or disaster and then exercise her legislatively delegated authority—but only for 28 days. After 28 days, the Governor’s EMA powers end unless the Legislature approves a continuing state of emergency or disaster. MCL 30.403(3)–(4).

55. Given the COVID-19 pandemic, the Governor declared a state of emergency under MCL 30.403(4) on March 10, 2020; and she expanded that initial declaration to include a state of disaster under MCL 30.403(3) on April 1, 2020, before subsequently requesting a legislative extension of the declaration.

56. On April 7, 2020, the Legislature agreed, via concurrent resolution, to extend the declarations of emergency and disaster to April 30, 2020.

57. The Legislature did not approve a further extension of any emergency or disaster declaration.

58. The Governor terminated her declarations of a COVID-19 emergency and disaster under the EMA, as is statutorily required, but restated the same declarations under that same law just one minute later.

59. The Governor next issued another stay-at-home order relying on her emergency powers under the EMA.

60. The Governor further ordered that all other still-existing COVID-19 executive orders now rest, in part, on her redeclared EMA emergency and disaster declarations.

61. Those actions are inconsistent with the EMA's plain text.

62. The Governor's contrary interpretation of the EMA would nullify the EMA's carefully circumscribed cooperative regime; produce absurd results; render the Legislature's role a nullity; and defeat a central purpose of the statute: allocating power across both the legislative and executive branches to respond to crises.

63. The Court should declare that the Governor cannot rely on the EMA to justify her April 30, 2020 declarations of emergency and disaster, or any of the executive orders that rest on those declarations.

COUNT II
VIOLATION OF THE EMERGENCY POWERS OF THE GOVERNOR ACT

64. The Legislature incorporates the allegations of the foregoing paragraphs as if fully stated herein.

65. The Governor's COVID-19 executive orders have also relied, in part, on authority from the delegation in the EPGA, MCL 10.31–10.33.

66. The EPGA, however, does not provide authority for the Governor's statewide COVID-19 executive orders.

67. The EPGA's plain text, especially when considered with the EMA's language and the EPGA's historical context, show that the EPGA was intended to address local crises in the vein of civil disturbances in an area within the state—not statewide health emergencies.

68. Interpreting the EPGA otherwise would disregard the plain language of the EPGA and create significant constitutional concerns.

69. If, however, the EMA and EPGA are construed to be coextensive, then under the doctrine of *in pari materia*, the EMA's 28-day rule applies to the EPGA.

70. The Court should declare that the EPGA does not provide authority for the Governor's COVID-19 orders.

COUNT III
VIOLATION OF ARTICLE 5, § 1, OF THE 1963 MICHIGAN CONSTITUTION

71. The Legislature incorporates the allegations of the foregoing paragraphs as if fully stated herein.

72. The Governor’s COVID-19 executive orders have relied, in part, on her authority under Article 5, § 1, of Michigan’s 1963 Constitution. This includes, for example, EO 2020-70, Michigan’s “stay-at-home order,” which purports to “suspend activities that are not necessary to sustain or protect life.” EO 2020-70.

73. Article 5, § 1 says: “Except to the extent limited or abrogated by article V, section 2, or article IV, section 6, the executive power is vested in the governor.” (Neither of those exceptions applies here.)

74. The Governor’s COVID-19 executive orders—which create, modify, and suspend numerous laws—are an exercise of *lawmaking*, not executive authority.

75. Under Article 5, § 1, “[t]he Governor has no power to make laws.” *Taxpayers of Mich Against Casinos v State*, 471 Mich 306, 356; 685 NW2d 221 (2004) (Weaver, J., concurring), citing *People v Dettenthaler*, 118 Mich 595; 77 NW 450 (1898).

76. Rather, “[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.” Const 1963, art 4, § 1. Importantly, neither of those exceptions apply here: Article 4, § 6, gives legislative power to the redistricting commission, and Article 5, § 2, “delegate[s] a very limited and specific legislative power to the executive.” *Soap & Detergent Ass’n v Nat. Res Com’n*, 415 Mich 728, 753; 330 NW2d 346 (1982).

77. Therefore, the Court should declare that Article 5, § 1, does not give the Governor the power to issue lawmaking executive orders to address an emergency,

including the power to suspend, vitiate, modify, or supplement existing Michigan laws.

COUNT IV
VIOLATION OF ARTICLE 3, § 2, OF THE 1963 MICHIGAN CONSTITUTION

78. The Legislature incorporates the allegations of the foregoing paragraphs as if fully stated herein.

79. As noted above, the Executive Branch has no lawmaking authority; rather, the Legislature is *the* lawmaking branch of Michigan’s government. Const 1963, art 4, § 1.

80. Michigan’s separation of powers clause says: “The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.” Const 1963, art 3, § 2.

81. Yet the Governor’s unilateral extension of her COVID-19 executive orders past April 30 exercises lawmaking authority that belongs solely to the Legislature.

82. Ruling by Executive Order—functionally, rule by the pen of one person—is not Michigan’s default governmental position. It is an extreme derogation from the strong default of rule by law—justified, if at all, only in the most extreme of crises and for the shortest time possible solely to allow for swift protective action pending more deliberate and durable public policy determinations by the Legislature.

83. Michigan has been under rule-by-executive-order for over eight weeks.

84. Whatever limited power the Governor may have rightfully wielded for a short time during the first appearance and then height of the COVID-19 emergency has now run out.

85. For nearly two months, the Legislature has been appropriately deferential to the Governor's efforts to manage the COVID-19 emergency, even when the Legislature found them disagreeable and wrongheaded.

86. But Michigan's constitutional structure—a structure built to weather crises of every kind—explicitly gives *only the Legislature* the power to make laws.

87. Since March 10, 2020, the Legislature has performed its lawmaking duties quickly and effectively. It immediately awarded the Governor the \$150 million she asked for to fight COVID-19. It has set up committees and workgroups to recommend next steps. And both the Senate and House caucuses have offered plans to handle the COVID-19 fallout going forward. Meanwhile, the Legislature has continued its normal business, passing and introducing scores of bills on myriad topics, dozens of them pertaining to COVID-19. Many of these bills seek to establish through legislation what the Governor has attempted to do through executive order.

88. Crucially, the Legislature is *not* asking the Court to declare that the Governor's policy decisions are bad policy or that she has no role to play in controlling COVID-19.

89. Rather, the Legislature is merely asking the Court to affirm Michigan's constitutional structure: that the Legislature *makes* the laws and the Executive *enforces* them. In short, this request is a *who* issue, not a *what* or *how much* issue.

Irrespective of the wisdom of the Governor's choices, these are simply no longer her calls to make unilaterally. If the Governor wants to suspend, modify, or supplement a Michigan law, she must work with the Legislature to do so. After all, Michigan's other governors have handled every crisis in exactly that fashion since this State's inception.

90. To the extent the Governor believes that the Legislature's delegation of authority under the EPGA somehow justifies her actions, she is wrong.

- a. First, the Legislature lacks the constitutional authority to delegate as much power as the Governor believes the EPGA gives her. The Governor's unprecedented interpretation of the EPGA would allow her to wield unbelievably broad lawmaking power. Such a delegation cannot survive in our constitutional system.
- b. Second, a proper delegation would be constitutionally required to include an express articulation of the exact policy to be achieved via the delegation and robust standards and safeguards for its achievement; the EPGA includes no clear articulation of policy and no standards or safeguards guiding the Governor's exercise of this awesome power.

91. The Court should therefore declare that the Governor's ongoing COVID-19 executive orders, as well as the EPA to the extent it authorizes those orders, violate the separation of powers.

REQUEST FOR RELIEF

WHEREFORE, the Legislature respectfully requests that this Court:

- A. Order “a speedy hearing” of this action and “advance it on the calendar” under MCR 2.605(D).
- B. Declare and adjudge that:
 - 1. The Governor’s authority to act under the EMA ended April 30, 2020;
 - 2. The EPGA does not provide authority for the Governor’s COVID-19 executive orders;
 - 3. The Governor has no lawmaking power under Const 1963, art 5, § 1; and
 - 4. The Governor’s ongoing COVID-19 executive orders violate the separation of powers.
- C. Grant such other relief as this Court deems just and proper.

Respectfully submitted,

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Dated: May 6, 2020

I declare that the statement above are true to the best of my knowledge, information and belief:

/s/ Hassan Beydoun (with consent)
Hassan Beydoun, on behalf of
The Michigan House of Representatives

/s/ William R. Stone (with consent)
William R. Stone, on behalf of
The Michigan Senate