New Civil Liberties Alliance

October 6, 2020

Via eFileMA

Hon. Francis V. Kenneally
Clerk, Supreme Judicial Court
John Adams Courthouse
1 Pemberton Square, Suite 1400
Boston, MA 02108

Re: Desrosiers v. Baker, *SJC-12983*
Mass. R. App. P. 16(l): Supplemental Notice of Pertinent & Significant Authorities

Dear Mr. Kenneally,

Petitioners respectfully submit this letter to alert the Court to state and federal judicial decisions that have been issued since the Supreme Judicial Court heard oral arguments in *Desrosiers v. Baker* on September 11, 2020. Under the Massachusetts Rules of Appellate Procedure,

> [w]hen pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter setting forth the citations.

Mass. R. App. P. 16(l). Such is the case here, where the Michigan Supreme Court and the United States District Court for the Western District of Pennsylvania have recently ruled on matters raised by the Justices during oral argument and by the parties' briefing.

At oral argument, Justice Lenk asked undersigned counsel: "In terms of statutes for the states, and the decisions in this regard … could you tell me what's going on with other states and what the results have been there?" Oral Argument at 16:29 (Sept. 11, 2020). Undersigned counsel noted that a challenge to Governor Whitmer's COVID-19 orders, based on two Michigan emergency statutes, was pending before the Michigan Supreme Court. *Id.* at 16:55. On October 2, 2020, in *Midwest Institute of Health, PLLC v. Whitmer*, the Michigan Supreme Court held that Governor Whitmer's COVID-19 orders violated the separation of powers and nondelegation clauses of the Michigan Constitution. *Midwest Inst. of Health, PLLC v. Whitmer*, __ N.W.2d __, 2020 WL 5877599, at 31 (Mich. Oct. 2, 2020) (Exhibit A).

In addition to Justice Lenk's question regarding judicial review of other states' gubernatorial COVID-19 orders, Governor Baker's briefing drew comparisons between the Massachusetts Civil Defense Act and the Pennsylvania Emergency Code to defend his interpretation of the Civil Defense Act. Br. for Resp. at 27-28, 42 (Aug. 28, 2020) (citing *Friends of Danny DeVito v. Wolf*, 227

A.3d 872 (Pa. 2020)). Petitioners contradicted Respondent's interpretation of the two statutes and Governor Baker's characterization of the holding of *Friends of Danny DeVito* in their Reply Brief. Pet's Reply Br. at 7 n.2, 10 & 12 (Sept. 2, 2020). On September 14, 2020, in *County of Butler v. Wolf*, the Western District of Pennsylvania held that Governor Wolf's COVID-19 orders violated First Amendment rights to assembly and speech, and Fourteenth Amendment rights to substantive due process and equal protection. *Cty. of Butler v. Wolf*, __ F. Supp. 3d __, 2020 WL 5510690, at *2 (W.D. Pa. Sept. 14, 2020) (Exhibit B).

Thus, since judicial interpretation of the state and federal constitutionality of Michigan and Pennsylvania COVID-19 emergency orders were raised in oral argument and in the parties' briefing, Petitioners offer the following supplemental citations, without argument. Mass. R. App. P. 16(l).

Michigan | *Midwest Inst. of Health, PLLC v. Whitmer*

On October 2, 2020, the United States District Court for the Western District of Michigan asked the Michigan Supreme Court "to resolve critical questions concerning the constitutional and legal authority of the Governor to issue such [COVID-19 emergency] orders." *Midwest Inst. of Health*, 2020 WL 5877599, at 1. After oral argument in *Desrosiers v. Baker*, the Michigan Supreme Court held:

> first, the Governor did not possess the authority under the Emergency Management Act of 1976 (the EMA), MCL 30.401 *et seq.*, to declare a "state of emergency" or "state of disaster" based on the COVID-19 pandemic after April 30, 2020; and second, the Governor does not possess the authority to exercise emergency powers under the Emergency Powers of the Governor Act of 1945 (the EPGA), MCL 10.31 *et seq.*, because that act is an unlawful delegation of legislative power to the executive branch in violation of the Michigan Constitution. Accordingly, the executive orders issued by the Governor in response to the COVID-19 pandemic now lack any basis under Michigan law.

Id. at 1-2 (underscores in original). While Michigan's statutory scheme and the factual foundation of Governor Whitmer's orders differ in some ways from those presented in *Desrosiers v. Baker*, there are several important statutory interpretation and constitutional principles upon which this Court must deliberate, that were addressed in the *Midwest Institute of Health* decision. For instance, the meaning of undefined statutory terms (*see, e.g.*, *id.* at 9-10, 11-13), the significance of historical context for interpreting emergency statutes (*see, e.g.*, *id.* at 10), the consequence of interpreting one statute to nullify another or render it surplusage (*see, e.g.*, *id.* at 10), and the importance and application of the separation of powers and the nondelegation doctrine (*see, e.g.*, *id.* at 14-18, 25-27).

The Michigan Supreme Court also extensively discussed and applied this Court's decision in *Opinion of the Justices*, 315 Mass. 761 (1944). *Id.* at 22-23. It noted that the Massachusetts Constitution does not allow the General Court "to confer upon the governor 'a roving commission to repeal or amend by executive order unspecified provisions included anywhere in the entire body of' state law." *Id.* at 22 (quoting *Opinion of the Justices*, 315 Mass. at 767). The Michigan Court adopted this Court's interpretation of the limited nature of authority delegated to the Governor,

concluding that emergencies do "not abrogate the Constitution." *Id.* at 22 (quoting *Opinion of the Justices*, 315 Mass. at 768) (internal quotations omitted).

In *Midwest Institute of Health, PLLC v. Whitmer*, the Michigan Supreme Court held that Governor Whitmer's COVID-19 orders violated the separation of powers and nondelegation clauses of the Michigan Constitution. *Id.* at 31. It offers analyses and perspectives that could aid this Court in its determination of *Desrosiers v. Baker*.

Pennsylvania | *County of Butler v. Wolf*

On September 14, 2020, the United States District Court for the Western District of Pennsylvania held:

> (1) that the congregate gathering limits imposed by Defendants' mitigation orders violate the right of assembly enshrined in the First Amendment; (2) that the stay-at-home and business closure components of Defendants' orders violate the Due Process Clause of the Fourteenth Amendment; and (3) that the business closure components of Defendants' orders violate the Equal Protection Clause of the Fourteenth Amendment.

Cty. of Butler, 2020 WL 5510690, at *2. While Pennsylvania's statutory scheme and the factual foundation of Governor Wolf's orders differ in some ways from those presented in *Desrosiers v. Baker*, there are several important constitutional principles upon which this Court must deliberate, that were addressed in the *County of Butler* decision.

For instance, the district court provided context for its review of a well-meaning Governor's orders intended to mitigate a serious health crisis, by explaining that "the greatest threats to our system of constitutional liberties may arise when the ends *are* laudable, and the intent *is* good—especially in a time of emergency." *Id.* at *1 (emphasis in original). The district court considered whether it should afford Governor Wolf's orders any deference or whether ordinary constitutional scrutiny should apply (*see, e.g.*, *id.* at **5-10), whether the orders restricting gatherings violate the First Amendment (*see, e.g.*, *id.* at **11-15), whether the orders violate substantive due process under the Fourteenth Amendment, including the rights to pursue one's chosen occupation and to be free from arbitrary governmental authority (*see, e.g.*, *id.* at **16-24, 25-29), and whether the orders closing businesses violate the Equal Protection Clause of the Fourteenth Amendment (*see, e.g.*, *id.* at 29-31).

In *County of Butler v. Wolf*, the district court held that Governor Wolf's COVID-19 orders violated rights to assembly, speech, substantive due process, and equal protection. *Id.* at **15, 23, 24, 29 & 31. It offers analyses and perspectives that could aid this Court in its determination of *Desrosiers v. Baker*.

Conclusion

For the foregoing reasons, Petitioners alert this Court to these pertinent and significant authorities which have been issued after the close of briefing and oral arguments in the matter of *Desrosiers v. Baker*.

Respectfully submitted,

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Certificate of Service

I hereby certify that on October 6, 2020, the foregoing Petitioners' Supplemental Notice of Pertinent & Significant Authorities in the matter of *Desrosiers, et al. v. Baker*, SJC-12983, in the Supreme Judicial Court, was filed electronically with the Clerk of Court to be served by operation of the Court's CM/ECF system upon all counsel of record in the above-captioned case. Courtesy copies will also be emailed to Respondent.

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EXHIBIT A

***Midwest Inst. of Health, PLLC v. Whitmer*, __ N.W.2d __, 2020 WL 5877599 (Mich. Oct. 2, 2020)**

2020 WL 5877599
Only the Westlaw citation
is currently available.
Supreme Court of Michigan.

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

No. 161492
|
FILED October 2, 2020

USDC-WD: 1:20-cv-414

Justices: Stephen J. Markman Brian K. Zahra Richard H. Bernstein Elizabeth T. Clement Megan K. Cavanagh

OPINION

Chief Justice: Bridget M. McCormack

BEFORE THE ENTIRE BENCH

MARKMAN, J.

This case concerns the nature and scope of our state's public response to one of the most threatening public-health crises of modern times. In response to a global, national, and state outbreak of the severe acute respiratory disease named COVID-19, Michigan's Governor has issued a succession of executive orders over the past six months limiting public and private gatherings, closing and imposing restrictions upon certain businesses, and regulating a broad variety of other aspects of the day-to-day lives of our state's citizens in an effort to contain the spread of this contagious and sometimes deadly disease.

The ongoing validity of these executive orders has been the subject of much public debate as well as litigation in both state and federal courts. In the interest of comity, the United States District Court for the Western District of Michigan has asked this Court to resolve critical questions concerning the constitutional and legal authority of the Governor to issue such orders. We hereby respond to the federal court in the affirmative by choosing to answer the questions the federal court has certified, concluding as follows: first, the Governor did not possess the authority under the Emergency Management Act of 1976 (the EMA), MCL 30.401 *et seq.*, to declare a "state of emergency" or "state of disaster" based on the COVID-19 pandemic after

April 30, 2020; and second, the Governor does not possess the authority to exercise emergency powers under the Emergency Powers of the Governor Act of 1945 (the EPGA), MCL 10.31 *et seq.*, because that act is an unlawful delegation of legislative power to the executive branch in violation of the Michigan Constitution. Accordingly, the executive orders issued by the Governor in response to the COVID-19 pandemic now lack any basis under Michigan law.[1]

1 Our decision leaves open many avenues for the Governor and Legislature to work together to address this challenge and we hope that this will take place. See *Gundy v United States*, 588 US ___, ___; 139 S Ct 2116, 2145; 204 L Ed 2d 522 (2019) (Gorsuch, J., dissenting) ("Respecting the separation of powers forecloses no substantive outcomes. It only requires us to respect along the way one of the most vital of the procedural protections of individual liberty found in our Constitution.").

I. FACTS & HISTORY

The coronavirus (COVID-19) is a respiratory disease that can result, and has resulted, in significant numbers of persons suffering serious illness or death. In response to COVID-19, on March 10, 2020, one day before it was declared a pandemic by the World Health Organization, the Governor issued Executive Order (EO) No. 2020-04, declaring a "state of emergency" under the EPGA and the EMA. On March 20, 2020, the Governor issued EO 2020-17, which prohibited medical providers from performing nonessential procedures. On March 23, 2020, she issued EO 2020-21, which ordered all residents to stay at home with limited exceptions. On April 1, 2020, she issued EO 2020-33, which declared a "state of emergency" under the EPGA and a "state of emergency" and "state of disaster" under the EMA. She then requested that the Legislature extend the state of emergency and state of disaster by 70 days, and a resolution was adopted, extending the state of emergency and state of disaster, but only through April 30, 2020. Senate Concurrent Resolution No. 2020-24.

On April 30, 2020, the Governor issued EO 2020-66, which terminated the declaration of a state of emergency and state of disaster under the EMA. But, immediately thereafter, she issued EO 2020-67, which provided that a state of emergency remained declared under the EPGA. At the same time, she issued EO 2020-68, which redeclared a state of emergency and state of disaster under the EMA.[2] Although the Governor subsequently lifted the ban on nonessential medical procedures, she then issued EO 2020-97, which imposed numerous obligations on healthcare providers, including specific waiting-room procedures, limitations on the number of patient appointments, adding special hours for highly vulnerable patients, and establishing enhanced telehealth and telemedicine procedures.[3]

2 EOs 2020-67 and 2020-68 were later rescinded by orders that themselves were subsequently rescinded. Most recently, the Governor extended the state of emergency and state of disaster in

EO 2020-186, relying on both the EPGA and the EMA.

3 EO 2020-97 was later rescinded by an order that itself was subsequently rescinded. Most recently, the Governor issued EO 2020-184 which continues to impose a variety of restrictions on healthcare providers.

Plaintiffs in the underlying federal case are healthcare providers that were prohibited from performing nonessential procedures while EO 2020-17 was in effect and a patient who was prohibited from undergoing knee-replacement surgery. Defendants are the Governor, the Attorney General, and the Director of the Michigan Department of Health and Human Services. Although EO 2020-17 has been rescinded, the federal district court held that the case is not moot because at that time EO 2020-114 (now EO 2020-184) continued to impose restrictions on healthcare providers. After the federal district court decided to certify the questions to this Court, defendants moved for reconsideration, raising-- for the first time-- Eleventh Amendment immunity. The federal district court denied this motion and held that defendants had waived such immunity by not timely raising it in either the principal briefs of their motions to dismiss or in their initial responses to the court's invitation to brief the propriety of certification to this Court. Defendants appealed that ruling, and the matter remains pending in the United States Court of Appeals for the Sixth Circuit.

The federal district court has asked this Court to address two certified questions: (1) whether, under the EMA or the EPGA, the Governor has had the authority after April 30, 2020, to issue or renew any executive orders related to the COVID-19 pandemic; and (2) whether the EPGA and/or the EMA violate the Separation of Powers and/or the Nondelegation Clauses of the Michigan Constitution. We heard oral argument on these questions on September 9, 2020.

II. STANDARD OF REVIEW

"Matters of constitutional and statutory interpretation are reviewed de novo." *People v Skinner*, 502 Mich 89, 99; 917 NW2d 292 (2018). " '[S]tatutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.' " *Id.* at 100, quoting *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014), in turn citing *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003).

III. ANALYSIS

A. CERTIFIED QUESTIONS

MCR 7.308(A)(2)(a) provides:

> When a federal court, another state's appellate court, or a tribal court considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent,

> the court may on its own initiative or that of an interested party certify the question to the Court.

MCR 7.308(A)(5) provides:

> The Supreme Court may deny the request for a certified question by order, issue a peremptory order, or render a decision in the ordinary form of an opinion to be published with other opinions of the Court. The clerk shall send a paper copy or provide electronic notice of the Court's decision to the certifying court.

Defendants argue that we should not answer the certified questions, both because the case is moot[4] and because defendants are entitled to Eleventh Amendment immunity.[5] The federal district court held that the case is not moot because although nonessential medical procedures are no longer prohibited, plaintiffs remain subject to many restrictions, including in particular those pertaining to the number of appointments they can schedule on a daily basis. The federal district court also held that defendants had waived Eleventh Amendment immunity by waiting to raise this issue until their motion for reconsideration.

We agree with plaintiffs that this Court should not address-- much less second-guess-- the federal district court's decision to certify certain questions to this Court and not to certify others. Both mootness and Eleventh Amendment immunity are matters that fall within the jurisdiction of the federal courts, and neither matter is included within the federal court's certified questions. And those matters this Court is best equipped to answer are precisely those the federal court has certified. Therefore, those are the questions we will answer herein.

4 Defendants argue that the case is moot because plaintiffs originally challenged the prohibition against nonessential medical procedures established by EO 2020-17 and EO 2020-17 as well as the challenged prohibition itself have since been lifted.

5 The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." "The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." *Bd of Trustees of Univ of Alabama v Garrett*, 531 US 356, 363; 121 S Ct 955; 148 L Ed 2d 866 (2001). Suits brought against state officials in their official capacities are equivalent to suits against the state itself. *Kentucky v Graham*, 473 US 159, 166; 105 S Ct 3099; 87 L Ed 2d 114 (1985). However, a state may waive its Eleventh Amendment immunity through its conduct in federal court. *Lapides v Bd of Regents of the Univ Sys of Georgia*, 535 US 613, 618; 122 S Ct 1640; 152 L Ed 2d 806 (2002). The doctrine of waiver prevents states from selectively invoking immunity "to achieve unfair tactical advantages." *Id*. at 621. Here, in response to plaintiffs' motion for a preliminary injunction, defendants filed 107 pages of briefing with no mention of Eleventh Amendment immunity. Subsequently, defendants filed lengthy motions to dismiss with only passing reference to the Eleventh Amendment to assert that plaintiffs are not entitled to monetary damages. Finally, defendants filed briefs-- and oral arguments were held-- regarding the certification of the issues to this Court, and never once was Eleventh Amendment immunity raised. Defendants did not raise this matter until they filed their motion for reconsideration after the federal district court indicated that it was going to certify the questions to this Court.

B. THE EMA

The first question before this Court is whether the Governor possessed the authority under the EMA to renew her declaration of a state of emergency and state of disaster based on the COVID-19 pandemic after April 30, 2020.[6] MCL 30.403 of the EMA provides, in pertinent part:

> (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*....
>
> (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*. [Emphasis added.]

Critically, MCL 30.403(3) and (4) provide that "[a]fter 28 days, the governor shall issue an executive order or proclamation declaring the state of [disaster/emergency] terminated, unless a request by the governor for an extension of the state of [disaster/emergency] for a specific number of days is approved by resolution of both houses of the legislature." Because the Legislature here did not approve an extension of the "state of emergency" or "state of disaster" beyond April 30, 2020, the Governor was required to issue an executive order declaring these to be terminated. While the Governor did so, she acted immediately thereafter to issue another executive order, again declaring a "state of emergency" and "state of disaster" under the EMA for the identical reasons as the declarations that had just been terminated-- the public-health crisis created by COVID-19. Given that MCL 30.403(3) and (4) required the Governor to terminate a declaration of a state of emergency or state of disaster after 28 days in the absence of a legislatively

authorized extension, we do not believe that the Legislature intended to allow the Governor to redeclare under the EMA the identical state of emergency and state of disaster under these circumstances. To allow such a redeclaration would effectively render the 28-day limitation a nullity.

6 The parties do not dispute that the Governor possessed the authority under the EMA to issue executive orders concerning the COVID-19 pandemic prior to April 30, 2020. Moreover, as a general proposition, it cannot be denied that executive orders may be given the force of law if authorized by a statute that constitutionally delegates power to the executive or, indeed, as a function of any other constitutional authority, including that inherent within the executive power. *Cunningham v Neagle*, 135 US 1; 10 S Ct 658; 34 L Ed 55 (1890). However, not only has no such "other" or "inherent" constitutional authority been argued, but it cannot readily be imagined that such a basis of authority would exist in support of a broad and general exercise of legislative authority by the executive branch. We specifically reject the argument offered by amicus Restore Freedom that the Governor's authority to issue executive orders is restricted to the circumstances contemplated by Const 1963, art 5, § 2, which provides that the Governor "may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration."

The Governor argues that because MCL 30.403(3) and (4) provide that "[t]he governor shall, by executive order or proclamation, declare a state of [disaster/emergency] if he or she finds [a disaster/an emergency] has occurred or the threat of [a disaster/an emergency] exists," the Governor had no choice here but to redeclare a state of emergency and state of disaster. However, when the cited language is read in reasonable conjunction with the language imposing the 28-day limitation, it is clear that the Governor only possesses the authority or obligation to declare a state of emergency or state of disaster once and then must terminate that declaration after 28 days if the Legislature has not authorized an extension. The Governor possesses no authority-- much less obligation-- to *redeclare* the same state of emergency or state of disaster and thereby avoid the Legislature's limitation on her authority under the EMA. As the Court of Claims correctly stated in *Mich House of Representatives v Governor*,[7] unpublished opinion of the Court of Claims, issued May 21, 2020 (Docket No. 20-000079-MZ); slip op at 23-24:

> [A]t the end of the 28 days, the EMA contemplates only two outcomes: (1) the state of emergency and/or disaster is terminated by order of the Governor; or (2) the state of emergency/disaster continues *with legislative approval*. The only qualifier on the "shall terminate" language is an affirmative grant of an extension from the Legislature. There is no third option for the Governor to continue the state of emergency and/or disaster on her own, absent legislative approval. ... To adopt the Governor's interpretation of the statute would render nugatory the express 28-day limit and it would require the Court to ignore the plain statutory language.

7 In that case, the Michigan House of Representatives and Senate filed their own cause of action against the Governor, arguing that she lacked the authority under the EMA or the EPGA

to renew her declaration of a state of emergency or state of disaster based on the COVID-19 pandemic after April 30, 2020, and that, if those statutes did grant her such authority, they are unconstitutional. The Court of Claims held that the Governor lacked the authority under the EMA to renew a declaration of a state of emergency or state of disaster after April 30, 2020, based on the COVID-19 pandemic. However, the Court of Claims held that she did possess the authority under the EPGA to renew her declaration of a state of emergency after April 30, 2020, based on the COVID-19 pandemic and that the EPGA is constitutionally valid. The Court of Appeals subsequently held in a divided opinion that "the Governor's declaration of a state of emergency, her extension of the state of emergency, and her issuance of related executive orders fell within the scope of the Governor's authority under the EPGA" and that "the EPGA is constitutionally sound." *House of Representatives v Governor*, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 353655); slip op at 1. The Court of Appeals "decline[d] to address whether the Governor was additionally authorized to take those same measures under the EMA ...." *Id.* at 1-2. Judge TUKEL, in dissent, concluded that with regard to the EPGA, "at least in a case such as this involving an 'epidemic,' ... the EMA's 28-day time limit controls"; "the Governor's actions violate the EMA"; and "the Governor's actions violate the separation of powers ...." *Id.* at 3-4 (TUKEL, J., concurring in part and dissenting in part). The Legislature's application for leave to appeal remains pending in this Court.

Furthermore, and contrary to the Governor's argument, the 28-day limitation in the EMA does not amount to an impermissible "legislative veto."[8] Once again, MCL 30.403(3) and (4) provide that "[a]fter 28 days, the governor shall issue an executive order or proclamation declaring the state of [emergency/disaster] terminated, unless a request by the governor for an extension of the state of [emergency/disaster] for a specific number of days is approved by resolution of both houses of the legislature." These provisions impose nothing more than a durational limitation on the Governor's authority. The Governor's declaration of a state of emergency or state of disaster may only endure for 28 days absent legislative approval of an extension. So, if the Legislature does nothing, as it did here, the Governor is obligated to terminate the state of emergency or state of disaster after 28 days. A durational limitation is not the equivalent of a veto.

8 In *Immigration & Naturalization Serv v Chadha*, 462 US 919; 103 S Ct 2764; 77 L Ed 2d 317 (1983), the United States Supreme Court concluded that a provision of the Immigration and Nationality Act that authorized "one House of Congress, by resolution, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General of the United States, to allow a particular deportable alien to remain in the United States" was unconstitutional. *Id.* at 923, citing 8 USC 1254(c)(2). And in *Blank v Dep't of Corrections*, 462 Mich 103, 113; 611 NW2d 530 (2000) (opinion by KELLY, J.), a plurality of this Court applied the reasoning of *Chadha* to conclude that statutes purporting to "retain [in the Legislature] the right to approve or disapprove rules proposed by executive branch agencies" were unconstitutional. The statutes at issue in *Chadha* and *Blank* were described as imposing "legislative vetoes."

As the Court of Claims again correctly explained in *Mich House of Representatives v Governor*, unpublished opinion of the Court of Claims, issued May 21, 2020 (Docket No. 20-000079-MZ); slip op at 25, "The Legislature has not 'vetoed' or negated any action by the executive branch by imposing a temporal limit on the Governor's authority; instead, it limited the amount of time the Governor can act independently of the Legislature in

response to a particular emergent matter." Indeed, *Immigration & Naturalization Serv v Chadha*, 462 US 919, 955 n 19; 103 S Ct 2764; 77 L Ed 2d 317 (1983), itself expressly recognized that "durational limits on authorizations ... lie well within Congress' constitutional power." That is exactly what the 28-day limitation establishes-- a durational limitation on an authorization. Nothing prohibits the Legislature from placing such a limitation on authority delegated to the Governor, and such a limitation does not render illusory in any way the delegation itself.

For these reasons, we conclude that the Governor did not possess the authority under the EMA to renew her declaration of a state of emergency or state of disaster based on the COVID-19 pandemic after April 30, 2020.[9]

9 Given that we conclude that the Governor did not possess the authority under the EMA to renew her declaration of a state of emergency or state of disaster based on the COVID-19 pandemic after April 30, 2020, it is unnecessary for us to decide whether the EMA violates the Michigan Constitution, a question also certified to this Court.

C. THE EPGA

The second question before this Court is whether the Governor possessed the authority under the EPGA to proclaim a state of emergency based on the COVID-19 pandemic after April 30, 2020.

1. STATUTORY INTERPRETATION

MCL 10.31(1) of the EPGA sets forth the circumstances in which the Governor may proclaim a state of emergency and the authorized subject matter of his or her emergency powers:

> 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(2) of the EPGA sets forth the effectiveness of the emergency powers, including the time at which those powers are no longer in effect:

> The orders, rules, and regulations promulgated under subsection (1) are effective from the date and in the manner prescribed in the orders, rules, and regulations and shall be made public as provided in the orders, rules, and regulations. The orders, rules, and regulations may be amended, modified, or rescinded, in the manner in which they were promulgated, from time to time by the governor during the pendency of the emergency, but shall cease to be in effect upon declaration by the governor that the emergency no longer exists.

MCL 10.32 explains the legislative intentions of the EPGA:

> It is hereby declared to be the legislative intent to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. The provisions of this act shall be broadly construed to effectuate this purpose.[10]

Plaintiffs argue that a genuine emergency must necessarily be short-lived and that because our state has been dealing with COVID-19 for more than six months, it is no longer an emergency. We respectfully disagree. "Emergency" is defined as "an urgent need for assistance or relief." *Merriam-Webster's Collegiate Dictionary* (11th ed). Simply because something has been ongoing for some extended period of time does not signify that there is no longer an "urgent need for assistance or relief." That a fire, for example, has been burning for months does not mean that there is no longer an "urgent need for assistance or relief," and the same is obviously true of an epidemic. In short, an emergency is an emergency for as long as it persists as an emergency.

10 The EPGA includes two other provisions, neither of which is relevant here. MCL 10.31(3) provides that "Subsection (1) does not authorize the seizure, taking, or confiscation of lawfully possessed firearms, ammunition, or other weapons," and MCL 10.33 provides that "[t]he violation of any such orders, rules and regulations made in conformity with this act shall be punishable as a misdemeanor, where such order, rule or regulation states that the violation thereof shall constitute a misdemeanor."

Furthermore, the Legislature argues that the EPGA only encompasses local--not statewide-- emergencies. It relies on the fact that the EPGA refers to a public emergency "within the state," MCL 10.31(1), and contends that a statewide emergency is not "within" the state. Again, we disagree and believe that such a reading does not

constitute a reasonable understanding of the language of the statute. "Within" simply means "the inside of." *Merriam-Webster's Collegiate Dictionary* (11th ed). A statewide emergency is an emergency "within the inside of the state," with the entirety of Michigan's counties, cities, and townships fairly described as being located "within the inside of the state."

The Legislature also argues that the EPGA's references to the "area involved," the "affected area," "any section of the area," and "specific zones within the area" signify that the EPGA was only intended to apply to local emergencies. Again, we disagree and do not find this to be a reasonable understanding of the EPGA. "Area" is defined as "a geographic region." *Merriam-Webster's Collegiate Dictionary* (11th ed). The "area involved" or the "affected area" may comprise the entire state, or it may comprise some more localized geographical part of the state. Indeed, the EMA, which all agree is applicable to statewide emergencies such as the present pandemic, also refers repeatedly to the "threatened area." See MCL 30.403(3) and (4); MCL 30.405(1)(e) and (g). And that the Governor may promulgate rules that pertain to the "affected area," to a "section" of the affected area, or to a "specific zone" within the affected area does not indicate that the Governor cannot declare a statewide emergency. It simply means that once the Governor has declared a statewide emergency, she is not obligated to treat the entire state in an identical manner.[11]

11 Plaintiffs also argue that because the EPGA empowers certain *local* officials to seek an emergency declaration, the concerns of the statute are primarily local in nature. However, the EPGA also empowers the commissioner of the Michigan state police to request such a declaration, and of course, it allows the Governor herself to proclaim a state of emergency upon her own volition.

Additionally, both plaintiffs and the Legislature argue that the historical context of the EPGA, enacted in 1945 in response to riots in Detroit in 1943, suggests that it was intended to apply only to local emergencies. However, even if an undisputed or a principal purpose of the EPGA was to enable the Governor to respond to a local emergency such as a riot, that does not indicate that enabling the Governor to respond to a local emergency was the EPGA's *exclusive* purpose. "[T]he remedy [of a legal provision] often extends beyond the particular act or mischief which first suggested the necessity of the law." *Dist of Columbia v Heller*, 554 US 570, 578; 128 S Ct 2783; 171 L Ed 2d 637 (2008) (quotation marks and citations omitted). That is, historical context and rationale, while often helpful in giving reasonable meaning to a statute, cannot ultimately take priority over its actual language. What is dispositive here is that the actual terms of the EPGA do not preclude the Governor from proclaiming a state of emergency in response to a statewide emergency.

In *House of Representatives v Governor*, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 353655) (TUKEL, J.,

concurring in part and dissenting in part); slip op at 3, Judge TUKEL concluded in a thoughtful dissent that "at least in a case such as this involving an 'epidemic,' ... the EMA's 28-day time limit controls." He relied on the fact that the definition of "disaster" within the EMA includes an "epidemic" while the EPGA does not include that term. However, the definition of "disaster" within the EMA includes a variety of examples of types of disasters, and if all of those types of disasters were excluded from the EPGA using Judge TUKEL's reasoning, the EPGA would be effectively rendered a nullity,[12] running afoul of the interpretive maxim that "a court should avoid a construction that would render any part of the statute surplusage or nugatory." *In re MCI Telecom Complaint*, 460 Mich 396, 414; 596 NW2d 164 (1999). Such an understanding of the EPGA would also run afoul of the EMA, which provides, in pertinent part:

> This act shall not be construed to do any of the following:
>
> * * *
>
> (d) Limit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to [the EPGA] or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of this state independent of, or in conjunction with, this act. [MCL 30.417.]

To rely on the inclusion of the word "epidemic" within the EMA to conclude that the EPGA does not apply, or that the 28-day limitation of the EMA does apply to the EPGA, would, in our judgment, be to construe the EMA to "[l]imit, modify, or abridge the authority of the governor" under the EPGA, which is prohibited by MCL 30.417.[13]

12 The EMA defines "disaster" as "an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to, fire, flood, snowstorm, ice storm, tornado, windstorm, wave action, oil spill, water contamination, utility failure, hazardous peacetime radiological incident, major transportation accident, hazardous materials incident, epidemic, air contamination, blight, drought, infestation, explosion, or hostile military action or paramilitary action, or similar occurrences resulting from terrorist activities, riots, or civil disorders." MCL 30.402(e). If the EPGA does not apply to emergencies arising from one of the above circumstances, we are uncertain as to what type of emergencies the EPGA would apply. Judge TUKEL opined that the Legislature could not have intended for both the EPGA and the EMA to apply to epidemics. However, both the EPGA and the EMA explicitly state that they apply to riots. Accordingly, the Legislature obviously intended for there to be some level of overlap between the two acts.

13 Similarly, reading the 28-day time limitation of the EMA into the EPGA on the basis that these two statutes stand *in pari materia*, as argued by plaintiffs, is also, in our judgment, precluded by MCL 30.417.

Finally, Justice VIVIANO concludes after a thorough and considered analysis that the EPGA does not apply "in the sphere of public health generally or to an epidemic like COVID-19 in particular" because the EPGA only allows the Governor to declare a state of emergency "when public safety is imperiled," MCL 10.31(1), and "public safety" does not encompass

"public health." Although we agree with Justice VIVIANO that the EPGA only allows the Governor to declare a state of emergency "when public safety is imperiled," we respectfully disagree that public-health emergencies such as the COVID-19 pandemic cannot be said to imperil "public safety." "Public" is defined as "relating to people in general," *Merriam-Webster's Collegiate Dictionary* (11th ed), and "safety" is defined as "the condition of being safe from undergoing or causing hurt, injury, or loss," *id*. Given that COVID-19 has resulted in the deaths of many thousands in Michigan and hundreds of thousands across the country,[14] COVID-19, in our judgment, can reasonably be said to imperil "public safety."

14 See Centers for Disease Control and Prevention, *Provisional Death Counts for Coronavirus Disease 2019 (COVID-19)* <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm> (accessed October 1, 2020) [https://perma.cc/6UPD-RHZ3].

The people of this state, as well as their public officials, deserve to be able to read and to comprehend their own laws. See, e.g., *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 284 n 10; 696 NW2d 646 (2005) ("[L]aws are also made more accessible to the people when each of them is able to read the law and thereby understand his or her rights and responsibilities. When the words of the law bear little or no relationship to what courts say the law means ..., then the law increasingly becomes the exclusive province of lawyers and judges."); *Robinson v Detroit*, 462 Mich 439, 467; 613 NW2d 307 (2000) ("[I]f the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts."). As Justice COOLEY once explained:

> [Courts] may give a sensible and reasonable interpretation to legislative expressions which are obscure, but they have no right to distort those which are clear and intelligible. The fair and natural import of the terms employed, in view of the subject matter of the law, is what should govern[.] [*People ex rel Twitchell v Blodgett*, 13 Mich 127, 167-168 (1865).]

See also MCL 8.3a ("All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."). We disagree with Justice VIVIANO that "public safety" constitutes a legal term of art. There is nothing "obscure," "peculiar," or "technical" about the phrase "public safety." Rather, this phrase is reasonably "clear," "intelligible," and "common"--so much so that prior to Justice VIVIANO first asserting his analysis at oral argument, nobody had argued on their own accord in either this case or in *House of Representatives v Governor* that COVID-19 did not imperil "public safety."[15] Moreover, it is telling that not one of the sources

cited by Justice VIVIANO asserts, as does he, that a public-health emergency such as COVID-19 does not, reasonably understood, imperil "public safety." Indeed, both the United States Supreme Court and this Court have long recognized to the contrary. See, e.g., *Jacobson v Massachusetts*, 197 US 11, 37; 25 S Ct 358; 49 L Ed 643 (1905) ("It seems to the court that an affirmative answer to these questions [in *Jacobson*] would practically strip the legislative department of its function to care for the public health and the *public safety* when endangered by *epidemics* of disease.") (emphasis added); *People ex rel Hill v Lansing Bd of Ed*, 224 Mich 388, 391; 195 NW 95 (1923) ("[A] community has the right to protect itself against an *epidemic* of disease which threatens the *safety* of its members.") (quotation marks and citation omitted; emphasis added).

15 Indeed, before Justice VIVIANO presented his analysis at oral argument, plaintiffs themselves effectively conceded that COVID-19 imperiled "public safety." See Plaintiffs' Reply Brief (August 20, 2020) at 1 ("Plaintiffs acknowledge that for 51 days following the Governor's first declaration of a state of emergency based on COVID-19, the Governor acted within the bounds of the enabling statutes and the Michigan Constitution."); *id*. at 3 ("The Governor acted within the limits of her authority for 51 days.").

Once again, "[t]his Court 'must presume a statute is constitutional and construe it as such, unless the only proper construction renders the statute unconstitutional.' " *Grebner v State*, 480 Mich 939, 940 (2007) (citation omitted). Accordingly, "assuming that there are two *reasonable* ways of interpreting [a statute]-- one that renders the statute unconstitutional and one that renders it constitutional-- we should choose the interpretation that renders the statute constitutional." *Skinner*, 502 Mich at 110-111 (emphasis added). However, we are not prepared to rewrite the EPGA or to construe it in an overly narrow or strained manner to avoid rendering it unconstitutional under the nondelegation doctrine or any other constitutional doctrine.[16] To do so would read the EPGA in a way that does not reflect the genuine intentions of the statute's framers, an approach that would be in ironic conflict with the fundamental premise of the nondelegation doctrine itself, which is that the laws of our state are to be determined by the Legislature. For these reasons, we conclude that there is one predominant and reasonable construction of the EPGA-- the construction given to it by the Governor. This is not to say, however, that the construction advanced by the Governor and the other defendants renders the EPGA a constitutionally permissible delegation of legislative power to the executive. To the contrary, while the EPGA purports to grant the Governor the power to proclaim a state of emergency based on the COVID-19 pandemic, and accordingly to exercise broad emergency powers, the EPGA by that very construction stands in violation of the Michigan Constitution.

16 In addressing the constitutionality of a statute, this Court itself must be regardful of the separation of powers. We are not empowered to add, subtract, or modify a statute out of judicial preference. Rather, it is the province

> of the Legislature to make the law through the process of bicameral passage and presentment to the executive, and it is our duty only to state, to the best of our judgment, what that law requires. By the same token, it is also the responsibility of this Court in recognizing the separation of powers to ensure that the Legislature does not exceed its constitutional authority in "making the law" either by encroaching upon the powers of another branch or by relinquishing its own powers to another branch.

2. NONDELEGATION DOCTRINE

Const 1963, art 3, § 2 summarizes the separation-of-powers principle in Michigan as follows:

> 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.

"[T]he principal function of the separation of powers ... is to ... protect individual liberty[.]" *Clinton v City of New York*, 524 US 417, 482; 118 S Ct 2091; 141 L Ed 2d 393 (1998) (Breyer, J., dissenting). " '[T]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.' " *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 141; 719 NW2d 553 (2006), quoting The Federalist No. 47 (Madison) (Rossiter ed, 1961), p 301. And as Montesquieu explained, "[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Baron de Montesquieu, *The Spirit of the Laws* (London: J. Nourse and P. Vaillant, 1758), Book XI, ch 6, p 216.

Const 1963, art 4, § 1 provides that "the legislative power of the State of Michigan is vested in a senate and a house of representatives." "The 'legislative power' has been defined as the power 'to regulate public concerns, and to make law for the benefit and welfare of the state.' " *46th Circuit Trial Court*, 476 Mich at 141, quoting Cooley, Constitutional Limitations (1886), p 92. "The power of the *Legislative* being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make *Laws*, and not to make *Legislators*, the *Legislative* can have no power to transfer their Authority of making Laws, and place it in other hands." Locke, *Two Treatises of Government* (New York: New American Library, Laslett ed, 1963), pp 408-409. Accordingly, "[o]ne of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority." Cooley, Constitutional Limitations (1886), pp 116-117.

"Strictly speaking, there is *no* acceptable delegation of legislative power." *Mistretta*

v United States, 488 US 361, 419; 109 S Ct 647; 102 L Ed 2d 714 (1989) (Scalia, J., dissenting). "The true distinction ... is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." *Marshall Field & Co v Clark*, 143 US 649, 693-694; 12 S Ct 495; 36 L Ed 294 (1892) (quotation marks and citation omitted). "[A] certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action ...." *Mistretta*, 488 US at 417 (Scalia, J., dissenting). "The focus of controversy ... has been whether the *degree* of generality contained in the authorization for exercise of executive or judicial powers in a particular field is so unacceptably high as to *amount* to a delegation of legislative powers." *Id*. at 419.

We have explained that "[c]hallenges of unconstitutional delegation of legislative power are generally framed in terms of the adequacy of the standards fashioned by the Legislature to channel the agency's or individual's exercise of the delegated power." *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 51; 367 NW2d 1 (1985). "The preciseness required of the standards will depend on the complexity of the subject." *Id*. "In making this determination whether the statute contains sufficient limits or standards we must be mindful of the fact that such standards must be sufficiently broad to permit efficient administration in order to properly carry out the policy of the Legislature but not so broad as to leave the people unprotected from uncontrolled, arbitrary power in the hands of administrative officials." *Dep't of Natural Resources v Seaman*, 396 Mich 299, 308-309; 240 NW2d 206 (1976). "[T]he standards prescribed for guidance [must be] as reasonably precise as the subject-matter requires or permits." *Osius v St Clair Shores*, 344 Mich 693, 698; 75 NW2d 25 (1956).

The United States Supreme Court[17] has explained that "[s]o long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power.' " *Mistretta*, 488 US at 372, quoting *J W Hampton, Jr & Co v United States*, 276 US 394, 409; 48 S Ct 348; 72 L Ed 624 (1928) (brackets omitted).[18] That is, "[t]he constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion." *Gundy v United States*, 588 US ___, ___; 139 S Ct 2116, 2123; 204 L Ed 2d 522 (2019) (opinion by Kagan, J.). "[T]he answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides." *Id*.

17 In *Taylor*, 468 Mich at 10, we observed that our nondelegation caselaw is "similar to the federally developed" nondelegation caselaw.

18 The "intelligible principle" test has been subject to growing criticism by some members of the United States Supreme Court in recent years for failing to sufficiently protect the separation of powers. See, e.g., *Dep't of Transp v Ass'n of American Railroads*, 575 US 43, 77; 135 S Ct 1225; 191 L Ed 2d 153 (2015) (Thomas, J., concurring) ("Implicitly recognizing that the power to fashion legally binding rules is legislative, we have nevertheless classified rulemaking as executive (or judicial) power when the authorizing statute sets out 'an intelligible principle' to guide the rulemaker's discretion. ... I would return to the original understanding of the federal legislative power and require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process."); *Gundy*, 588 US at ___; 139 S Ct at 2140 (Gorsuch, J., dissenting) (asserting that the "intelligible principle" test "has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional"). Nonetheless, the "intelligible principle" test remains as the dominant expression of what is required to sustain a constitutional delegation of powers.

The scope of the delegation is also relevant when assessing the sufficiency of the standards. "[T]he degree of agency discretion that is acceptable varies according to the scope of the power ... conferred." *Whitman v American Trucking Associations, Inc*, 531 US 457, 475; 121 S Ct 903; 149 L Ed 2d 1 (2001). Consequently, "the ultimate judgment regarding the constitutionality of a delegation must be made not on the basis of the scope of the power alone, but on the basis of its scope *plus* the specificity of the standards governing its exercise. When the scope increases to immense proportions ... the standards must be correspondingly more precise." *Synar v United States*, 626 F Supp 1374, 1386 (D DC, 1986). See also *Int'l Refugee Assistance Project v Trump*, 883 F3d 233, 293 (CA 4, 2018) (Gregory, C.J., concurring) ("When broad power is delegated with few or no constraints, the risk of an unconstitutional delegation is at its peak. ... Therefore, whether a delegation is unconstitutional depends on two factors—the amount of discretion and the scope of authority."), vacated by *Trump v Int'l Refugee Assistance Project*, 585 US ___; 138 S Ct 2710 (2018). As the federal Court of Appeals for the District of Columbia Circuit has recognized in a series of cases, a critical component of the scope of the delegated "power" is the breadth of subjects to which the power can be applied:

> But petitioners have ignored a limit to the nondelegation doctrine that we relied on in *American Trucking* and even more emphatically in its immediate precursor, *International Union, UAW v. OSHA ("Lockout/Tagout I")*, 938 F.2d 1310 (D.C.Cir.1991). There we noted that the scope of the agency's "claimed power to roam" was "immense, encompassing all American enterprise." *Id.* at 1317. Quoting verbatim from *Synar v. United States*, 626 F.Supp. 1374, 1383 (D.D.C.1986) (three-judge panel), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986), we said, "When the scope increases to immense proportions, as in [*Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935)], the standards must be correspondingly more precise." *Lockout/Tagout I*, 938

> F.2d at 1317. We noted that a mass of cases in courts had upheld delegations of effectively standardless discretion, and distinguished them precisely on the ground of the narrower scope within which the agencies could deploy that discretion. *Id*. [*Michigan v US Environmental Protection Agency*, 341 US App DC 306, 323; 213 F3d 663 (2000) (brackets in original).]

In other words, it is one thing if a statute confers a great degree of discretion, i.e., power, over a narrow subject; it is quite another if that power can be brought to bear on something as "immense" as an entire economy. See *Schechter Poultry Corp v United States*, 295 US 495, 539; 55 S Ct 837; 79 L Ed 1570 (1935) (striking down a delegation to the President to approve trade standards when the "authority relates to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country"). Furthermore, "[t]he area of permissible indefiniteness narrows ... when the regulation invokes criminal sanctions and potentially affects fundamental rights ...." *United States v Robel*, 389 US 258, 275; 88 S Ct 419; 19 L Ed 2d 508 (1967) (Brennan, J., concurring in the result).

Finally, the durational scope of the delegated power also has some relevant bearing, in our judgment, on whether the statute violates the nondelegation doctrine. Of course, an unconstitutional delegation is no less unconstitutional because it lasts for only two days. But it is also true, as common sense would suggest, that the conferral of indefinite authority accords a greater accumulation of power than does the grant of temporary authority. Courts have recognized this consideration, although they have also acknowledged that it is not often dispositive. In *Gundy*, for example, the plurality thought it relevant to the delegation analysis in that case that the statute accorded the executive "only temporary authority." *Gundy*, 588 US at ___; 139 S Ct at 2130; see also *United States v Touby*, 909 F2d 759, 767 (CA 3, 1990) ("[I]t was reasonable for Congress to broadly delegate special authority to the Attorney General, particularly when the delegation permits scheduling to be effective only for a limited period of time."); *United States v Emerson*, 846 F2d 541, 545 (CA 9, 1988) (upholding delegation because, in part, the delegated power was temporary); *Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v Connally*, 337 F Supp 737, 754 (D DC, 1971) ("It is also material, though not dispositive, to note the limited time frame established by Congress for the stabilization authority delegated to the President."); *Marran v Baird*, 635 A2d 1174, 1181 (RI, 1994) (upholding a delegation because, in part, the danger of "administrative abuse" was diminished given the limited duration of the delegated authority).

It is therefore impossible to ascertain whether the standards set forth in the EPGA that guide the Governor's discretionary exercise of her emergency powers satisfy the nondelegation doctrine without first assessing the precise scope of these powers. Simply put, as the scope of the powers conferred upon the Governor by the Legislature becomes increasingly broad, in regard to both the *subject matter* and their *duration*, the *standards* imposed upon the Governor's discretion by the Legislature must correspondingly become more detailed and precise.

a. SCOPE OF DELEGATED POWER

Concerning the subject matter of the emergency powers conferred by the EPGA, it is remarkably broad, authorizing the Governor to enter orders "to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1). It is indisputable that such orders "to protect life and property" encompass a substantial part of the entire police power of the state. See *Connor v Herrick*, 349 Mich 201, 217; 84 NW2d 427 (1957) ("[T]here seems to be no doubt that [the police power] does extend to the protection of the *lives, health, and property of the citizens*, and to the preservation of good order and public morals.") (emphasis added). And the police power is legislative in nature. See *Bolden v Grand Rapids Operating Corp*, 239 Mich 318, 321; 214 NW 241 (1927) ("The power we allude to is rather the police power, the power vested in the Legislature by the Constitution, to make, ordain and establish all manner of wholesome and reasonable laws ....") (quotation marks and citation omitted). The EPGA "in effect, suspends normal civil government." *Walsh v River Rouge*, 385 Mich 623, 639; 189 NW2d 318 (1971). "The invocation of a curfew or restriction on the right to assemble or prohibiting the right to carry on businesses licensed by the State of Michigan involves the suspension of constitutional liberties of the people." *Id*.

To illustrate the breadth of the emergency powers contemplated by the EPGA, we note that during the COVID-19 pandemic the Governor has, by way of executive orders specifically issued under the EPGA, effected the following public policies: *requiring* all residents to stay home with limited exceptions; *requiring* all residents to wear face coverings in indoor public spaces and when outdoors if unable to consistently maintain a distance of six feet or more from individuals who are not members of their household, including requiring children to wear face coverings while playing sports; *requiring* all residents to remain at least six feet away from people outside one's household to the extent feasible under the circumstances; *requiring* businesses to comply with numerous workplace safeguards, including daily health screenings of employees; *closing* restaurants, food courts, cafes, coffeehouses, bars, taverns, brew pubs, breweries, microbreweries, distilleries, wineries, tasting rooms, clubs, hookah

bars, cigar bars, vaping lounges, barbershops, hair salons, nail salons, tanning salons, tattoo parlors, schools, churches, theaters, cinemas, libraries, museums, gymnasiums, fitness centers, public swimming pools, recreation centers, indoor sports facilities, indoor exercise facilities, exercise studios, spas, casinos, and racetracks; *closing* places of public amusement, including arcades, bingo halls, bowling alleys, indoor climbing facilities, skating rinks, and trampoline parks; *prohibiting* nonessential travel, in-person work that is not necessary to sustain or protect life, and nonessential in-person business operations; *prohibiting* the sale of carpet, flooring, furniture, plants, and paint; *prohibiting* advertisements for nonessential goods, nonessential medical and dental procedures, and nonessential veterinary services; *prohibiting* visitors at healthcare facilities, residential care facilities, congregate care facilities, and juvenile justice facilities; and *prohibiting* boating, golfing, and public and private gatherings of persons not part of a single household. Each of these policies was putatively ordered "to protect life and property" and/or to "bring the emergency situation within the affected area under control." What is more, these policies exhibit a sweeping scope, both with regard to the subjects covered and the power exercised over those subjects. Indeed, they rest on an assertion of power to reorder social life and to limit, if not altogether displace, the livelihoods of residents across the state and throughout wide-ranging industries.

b. DURATION OF DELEGATED POWER

Concerning the duration of the emergency powers conferred by the EPGA, those powers may be exercised until a "declaration by the governor that the emergency no longer exists." MCL 10.31(2). Thus, the Governor's emergency powers are of indefinite duration. This, of course, is very much unlike the EMA, which provides that "[t]he 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*." MCL 30.403(4) (emphasis added). And as the present circumstances illustrate, if the emergency is unresolved for a period of months or longer, the emergency powers under the EPGA may be exercised for a period of months or longer.[19] The fact that the EPGA authorizes indefinite exercise of emergency powers for perhaps months--or even years-- considerably broadens the scope of authority conferred by that statute. See *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 652-653; 72 S Ct 863; 96 L Ed 1153 (1952) (Jackson, J., concurring) (explaining that "Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of a national emergency" but that

those "authorities" are perhaps best characterized as "temporary law"). Thus, under the EPGA, the state's legislative authority, including its police powers, may conceivably be delegated to the state's executive authority for an indefinite period.

19 When Justice BERNSTEIN questioned counsel for the Governor during oral argument concerning the ending point of the Governor's exercise of emergency powers under the EPGA, counsel replied:

> Regarding this pandemic in terms of timing, while I have no crystal ball, the reasonable prognostication is that we're talking about a matter of months. So we're looking at certain benchmarks: sufficient immunity, vaccination, therapeutic interventions, and a combination of those things. [Michigan Supreme Court, *Oral Arguments in In re Certified Questions* <https://www.youtube.com/watch?v=HyBanqtCLvo> at 1:44:20 to 1:44:38 (accessed September 29, 2020).]

c. STANDARDS OF DELEGATED POWER

It is against the above backdrop that the constitutionality of the standards, or legislative direction to the executive branch, set forth in the EPGA must be considered. What standards or legislative direction are sufficient to transform a delegation of power in which what is being delegated consists of pure legislative policymaking power into a delegation in which what is being delegated has been made an essentially executive "carrying-out of policy" power by virtue of the accompanying direction given by the Legislature to the executive in the delegation? When the scope of the power delegated "increases to immense proportions ... the standards must be correspondingly more precise." *Synar*, 626 F Supp at 1386. Under the EPGA, the standards governing the Governor's exercise of emergency powers include only the words "reasonable" and "necessary." See MCL 10.31(1) ("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.") (emphasis added).

Concerning the term "reasonableness," that word places a largely (if not entirely) illusory limitation upon the Governor's discretion because the Legislature is presumed not to delegate the authority to act unreasonably in the first place. In this regard, in *Mich Farm Bureau v Bureau of Workmen's Compensation*, 408 Mich 141; 289 NW2d 699 (1980), we explained that an administrative rule is valid " 'if it is (a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable. The requirement of reasonableness stems both from the idea of constitutional due process and from the idea of statutory interpretation that legislative bodies are assumed to intend to avoid the delegation of power to act unreasonably.' " *Id*. at 149, quoting 1 Davis, Administrative Law, § 5.03, p 299. See also *American Radio Relay League, Inc v Fed Communications Comm*, 199 US App DC 293, 297; 617 F2d 875 (1980) ("We fail to find

significance in the fact that Congress said 'reasonable regulations' instead of simply 'regulations.' ... Here, the word 'reasonable' clearly is nothing more than surplusage, for we cannot assume that Congress would ever intend anything other than reasonable agency action."). Although those cases addressed delegated agency powers, we see no reason why the same principle would not apply to all powers delegated to the executive. Accordingly, the reference in MCL 10.31(1) to "reasonable orders, rules, and regulations" communicates little more than simply "orders, rules, and regulations." The word "reasonable"-- far from imposing a significant or in any way meaningful standard upon the Governor-- is essentially surplusage. It neither affords direction to the Governor for how to carry out the powers that have been delegated to her nor constrains her conduct in any realistic manner.

Concerning the term "necessary," that word means "absolutely needed : REQUIRED." *Merriam-Webster's Collegiate Dictionary* (11th ed). Given the exceptionally broad scope of the EPGA, which authorizes indefinite orders that are "necessary to protect life and property," we believe that such a standard is also insufficient to satisfy the nondelegation doctrine when considered both in isolation and alongside the word "reasonable." It is elementary that "life" and "property" may be threatened by a virtually unlimited array of conduct, circumstances, and serendipitous occurrences. A person driving on the road instead of staying inside at home, for example, may fairly be understood as posing a threat to "life" and "property" because there is perpetual risk that he or she will be involved in an automobile accident. Thus, the Governor under the EPGA may find that an order prohibiting a person from driving is warranted merely on the basis of this rationale. The contagions, accidents, misfortunes, risks, and acts of God, ordinarily and inevitably associated with the human condition and with our everyday social experiences, are simply too various for this standard to supply any meaningful limitation upon the exercise of the delegated power. Simply put, the EPGA, in setting forth a "necessary" standard, just as in setting forth a "reasonable" standard, neither supplies genuine guidance to the Governor as to how to exercise the authority delegated to her by the EPGA nor constrains her actions in any meaningful manner.[20]

20 In *Touby v United States*, 500 US 160; 111 S Ct 1752; 114 L Ed 2d 219 (1991), the United States Supreme Court upheld as constitutional 21 USC 811(h) of the Controlled Substances Act, 21 USC 801 *et seq*., which provided that "the Attorney General can schedule a substance on a temporary basis when doing so is 'necessary to avoid an imminent hazard to the public safety.' " *Id*. at 163, quoting 21 USC 811(h). The Court explained that the statute satisfied the nondelegation doctrine because the surrounding statutes imposed other standards upon the Attorney General's discretion to temporarily schedule a substance:

> Although it features fewer procedural requirements than the permanent scheduling statute, § 201(h) meaningfully constrains the Attorney General's discretion to define criminal conduct. To schedule a drug temporarily, the Attorney General must find that doing so is "necessary to avoid an

> imminent hazard to the public safety." § 201(h)(1), 21 U.S.C. § 811(h)(1). In making this determination, he is "required to consider" three factors: the drug's "history and current pattern of abuse"; "[t]he scope, duration, and significance of abuse"; and "[w]hat, if any, risk there is to the public health." §§ 201(c)(4)-(6), 201(h)(3), 21 U.S.C. §§ 811(c)(4)-(6), 811(h)(3). Included within these factors are three other factors on which the statute places a special emphasis: "actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution." § 201(h)(3), 21 U.S.C. § 811(h)(3). The Attorney General also must publish 30-day notice of the proposed scheduling in the Federal Register, transmit notice to the Secretary of HHS, and "take into consideration any comments submitted by the Secretary in response." §§ 201(h)(1), 201(h)(4), 21 U.S.C. §§ 811(h)(1), 811(h)(4). [*Id.* at 166 (brackets in original).]
>
> As *Touby* illustrates, the word "necessary" may be a *part* of a sufficient standard imposed upon the executive branch, but we do not believe that it is *by itself* a sufficient standard, at least not in the context of the remarkably broad powers conferred by the EPGA.

In this regard, we also find illuminating an advisory opinion written in the midst of World War II by the Supreme Judicial Court of Massachusetts. *Opinion of the Justices*, 315 Mass 761; 52 NE2d 974 (1944). The statute at issue was a wartime measure allowing the governor to " 'have and ... [to] exercise any and all authority over persons and property, necessary or expedient for meeting the supreme emergency of such a state of war,' " as consistent with the state constitution. *Id.* at 766, citing Mass Acts of 1942, ch 13, special session. The question posed was whether this statute allowed the governor to modify statutes establishing the date of state primaries so as to allow soldiers to vote. *Id.* at 765. The majority recognized that this statute would allow the governor "to render inoperative any law inconsistent with" his orders and to wield "all authority of every kind over persons or property which it could constitutionally confer upon him by specific enactments wherein the precise powers intended to be granted and the manner of their exercise should be particularly stated, subject only to the limitation that the action taken by the Governor shall be 'necessary or expedient for meeting the supreme emergency' of war." *Id.* at 767. The majority did not believe that the state constitution allowed the Legislature to confer upon the governor "a roving commission to repeal or amend by executive order unspecified provisions included anywhere in the entire body of" state law. *Id.* The standard given in the statute-- "necessary" and "expedient' for the war "emergency"-- was "a limitation so elastic that it is impossible to imagine what might be done within its extent in almost every field of administration and of jurisprudence." *Id.* at 768. The statute thus surrendered legislative power to the executive by granting him "without specification or definition of means or ends all the powers which it could grant by specific enactment in all fields which may be affected by a factor so all pervasive as war." *Id.* The emergency-- the war-- did "not abrogate the Constitution." *Id.* See also *Home Bldg & Loan Ass'n v Blaisdell*, 290 US 398, 425; 54 S Ct 231; 78 L Ed 413 (1934) ("Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.").

The consequence of such illusory "non-standard" standards in this case is that the Governor possesses free rein to exercise a substantial part of our state and local legislative authority-- including police powers-- for an indefinite period of time. There is, in other words, nothing within either the "necessary" or "reasonable" standards that serves in any realistic way to transform an otherwise impermissible delegation of *legislative* power into a permissible delegation of *executive* power. This is particularly true in the specific context of the EPGA, a statute that delegates power of immense breadth and is devoid of all temporal limitations. These facets of the EPGA-- its expansiveness, its indefinite duration, and its inadequate standards-- are simply insufficient to sustain *this* delegation. While, in the context of a less-encompassing delegation, the standard might be sufficient to sustain the delegation, that is not the case the Court entertains today.

We accordingly conclude that the delegation of power to the Governor to "promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property," MCL 10.31(1), constitutes an unlawful delegation of legislative power to the executive and is therefore unconstitutional under Const 1963, art 3, § 2, which prohibits exercise of the legislative power by the executive branch. The powers conferred by the EPGA simply cannot be rendered constitutional by the standards "reasonable" and "necessary," either separately or in tandem.[21]

21 Although we disagree with the Chief Justice concerning the legal definition that has been set forth by the United States Supreme Court of the nondelegation doctrine, we acknowledge in accord with her and Justice BERNSTEIN that it has been exceedingly rare for a delegation of power to have been actually invalidated by the United States Supreme Court on the basis of that doctrine. The United States Supreme Court has "found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.' " *Whitman*, 531 US at 474, citing *Panama Refining Co v Ryan*, 293 US 388; 55 S Ct 241; 79 L Ed 446 (1935), and *Schechter Poultry Corp*, 295 US 495. Yet, just as the nondelegation doctrine constitutes an extraordinary doctrine, not routinely to be invoked, it is precisely our point that the delegation in the instant case is also extraordinary and justifies our constitutional objections. We are unaware of any other law of this state that has delegated such vast police power to the executive branch with such anemic "standards" imposed upon its discretion. If the Chief Justice and Justice BERNSTEIN would not invoke the nondelegation doctrine here, it is difficult to imagine when, if ever, they would invoke it. They would transform an admittedly rarely imposed doctrine, but one serving a critical purpose in upholding our system of separated powers, into an entirely obsolete and defunct doctrine.

d. SEVERABILITY

Having reached this conclusion, we must then address whether the unlawful delegation is severable from the EPGA as a whole. MCL 8.5 provides as follows:

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
>
> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

"This Court has long recognized that '[i]t is the law of this State that if invalid or unconstitutional language can be deleted from an ordinance and still leave it complete and operative then such remainder of the ordinance be permitted to stand.' " *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 345; 806 NW2d 683 (2011), quoting *Eastwood Park Amusement Co v East Detroit Mayor*, 325 Mich 60, 72; 38 NW2d 77 (1949).

We are convinced that severing the unlawful delegation from the remainder of the EPGA would be "inconsistent with the manifest intent of the legislature." See MCL 8.5. Our task in discerning the manifest intent of the Legislature in this regard is rather straightforward. MCL 10.32 of the EPGA provides that "[i]t is hereby declared to be the legislative intent to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster." Without conferring the power "to protect life and property," the EPGA *only* confers the power "to bring the emergency situation within the affected area under control." MCL 10.31(1). That is, if the unlawful delegation is severed, the EPGA confers *no* power to "control ... persons and conditions" unless that power is exercised to "bring the emergency situation within the affected area under control." *Id*. In our judgment, the EPGA is inoperative when we sever the power to "protect life and property" from the remainder of the EPGA; therefore, the EPGA is unconstitutional in its entirety.

IV. RESPONSE TO THE CHIEF JUSTICE

First, in her concurring and dissenting opinion, our Chief Justice is correct (or, at least, I hope she is) that "[e]very eighth-grade civics student learns about the separation of powers and checks and balances—design features of our government to prevent one branch from accumulating too much power." At the same time (again, I hope), every student also learns in that same classroom that these "design features" both define the distinctive authorities of the three branches of our government and empower each of these branches to "check and

balance" the authorities of the others. And specifically relevant to the instant case is the authority of the judicial branch, in which the judiciary must identify whether the Constitution has been breached and undo such breaches, in order that the rights of the people may be upheld or that facets of our constitutional structure, including its separated powers and checks and balances that preserve and protect these same rights, may be upheld. These students will also learn that these "design features" have operated throughout our nation's history to maintain a stable, limited, and representative form of government. The nondelegation doctrine-- the constitutional doctrine at issue in this case-- sets forth a foundational principle of our system of separated powers and checks and balances precisely because it acts in support of the logical proposition that just as no branch may act to breach the authority of another, so too may no branch act to breach its own authority by relinquishing it to another branch.[22] And despite what is suggested by the Chief Justice, separation-of-powers disputes do not invariably give rise to something akin to a "political question" to be avoided by the judiciary and resolved exclusively by the quarreling branches themselves. When President Nixon asserted his "executive privilege" to disregard a subpoena from a special prosecutor, it was no "political question"; when President Clinton asserted his authority to dismiss a lawsuit on "presidential immunity" grounds, it was no "political question"; when Congress asserted its authority to exercise a one-house legislative veto, it was no "political question"; and when Presidents have claimed the authority to issue executive orders, to impound appropriated funds, or to exercise line-item vetoes, these too did not invariably become "political questions."[23] Similarly, that the political process itself may afford potential relief to an aggrieved party does not, as the Chief Justice suggests, somehow relieve the judiciary of its obligation to expound upon the meaning of the law and the Constitution.

22 "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury v Madison*, 5 US (1 Cranch) 137, 176; 2 L Ed 60 (1803).

23 See *United States v Nixon*, 418 US 683; 94 S Ct 3090; 41 L Ed 2d 1039 (1974); *Clinton v Jones*, 520 US 681; 117 S Ct 1636; 137 L Ed 2d 945 (1997); *Chadha*, 462 US 919; *Trump v Hawaii*, 585 US ___; 138 S Ct 2392; 201 L Ed 2d 775 (2018); *Train v City of New York*, 420 US 35; 95 S Ct 839; 43 L Ed 2d 1 (1975); *Clinton*, 524 US 417.

Second, the Chief Justice suggests that we have "announced" a new principle as part of the nondelegation doctrine because, while caselaw from the United States Supreme Court and this Court "require *some* standards for the delegation of legislative authority," such that "in theory, an inadequate standard would be insufficient," "until today, the United States Supreme Court and this Court have struck down statutes under the nondelegation doctrine only when the statutes contained *no* standards to guide the decision-maker's discretion." However, it is not this majority that

has "announced" any novel proposition; rather, it is the Chief Justice who has announced a new principle by stating that repeated judicial statements espousing the necessity of meaningful legislative standards in support of a delegation do not mean what they say. Instead, all that is required is a standard-- some standard, any standard, a standard however illusory or meaningless or ineffectual in achieving its obvious and fundamental purpose-- to transform a delegation of "legislative" power into a delegation of "executive" power. And as a result, the only delegation that will ever *actually* run afoul of the Constitution will be one in which there are "*no* standards to guide the decision-maker's discretion." By this understanding, the Legislature may dissipate and reconfigure its own constitutional authority through empty and standardless delegations, and this Court will have no recourse but to affirm these delegations and acquiesce in the transformation of our system of separated powers and checks and balances, facilitating the dilution of perhaps the greatest constitutional barrier to abuse of public power. We do not believe that such a proposition is supported by either federal or state caselaw, and for good reason.[24] Rather, we have explained that a statute must at least "contain[ ] *sufficient* limits or standards ...." *Seaman*, 396 Mich at 308 (emphasis added). And the United States Supreme Court has used similar language as well. See, e.g., *Mistretta*, 488 US at 374 ("[W]e harbor no doubt that Congress' delegation of authority to the Sentencing Commission is *sufficiently* specific and detailed to meet constitutional requirements.") (emphasis added). It is a very real and meaningful demand upon this Court that we ensure that delegations of authority are properly undertaken. As Justice Gorsuch opined:

> [Enforcing the separation of powers is] about respecting the people's sovereign choice to vest the legislative power in Congress alone. And [it is] about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law. So when a case or controversy comes within the judicial competence, the Constitution does not permit judges to look the other way; we must call foul when the constitutional lines are crossed. [*Gundy*, 588 US at ___; 139 S Ct at 2135 (Gorsuch, J., dissenting).]

24 It is questionable to assert that the United States Supreme Court has never invalidated a statute that included some standard. In *Schechter Poultry Corp*, the statute invalidated by the United States Supreme Court as violating the nondelegation doctrine arguably did include a standard: "fair competition." See *Schechter Poultry Corp*, 295 US at 521-522. See also *Whitman*, 531 US at 474 (observing that in *Schechter Poultry Corp*, the Court invalidated a statute "which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition' "); *Clinton*, 524 US at 486 (Breyer, J., dissenting) ("[*Schechter Poultry Corp*] involved a delegation through the National Industrial Recovery Act, 48 Stat. 195, that contained not simply a broad standard ('fair competition'), but also the conferral of power on private parties to promulgate rules applying that standard to virtually all of American industry.") (citations omitted). But tallying up the number of such cases is not the point and is mere

> distraction; we acknowledge that there are not a large number of such cases. See note 21 of this opinion. What *is* relevant, however, is this: (a) there is a constitutional test, articulated by both the United States Supreme Court and this Court, imposing limits upon excessive delegations of power; (b) that test has regularly been considered and applied by each of those Courts; (c) that test is predicated upon both the language and the logic of our federal and state Constitutions, see, e.g., US Const, art I, § 1; Const 1963, art 4, § 1; Const 1963, art 3, § 2; and (d) there is in the present dispute a delegation of power by the Legislature that is unparalleled in Michigan legal history. The critical question is this-- if the EPGA does not constitute an excessive delegation of power under our Constitution, what ever would?

Third, the Chief Justice also believes that this majority has "announced" a new principle to the effect that the standards imposed upon the executive must become more rigorous as the scope of the powers conferred becomes greater. Again, we disagree. As already noted, the United States Supreme Court has stated that "the degree of agency discretion that is acceptable varies according to the scope of the power ... conferred." *Whitman*, 531 US at 475. It then explained that the standards imposed must be "substantial" when the scope of the powers conferred is great: "While Congress need not provide any direction to the [Environmental Protection Agency] regarding the manner in which it is to define 'country elevators,' which are to be exempt from new-stationary-source regulations governing grain elevators, see 42 U.S.C. § 7411(i), it must provide substantial guidance on setting air standards that affect the entire national economy." *Id*. Although we are obviously not bound by *Whitman* or the lower federal courts that have applied this same principle, see, e.g., *People v Tanner*, 496 Mich 199, 221; 853 NW2d 653 (2014), it is hardly novel for this Court, as suggested by the Chief Justice, to invoke federal judicial decisions, including those of the United States Supreme Court, for their persuasiveness.

Fourth, the Chief Justice disagrees with our conclusion that the EPGA includes only the words "reasonable" and "necessary" as defining the standards governing the Governor's emergency orders. She states that "[t]he EPGA does not use 'reasonable' or 'necessary' in a vacuum; the Governor's action must be 'reasonable' or 'necessary' to 'protect life and property or to bring the emergency situation within the affected area under control.' " We respectfully disagree concerning the pertinent "standards" in the present analysis. Although we have already quoted from part of Justice Kagan's explanation of a nondelegation analysis in her *Gundy* lead opinion, we do so again with more of the surrounding language:

> [A] nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides. [*Gundy*, 588 US at ___; 139 S Ct at 2123 (opinion by Kagan, J.).]

Here, the "task" that the EPGA delegates to the Governor is to promulgate

"orders, rules, and regulations" to "protect life and property" and to "bring the emergency situation within the affected area under control." MCL 10.31(1). The "instructions," i.e., the standards, that the EPGA provides are that such "orders, rules, and regulations" be "reasonable" and "necessary" for the enumerated tasks. *Id*. Thus, the only standards are that the Governor's orders be "reasonable" and "necessary."

Fifth, to the extent the Chief Justice suggests our decision is inconsistent with the cases of the United States Supreme Court sustaining various broad delegations, we respectfully disagree and find the following sampling of cases illustrative and useful:

In *New York Central Securities Corp v United States*, 287 US 12; 53 S Ct 45; 77 L Ed 138 (1932), the Interstate Commerce Commission (ICC) authorized a set of railroad-system leases pursuant to the Interstate Commerce Act, which provided that the ICC may authorize such leases when in the "public interest." *Id*. at 19, 20 n 1. At issue before the United States Supreme Court was whether the "public interest" standard constituted an invalid delegation because it was "uncertain." *Id*. at 24. The Court sustained the delegation, reasoning as follows:

> Appellant insists that the delegation of authority to the Commission is invalid because the stated criterion is uncertain. That criterion is the "public interest." It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary. ... [T]he term "public interest" as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the [ICC] has constantly addressed itself in the exercise of the authority conferred. [*Id*. at 24-25.]

Thus, the standard in *New York Central Securities Corp* was not simply "public interest" but also "adequacy of transportation service," "essential conditions of economy and efficiency," and "appropriate provision and best use of transportation facilities."

In *Fed Radio Comm v Nelson Bros Bond & Mortgage Co*, 289 US 266; 53 S Ct 627; 77 L Ed 1166 (1933), the Court was confronted with a delegation challenge to the Radio Act of 1927, which provided that the Federal Radio Commission may allow radio frequency use by a particular entity " 'from time to time, as public convenience, interest, or necessity requires ....' " *Id*. at 279, quoting 47 USC 84. The Court rejected the challenge, reasoning that when 47 USC 84 was read in context, the standard was limited by several specific concerns:

> In granting licenses the commission is required to act "as public convenience,

> interest or necessity requires." This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. ... The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services, and, where an equitable adjustment between states is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities. [*Id.* at 285.]

Thus, the standard in *Fed Radio Comm* was not simply "public convenience, interest, or necessity" but also "the nature of radio transmission and reception," "the scope, character, and quality of services," and in certain cases "the relative advantages in service which will be enjoyed by the public through the distribution of facilities."

In *Yakus v United States*, 321 US 414; 64 S Ct 660; 88 L Ed 834 (1944), the United States Supreme Court considered a nondelegation challenge to § 2(a) of the Emergency Price Control Act, which authorized the "Price Administrator" to fix commodity prices at a level that " 'in his judgment will be generally fair and equitable and will effectuate the purposes of this Act' ...." *Id.* at 420, quoting § 2(a). In rejecting the challenge, the Court explained:

> The boundaries of the field of the Administrator's permissible action are marked by the statute. It directs that the prices fixed shall effectuate the declared policy of the Act to stabilize commodity prices so as to prevent wartime inflation and its enumerated disruptive causes and effects. In addition the prices established must be fair and equitable, and in fixing them the Administrator is directed to give due consideration, so far as practicable, to prevailing prices during the designated base period, with prescribed administrative adjustments to compensate for enumerated disturbing factors affecting prices. In short the purposes of the Act specified in § 1 denote the objective to be sought by the Administrator in fixing prices—the prevention of inflation and its enumerated consequences. The standards set out in § 2 define the boundaries within which prices having that purpose must be fixed. It is enough to satisfy the statutory requirements that the Administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards .... [*Yakus*, 321 US at 423.]

Thus, the standard in *Yakus* was not simply "fair and equitable" but also "prevailing prices during the designated base period" and "administrative adjustments to compensate for enumerated disturbing factors affecting prices."

And in *Whitman*, the United States Supreme Court considered a nondelegation challenge to § 109(b)(1) of the Clean Air Act (CAA), which "instructs the EPA to set 'ambient air quality standards the attainment and maintenance of which in the judgment of

the Administrator, based on [the] criteria [documents of § 108] and allowing an adequate margin of safety, are requisite to protect the public health.' " *Whitman*, 531 US at 472, quoting 42 USC 7409(b)(1) (brackets in original). In addressing the challenge, the Court first noted its agreement with the Solicitor General's interpretation of § 109(b)(1):

> We agree with the Solicitor General that the text of § 109(b)(1) of the CAA at a minimum requires that "[f]or a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge, [the] EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air." Requisite, in turn, "mean[s] sufficient, but not more than necessary." [*Id.* at 473 (citations omitted; brackets in original).]

The Court then rejected the challenge:

> Section 109(b)(1) of the CAA, which to repeat we interpret as requiring the EPA to set air quality standards at the level that is "requisite" that is, not lower or higher than is necessary—to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent. [*Id.* at 475-476.]

Thus, the standard in *Whitman* was not simply "requisite to protect the public health" but also included consideration of "a discrete set of pollutants" and "published air quality criteria that reflect the latest scientific knowledge." See 42 USC 7408.

As these cases suggest, it reflects an incomplete understanding of United States Supreme Court nondelegation law to assert that vague terms such as "public interest" are ordinarily or typically sufficient to sustain a statute against a nondelegation challenge, even those statutes whose breadth and purview is far more narrow than that of the EPGA. Indeed, if the Chief Justice is correct that a statute only violates the nondelegation doctrine when "the statute[ ] contain[s] *no* standards to guide the decision-maker's discretion," *why* would the United States Supreme Court continually hear such appeals only to decide whether the standards in these cases are *sufficient*?

Sixth, in the end, if the standards in support of the EPGA's delegation of power satisfy the Constitution, our response can only be: what standards would ever *not satisfy* the Constitution? As laid out earlier in this opinion, the EPGA confers an unprecedentedly broad power in Michigan that is restrained by only two words-- "reasonable" and "necessary"-- that do almost nothing to cabin either the authority or the discretion of the person in whom this power has been vested. Put simply, and our criticism is not of the Governor in this regard but of the statute in dispute-- almost certainly, no individual in the history of this state has ever been vested with as much concentrated and standardless power to regulate the lives of our people,

free of the inconvenience of having to act in accord with other accountable branches of government and free of any need to subject her decisions to the ordinary interplay of our system of separated powers and checks and balances, with even the ending date of this exercise of power reposing exclusively in her own judgment and discretion. It is in no way to diminish the present pandemic for this Court to assert, as we now do, that with respect to the most fundamental propositions of our system of constitutional governance, with respect to the public institutions that have most sustained our freedoms over the past 183 years, there must now be some rudimentary return to normalcy.

Finally, we observe in response to the Chief Justice that this decision should be understood as it has been explained throughout this opinion. It is not, we believe, a decision that does anything other than apply *ordinary* principles of administrative law, essentially balancing the required specificity of legislative standards that must accompany a grant of delegated powers with the breadth of those powers. What principally is *extraordinary* in this case is the scope of the statute under consideration, the EPGA, and the expansiveness of the authority it concentrates in a single public official. We do not believe that the conflation of circumstances giving definition to the delegated powers in this case-- the breadth of the delegation, the indefiniteness of the delegation, and the inadequacy of the standards limiting the delegation-- will soon come before this Court again. We have not sought here to *redefine* the constitutional relationship between the legislative and executive branches but only to *maintain* that relationship as it has existed for as long as our state has been a part of this Union. Although singular assertions of governmental authority may sometimes be required in response to a public emergency-- and the present pandemic is clearly such an emergency-- the sheer magnitude of the authority in dispute, as well as its concentration in a single individual, simply cannot be sustained within our constitutional system of separated powers.

V. CONCLUSION

We conclude that the Governor lacked the authority to declare a "state of emergency" or a "state of disaster" under the EMA after April 30, 2020, on the basis of the COVID-19 pandemic. Furthermore, we conclude that the EPGA is in violation of the Constitution of our state because it purports to delegate to the executive branch the legislative powers of state government-- including its plenary police powers-- and to allow the exercise of such powers indefinitely. As a consequence, the EPGA cannot continue to provide a basis for the Governor to exercise emergency powers.[25]

25 We note that majorities of this Court have joined in full Part III(B) of this opinion, in which we hold that the Governor lacked the authority to

declare a "state of emergency" or a "state of disaster" under the EMA after April 30, 2020, and Part III(C)(2), in which we hold that the EPGA is unconstitutional. The former is a unanimous holding of this Court.

Stephen J. Markman

Brian K. Zahra

David F. Viviano (as to Parts III(A), (B), (C)(2), and IV)

Elizabeth T. Clement

David F. Viviano
VIVIANO, J. (*concurring in part and dissenting in part*).

According to the Centers for Disease Control and Prevention, the severe acute respiratory disease known as COVID-19 has been involved in the deaths of thousands of Michiganders and over 190,000 people nationwide.[1] There is little doubt that COVID-19 is one of the most significant public-health challenges our state has ever faced. To limit the spread of the disease, Governor Gretchen Whitmer has issued scores of executive orders regulating many of the daily activities of our state's inhabitants. It is not the Court's place here to adjudge the efficacy or reasonableness of those orders. Instead, we must determine whether they are lawful, i.e., whether the power the Governor has asserted in issuing those orders is validly claimed under the Constitution and laws of this state.

1 See Centers for Disease Control and Prevention, *Provisional Death Counts for Coronavirus Disease 2019 (COVID-19)* <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm> (accessed October 1, 2020) [https://perma.cc/8HKP-SN6A].

While the majority decides this case on constitutional grounds, I believe it is easily resolved by the correct interpretation of the statute at issue, the Emergency Powers of the Governor Act of 1945 (the EPGA), MCL 10.31 *et seq*. Contrary to the majority, I would conclude that the EPGA does not allow for declarations of emergency to confront public-health events like pandemics. In light of this conclusion, it would be unnecessary to decide the constitutional question of whether the EPGA violates the separation of powers. Yet, because the rest of the Court, both majority and dissent, have interpreted the statute much more broadly, I believe it is incumbent upon me to decide the constitutional issue as well. In doing so, I agree with the majority and join its analysis holding that the EPGA (under the majority's construction) is an unconstitutional delegation of legislative power. I also agree with the majority that the Governor lacked authority to renew her declarations under the Emergency Management Act (the EMA), MCL 30.401 *et seq*. Accordingly, I join Parts III(A), (B), (C)(2), and IV of the majority opinion and concur in part and dissent in part.

I. THE EPGA: HISTORY, TEXT, AND CONTEXT

The EPGA's history is a good place to begin because, in this case, it helps illuminate the statute's meaning.[2] In the summer of 1943, a little less than two years before the EPGA's enactment, Detroit experienced a violent riot sparked by racial tensions. Thousands of soldiers entered the city, 34 individuals were killed, property damages amounted to $2 million, and countless injuries occurred. Capeci & Wilkerson, *Layered Violence: The Detroit Rioters of 1943* (Jackson: University Press of Mississippi, 1991), pp 17-18. One of the most difficult problems officials faced was how to authorize the use of federal troops to control the rioting. See Shogan & Craig, *The Detroit Race Riot: A Study in Violence* (New York: Da Capo Press, 1976), pp 68-76. Although thousands of police officers had been deployed, officials believed that something more was needed. *Id*. at 70. In the midst of the crisis, Governor Harry Kelly was informed that martial law had to be declared in order to obtain federal assistance. *Id*. at 75-76. That would have required suspending all local and state laws in the city, depriving the city council and police departments of all authority, and suspending state-government operations in the area. *Id*.

2 It is true that we generally do not look to contemporaneous history when interpreting a statute unless its meaning is doubtful. See *People v Hall*, 391 Mich 175, 191; 215 NW2d 166 (1974). I believe the correct interpretation of the EPGA—that it does not encompass public health—is not doubtful. But given the significance of the issues at stake in this case, and that a majority of a Court of Appeals panel, the Court of Claims, and my colleagues here have all reached a different conclusion, it is worth examining whether the historical context supports or undermines my conclusion.

Understandably, Governor Kelly was reluctant to take that step. *Id*. Instead, without relying on any apparent authority, he proclaimed a " 'state of emergency,' " authorizing the use of the "State Troops"—at that time, an "inexperienced" and "volunteer organization set up ... to replace National Guard units called into federal service during" World War II. *Id*. at 76-77, 79. In his proclamation, Governor Kelly also banned the sale of alcohol, closed "[a]ll places of amusement," established a curfew, and prohibited assembly and the carrying of weapons. Kelly, Declaration and Proclamation (June 21, 1943), reprinted in *The Detroit Race Riot*, pp 144-145. Later the same day, federal officials found a way to offer assistance short of declaring martial law. *The Detroit Race Riot*, p 80. President Franklin D. Roosevelt issued a presidential proclamation, and army troops moved in to bring the situation under control. *Id*. at 80-82, 153-154.

When the EPGA was introduced and enacted in 1945, it was well known that the legislation stemmed from the recent race riot and the perceived inability to order troops without declaring martial law; indeed, when it was first introduced in the Legislature, it was dubbed the "Anti-Riot Bill."[3] The text reflects this emphasis. The first section is the most important for our purposes. Its first sentence describes when and how the statute may be invoked:

> *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. [MCL 10.31(1) (emphasis added).]

The provision for proclaiming "a state of emergency" very clearly reflects Governor Kelly's declaration, which used the same term (albeit without any statutory authorization to do so).

[3] See *Senators Offer Anti-Riot Bill*, Detroit Free Press (April 7, 1945), p 2 ("A bill to equip the Governor with authority to deal with rioting without declaring martial law was introduced in the Senate .... [Senator] Hittle said the bill was proposed by State Police Commissioner Oscar H. Olander and results from experience in the 1943 Detroit riot."); see also *Governor Gets Great Powers: Can Suppress Civil Disorders Quickly*, The Herald-Press (May 26, 1945), p 2 (noting that the law gives "wide powers to suppress civil disorder without proclaiming martial law" and "was requested by state police as an aftermath of the Detroit race riots" due to their discovery that "there was no middle ground legally between minor laws forbidding unlawful assembly and the drastic ordering of martial law, suspending civil rights"); The Sebewaing Blade (May 4, 1945), p 2 ("This measure is designed to remedy a legal handicap which arose in the Detroit race riots two years ago ....").

The second two sentences pertain to the scope of the Governor's authority to address an emergency situation once an emergency has been declared:

> 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. [*Id.*]

The list of possible emergency orders comes, in large part, from the 1943 proclamation. Both speak of controlling "places of amusement" and "assembly," and both contain provisions for curfews and prohibitions on the "sale ... of alcoholic beverages." And as originally passed, the EPGA also allowed the Governor "control of the possession, sale, carrying and use of firearms [and]

other dangerous weapons," 1945 PA 302(1), repealed by 2006 PA 546, just as the proclamation had prohibited the carrying of "arms or weapons of any description," Kelly, Declaration and Proclamation (June 21, 1943), reprinted in *The Detroit Race Riot*, p 145. Thus, the very structure of the act and its key terms largely reflect the 1943 proclamation.

The second section also describes the powers the Governor wields once an emergency has been declared, but as the Governor's counsel conceded at argument, this section does not address or expand the types of situations that qualify as emergencies:

> It is hereby declared to be the legislative intent to invest the governor with sufficiently *broad power of action in the exercise of the police power of the state* to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. The provisions of this act shall be broadly construed to effectuate this purpose. [MCL 10.32 (emphasis added).]

The final section makes it a misdemeanor to violate rules or orders prescribed pursuant to the statute. MCL 10.33.

The dispositive issue here is whether this statute applies in the sphere of public health generally or to an epidemic like COVID-19 in particular. The statute provides a list of events —for example, disaster, rioting, and catastrophe—justifying a declaration of emergency. MCL 10.31(1). But tacked to the end of the list is the stipulation that the Governor may take such action only "when public safety is imperiled." The Attorney General in this case has correctly recognized that it modifies the entire series that precedes it. See generally Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 147 (straightforward, parallel constructions of nouns in a series are normally all modified by postpositive modifiers). In other words, not just any catastrophe will do; it must be one that imperils "public safety."

The Governor reads "public safety" expansively to encompass "public health." She does not provide a source defining this exact term, however. By itself, the ordinary meaning of "safety" at the time the EPGA was enacted in 1945 might lend some support to the Governor's reading. The dictionary she cites defined safety as the "[c]ondition of being safe; freedom from danger or hazard." *Webster's New Collegiate Dictionary* (1949). "Safety" could, therefore, cover health issues.[4] But, as we shall see below, four justices from this Court read the same lay dictionary definition (from an earlier edition) as excluding health considerations. *Chicago & N W R Co v Pub Utilities Comm*, 233 Mich 676, 696; 208 NW 62 (1926) (opinion by SHARPE, J.). Moreover, we are looking for the meaning of "public safety." None of the everyday dictionaries defines that term. Nor do the legal dictionaries from the

period. See, e.g., *Black's Law Dictionary* (4th ed).

4 The last entry in *Webster's* definition for "safety" characterized it as "[a] keeping of oneself or others safe, esp. from danger of accident or disease." *Id.*

The statutory context makes clear that the EPGA uses "public safety" as a term of art with a narrower meaning than the one the Governor posits. Recall that MCL 10.32 gives the Governor "sufficiently broad power of action in the exercise of the *police power* of the state ...." (Emphasis added.) As we have explained, "It has been long recognized that the state, pursuant to its inherent police power, may enact regulations to promote the public health, safety, and welfare." *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 73; 367 NW2d 1 (1985); see also *Osborn v Charlevoix Circuit Judge*, 114 Mich 655, 664; 72 NW 982 (1897) (same). In other words, "public safety" was one of the objectives for which the police power could be exercised; so was "public health." See Legarre, *The Historical Background of the Police Power*, 9 U Pa J Const L 745, 791 (2007) (noting caselaw standing for the proposition "that the state's police power existed only for certain limited objectives, namely, the promotion of public health, safety, and morals").

Thus, when terms from the police-power context like "public safety" crop up in statutes, as they frequently do, courts treat them as terms of art. Cf. *Lincoln Ctr v Farmway Co-Op, Inc*, 298 Kan 540, 552; 316 P3d 707 (2013) (noting that the meaning of the terms "public health" and "public safety" is "widely understood in legal circles"); *CLEAN v Washington*, 130 Wash 2d 782, 804; 928 P2d 1054 (1996) (en banc) (noting that the "terms 'public peace, health or safety' " are "synonymous with an exercise of the State's 'police power' "). In light of the lengthy history and pervasive use of the terms "police power" and "public safety," the Legislature's intent in employing them in the EPGA is unmistakable. By invoking "public safety" and placing it alongside "police power," the Legislature incorporated the specialized legal meanings of these terms.

Another contextual clue supports this conclusion. If the term "public safety" is given the ordinary meaning offered by the Governor and embraced by the majority, it would render as surplusage the phrase "when public safety is imperiled." Courts, however, strive to avoid interpretations that read statutes as containing terms that are surplusage or nugatory. *People v Pinkney*, 501 Mich 259, 282; 912 NW2d 535 (2018). As noted, the full phrase—"when public safety is imperiled"—modifies the entire preceding list of triggering events (i.e., "times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state"). The term "public" already precedes and modifies this list, so interpreting it under its ordinary meaning in the phrase "public safety" inevitably leads to surplusage. And by defining "safety" broadly as " 'the condition of being safe from undergoing

or causing hurt, injury, or loss,' " the majority also fails to give it any real meaning. It is hard to imagine a "great ... crisis, disaster, riot[ ], catastrophe, or similar public emergency" that does not risk "causing hurt, injury, or loss" to "people in general." Thus, ignoring context and reading "public safety" as a term of ordinary meaning renders it nugatory by giving it no meaning at all.

So our task is to decide whether "public safety," as a term of art related to the "police power," includes public-health issues like epidemics.

II. THE DISTINCTION BETWEEN PUBLIC SAFETY AND PUBLIC HEALTH

A. CASELAW

The distinction between "public safety" and "public health" is borne out in caselaw from this Court and others.[5] Most directly, in 1931 this Court defined public safety as it was used in a constitutional provision allowing laws to take immediate effect if necessary " 'for the preservation of the public peace, health or safety,' " i.e., if they invoked the police power. *Naudzius v Lahr*, 253 Mich 216, 227; 234 NW 581 (1931) (citation omitted). Our core interpretation suggests that public health is not within the scope of "public safety": " 'Laws in regard to "public safety" are allied in their application and effect to those enacted to promote the public peace, preserve order, and provide that security to the individual which comes from an observance of law.' " *Id.* at 228, quoting *Pollock v Becker*, 289 Mo 660; 233 SW 641, 649 (1921) (en banc). This definition of "public safety" matches others from both that period and now.[6]

5 The distinction stretches at least as far back as Lord Blackstone, who distinguished offenses against the "public peace" (e.g., murder, public fighting, and destruction of public property) and offenses against "public health," which involved communicable diseases. 4 Blackstone, Commentaries on the Laws of England, pp **142-149, 161. Blackstone's contemporary, Jeremy Bentham, similarly carved up the police powers "into eight *distinct* branches," including "the prevention of offences," "the prevention of calamities," and "the prevention of endemic diseases." Bentham, *A General View of a Complete Code of Laws*, in 3 Bentham, The Works of Jeremy Bentham (Bowring ed, 1843), p 169 (emphasis added).

6 See Graves, *American State Government* (Boston: DC Heath & Co, 3d ed, 1946), p 784 (stating that public safety included laws on criminal control, protection of life and property, industrial safety, fireworks, firearms, building codes, and motor vehicles); 16A CJS, Constitutional Law (June 2020 update), § 707 (stating that public-safety laws concern "dangerous persons, restraining dangerous practices, and prohibiting dangerous structures") (citations omitted).

Our adoption of *Pollock*'s definition is particularly meaningful because *Pollock* was interpreting a similar constitutional provision and went on to define each of the terms in that provision. "Public peace," according to *Pollock*, was "that quiet, order and freedom from disturbance guaranteed by law." *Pollock*, 233 SW at 649. "By the 'public health,' " the court explained, "is meant the wholesome

sanitary condition of the community at large." *Id*.

We had also acknowledged the distinctions earlier in *Newberry v Starr*, 247 Mich 404; 225 NW 885 (1929). Examining the same constitutional provision, we answered whether an act creating school districts could be given immediate effect because it bore "any real or substantial relation to preservation of public health, peace, or safety[.]" *Id*. at 411. We treated these as three separate categories, noting that "school districts have most important duties relating to preservation of health," during such epidemics, "and less important duties respecting peace and safety," including building safety and the safety of students in attendance. *Id*.

We again addressed the distinction in *Chicago*, 233 Mich at 699 (opinion by SHARPE, J.). There, a state law requiring cab curtains for the health of railroad employees was challenged as conflicting with federal railroad legislation that expressly stated its purpose was safety. Justice SHARPE, writing for four justices on a Court of eight, explained:

> In my opinion, the words "health" and "safety," as used in these acts, are not synonymous terms. "Health" is defined by Webster as "The state of being hale, sound, or whole, in body, mind, or soul; especially, the state of being free from physical disease or pain," and "safety" as "freedom from danger or hazard; exemption from hurt, injury, or loss." While some of the safety provisions of the federal acts may tend to protect the health of the employees, such protection is but incidental to the main purpose, that of safeguarding the lives and limbs of the employees and protecting th[at] which is being transported, be it passengers or freight. [*Id*. at 696.][7]

Thus, four justices rejected the conflation of safety and health, using an earlier version of the same dictionary the Governor cites here. The other four justices did not reject this argument but instead thought the federal legislation "covered 'the entire locomotive and tender and all their parts' ...." *Id*. at 689.[8]

7 That conclusion reflected the majority position of the Wisconsin Supreme Court in *Chicago & N W R Co v R Comm of Wisconsin*, 188 Wis 232; 205 NW 932, 934 (1925) ("[T]he public health and the public safety afford two distinct fields of legislation. It is true that to some extent regulations promoting public safety also promote public health, but that fact alone cannot make a health regulation of a regulation distinctly in the interest of safety."), rev'd on other grounds by *Napier v Atlantic Coast Line R Co*, 272 US 605 (1926).

8 That was also the conclusion of the United States Supreme Court when it decided the issue in *Napier v Atlantic Coast Line R Co*, 272 US 605; 47 S Ct 207; 71 L Ed 432 (1926). Again, the distinction drawn between health and safety was not rejected, however. The Court merely observed that regulations for health or comfort may incidentally promote safety. *Id*. at 611-612.

And the distinction has persisted in more recent cases from our sister state courts as well. In *Olivette v St Louis Co*, 507 SW3d 637, 638, 645-646 (Mo App, 2017), the court rejected a county's effort to ground an ordinance establishing minimum police-force standards on a

1945 statute allowing it to promulgate rules to promote the " 'public health' " and prevent contagious diseases. *Id.* at 642 (citation omitted). In doing so, the court declined to adopt a broad definition of "public health," noting that the legislature had created "different departments to address 'public safety' and 'public health,' " indicating that "it considers these two different and distinct areas of government authority." *Id.* at 645. In addition, the Legislature had enacted numerous statutes distinguishing the terms, "such as in the phrase 'public health, safety and welfare[.]' " *Id.*; see also *Winterfield v Palm Beach*, 455 So 2d 359, 361 (Fla, 1984) ("At the very least, the public safety purpose of the police and fire projects is separate and distinct from the public health purpose of the sewer projects.").

B. STATUTORY CONTEXT

The statutory structure in place when the Legislature enacted the EPGA also confirms the distinct meanings of "public safety" and "public health" and demonstrates that the Legislature did not mean to conflate the two concepts in the EPGA.

As far back as 1873, the Legislature had created the State Board of Health (the Board), which was given "general supervision of the interests of the health and life of the citizens of this State." 1873 PA 81, § 2.[9] The Board was to "make sanitary investigations and inquiries respecting the causes of disease, and especially of epidemics[.]" *Id.* Around the same time, the Legislature enacted a framework for localities to address contagious diseases, once again under the rubric of "health" rather than "safety." In 1883, the Legislature authorized municipal health officers to investigate any outbreaks of "communicable disease dangerous to the public health" and order isolation of the sick, require vaccinations, and mandate other sanitary measures to combat the disease. 1883 PA 137, § 1. Violations of the health officer's orders was a finable offense. 1883 PA 137, § 2. Ten years later, the Legislature granted similar powers to the State Board of Health, allowing it to isolate individuals suspected of having communicable diseases—the Governor's only role was to draw money from the general fund for the Board's use. 1893 PA 47.

9 Even further back, our earliest statutes devoted a separate statutory title to "Public Health" (providing for local boards of health and quarantines, among other things), as distinct from the title dealing with the "Internal Police of the State" (providing for the regulation of disorderly persons, taverns, and "the law of the road," among other things). See 1838 RS, Part 1, Titles VIII and IX.

The statutory structure in place in 1945 took shape in the wake of the influenza epidemic of 1918. In the midst of that epidemic, Governor Albert Sleeper banned by order various public meetings. *State Closing is "Flu" Order*, Lansing State Journal (October 19, 1918), p 1. The order did not cite any authority allowing the Governor

to take such action, but the closures lasted only a few weeks. *Id*. (reprinting order); *Governor Lifts "Flu" Ban*, The Sebewaing Blade (November 7, 1918), p 1. Perhaps in response, just months after the ban, the Legislature overhauled the statutory framework for addressing statewide epidemics and public health more generally. In an act "to protect the public health," the Legislature replaced the State Board of Health with a State Health Commissioner, who was given authority over the health laws as well as public meetings. 1919 PA 146, §§ 1, 2, and 9.

As things stood in 1945, the Commissioner had "general charge and supervision of the enforcement of the health laws" of the state. 1948 CL 325.2.[10] And there was a lot to supervise—the health code stretched over multiple chapters and sections, involving statistics, local health boards, handling of dead bodies, mental diseases, hospitals, and communicable diseases, among others. One of the first provisions in the code came from 1919 PA 146, § 9—the section of the act addressing public meetings:

> In case of an epidemic of any infectious or dangerous communicable disease within this state or any community thereof, the state health commissioner may, if he deem it necessary to protect the public health, forbid the holding of public meetings of any nature whatsoever except church services which may be restricted as to number in attendance at 1 time, in said community, or may limit the right to hold such meetings in his discretion. Such action shall not be taken, however, without the consent and approval of the advisory council of health. ... Such order shall be signed by the health commissioner and if applicable to the entire state be countersigned by the governor. [1948 CL 325.9]

10 Although the citations are to the 1948 compiled laws, all statutes cited appeared the same in 1945.

An entire chapter of the code contained detailed provisions applicable to communicable diseases. Upon finding that, among other things, a "dangerous communicable disease" existed inside or outside the state "whereby the public health is imperiled," the State Health Commissioner was "authorized to establish a system of quarantine for the state of Michigan and the governor shall have authority to order the state militia to any section of the state on request of the state board of health to enforce such quarantine." 1948 CL 329.1. The purpose of the quarantine was to prevent travel within the state and detain individuals exposed to the disease. 1948 CL 329.2. Railroad cars and "public or private conveyances" could also be detained under rules produced by the Commissioner if they contained persons or property carrying the infection, which could then be isolated. 1948 CL 329.3. Violation of the Commissioner's rules was a misdemeanor. 1948 CL 329.6.

Local health boards also played a large role in the response to epidemics.

Most directly, local health boards had authority to quarantine those "infected with a dangerous communicable disease." 1948 CL 327.15; see also 1948 CL 327.27 and 1948 CL 327.28 (allowing townships to set up quarantine grounds and establish joint quarantine areas); 1948 CL 327.29 (permitting the township board of health to quarantine vessels). Localities bordering other states could examine any travelers from "infected places in other states" for "any infection which may be dangerous to the public health" and restrain their entry if necessary. 1948 CL 327.17. Localities could also establish hospitals specifically for dealing with any "disease which may be dangerous to the public health." 1948 CL 327.35.[11] During outbreaks, the township board of health had to "immediately provide such hospital[s]" or places for the infected and had to remove infected individuals to that place. 1948 CL 327.39; 1948 CL 327.40. Boards of health had a general duty to "use all possible care to prevent the spreading of the infection ...." 1948 CL 327.41. Many other statutes mentioned both "health" and "safety," indicating that these terms had different meanings—if they meant the same thing, the Legislature would not likely have used each term. See, e.g., 1948 CL 42.17 (providing that charter townships had the same authority as cities "to provide for the public peace and health and for the safety of persons and property").

11 See also 1948 CL 327.49 (applying township standards to cities and villages); 1948 CL 331.202 (authorizing certain counties to build and maintain "a hospital for the treatment of persons suffering from contagious and infectious diseases"); 1948 CL 67.52 (authorizing village councils to provide for a hospital for persons with infectious or contagious diseases and authorizing the council to order detention and treatment of those individuals).

Other provisions, both in the health code and elsewhere, constructed elaborate rules on how epidemics were to be handled, spanning from the appointment of state medical officials to specific instructions for railroads and summer resorts to criminal penalties for spreading communicable diseases.[12]

12 See, e.g., 1948 CL 329.4 and 1948 CL 329.5 (disinfection of persons and property); 1948 CL 329.51 (appointment of a state medical inspector); 1948 CL 325.23 (creating a state bacteriology position tasked with examining and analyzing materials "in localities where there is an outbreak of any contagious disease or epidemic" if the examination or analysis was "necessary to the public health and welfare"); 1948 CL 327.43 (providing duties with regard to any "disease dangerous to the public health" in boarding houses and hotels); 1948 CL 327.44 (obligating physicians to report any cases of diseases "dangerous to the public health"); 1948 CL 125.485 (allowing an officer of the health department to order that a dwelling be vacated if it was "infected with contagious disease"); 1948 CL 462.5(a) (prohibiting railroads from offering free transportation except in limited circumstances, including offering free passage "with the object of providing relief in cases of general epidemic, pestilence or otherwise calamitous visitation"); 1948 CL 455.212 (allowing the board of summer resorts to enact bylaws "to protect all occupants from contagious diseases and to remove from said lands any and all persons afflicted with contagious diseases"); 1948 CL 750.473 ("No person sick with ... any other communicable disease, dangerous to the public health, and no article which has been infected or is liable to propagate or convey any such disease, shall come or be brought into any township, city or village in Michigan ...."); 1948 CL 125.757d (requiring

> owners of trailer-coach parks to report to a board of health any person suspected of having a "communicable disease").

An entirely different batch of statutes addressed public safety.[13] Just as it had announced when it was legislating for "public health," the Legislature did so with "public safety." The title to the 1935 legislation creating the state police began, "An Act to provide for the public safety[.]" 1935 PA 59, title. In creating the state police, the Legislature transferred to it the "department of public safety" and made the state police commissioner the state's deputy oil inspector and fire marshal. 1948 CL 28.5; 1948 CL 28.13 ("Whenever reference is made in any law to the 'commissioner of public safety' or to the 'department of public safety' such reference shall be construed to mean, respectively, the commissioner of the Michigan state police and department of Michigan state police ...."). In other words, the state had a separate department assigned to "public safety," and it fell within the state police force's purview. None of the relevant statutes regarding that department or the police force referred to epidemics or communicable diseases.[14] Rather, the police were assigned to enforce the criminal laws. 1948 CL 28.6. Other matters also fell within the concept of public safety, such as highway traffic regulation. In 1941, the Legislature created the "Michigan state safety commission" for the express purpose of "promot[ing] ... greater safety on the public highways and other places within the state ...." 1941 PA 188, title.

13 It is true that a few health statutes mentioned "safety" or "public safety." For example, the statute allowing local boards of health to quarantine individuals with diseases gave the boards the power to "make effectual provision in the manner in which it shall judge best for the safety of the inhabitants and it may remove such sick or infected person to a separate house or hospital ...." 1948 CL 327.15. But it seems likely that the Legislature invoked safety because these statutes involved removing individuals. That would explain why the Legislature provided for justices of the peace to make out warrants directing law enforcement to conduct the removals. 1948 CL 327.18. Other courts have made this connection. See *Haverty v Bass*, 66 Me 71, 73 (1874) ("[The statute] enables [officials charged with enforcing the statute] to command the services of others. It might be difficult to obtain the necessary assistance, in an undertaking so hazardous to health. But, by means of a warrant, they can compel executive officers to act. They can remove a sick person without the aid of a warrant, or they can use that instrumentality to enforce obedience to their commands, if a resort to such means of assistance becomes necessary."). For this reason, the cases cited by the majority that addressed statutes referring to both health and safety—*Jacobson v Massachusetts*, 197 US 11, 37; 25 S Ct 358; 49 L Ed 643 (1905); *People ex rel Hill v Lansing Bd of Ed*, 224 Mich 388, 391; 195 NW 95 (1923)—are distinguishable.

14 Some statutes regulating the police mentioned "public health." The title to one such act for inspection of kerosene and petroleum products referred to "the protection of public health and safety[.]" 1939 PA 114, title. Of course, an explosive substance poses a safety risk unlike an epidemic, and thus it makes sense that it would fall under the purview of the police.

This was the state of the law in 1945 when the Legislature passed the EPGA. These statutes, like the caselaw, support the conclusion that "public health" and "public safety" represented distinct legal concepts. The statutory context does more than that, however. Reading the EPGA in light of this context also

demonstrates how improbable it is that the Legislature meant to depart from the historical understanding of "public safety" by expanding the concept to include "public health" emergencies.

In general, we interpret statutes in the manner "most compatible with the surrounding body of law into which the provision must be integrated[.]" *Green v Bock Laundry Machine Co*, 490 US 504, 528; 109 S Ct 1981; 104 L Ed 2d 557 (1989) (Scalia, J., concurring). The statutory terms and phrases a court interprets are not only part of a whole statute but more broadly are "part of an entire *corpus juris*. So, if possible, it should no more be interpreted to clash with the rest of that corpus than it should be interpreted to clash with other provisions of the same law." *Reading Law*, p 252. One way we do so is by adhering to the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v United States*, 485 US 759, 778; 108 S Ct 1537; 99 L Ed 2d 839 (1988) (plurality opinion by Scalia, J.); see also *Grimes v Dep't of Transp*, 475 Mich 72, 89-90; 715 NW2d 275 (2006) (courts avoid interpretations that render text surplusage). "If possible, every word and every provision is to be given effect .... None should needlessly be given an interpretation that causes it to duplicate another provision ...." *Reading Law*, p 174. In a like manner, when a statute specifically addresses a topic, that statute will control over a more general statute that might otherwise apply. See *TOMRA of North America, Inc v Dep't of Treasury*, ___ Mich ___, ___; ___ NW2d ___ (2020) (Docket Nos. 158333 and 158335); slip op at 13-14.

The Governor's broad reading of the EPGA does not comport with these longstanding interpretive principles. For her to be correct, we would have to assume that the Legislature in 1945 meant to lay waste to the extensive statutory provisions specifically addressing epidemics and communicable diseases. Under her reading, this body of statutory law would have been mere surplusage. An epidemic would constitute a "public safety" event justifying a state of emergency. At that point, the actual "public health" statutes would have been totally eclipsed by a statute that, on its face, does not even refer to public health or epidemics. The powerful but limited tools given to the Governor and the State Health Commissioner under the health code would have been superfluous—the Governor, applying the EPGA, could have fashioned any tools she thought fit and transgressed any limitations prescribed by the health code.

The same problem arises in the statutory context today. When the meaning of a term is questionable, as "public safety" might be thought of here, courts should "construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." *West Virginia Univ Hosps, Inc v Casey*, 499 US 83, 100; 111 S Ct 1138;

113 L Ed 2d 68 (1991). This is "because it is our role to make sense rather than nonsense out of the *corpus juris*." *Id.* at 101.

The Governor's interpretation makes nonsense out of the current body of statutes. Many laws similar to those above remain on the books.[15] Most notably, the 1919 law passed in the wake of the influenza epidemic and Governor Sleeper's actions is still the law, albeit in slightly modified form. See MCL 333.2253 (allowing the director of the health department to "prohibit the gathering of people for any purpose and [to] establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws"). But this law is redundant alongside the EPGA. As if to prove this, the Director of the Department of Health and Human Services (DHHS) has issued a series of orders under MCL 333.2253 simply "reinforcing" key executive orders on COVID-19, such as those mandating masks and instituting the Safe Start Program, which itself contains the Governor's overarching regulatory response to COVID-19 (e.g., remote-work requirements, public-accommodation restrictions, and prohibitions on large gatherings). *Emergency Order Under MCL 333.2253 – Regarding Executive Orders 2020-153, 2020-160, and 2020-161*, order of the Director of the DHHS, entered July 29, 2020 ("reinforcing" EOs 2020-153, 2020-160, and 2020-161). In other words, nearly everything the Governor has done under the EPGA, she has also purported to do, via the DHHS Director, under MCL 333.2253.

15 See, e.g., MCL 333.2221(1) (charging the Department of Public Health with the responsibility to "continually and diligently endeavor to prevent disease"); see also MCL 333.2221(2)(a) and (d) (giving the department "general supervision of the interests of the health and life of the people of this state" and making it responsible for investigating "[t]he causes of disease and especially of epidemics"); MCL 333.5115 (the department must establish standards for "the discovery and care of an individual having or suspected of having a communicable disease or a serious communicable disease or infection"); MCL 333.5203(1) (the department must issue warnings to individuals with communicable diseases deemed to be "health threat[s] to others"); MCL 333.5205 (those warnings can be enforced in court); MCL 333.5207 (the individuals can be temporarily detained, tested, and treated); MCL 333.9621 (allowing local health departments, state institutions, and physicians to require microbiological examinations in locations "where there is an outbreak of a communicable disease or epidemic requiring the examination or analysis to protect the public health"); MCL 331.202 (allowing counties with a certain population to construct and maintain hospitals for individuals with "contagious and infectious diseases").

The contextual clues within the EPGA all lead to the same conclusion. To begin with, nowhere does the EPGA refer to terms or tools traditionally associated with public-health emergencies. This stands in stark contrast to the provisions from the 1945 health code discussed above. Those statutes referred to quarantines, removal of the sick, and medical treatment —the common responses to epidemics for centuries. See Zuckerman, *Plague and Contagionism in Eighteenth-Century England: The Role of Richard Mead*, 78

Bull Hist Med 273, 287-289 (2004); Link, *Public Health History: Toward a New Synthesis*, 19 Reviews Am Hist 528, 529 (1991) (book review).

Instead, what we find in the EPGA are terms suggesting safety concerns of the sort law-enforcement agencies have a duty to confront. Consider the nonexhaustive list of example orders the Governor can issue controlling matters such as traffic, places of amusement, alcoholic beverages, and explosives. These all appear to anticipate events like riots, in which the behavior of the public is what poses the safety risk. None of the examples relates to contagious diseases or epidemics. The references to designated "area[s]" and "specific zones" also suggest a focus on safety issues like civil disturbances. Although the statute does not expressly or impliedly limit the geographic scope of the emergency, it was evidently crafted with local emergencies in mind. That focus is also evident in the provision allowing city mayors and county sheriffs to seek emergency declarations. The accommodation for localities seems designed for civil disturbances and the like, not epidemics that could easily spread from place to place across the state. Read as part of the larger statutory context, then, the EPGA suggests a focus on public safety rather than public health.

C. PRACTICAL CONSTRUCTION OF THE EPGA

Another relevant interpretive consideration is how governors have used and construed the EPGA in the past. See *Westbrook v Miller*, 56 Mich 148, 151-152; 22 NW 256 (1885) (noting that "great deference is always" owed to an executive's practical construction of a statute it enforces); 2B Singer, Sutherland Statutory Construction (7th ed, October 2019 update), § 49:3 (noting that "long-continued contemporaneous and practical interpretation of a statute by executive officers ... is an invaluable aid to construction" and "is closely related to the doctrine that statutes are given their common and ordinary meaning").

In this regard, although "public health" was mentioned in past emergency declarations and orders under the EPGA, none ever involved public-health emergencies.[16] Rather, prior to the adoption of the EMA in 1976, in the handful of times it was invoked, governors had employed the EPGA for events like riots, energy shortages, and violent strikes or protests. See, e.g., Executive Order No. 1967-3 (riots). Since the passage of the EMA in 1976, the EPGA has been mostly dormant. The only executive order expressly citing the EPGA in the past 50 years was in response to an oil spill—but the EMA was also invoked. Executive Order No. 2010-7. That is it.

16 It has been observed that Governor William Milliken ostensibly used the EPGA in 1970 to ban fishing in Lake St. Clair and the St. Clair River due to pollution concerns; two weeks after issuing that order, he issued a similar order

banning commercial walleye fishing on Lake Erie. See Van Beek, *A History of Michigan's Controversial 1945 Emergency Powers Law* (August 31, 2020), p 3. But even assuming that this falls within the realm of "public health," Governor Milliken's orders did not cite the EPGA or declare an emergency. Executive Order No. 1970-6; Executive Order No. 1970-7.

This limited, practical use of the EPGA was perhaps a result of Governor Milliken's belief, expressed in his "Special Message to the Legislature on Natural Disasters," that the statute was "pertinent to civil disturbances ...." 1973 House Journal 861 (No. 41, April 11, 1973). Whatever the reason for its limited use, the Governor's current application of the statute to cover public-health emergencies is unprecedented.[17] Thus, an examination of the statute's prior uses also supports the narrower interpretation given above.

17 Not only is the Governor's use of the statute unprecedented in Michigan, it is unique across the entire country. The statutory authority invoked in the COVID-19 emergency declarations by nearly every other state governor explicitly contemplates public-health emergencies. See Ala Code 31-9-1 and Ala Code 31-9-3(4); Alas Stat 26.23.020(i); Ariz Rev Stat Ann 26-301(15), Ariz Rev State Ann 26-303(D) and Ariz Rev Stat Ann 36-787; Ark Code Ann 12-75-102 and Ark Code Ann 20-7-110; Cal Gov Code 8558; Colo Rev Stat 24-33.5-704.5; Conn Gen Stat 19a-131a; Del Code Ann, tit 20, §§ 3102(2) and 3132(11); Fla Stat 381.00315; Ga Code Ann 38-3-51(a); Hawaii Rev Stat 127A-2; Idaho Code 46-1002 and Idaho Code 46-1007; Ill Comp Stat, ch 20, 3305/4; Ind Code 10-14-3-12 and Ind Code 10-14-3-1; Iowa Code 29C.6(1); Kan Stat Ann 48-904; Ky Rev Stat Ann 39A.020(12); La Stat Ann 29:762; Me Stat, tit 37-B, § 703 and Me Stat, tit 22, § 801(4-A); Md Code Ann, Pub Safety, 14-101(c); Mass Gen Laws, ch 17, § 2A; Minn Stat 4.035(2); Miss Code Ann 33-15-5(g); Mont Code Ann 10-3-103(4); NJ Stat Ann 26:13-2; NM Stat Ann 12-10A-3 and NM Stat Ann 12-10-4(B); NY Exec Law 20 (McKinney); NC Gen Stat 166A-19.3(6); ND Cent Code 37-17.1-04; Ohio Rev Code Ann 5502.21; Okla Stat, tit 63, §§ 683.2(A) and 683.3; Or Rev Stat 401.025; Pa Cons Stat, tit 35, § 7102; RI Gen Laws, tit 30, § 30-15-3; SC Code Ann 25-1-440 and SC Code Ann 44-4-130; SD Codified Laws 34-48A-1; Tenn Code Ann 58-2-102; Tex Gov't Code Ann 418.014; Utah Code Ann 53-2a-202(1); Vt Stat Ann, tit 20, § 1(a); Va Code Ann 44-146.14(a) and Va Code Ann 44-146.16; Wash Rev Code 38.52.010 and Wash Rev Code 38.52.020(1); W Va Code 15-5-1; Wis Stat 323.10; Wy Stat Ann 19-13-103(a) and Wy Stat Ann 35-4-115(a)(i); see also Nev Rev Stat 414.0335 and Nev Rev Stat 414.0345 (the governor did not cite specific statutes in the COVID-19 declaration of emergency but instead broadly invoked the "laws" of the state—these statutes allow emergency declarations for public-health events). In the remaining few states, the respective governors have invoked statutes that at least arguably define emergencies or disasters with enough breadth to cover public health. See Neb Rev Stat 81-829.39(2) and (3) (defining "emergency" and "disaster" to mean, in relevant part, "any event or the imminent threat thereof causing serious damage, injury, or loss of life or property resulting from any natural or manmade cause"); Mo Rev Stat 44.010 (defining emergencies to include natural disasters that affect the "safety and welfare" of the residents, including things like bioterrorism); NH Stat 21-P:35(VIII) (defining "state of emergency" as a "condition, situation, or set of circumstances deemed to be so extremely hazardous or dangerous to life or property that it is necessary and essential to invoke, require, or utilize extraordinary measures, actions, and procedures to lessen or mitigate possible harm").

III. CONSTITUTIONAL DOUBT

If, after all this, I had any lingering doubts about the meaning of the statute, then, as plaintiffs point out, I would still be forced to choose the narrower interpretation. That is because it avoids the grave

constitutional questions raised by the Governor's exceedingly broad reading of the statute. " 'When the validity of an act ... is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' " *Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477, 508; 274 NW2d 373 (1979), quoting *Ashwander v Tennessee Valley Auth*, 297 US 288, 348; 56 S Ct 466; 80 L Ed 688 (1936). This principle, known as the constitutional-doubt canon, "rests on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v Martinez*, 543 US 371, 381; 125 S Ct 716; 160 L Ed 2d 734 (2005).[18]

18 This rule of interpretation is often invoked alongside a separate rule of judicial procedure: the rule of constitutional avoidance. See *Reading Law*, p 251. The latter rule is also deeply rooted in our constitutional jurisprudence. See *Powell v Eldred*, 39 Mich 552, 553 (1878) ("It is a cardinal principle with courts not to pass upon the constitutionality of acts of the Legislature, unless where necessary to a determination of the case."). Courts should be reluctant—and indeed should refuse—"to undertake the most important and the most delicate of the Court's functions ... until necessity compels it in the performance of constitutional duty." *Rescue Army v Muni Court of Los Angeles*, 331 US 549, 569; 67 S Ct 1409; 91 L Ed 1666 (1947). The rule of constitutional avoidance protects the separation of powers. See *id.* at 570 (noting that the rule is "basic to the federal system and this Court's appropriate place within that structure"); *id.* at 571 (noting that the rule is founded on, among other things, "the necessity, if government is to function constitutionally, for each to keep within its power, including the courts"). Indeed, we have said that the "avoidance of unnecessary constitutional issues" is a core aspect of "judicial power." *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 614-615; 684 NW2d 800 (2004), rev'd on other grounds by *Lansing Sch Ed Ass'n, MEA/NEA v Lansing Bd of Ed*, 487 Mich 349 (2010); see also *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 292-293; 737 NW2d 447 (2007) (citing *Nat'l Wildlife*'s definition of "judicial power" and stating that preservation of the separation of powers depends on the judiciary confining itself to this definition), rev'd on other grounds by *Lansing Sch*, 487 Mich 349.

Here, plaintiffs claim that the statute, under the Governor's interpretation, would violate the separation of powers by improperly delegating legislative authority and by failing to articulate standards to guide the Governor's exercise of the statutory power. Our Constitution divides the powers of government among the three branches and states that "[n]o 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.

As I explain below, I believe that if the Governor's and the majority's interpretation is correct, then the EPGA is in trouble. The spin the Governor and the majority give the statute allows her to wield staggering powers across the entire terrain of our lives and our laws. And once declared, an emergency ends only when she says it ends. Until then, the Governor has vast powers. Using these powers here, she has unilaterally suspended statutes and determined which businesses can open, what they can sell, and how they can sell it; which homes residents can use; whether and how people socialize;

what outdoor recreation is acceptable; what medical services individuals can obtain; and much more besides.[19] All of this raises serious doubts about the statute's constitutionality. Indeed, below I explain that, assuming the Governor and the majority are correct on what the statute means, I agree with the majority that the EPGA constitutes an unconstitutional delegation of legislative power. But I would avoid these determinations by adopting the more reasonable (and, in my opinion, clearly correct) interpretation above.

19 See Governor Gretchen Whitmer, *MI Safe Start: A Plan to Re-Engage Michigan's Economy* (May 7, 2020), available at <https://www.michigan.gov/documents/whitmer/MI_SAFE_START_PLAN_689875_7.pdf> (accessed October 1, 2010) [https://perma.cc/CM42-6JDS]; Executive Order Nos. 2020-4, 2020-5, 2020-6, 2020-14, 2020-17, and 2020-21.

IV. RESPONSE TO THE MAJORITY

By focusing on ordinary meaning, the majority opinion fails to seriously consider the fundamental principle that "[w]ords are to be understood in their ordinary, everyday meanings—*unless* the context indicates that they bear a technical sense." See *Reading Law*, p 69 (emphasis added). It is true that "[i]nterpreters should not be required to divine arcane nuances or to discover hidden meanings" and that "we should not make [interpretation] gratuitously roundabout and complex." *Id*. at 69-70. And it is also true, as I have pointed out elsewhere, that " '[o]ne should assume the contextually appropriate ordinary meaning unless there is reason to think otherwise.' " *In re Erwin Estate*, 503 Mich 1, 33 n 15; 921 NW2d 308 (2018) (VIVIANO, J., dissenting), quoting *Reading Law*, p 70. But, as Scalia and Garner are quick to point out, "[s]ometimes there *is* reason to think otherwise, which ordinarily comes from context." *Reading Law*, p 70.

As the authors explain, in somewhat elementary fashion, "[e]very field of serious endeavor develops its own nomenclature—sometimes referred to as *terms of art*," and "[s]ometimes context indicates that [this] technical meaning applies." *Id*. at 73. This is not a new principle. See, e.g., 1 Kent, Commentaries on American Law (1826), p 432 ("The words of a statute are to be taken in their natural and ordinary signification and import; and if technical words are used, they are to be taken in a technical sense."). It is deeply embedded in our law. See MCL 8.3a ("All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.").

The majority ignores the obvious contextual clues that inexorably lead to the conclusion that "public safety" is a term of art—i.e., it is an object of the police power and is referenced in a statute

that explicitly delegates the police power to the Governor. Instead, the majority rejects the technical meaning without any serious analysis by asserting in conclusory fashion that the statute is "common" and "clear" and by rejecting such "fine" distinctions in a case of this magnitude.

But that is not all. As described above, by reading "public safety" according to the ordinary meanings of its two words, the majority opinion ignores the statutory context and renders the entire phrase "when public safety is imperiled" nugatory. This disregards yet another widely accepted and routinely applied canon of interpretation: the surplusage canon.[20]

20 The majority opinion also finds it significant that I was the first to raise the question of whether "public safety" should be interpreted as a legal term of art when I did so at oral argument and notes that plaintiffs "effectively conceded" this argument. However, the Court requested supplemental briefing on the issue, and all parties and amici have had an opportunity to be heard on this issue. In any event, the Court is certainly not bound by the concession. Compare *Bisio v The City of the Village of Clarkston*, ___ Mich ___, ___; ___ NW2d ___ (2020) (Docket No. 158240) (adopting an interpretation of a statute favoring a party contrary to that party's concession when the issue was raised at the eleventh hour by amicus, the issue was not addressed at oral argument, and the parties were not given an opportunity for supplemental briefing).

Perhaps most troubling—in a case in which the majority endeavors to protect the separation of powers—is the majority's disregard of yet another fundamental and longstanding interpretive rule: the constitutional-doubt canon. Although I believe my reading of the EPGA is the most reasonable interpretation of the statute, even if I were inclined to accept the Governor's interpretation, courts have an obligation to go further to see if "a construction of the statute is fairly possible by which the question may be avoided." *Workman*, 404 Mich at 508 (quotation marks and citation omitted). The majority opinion not only overlooks basic interpretive principles in the first instance, but it also fails to take a second look to see if there is another reasonable construction of the statute. This failure to grapple with the constitutional-doubt canon deprives the majority of an indispensable interpretive tool that functions both to uncover the meaning of statutory text and also to respect separation-of-powers principles by "minimiz[ing] the occasions on which [the courts] confront and perhaps contradict the legislative branch." *Reading Law*, p 249.

I would not suspend the sound principles of interpretation that have guided our interpretive efforts for centuries for this or any case. Instead, I would give the EPGA its fair meaning, as outlined above.

V. DELEGATION

It should be abundantly clear by now that I do not believe we need to reach the constitutional question in this case because the statute simply does not apply. But six justices disagree, and so my interpretation is not binding. Instead, the interpretation that now governs reads the

EPGA to cover nearly everything under the sun, thus bringing the delegation issue into focus. This is, moreover, a certified-question case in which we are presented two discrete issues, one of which involves delegation. Therefore, I consider it my duty to answer whether the EPGA, as construed by the majority, constitutes an impermissible delegation of legislative powers.[21]

21 Cf. *Jefferson Co v Acker*, 527 US 423, 448; 119 S Ct 2069; 144 L Ed 2d 408 (1999) (Scalia, J., concurring in part and dissenting in part) ("For the foregoing reasons, I would hold that this case was improperly removed. In view, however, of the decision of a majority of the Court to reach the merits, I join Parts I, III, and IV of the Court's opinion. Cf. *Edgar v. MITE Corp.*, 457 U.S. 624, 646, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982) (Powell, J., concurring in part); *United States v. Jorn*, 400 U.S. 470, 488, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971) (Black, J., concurring in judgment).").

I fully agree with and join the majority's analysis and conclusion that the EPGA is an unconstitutional delegation. I write only to explain why, in an appropriate future case, I would consider adopting the approach to nondelegation advocated by Justice Gorsuch in *Gundy v United States*, 588 US ___, ___; 139 S Ct 2116, 2131; 204 L Ed 2d 522 (2019) (Gorsuch, J., dissenting). The framework he advanced is firmly grounded in history and makes short work of the modern view, illustrated by the Chief Justice's "*any* standards" test here, that a legislature can cede immense power to the executive so long as it sprinkles in a few vague adjectives that a court can pass off as standards.

As Justice Gorsuch stated, the core principle underlying the nondelegation doctrine—and one that is enshrined in our own Constitution, Const 1963, art 3, § 2—is that the Legislature simply may not " 'delegate ... powers which are strictly and exclusively legislative.' " *Gundy*, 139 S Ct at 2133 (Gorsuch, J., dissenting), quoting *Wayman v Southard*, 23 US (10 Wheat) 1, 42-43; 6 L Ed 253 (1825). Lawmaking, the framers of the federal Constitution believed, should be difficult because it poses dangers to liberty; thus, federal statutes require passage by two legislative bodies and approval by the executive to become law. *Id.* at 2134. Our own Constitution, of course, reflects these same requirements. Const 1963, art 4, §§ 26 and 33. And throughout our constitutional history, especially near the beginning of our statehood, the same fears of excessive lawmaking by the legislative branch were prevalent. See, e.g., Campbell, *Judicial History of Michigan* (1886), p 44 (noting that the 1850 Constitution contained a "number of provisions which seem to indicate that it was supposed the people could not trust their agents and representatives"); see generally Shugerman, *The People's Courts: Pursuing Judicial Independence in America* (Cambridge: Harvard University Press, 2012), pp 6, 123-143 (describing popular distrust of legislatures in the mid-nineteenth century).

The strict requirements for legislation would mean nothing, Justice Gorsuch observed, if the legislative branch "could pass off its legislative power

to the executive branch ....” *Gundy*, 588 US at ___; 139 S Ct at 2134 (Gorsuch, J., dissenting). More important still, these hedges against hasty lawmaking and the separation of powers were not an experiment designed to preserve “institutional prerogatives or governmental turf”; they were, instead, meant to “respect[ ] the people's sovereign choice to vest the legislative power” in one branch alone and to “safeguard[ ] a structure designed to protect their liberties, minority rights, fair notice, and the rule of law.” *Id.* at 2135. So when a court throws up its hands and says an airy standard like “reasonableness” is enough to make a delegation proper, the court is not simply letting the Legislature recalibrate its institutional interests—it is allowing the Legislature to pass off responsibility for legislating, thereby endangering the liberties of the people, as the present case has vividly demonstrated.[22]

22 In outlining the problems that would arise in such a scenario, Justice Gorsuch described a situation eerily similar to the present case:

> Without the involvement of representatives from across the country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current President. And if laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice. [*Gundy*, 588 US at ___; 139 S Ct at 2135 (Gorsuch, J., dissenting).]

How, then, are courts to discern improper delegations? Justice Gorsuch offered three standards covering the circumstances in which delegations are permissible. “First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to ‘fill up the details.’ ” *Id.* at 2136. This standard comes from United States Supreme Court Chief Justice Marshall, who, in an early decision, “distinguished between those ‘important subjects, which must be entirely regulated by the legislature itself,’ and ‘those of less interest, in which a general provision may be made, and the power given to those who are to act ... to fill up the details.’ ” *Id.*, quoting *Wayman*, 23 US (10 Wheat) at 31, 43. We have similarly recognized that “[t]he leaving of details of operation and administration” to the executive “is not an objectionable delegation of legislative power.” *People v Babcock*, 343 Mich 671, 680; 73 NW2d 521 (1955); see also *Argo Oil Corp v Atwood*, 274 Mich 47, 52; 264 NW 285 (1935) (“It is too well settled to need the citation of supporting authorities that the Legislature, within limits defined in the law, may confer authority on an administrative officer or board to make rules as to details, to find facts, and to exercise some discretion, in the administration of a statute. The difficulty is in determining whether the limits are sufficiently defined to avoid delegation of legislative powers.”).

“Second,” Justice Gorsuch continued, “once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding.” *Gundy*, 588 US at ___; 139 S Ct at 2136 (Gorsuch,

J., dissenting). For example, a statute might impose trade restrictions on another country if the President determines that that country has taken or not taken certain actions. *Id*. Once again, our caselaw contains this same standard. See *Argo Oil Corp*, 274 Mich at 52; see also *Tribbett v Marcellus*, 294 Mich 607, 615; 293 NW 872 (1940) ("While the legislature cannot delegate its power to make a law, nevertheless it can enact a law to delegate a power to determine a fact or a state of things upon which the application of the law depends.").

In fact, we have noted that "for many years this and other courts evaluated delegation challenges in terms of whether a legislative (policymaking) or administrative (factfinding) function was the subject of the delegation ...." *Blue Cross & Blue Shield of Mich*, 422 Mich at 51. But we jettisoned this more restrained and historically grounded test in favor of the regnant "standards" test, i.e., the "intelligible principle" test. *Id*. Why? Not because this new test better reflected the Constitution's original meaning or historical practice. Rather, we adopted the new position because we deemed the "standards" test to reflect the "essential purpose of the delegation doctrine" and because we better liked the consequences of this new test, i.e., that the Legislature could gather "the resources and expertise of agencies and individuals to assist the formulation and execution of legislative policy." *Id*. These are not considerations that normally justify a constitutional interpretation. See *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 59; 921 NW2d 247 (2018) (the object of constitutional interpretation is uncovering the text's original public meaning); *Tyler v People*, 8 Mich 320, 333 (1860) ("The expediency or policy of the statute has nothing to do with its constitutionality[.]"). As Justice Gorsuch described, the same mutation occurred in federal law, whereby a stray statement about intelligible principles "began to take on a life of its own" and eventually overwhelmed the traditional tests. *Gundy*, 588 US at ___; 139 S Ct at 2138-2140 (Gorsuch, J., dissenting).

Finally, the third realm of permissible delegation is the assignment of nonlegislative tasks to the executive (or judicial) branches. *Id*. at 2137. Almost by definition, if the delegated authority is not legislative, but already falls within the scope of executive authority, then no improper delegation has occurred. Our earlier caselaw similarly reflects this view. See, e.g., *People v Collins*, 3 Mich 343, 415-416 (1854) ("That the legislature may confer upon others, in their discretion, *administrative* powers necessary or proper for carrying on the government, not otherwise vested by the constitution, and in some cases involving the exercise of a discretion which the legislature itself might, but could not conveniently have exercised, no one will question. These, however, are not the law-making powers, and therefore do not here require particular notice. ... *But the power of enacting general laws cannot be delegated—not even to the people*.

There is nothing in the constitution which authorizes or contemplates it; nothing in the nature of the power which requires it; nothing in the usages of our American government which sanctions it; no single adjudication of a court of last resort, in any state, which affirms it; and such delegation would be contrary to the intent manifested by the very structure of the legislative department of the government.").

Our holding today could be explained through this traditional framework. The power the Governor holds under the EPGA is no mere "filling in the details." Nor could the EPGA be thought of as a fact-finding statute or a grant of nonlegislative power. Instead, the EPGA bestows upon the Governor pure lawmaking authority, precisely what the separation of powers is designed to prevent.

No one in this case has requested that we consider the analytical framework sketched by Justice Gorsuch. It is, however, a possible path toward a nondelegation doctrine that reflects the original public meaning of *our* Constitution—every version of which contains more explicit language bearing upon nondelegation than does our federal counterpart.[23] Thus, if the issue is properly presented in a future case, I would consider whether, and to what extent, we should adopt this framework.[24] But in the present matter, I fully concur with the majority's holding that the EPGA constitutes an unconstitutional delegation of legislative power.

23 See 1963 Const, art 3, § 2 ("No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."); 1908 Const, art 4, § 2 ("No person belonging to 1 department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution."); 1850 Const, art 3, § 2 (same); 1835 Const, art 3, § 1 ("[O]ne department shall never exercise the powers of another, except in such cases as are expressly provided for in this constitution."). See Cooley, Constitutional Limitations (1868), p 116 ("One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority.").

24 The Chief Justice apparently disagrees with this framework and asserts that it is based on "armchair history." Others disagree. See Wurman, *Nondelegation at the Founding*, 130 Yale L J (forthcoming), abstract, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559867#> (accessed October 1, 2020) [https://perma.cc/PVG7-8Y3M] (refuting the attempt by Professors Julian Mortenson and Nicholas Bagley to "challenge the conventional wisdom that, as an originalist matter, Congress cannot delegate its legislative power").

V. CONCLUSION

As discussed above, I believe that this case can be resolved on statutory grounds. In particular, I do not believe that the EPGA applies to public-health events like pandemics. Because my colleagues disagree and proceed to decide the constitutional issue, I consider it my duty to reach that issue as well. I agree with and join the majority's analysis and holding that the EPGA represents an unconstitutional delegation of legislative

authority. To my mind, the case also raises a larger point that the Court would do well to examine in an appropriate case: does the current "standards" test in the nondelegation doctrine reflect our Constitution's original public meaning? For now, however, I fully agree with the majority's articulation and application of the current standard here. I also agree with the majority's holding as to the EMA. For these reasons, I join Parts III(A), (B), (C)(2), and IV of the majority opinion and concur in part and dissent in part.

Bridget M. McCormack

MCCORMACK, C.J. (*concurring in part and dissenting in part*).

Every eighth-grade civics student learns about the separation of powers and checks and balances—design features of our government to prevent one branch from accumulating too much power. The principle of separation of powers is fundamental to democracy. As James Madison put it: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many ... may justly be pronounced the very definition of tyranny." The Federalist No. 47 (Madison) (Rossiter ed, 1961), p 301.

In this light, the Legislature's delegation of authority to the Governor in the Emergency Powers of the Governor Act (the EPGA), MCL 10.31 *et seq.*, may appear concerning at a superficial glance, given that it vests the Governor, and the Governor alone, with the authority to exercise the whole of the state's police power in some emergencies. But our job is to apply the law. And all our precedent (and that of the United States Supreme Court) vindicates the Legislature's choice to delegate authority to the Governor in an emergency.

That does not insulate the Governor's exercise of that authority from checks and balances. To the contrary, there are many ways to test the Governor's response to this life-and-death pandemic.

Some of these are judicial. For example, the statute allows a legal challenge to the Governor's declaration that COVID-19, as a threshold matter, constitutes a "great public crisis" that "imperil[s]" "public safety." MCL 10.31(1). For another example, any order issued under the statute could be challenged as not "necessary" or "reasonable" to "protect life and property or to bring the emergency situation within the affected area under control." *Id*. In these ways and others, the courts can easily be enlisted to assess the exercise of executive power, measuring the adequacy of its factual and legal bases against the statute's language.

There are legislative mechanisms available too. The Legislature might revisit its longstanding decision to have passed the EPGA. If the Legislature saw fit, it could repeal the statute. Or, the Legislature might amend the law to alter its standards or limit its scope. Changing

the statute provides a ready mechanism for legislative balance.

What is more, Michigan's citizens can initiate petition drives to repeal the EPGA (and they are) and to recall the Governor (and they are), exercising yet other constitutional safeguards to curb executive overreach. Citizens by petition could alternatively amend the statute. And with or without a citizens' petition, the Governor undoubtedly will be politically accountable to voters for her actions in our next gubernatorial election, the ultimate check.

Not content with available constitutional devices and unwilling to acknowledge the limitations expressed by the EGPA's terms, the majority forges its own path. It announces a new constitutional rule to strike down a 75-year-old statute passed to address emergencies. In so doing, the majority needlessly inserts the Court into what has become an emotionally charged political dispute. Because our precedent does not support the majority's decision, because I would not make new rules to address a once-in-a-century global pandemic, and because there are many other remedies available to curb executive overreach, I respectfully dissent in part.[1]

1 I concur in the majority's opinion to the extent that it concludes that we should answer the certified questions; holds that the Governor's executive orders issued after April 30, 2020, were not valid under the Emergency Management Act (the EMA), MCL 30.401 *et seq.*; and rejects the plaintiffs' statutory arguments that the EPGA does not authorize the Governor's executive orders. I therefore concur in Parts III(A) and (B) and all but the last paragraph of Part III(C)(1) of the majority opinion.

I. THE NONDELEGATION DOCTRINE

As the majority observes, "[s]tatutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003). In *Dep't of Natural Resources v Seaman*, 396 Mich 299, 309; 240 NW2d 206 (1976), this Court adopted a three-pronged standard for evaluating whether a statute has provided sufficient standards for the delegation of legislative power to be constitutional. First, the act in question must be read as a whole. Second, the standard must be as reasonably precise as the subject matter requires or permits. And third, if possible, the statute must be construed in a way that renders it valid, not invalid; as conferring administrative, not legislative, power; and as vesting discretionary, not arbitrary, authority. The second prong is at the center of this dispute.

In applying this standard, we have consistently upheld statutes with broad and indefinite delegations of legislative authority. See, e.g., *G F Redmond & Co v Mich Securities Comm*, 222 Mich 1, 7; 192 NW 688 (1923) (concluding that the statutory term "good cause" for revocation of a license was "sufficiently definite" to constitute an adequate standard); *Smith v Behrendt*, 278 Mich 91, 93-94, 96; 270 NW 227

(1936) (upholding a statute that delegated the authority to grant permits to operate otherwise-prohibited oversize vehicles on public highways "in special cases"); *State Highway Comm v Vanderkloot*, 392 Mich 159, 172; 220 NW2d 416 (1974) (holding that " 'necessity' is an adequate standard in the context of delegated eminent domain authority" and noting that " '[n]ecessity' is also a recognized standard guiding administrative bodies in making other discretionary determinations based upon delegated legislative authority").

The United States Supreme Court takes a similar approach: a delegation of legislative authority is valid if it provides an " 'intelligible principle' " to guide the decision-maker's authority. *Mistretta v United States*, 488 US 361, 372; 109 S Ct 647; 102 L Ed 2d 714 (1989), quoting *J W Hampton, Jr & Co v United States*, 276 US 394, 409; 48 S Ct 348; 72 L Ed 624 (1928). Under this standard, the United States Supreme Court has approved of "broad standards" for congressional delegation of legislative power. *Mistretta*, 488 US at 373. There is a reason for this: "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Id.* at 372. Using such delegations, "Congress gives its delegee the flexibility to deal with real-world constraints in carrying out his charge." *Gundy v United States*, 588 US ___, ___; 139 S Ct 2116, 2130; 204 L Ed 2d 522 (2019) (opinion by Kagan, J.).

The United States Supreme Court has only invalidated a statute under the nondelegation doctrine in two cases, both from 1935. *Panama Refining Co v Ryan*, 293 US 388; 55 S Ct 241; 79 L Ed 446 (1935); *ALA Schechter Poultry Corp v United States*, 295 US 495; 55 S Ct 837; 79 L Ed 1570 (1935). By contrast, the Court has "over and over upheld even very broad delegations" of authority in numerous cases spanning various decades. *Gundy*, 588 US at ___; 139 S Ct at 2129 (opinion by Kagan, J.). For a far-from-exhaustive list, see *Gundy*, 588 US at ___; 139 S Ct at 2129 (opinion by Kagan, J.); *id.* at 2131 (Alito, J., concurring in the judgment); *Whitman v American Trucking Associations, Inc*, 531 US 457, 472; 121 S Ct 903; 149 L Ed 2d 1 (2001); *Mistretta*, 488 US at 379; *United States v Mazurie*, 419 US 544, 556-557; 95 S Ct 710; 42 L Ed 2d 706 (1975); *United States v Sharpnack*, 355 US 286, 296-297; 78 S Ct 291; 2 L Ed 2d 282 (1958); *American Power & Light Co v Securities & Exch Comm*, 329 US 90, 104-106; 67 S Ct 133; 91 L Ed 103 (1946); *Yakus v United States*, 321 US 414, 425-426; 64 S Ct 660; 88 L Ed 834 (1944); *Mulford v Smith*, 307 US 38, 47-49; 59 S Ct 648; 83 L Ed 1092 (1939); *J W Hampton, Jr & Co*, 276 US at 409-411; *United States v Grimaud*, 220 US 506, 516-517, 521; 31 S Ct 480; 55 L Ed 563 (1911); *Marshall Field & Co v Clark*, 143 US 649, 693-694; 12 S Ct 495; 36 L Ed 294 (1892); *Wayman v Southard*, 23 US (10 Wheat) 1; 6 L Ed 253 (1825). Thus, the current state of the law is such that a successful nondelegation challenge in that Court is very hard to come by.[2]

2 *Gundy* suggests that some members of the current United States Supreme Court are prepared to revisit the doctrine in a future case. Justice VIVIANO finds Justice Gorsuch's approach potentially persuasive and suggests we might adopt it in a future case. But for now, Justice Gorsuch's approach is not the law, and *Panama Refining Co* and *ALA Schechter Poultry Corp* remain the only nondelegation challenges that have succeeded in that Court. And it is armchair history to suggest that the founding generation believed that the constitutional settlement imposed restrictions on the delegation of legislative power or that it empowered the judiciary to police the Legislature's delegations. As Professors Bagley and Mortenson have shown, the overwhelming majority of Founders didn't see anything wrong with delegations as a matter of legal theory. See Mortenson & Bagley, *Delegation at the Founding*, 121 Columbia L Rev (forthcoming 2021), available at <https://originalismblog.typepad.com/the-originalism-blog/2020/01/julian-davis-mortenson-nicholas-bagley-delegation-at-the-founding-with-a-response-from-ilan-wurmanmi.html> (accessed October 1, 2020) [https://perma.cc/9BF5-8SUX]; see generally Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: The University of North Carolina Press, 1996).

Both Courts have tests that require *some* standards for the delegation of legislative authority—in theory, an inadequate standard would be insufficient. But until today, the United States Supreme Court and this Court have struck down statutes under the nondelegation doctrine only when the statutes contained *no* standards to guide the decision-maker's discretion. See *Mistretta*, 488 US at 373 n 7 (discussing *Panama Refining Co* and *ALA Schechter Poultry Corp*); *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 52; 367 NW2d 1 (1985) (agreeing with the plaintiff that the statute at issue contained " 'absolutely no standards' "); *Osius v St Clair Shores*, 344 Mich 693, 700; 75 NW2d 25 (1956) (invalidating an ordinance giving a zoning board of appeals authority to approve or deny the erection of gas stations but providing no standards to guide its decisions). The bar for what standards qualify as constitutional is low.

The delegation in the EPGA plainly has standards that surmount that bar. For the Governor to invoke the EPGA, her actions must be "reasonable" and "necessary," they must "protect life and property" or "bring the emergency situation ... under control," and they may be taken only at a time of "public emergency" or "reasonable apprehension of immediate danger" when "public safety is imperiled." MCL 10.31(1). Those are standards. Reasonable people might disagree about their rigor, but this Court and the United States Supreme Court have consistently held similar standards constitutional. Until today, a delegation was invalid only when there were *no* standards. *Panama Refining Co*, 293 US 388; *Blue Cross & Blue Shield of Mich*, 422 Mich 1.

It is not my view that only delegations with no standards are unconstitutional. But until today this Court and the United States Supreme Court upheld every delegation that had some standards to guide the decision-maker's discretion. The particular standards in the EPGA are as reasonably precise as the statute's subject matter permits. Given the unpredictability and range of emergencies the Legislature

identified in the statute, it is difficult to see how it could have been more specific. Indeed the EPGA contains *multiple* limitations on the Governor's authority, each limitation requiring more of the Governor when exercising authority.[3] Therefore, our precedent holds that it does not violate the nondelegation doctrine.

3 The majority concludes otherwise by asserting that the EPGA contains only the limitations that the Governor's actions be "reasonable" and "necessary," but as the majority notes, the United States Supreme Court has observed that the word "necessary" may be *part* of a sufficient standard imposed upon the executive branch. *Touby v United States*, 500 US 160; 111 S Ct 1752; 114 L Ed 2d 219 (1991).
So too here. The EPGA does not use "reasonable" or "necessary" in a vacuum; the Governor's action must be "reasonable" or "necessary" to "protect life and property or to bring the emergency situation within the affected area under control." What more important objectives does a Governor have in an emergency than to protect life and property and bring the emergency situation under control? And given the variety, breadth, and scope of potential emergencies, how much more specific could the Legislature have been in setting the standards guiding the Governor's discretion to accomplish those goals? Far from "illusory," as the majority calls them, these standards are specifically targeted to allow the Governor to remedy the dire consequences flowing from the emergency. For that reason, the United States Supreme Court precedent discussed in the majority opinion that holds that a "necessity" or some comparable standard might not have been sufficient in and of itself, but was enough when coupled with some criterion, applies to the EPGA. In other words, the authority that the majority cites says the statute is constitutional. The majority's discussion of those cases also contradicts its claim that the standards in the EPGA are confined to "reasonable" or "necessary." For example, the majority admits that the standard in *New York Central Securities Corp v United States*, 287 US 12; 53 S Ct 45; 77 L Ed 138 (1932), was not simply confined to the "public interest" but also included "adequacy of transportation service," "essential conditions of economy and efficiency," and "appropriate provision and best use of transportation facilities" because those terms supplied some criterion. But the majority fails to recognize that the EPGA similarly contains some criterion when it states that the Governor's orders must be necessary to "protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

The majority believes that *Whitman* provides the foundation for its decision that a delegation as broad as this one requires more specific standards guiding the Governor's discretion. But *Whitman* cannot bear the weight that they place on it. *Whitman* does state (sensibly) that the degree of discretion that is acceptable varies according to the scope of the power conferred. But it then sets broad parameters that can't be cast aside here:

> [E]ven in sweeping regulatory schemes we have never demanded, as the Court of Appeals did here, that statutes provide a "determinate criterion" for saying "how much [of the regulated harm] is too much." In *Touby* [*v United States*, 500 US 160; 111 S Ct 1752; 114 L Ed 2d 219 (1991)], for example, we did not require the statute to decree how "imminent" was too imminent, or how "necessary" was necessary enough, or even—most relevant here—how "hazardous" was too hazardous. [*Whitman*, 531 US at 475 (citation omitted).]

And the *Whitman* Court *upheld* the delegation in that case. Thus, even in a "sweeping" law (like the EPGA), the United States Supreme Court's rules have said—and ours were in accordance until today—that the standards provided are

enough to guide the Governor's exercise of her discretion.[4]

4 The majority finds some light in the language from *Synar v United States*, 626 F Supp 1374, 1386 (D DC, 1986), that "[w]hen the scope increases to immense proportions ... the standards must be correspondingly more precise." *Synar*, of course, is not binding on us or any other court outside the DC Circuit, and it cited no authority for its claim. Why we would (or should) rely on that standard, which has no support in our law or that of the United States Supreme Court, is anyone's guess. But if we were to rely on it, it cuts against the majority's assertion that the duration of the delegation in the EPGA makes it unconstitutional. See *id*. at 1386-1387 (stating that "while extremely limited duration has been invoked as one of the elements sustaining a delegation, lengthy duration has never been held to render one void" and noting that "[t]he delegations upheld in [*J W Hampton, Jr & Co*, 276 US at 394], and [*Marshall Field & Co*, 143 US at 649] ... were for indefinite terms").

The majority reaches a contrary conclusion only by breaking new ground in our nondelegation jurisprudence. And what is its justification for doing so? Essentially this—the scope of the Governor's power under the EPGA is unprecedented, so we need a new nondelegation rule to contain it. But creating new constitutional doctrine to respond to a problem that has many other solutions puts the Court in a precarious position. If, as Aristotle said, "the law is reason free from passion," an emotionally charged case seems like a terrible candidate for making new law. When there is a settled rule that has been in place for decades, discarding it to respond to an outlier case (especially when there are other solutions available) is imprudent.

Breaking new constitutional ground here to facially invalidate the EPGA is unnecessary because there are other judicial remedies. If the citizens of this state believe that the Governor has overstepped, they can challenge her determination that this public-health crisis is an emergency that imperils public safety and seek a declaration that she no longer has the authority to act under the EPGA.[5] Or those aggrieved by her orders can challenge any or all of them. (Indeed, that's exactly what the plaintiffs here did.) If any order is not reasonable and necessary because it is not directed at protecting life and property or bringing the emergency situation under control, or not issued at a time of public emergency or reasonable apprehension of immediate danger that imperils public safety, it will fall. There are justiciable questions as to whether the Governor can continue to declare an ongoing emergency and invoke the EPGA generally, as well as to the propriety of specific individual executive orders.[6]

5 When the Governor issued the initial state of emergency back in March and a very real danger existed of hospitals being overrun with COVID-19 patients or running out of ventilators and personal-protection equipment, there was a specific set of facts to justify her declaration that the pandemic was a disaster that threatened public safety. Whether she can make a persuasive case that a disaster threatening public safety continues today is a question a court could decide. Resolving the Governor's authority to act under the EPGA by adjudicating such a challenge rather than striking the act altogether (an act that the Legislature believed gave the Governor necessary and important tools for combatting emergencies) would be a more modest use of our judicial power. I therefore strongly disagree

with the majority that the Governor's powers under the EPGA are of indefinite duration. And for that same reason, I don't view the lack of a specific durational limitation in the EPGA as "considerably broaden[ing] the scope of authority" conferred by the statute.

6 Of course, separation-of-powers disputes do not *always* involve political questions to be avoided by the judiciary (the majority's straw man offering). *This* separation-of-powers dispute is best resolved by the many other remedies available (including judicial remedies) before facially invalidating the EPGA.

Political remedies abound too. The people could convince their elected representatives to repeal (or amend) the EPGA, or attempt to do so themselves. Indeed, a petition to repeal the EPGA is circulating, and recent news reports suggest that it may already have enough signatures to proceed. See, e.g., Hermes & Booth, *Michigan Group Surpasses Signatures Needed for Petition Against Gov. Whitmer's Emergency Powers* (September 14, 2020), available at <https://www.clickondetroit.com/news/michigan/2020/09/14/group-gathers-signatures-to-petition-against-gov-whitmers-emergency-powers/> (accessed October 1, 2020) [https://perma.cc/98ZL-REE8]. Not to mention the most potent political remedy of all: the ballot box. If citizens are unhappy with the Governor's actions, they can launch a petition to recall her (and again, at least one is already circulating)—or vote against her in the next election.

Our nondelegation jurisprudence does not support the majority's decision to facially invalidate the EPGA. And the availability of other remedies makes this case a poor vehicle for reshaping the law. I dissent from the majority's sweeping constitutional ruling.[7]

7 I also question whether the facial validity of the EPGA is properly before the Court, even though I concede that is how the federal court presented the issues to us. The plaintiffs in the federal district court sought only as-applied relief. See Plaintiffs' Complaint (May 12, 2020) at 35-36, requesting the following relief:

> a. A declaratory judgment that the Provider Plaintiffs are permitted under Executive Order 2020-17, Executive Order 2020-77, and the HHS order to continue their business operations and Mr. Gulick is permitted under Executive Order 2020-17, Executive Order 2020-77, and the HHS order to obtain knee replacement surgery and other vital medical treatment;
>
> b. Alternatively, a declaration that Executive Order 2020-17 and Executive Order 2020-77, as applied to the Plaintiffs, violates the Michigan Constitution, the Fourteenth Amendment, and the Commerce Clause of the United States Constitution;
>
> c. Preliminary and permanent injunctive relief preventing the Defendants from enforcing Executive Order 2020-17, Executive Order 2020-77, and the HHS order against the Plaintiffs;
>
> d. Damages for the violation of the Plaintiffs' constitutional rights, in an amount to be proven at trial;
>
> e. Costs and expenses of this action, including reasonable attorneys' fees, in accordance with 42 U.S.C. § 1988; and
>
> f. Any further relief that the Court deems appropriate.

Yet the federal district court certified to this Court the question whether the Governor has the authority under the EPGA or EMA after April 30, 2020, to issue *any* executive order related to the COVID-19 crisis.

Finally, the plaintiffs seek a declaration prohibiting the defendants from enforcing Department of Health and Human Services orders issued by defendant Director Robert Gordon. Those orders proclaim to draw their authority not

from the EMA or EPGA but from MCL 333.2253. The federal district court did not certify to this Court any question regarding the validity of those orders, and this Court does not offer any opinion on the validity or continued enforcement of those orders.

II. CONCLUSION

I agree with the majority that the Governor's executive orders issued after April 30, 2020, were not valid under the EMA. But I dissent from its holding that the EPGA is facially unconstitutional under the nondelegation doctrine. I would uphold the EPGA as a valid delegation of legislative authority under our settled jurisprudence.

Richard H. Bernstein

Megan K. Cavanagh

Richard H. Bernstein

BERNSTEIN, J. (*concurring in part and dissenting in part*).

Like Chief Justice MCCORMACK, whose separate opinion I join in full, I concur in the majority's opinion in part but dissent from its ultimate holding that the Emergency Powers of the Governor Act (EPGA), MCL 10.31 *et seq.*, is unconstitutional. I write separately to express how I came to this difficult conclusion.

The Centers for Disease Control and Prevention report that, in the United States, there have been more than 7,000,000 confirmed cases of COVID-19, and more than 200,000 associated deaths.[1] This data confirms that the United States is the worldwide leader in both confirmed cases and deaths.[2] In Michigan alone, there have been more than 100,000 confirmed cases of COVID-19, and more than 6,000 associated deaths.[3] Although many of the measures enacted by executive order have led to the containment of these numbers in Michigan, history warns us that deadlier second or third waves may still await us.[4]

1 Centers for Disease Control and Prevention, *COVID Data Tracker* <https://covid.cdc.gov/covid-data-tracker/#cases_casesinlast7days> (accessed September 30, 2020) [https://perma.cc/9BCR-6CAL].

2 World Health Organization, *Coronavirus Disease (COVID-19) Dashboard* <https://covid19.who.int/> (accessed September 30, 2020) [https://perma.cc/ME95-PTFZ].

3 Michigan, *Coronavirus* <https://www.michigan.gov/coronavirus/> (accessed September 30, 2020) [https://perma.cc/Z2NE-XRLE].

4 "The first pandemic influenza wave appeared in the spring of 1918, followed in rapid succession by much more fatal second and third waves in the fall and winter of 1918–1919, respectively ...." Taubenberger & Morens, *1918 Influenza: The Mother of All Pandemics*, 12(1) Emerg Infect Dis 15, 16 (2006), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3291398/> (accessed September 30, 2020).

In short, the situation we all are facing is tremendously grave. COVID-19 has posed and continues to pose a very real

threat to both the lives and livelihoods of everyone in Michigan. This is, of course, an understatement to everyone who has lost a loved one or their very way of life. We are truly experiencing a global health crisis of unprecedented scope, and the fact that the Governor of Michigan has attempted to curb the threat by issuing executive orders is understandable. However, as my fellow Justices have recognized, it is not our role to consider or debate the practicality of any of these measures—instead, our job is to determine whether the Governor had the legal authority to act in the first place.

The separation of powers is one of the fundamental principles of our form of government.[5] As one of the Framers put it:

> If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. [The Federalist No. 51 (Madison) (Rossiter ed, 1961), p 322.]

Our entire government is built on the understanding that a system of checks and balances between the branches is necessary for a fully functioning democracy. Our interest in policing the boundaries between the separate branches of government is more than merely academic. I am reminded of a passage in the Bible, which reads, "Now there arose a new king over Egypt, who did not know Joseph." Exodus 1:8. It is this concern over a new king that propels my unease here. It is not enough to be content with how a *specific* individual may be wielding their power. Instead, we are concerned with the inherent authority to act, because in our system of government, leaders may come and go depending on the will of the electorate. That a specific leader can be credited with acting in good faith does not prevent a successor from behaving differently. It can only help sharpen our understanding of how best to protect our democracy to think about how an unknown future actor might exercise this authority and what concerns that might raise.[6]

5 "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Seila Law LLC v Consumer Fin Protection Bureau*, 591 US ___, ___; 140 S Ct 2183, 2202; 207 L Ed 2d 494 (2020), quoting *Bowsher v Synar*, 478 US 714, 730; 106 S Ct 3181; 92 L Ed 2d 583 (1986). " 'There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates' ...." The Federalist No. 47 (Madison) (Rossiter ed, 1961), p 302, quoting Montesquieu. "Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty. The Framers provided a vigorous Legislative Branch and a separate and wholly independent Executive Branch, with each branch responsible ultimately to the people." *Bowsher*, 478 US at 722.

6 See Somin, *Obama's Constitutional Legacy*, 65 Drake L Rev 1039, 1041-1046 (2017); Prokop, Vox, *How Barack Obama Is Expanding Presidential Power – and What It Means for the Future* <https://www.vox.com/2014/9/9/5964421/obama-lawsuit-republicans-abuse-of-power> (posted

> September 9, 2014) (accessed September 30, 2020) ("So future Republic presidents will inevitably cite the new precedents Obama is setting to justify actions of their own. 'I think Democrats are going to rue the day they did not push back against Obama on these things,' says [Mitchel] Sollenberger, the University of Michigan professor [of Political Science]. 'Just as Republicans regretted the same thing when they didn't push back against Bush.' ").

That said, after a thorough examination of prior caselaw from both this Court and the Supreme Court of the United States, I agree with Chief Justice MCCORMACK that the grant of power found in the EPGA does not offend the separation of powers. To be clear, I find this conclusion inherently troubling. Again, we are a government of checks and balances, and at first blush, it seems more than a little strange that a delegation of this scope could be constitutionally appropriate. However, as Justice Alito recently acknowledged, "[S]ince 1935, the [Supreme Court of the United States] has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards." *Gundy v United States*, 588 US ___, ___; 139 S Ct 2116, 2130-2131; 204 L Ed 2d 522 (2019) (Alito, J., concurring in the judgment).[7] Consistent with decades of jurisprudence from both this Court and the Supreme Court of the United States, I therefore agree with Chief Justice MCCORMACK that the nondelegation doctrine, as it is currently understood, is ill-suited to address the unique problem placed before us now. As Justice Alito noted:

> If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment. [*Id.* at 2131.]

Given that this Court considers its understanding of the nondelegation doctrine to be similar to that of the Supreme Court of the United States,[8] I would continue to apply the standards test that this Court has consistently used to analyze nondelegation challenges.[9] Because I agree with Chief Justice MCCORMACK that a straightforward application of that test leads to the conclusion that the EPGA satisfies the constitutional principle of the separation of powers, I would leave to the Supreme Court of the United States to decide whether it is now time to revisit the nondelegation doctrine.

7 For years, legal commentators have noted that the nondelegation doctrine does very little work. Eskridge & Ferejohn, *The Article I, Section 7 Game*, 80 Geo L J 523, 561 (1992) ("Although contrary to the Framers' apparent understanding in 1789, we agree with *Mistretta* [*v United States*, 488 US 361; 109 S Ct 647; 102 L Ed 2d 714 (1989),] that the nondelegation is essentially unenforceable as a constructional doctrine."); Wilkins & Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*, 63 Geo Wash L Rev 479, 541 (1995) (stating that "the New Deal-era nondelegation decisions have seemed virtually toothless since 1935 ...."); Young, *The Constitution Outside the Constitution*, 117 Yale

L J 408, 446 (2007) ("For example, Congress's ability to shift lawmaking responsibility to the executive branch was once limited by the nondelegation doctrine, which permitted shifting implementation functions to agencies but insisted that Congress make the basic policy decisions by articulating an 'intelligible principle' to guide agency discretion. But the courts found the concept of excessive delegation very difficult to define and police, and they eventually gave up trying."); Watts, *Rulemaking as Legislating*, 103 Geo L J 1003, 1016 (2015) ("So how is it that the Court continues to insist pursuant to the nondelegation doctrine's central premise that Congress may not delegate legislative power while, at the same time, Congress routinely delegates broad rulemaking powers to federal agencies and enables agencies to promulgate legislative rules on wide-ranging subjects that carry the force and effect of law? The answer lies in what is known as the intelligible principle requirement—a requirement that might sound substantial but, in reality, is quite toothless.") See also *Gundy*, 588 US at ___ n 62; 139 S Ct at 2140 n 62 (Gorsuch, J., dissenting).

To the extent that this commentary is understood to be limited to a federal context, this Court has also noted that application of the intelligible-principle requirement has led to "uniformly unsuccessful" delegation challenges since the New Deal era. *Taylor v Gate Pharm*, 468 Mich 1, 9; 658 NW2d 127 (2003). "In Michigan, this Court has considered similar claims regarding statutes where the claims included an allegation of improperly delegating the Legislature's power to a Michigan agency, and we have rejected the claims on a basis similar to the federally developed rationale." *Id.* at 10.

8 See *Taylor*, 468 Mich at 10.

9 See *Westervelt v Natural Resources Comm*, 402 Mich 412, 439-440; 263 NW2d 564 (1978).

To conclude, as I do, that Governor Whitmer has the legal authority to issue orders under the EPGA would not prevent the people of Michigan from otherwise expressing their frustrations with the COVID-19 orders. Efforts to repeal the EPGA are already underway. As with all elected officials, the Governor herself is politically accountable to the electorate, via the recall process or at the next gubernatorial election.[10] The enforcement of individual executive orders could and has already been challenged, as evidenced in the underlying case before us, as not being "reasonable" or "necessary to protect life and property." MCL 10.31(1).[11] As a hypothetical example, Executive Order No. 2020-180 states:

> [A]thletes training for, practicing for, or competing in an organized sport must wear a facial covering (except when swimming) or consistently maintain 6 feet of social distance (except for occasional and fleeting moments). For example, an athlete participating in a football, soccer, or volleyball game would not be able to consistently maintain 6 feet of distance, and therefore would need to wear a facial covering.

One could mount a challenge to the enforcement of this order in a region with a lower incidence of COVID-19, as a mask mandate might not be necessary to protect life and property under those circumstances. The very duration and scope of the executive orders could also be challenged under the same language, as some of the more invasive restrictions may no longer be reasonable or necessary if a vaccine were to be widely distributed or if a spike of infections were to be successfully flattened. All of these options would remain available to the people of Michigan even if this Court concluded that the Governor had the authority to issue orders under the EPGA.

10 As Alexander Hamilton has stated in referring to executive power, "it is far more safe there should be a single object for the jealousy and watchfulness of the people[.]" The Federalist No. 70 (Hamilton) (Rossiter ed, 1961), p 430. This appears to have been borne out in practice, as the Board of State Canvassers notes that 20 recall petitions against Governor Whitmer have been filed in 2020 alone. Michigan Secretary of State, Board of State Canvassers, *2020 Recall Petitions Submission and Status*, available at <https://www.michigan.gov/documents/sos/2020_BSC_Recall_Petitions_v2_703097_7.pdf> (accessed on September 30, 2020) [https://perma.cc/X4AD-ZAH2].

11 See also *Dep't of Health & Human Servs v Manke*, 505 Mich ___; 943 NW2d 397 (2020).

In conclusion, on the basis of settled caselaw from this Court and the Supreme Court of the United States, I would hold that the EPGA does not offend the nondelegation doctrine, and I would leave to the people of Michigan the right to mount challenges to individual orders issued under the EPGA.

All Citations

--- N.W.2d ----, 2020 WL 5877599 (Mem)

End of Document

EXHIBIT B

***Cty. of Butler v. Wolf*, __ F. Supp. 3d __,**
2020 WL 5510690, (W.D. Pa. Sept. 14, 2020)

2020 WL 5510690
Only the Westlaw citation
is currently available.
United States District
Court, W.D. Pennsylvania.

COUNTY OF BUTLER,
et al., Plaintiffs,
v.
Thomas W. WOLF,
et al., Defendants.

Civil Action No. 2:20-cv-677
|
Filed 09/14/2020

Synopsis

Background: Counties, citizens, elected representatives, and businesses brought action under § 1983 against Governor of State of Pennsylvania, alleging violation of Takings Clause, violation of Substantive Due Process, violation of Procedural Due Process, violation of Equal Protection, and violation of First Amendment as result of State's emergency measures relating to declared public health emergency from COVID-19. Plaintiffs moved for declaratory judgment.

Holdings: The District Court, William S. Stickman, J., held that:

[1] counties could not bring claims of constitutional violations under § 1983 against State;

[2] State's emergency measures relating to declared public health emergency from COVID-19 were not entitled to more deferential standard of review;

[3] intermediate scrutiny applied to First Amendment right-of-assembly challenge to content-neutral congregate gathering restrictions imposed by State;

[4] content-neutral congregate limitations were not narrowly tailored to serve significant government interest;

[5] application of voluntary cessation doctrine precluded determination that loosening of restrictions in subsequent orders rendered Substantive Due Process challenges moot;

[6] stay-at-home orders far exceeded any reasonable claim to be narrowly tailored; and

[7] orders closing all "non-life-sustaining" businesses were arbitrary in its creation, scope and administration in violation of Substantive Due Process rights.

Motion granted.

West Headnotes (52)

[1] Civil Rights Persons Aggrieved, and Standing in General

Counties in Pennsylvania could not bring claims of constitutional violations under § 1983 against State of Pennsylvania. 42 U.S.C.A. § 1983.

[2] **Civil Rights** Nature and elements of civil actions

Civil Rights Substantive or procedural rights

Substantive rights are not conferred under § 1983; that statute merely provides a cause of action for the deprivation of constitutional rights under the color of state law. 42 U.S.C.A. § 1983.

[3] **Counties** Nature and status

Counties are creatures of the state; they do not possess rights under the Constitution, and so they cannot assert a claim against the state, of which they are a creation, for violating rights that they do not possess.

[4] **Constitutional Law** Right of Assembly

Constitutional Law Public health

State's emergency measures relating to declared public health emergency from COVID-19 were not entitled to more deferential standard of review in action under § 1983 alleging violation of right of assembly and violation of due process; independent judiciary was needed to serve as check on exercise of emergency government power to ongoing and open-ended nature of restrictions that initially were billed as temporary measures allegedly necessary to prevent exponential growth and protect hospital capacity but that became open-ended and ongoing restrictions aimed at very different end of stopping spread of infectious disease with no plan to return to situation where there were no restrictions. U.S. Const. Amends. 1, 14; 42 U.S.C.A. § 1983.

[5] **Health** State and local regulations

States Police power

States have broad authority under state police powers in reacting to emergency situations relating to public health and safety.

[6] **Constitutional Law** Public health

A public health measure may violate Due Process. U.S. Const. Amend. 14.

[7] **Courts** Number of judges concurring in opinion, and opinion by divided court

Courts Operation and effect in general

Neither the Supreme Court's denial of review, nor a dissenting opinion are precedential.

[8] **Constitutional Law** Protection of constitutional rights

Ordinary constitutional scrutiny is necessary to maintain the independent judiciary's role as a guarantor of constitutional liberties, even in an emergency; while principles of balancing may require courts to give lesser weight to certain liberties for a time, the judiciary cannot abrogate its own critical constitutional role by applying an overly deferential standard.

[9] **Constitutional Law** Determination of constitutionality of actions of other branches in general

While respecting the immediate role of the political branches to address emergent situations, the judiciary cannot be overly deferential to their decisions; to do so risks subordinating the guarantees of the Constitution, guarantees which are the patrimony of every citizen, to the immediate need for an expedient solution, especially where measures directly impacting citizens are taken outside the normal legislative or administrative process.

[10] **Constitutional Law** Protection of constitutional rights

Using the normal levels of constitutional scrutiny in emergency circumstances does not prevent governments from taking extraordinary actions to face extraordinary situations; an element of each level of scrutiny is assessing and weighing the purpose and circumstances of the government's act, and therefore the application of normal scrutiny will only require the government to respect the fact that the Constitution applies even in times of emergency.

[11] **Constitutional Law** Right of Assembly

The right of assembly is a fundamental right enshrined in the First Amendment. U.S. Const. Amend. 1.

[12] Constitutional Law Right of Assembly

The First Amendment right of assembly applies to the States. U.S. Const. Amend. 1.

[13] Constitutional Law Right of Assembly

Constitutional Law Freedom of Speech, Expression, and Press

Although the right to peaceably assemble is not coterminous with the freedom of speech, they are afforded nearly identical analysis. U.S. Const. Amend. 1.

[14] Constitutional Law Political Rights and Discrimination

Free speech jurisprudence applied to right-of-assembly challenge to congregate gathering limitations that were imposed as part of State's emergency measures relating to declared public health emergency from COVID-19, since challenge had been made on basis that candidate was seeking to assemble relative to campaigning for public office, order hindered ability to campaign and limited ability to meet and connect with voters, and such conduct was expressive in nature. U.S. Const. Amend. 1.

[15] Constitutional Law Content-Based Regulations or Restrictions

Under the First Amendment, a content-based restriction on speech is one that singles out a specific subject matter for differential treatment. U.S. Const. Amend. 1.

[16] Constitutional Law Narrow tailoring requirement; relationship to governmental interest

Content-neutral time, place and manner restrictions are afforded intermediate scrutiny under the First Amendment. U.S. Const. Amend. 1.

[17] Constitutional Law Right of Assembly

Intermediate scrutiny applied to First Amendment right-of-assembly challenge to content-neutral congregate gathering restrictions imposed by State

as emergency measure relating to declared public health emergency from COVID-19; limiting people by number for gatherings specified in orders, while permitting commercial gatherings based only on occupancy percentage, was not content-based in that it did not have anything to do with "message" of any expressive behavior. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[18] Constitutional Law Content-Neutral Regulations or Restrictions

A regulation that serves purposes unrelated to the content of expression is deemed neutral under the First Amendment, even if it has an incidental effect on some speakers or messages but not others. U.S. Const. Amend. 1.

[19] Constitutional Law Narrow tailoring requirement; relationship to governmental interest

Constitutional Law Existence of other channels of expression

Under First Amendment jurisprudence, a non-content-based restriction is not subjected to strict scrutiny, but still must be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. U.S. Const. Amend. 1.

[20] Constitutional Law Right of Assembly

Health Quarantine

Content-neutral congregate limitations were not narrowly tailored to serve significant government interest to address declared public health emergency from COVID-19, and therefore violated First Amendment right-of-assembly; orders took one-size fits all approach and evidence did not establish that specific numeric congregate limits were necessary to achieve government ends. U.S. Const. Amend. 1.

[21] Constitutional Law Time, Place, or Manner Restrictions

Under the First Amendment, a time, place, or manner regulation may not burden substantially more speech than is necessary to further the government's legitimate interests; the government may not regulate expression in such

a manner that a substantial portion of the burden on speech does not serve to advance its goals. U.S. Const. Amend. 1.

[22] Constitutional Law Narrow tailoring

A statute is narrowly tailored for First Amendment free speech purposes if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy. U.S. Const. Amend. 1.

[23] Constitutional Law Right of Assembly

Health Quarantine

The imposition of a cap on the number of people that may gather for political, social, cultural, educational and other expressive gatherings, while permitting a larger number for commercial gatherings limited only by a percentage of the occupancy capacity of the facility, is not narrowly tailored and does not pass constitutional muster under the First Amendment; it creates a topsy-turvy world where persons are more restricted in areas traditionally protected by the First Amendment than in areas which usually receive far less, if any, protection. U.S. Const. Amend. 1.

[24] Constitutional Law Substantive Due Process in General

Constitutional Law Rights and interests protected; fundamental rights

Substantive Due Process is not an independent right, but rather, a recognition that the government may not infringe upon certain freedoms enjoyed by the people as a component of a system of ordered liberty. U.S. Const. Amend. 14.

[25] Constitutional Law Mootness

Application of voluntary cessation doctrine precluded determination that loosening of restrictions in subsequent orders rendered Substantive Due Process challenges moot to elements of State's business closure orders and stay-at-home orders that were imposed as result of declared public health emergency from COVID-19, since language of subsequent orders merely amended operation of those orders and some of those provisions could be reinstated, or orders were merely

suspended and could be reinstated to full effect at will. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 14.

1 Cases that cite this headnote

[26] **Federal Courts** Mootness

Federal Courts Inception and duration of dispute; recurrence; "capable of repetition yet evading review"

The mootness doctrine is rooted in Article III of the Constitution, which gives federal courts jurisdiction over "cases" and "controversies"; federal courts can entertain actions only if they present live disputes. U.S. Const. art. 3, § 2, cl. 1.

[27] **Federal Courts** Presumptions and burden of proof

Federal Courts Weight and sufficiency

The plaintiff in a federal action has the initial burden of showing a ripe dispute, but the burden will shift if a defendant asserts that some development has mooted elements of the plaintiff's claim; if the defendant claims that some development has mooted the case, it bears the heavy burden of persuading the court that there is no longer a live controversy. U.S. Const. art. 3, § 2, cl. 1.

[28] **Federal Courts** Mootness

Although a change in circumstance may render a case moot, it will not always do so; sometimes a suit filed on Monday will be able to proceed even if, because of a development on Tuesday, the suit would have been dismissed for lack of standing if it had been filed on Wednesday, and therefore the Tuesday development does not necessarily moot the suit. U.S. Const. art. 3, § 2, cl. 1.

[29] **Federal Courts** Voluntary cessation of challenged conduct

The "voluntary cessation" doctrine may serve as an exception to mootness. U.S. Const. art. 3, § 2, cl. 1.

1 Cases that cite this headnote

[30] **Declaratory Judgment** Moot, abstract or hypothetical questions

When a plaintiff seeks declaratory relief, a defendant arguing mootness must show that there is no reasonable

likelihood that a declaratory judgment would affect the parties' future conduct. U.S. Const. art. 3, § 2, cl. 1.

[31] **Constitutional Law** Judicial Authority and Duty in General

Constitutional Law Necessity of Determination

Federal Courts Voluntary cessation of challenged conduct

The voluntary cessation doctrine which may serve as an exception to mootness may create some tension with a principle of judicial restraint, i.e., that courts, when possible, generally should avoid constitutional issues; however, courts have a duty to fully examine and address issues legitimately brought to them by the parties and failure to do so in the name of restraint may very well constitute a dereliction of duty. U.S. Const. art. 3, § 2, cl. 1.

[32] **Constitutional Law** Public health

Health Quarantine

Unprecedented stay-at-home orders that were imposed on free people as result of declared public health emergency from COVID-19 far exceeded any reasonable claim to be narrowly tailored, and therefore violated Substantive Due Process right to intrastate travel under either intermediate scrutiny or strict scrutiny, since liberty of movement was default concept in free society, but orders were imposed for indefinite period of time and subjected every person in state to lock-down where he or she was involuntarily committed to stay-at-home unless he or she was going about activity approved as exception by those orders, and states and local governments were able to employ full menu of individual and community interventions that were not as intrusive and burdensome as lock-down of entire population, even when combating even more serious pandemics. U.S. Const. Amend. 14.

[33] **Constitutional Law** Public health

Health Quarantine

The power to subject a citizen to quarantine is subject to both procedural and Substantive Due Process restraints. U.S. Const. Amend. 14.

[34] **Constitutional Law** Levels of scrutiny; strict or heightened scrutiny

A critical element of intermediate scrutiny of a Due Process claim is that the challenged law be narrowly tailored so that it does not burden more conduct than is reasonably necessary. U.S. Const. Amend. 14.

[35] **Constitutional Law** Due process

Constitutional Law Restraint, commitment, and detention

Broad population-wide lock-downs are such a dramatic inversion of the concept of liberty in a free society as to be nearly presumptively in violation of Due Process unless the government can truly demonstrate that they burden no more liberty than is reasonably necessary to achieve an important government end. U.S. Const. Amend. 14.

[36] **Constitutional Law** Trade or Business

Constitutional Law Public health

Health Quarantine

Unprecedented orders closing all "non-life-sustaining" businesses, imposed by government sua sponte, suspended by it sua sponte, and susceptible to sua sponte re-imposition at any time as result of declared public health emergency from COVID-19 were arbitrary in its creation, scope and administration, and therefore in violation of Substantive Due Process rights even under rational basis scrutiny; government never formulated set, objective definition in writing of what constituted "life-sustaining" and it closed waiver process because backlog of requests slowed process down and therefore went from slowed process to no process. U.S. Const. Amend. 14.

[37] **Constitutional Law** Substantive Due Process in General

Constitutional Law Right to choose or pursue profession or occupation in general

The Due Process Clause of the Fourteenth Amendment includes a substantive component that bars arbitrary, wrongful, government action regardless of the fairness of the procedures used to implement them; the right of

citizens to support themselves by engaging in a chosen occupation is deeply rooted in the nation's legal and cultural history and has long been recognized as a component of the liberties protected by the Fourteenth Amendment. U.S. Const. Amend. 14.

[38] Constitutional Law 🔑 Right to choose or pursue profession or occupation in general

A citizen has a Substantive Due Process right to work for a living and pursue his or her chosen occupation. U.S. Const. Amend. 14.

[39] Constitutional Law 🔑 Right to choose or pursue profession or occupation in general

Courts generally treat government action purportedly violating the right to pursue an occupation in the same light as economic legislation and use the general standard of review applied to Substantive Due Process claims. U.S. Const. Amend. 14.

[40] Constitutional Law 🔑 Substantive Due Process in General

In reviewing a substantive due process claim, the criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a government officer that is at issue; "specific acts" are also known as "executive acts" in Substantive Due Process jurisprudence. U.S. Const. Amend. 14.

[41] Constitutional Law 🔑 Reasonableness, rationality, and relationship to object

Substantive Due Process challenges to a legislative act are reviewed under the rational basis test. U.S. Const. Amend. 14.

[42] Constitutional Law 🔑 Arbitrariness

The touchstone of Due Process is protection of the individual against arbitrary actions of government. U.S. Const. Amend. 14.

[43] Constitutional Law 🔑 Reasonableness, rationality, and relationship to object

Rational basis review applicable to a Substantive Due

Process claim is a forgiving standard for government acts, but it is not a toothless one. U.S. Const. Amend. 14.

[44] Constitutional Law Reasonableness, rationality, and relationship to object

As a general matter, the rational basis test applicable to a Substantive Due Process claim requires only that the governmental action bear a rational relationship to some legitimate end; conversely, actions which are irrational, arbitrary or capricious do not bear a rational relationship to any end. U.S. Const. Amend. 14.

[45] Constitutional Law Other particular issues and applications

Health Quarantine

Unprecedented orders closing all "non-life-sustaining" businesses, imposed by government sua sponte, suspended by it sua sponte, and susceptible to sua sponte re-imposition at any time as result of declared public health emergency from COVID-19 were arbitrary in its creation, scope and administration, and therefore in violation of Equal Protection rights even under rational basis scrutiny; orders treated small retailers differently than their larger competitors, which were permitted to remain open and continue offering same products that small retailers were forbidden from selling, determination as to which businesses they would deem "life-sustaining" and which would be deemed "non-life-sustaining" was arbitrary, ad hoc, process that was never reduced to set, objective and measurable definition, and shutdown of "non-life-sustaining" businesses did not rationally relate to government's stated purpose. U.S. Const. Amend. 14.

[46] Constitutional Law "Class of one" claims

Where a plaintiff in an Equal Protection claim does not allege that distinctions were made on the basis of a suspect classification such as race, nationality, gender or religion, the claim arises under the "class of one" theory. U.S. Const. Amend. 14.

[47] **Constitutional Law** 🔑 "Class of one" claims

Constitutional Law 🔑 "Class of one" claims

To prevail on a "class of one" Equal Protection claim, the plaintiff must demonstrate: (1) the defendant treated him differently than others similarly situated, (2) the defendant did so intentionally, and (3) there was no rational basis for the difference in treatment. U.S. Const. Amend. 14.

[48] **Constitutional Law** 🔑 Arbitrary, capricious, or unreasonable action in general

The equal protection rational basis test is forgiving, but not without limits in its deference, and so distinctions cannot be arbitrary or irrational and pass scrutiny; the State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. U.S. Const. Amend. 14.

[49] **Constitutional Law** 🔑 Territorial uniformity; application to places, areas, or regions

States and local governments may impose requirements or restrictions that apply in one region and not in others without violating Equal Protection rights. U.S. Const. Amend. 14.

[50] **Constitutional Law** 🔑 Other particular issues and applications

Health 🔑 Quarantine

Government's reopening plan after restrictions had been imposed as result of declared public health emergency from COVID-19, which was rolled out on regional basis based on counties, had rational basis, and therefore did not violate Equal Protection, since plan recognized and respected differences in population density, infrastructure, and other factors relevant to effort to address virus and neighboring counties could be permitted to open earlier despite similarities. U.S. Const. Amend. 14.

[51] **Constitutional Law** 🔑 Rational Basis Standard; Reasonableness

Rational basis under the Equal Protection Clause does not require the granularity of a neighborhood by neighborhood

plan; distinctions between counties are a historically accepted manner of statewide administration. U.S. Const. Amend. 14.

[52] **Constitutional Law** Trade or Business

Constitutional Law Other particular issues and applications

To the extent that the government in a public health emergency exercises an unprecedented degree of immediate power over businesses and livelihoods, to the extent that it singlehandedly picks which businesses can stay open and which must close, and to the extent that it picks winners and losers, it has an obligation under the Equal Protection Clause to do so based on objective definitions and measurable criteria; the Equal Protection Clause cannot countenance the exercise of raw authority to make critical determinations where the government could not, at least, enshrine a definition somewhere. U.S. Const. Amend. 14.

Attorneys and Law Firms

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OPINION

WILLIAM S. STICKMAN IV, United States District Judge

I. INTRODUCTION

***1** The COVID-19 pandemic has impacted every aspect of American life. Since the novel coronavirus emerged in late 2019, governments throughout the world have grappled with how they can intervene in a manner that is effective to protect their citizens from getting sick and, specifically, how they can protect their healthcare systems from being overwhelmed by an onslaught of cases, hindering their ability to treat patients suffering from COVID-19 or any other emergency condition. In this Country, founded on a tradition of liberty enshrined in our Constitution, governments, governors, and courts have grappled with how to balance the legitimate authority of public officials in a health emergency with the Constitutional rights of citizens. In this case, the Court is required to examine some of the measures taken by Defendants

—Pennsylvania Governor Thomas W. Wolf and Pennsylvania Secretary of Health Rachel Levine—to combat the spread of the novel coronavirus. The measures at issue are: (1) the restrictions on gatherings[1]; and, (2) the orders closing "non-life-sustaining" businesses and directing Pennsylvanians to stay-at-home.

1 Pursuant to the July 15, 2020 Orders of Defendants, indoor events and gatherings of more than 25 people are prohibited, and outdoor events and gatherings of more than 250 people are prohibited. (ECF Nos. 48-5, 48-6).

After reviewing the record in this case, including numerous exhibits and witness testimony, the Court believes that Defendants undertook their actions in a well-intentioned effort to protect Pennsylvanians from the virus. However, good intentions toward a laudable end are not alone enough to uphold governmental action against a constitutional challenge. Indeed, the greatest threats to our system of constitutional liberties may arise when the ends *are* laudable, and the intent *is* good—especially in a time of emergency. In an emergency, even a vigilant public may let down its guard over its constitutional liberties only to find that liberties, once relinquished, are hard to recoup and that restrictions —while expedient in the face of an emergency situation—may persist long after immediate danger has passed. Thus, in reviewing emergency measures, the job of courts is made more difficult by the delicate balancing that they must undertake. The Court is guided in this balancing by principles of established constitutional jurisprudence.

This action seeks a declaration that Defendants' actions violated and continue to violate the First Amendment, as well as both the Due Process and Equal Protection clauses of the Fourteenth Amendment. Specifically, Plaintiffs argue that numeric limitations on the size of gatherings violates the First Amendment. They argue that the components of Defendants' orders closing "non-life-sustaining" businesses and requiring Pennsylvanians to stay-at-home violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

To examine the issues presented by Plaintiffs, the Court first had to determine what type of scrutiny should be applied to the constitutional claims. As explained at length below, the Court believes that ordinary canons of scrutiny are appropriate, rather than a lesser emergency regimen. The Court next had to determine whether the question of the business closure and related stay-at-home provisions of Defendants' orders remain before it. The record shows that they do. The language of the orders themselves, as well as testimony adduced at trial, show that these provisions are merely suspended, not rescinded, and can be re-imposed at Defendants' will. This, in addition to the voluntary cessation doctrine, compelled the Court to examine issues relating to these components of Defendants' orders.

***2** Having addressed the necessary threshold questions, the Court proceeded to the merits of Plaintiffs' claims and, after carefully considering the trial record and the parties extensive pre and post-trial briefing holds and declares: (1) that the congregate gathering limits imposed by Defendants' mitigation orders violate the right of assembly enshrined in the First Amendment; (2) that the stay-at-home and business closure[2] components of Defendants' orders violate the Due Process Clause of the Fourteenth Amendment; and (3) that the business closure components of Defendants' orders violate the Equal Protection Clause of the Fourteenth Amendment.

2 Plaintiffs challenge only the business closure provisions which had designated every business in the Commonwealth as "life-sustaining" or "non-life-sustaining" and closed the later. They do not challenge components of those orders which permit the businesses to open subject to certain restrictions, such as percentage occupancy limits. As such, the Court's opinion does not impact those components of Defendants' orders.

II. BACKGROUND

Pennsylvania saw its first presumptive positive cases of COVID-19 in the early days of March 2020. (ECF No. 40, p. 1; ECF No. 37, ¶ 6). On March 6, 2020, Governor Wolf signed a Proclamation of Disaster Emergency noting that "the possible increased threat from COVID-19 constitutes a threat of imminent disaster to the health of the citizens of the Commonwealth" such that it was necessary "to implement measures to mitigate the spread of COVID-19." (ECF No. 42-1).

The Governor's proclamation of a disaster emergency vested him with extraordinary authority to take expansive action by executive order. Within the Governor's office, a "group" "was formed to work on issues related to the pandemic" both on the "economic development side and pertaining to the business closures" and "on the health side, teams were formed to work to understand the progress of the pandemic." (ECF No. 75, p. 17).[3] It was an "interdisciplinary team" with "individuals from the [G]overnor's office and agencies being pulled together for specific tasks," including Secretary Levine. (ECF No. 75, pp. 17-18). The "group" never reduced its purpose to writing, although "its stated purpose was to develop mechanisms to respond to that emerging threat [i.e. a pandemic] in a very quick period of time." (ECF No. 75, p. 26). The names of its members remain unknown.

3 Throughout this Opinion, page citations are to pages of the applicable trial transcripts and pleadings, and not the ECF document page number.

Part of the "group" consisted of a "reopening team" and a "policy team." (ECF No. 75, pp. 17-21). None of their "hundreds, if not thousands" of meetings were open to the public, no meeting minutes were kept, and "formality was not the first thing on [their] minds." (ECF No. 75, pp. 21, 26, 28, 30-31, 89-90, 134). The "reopening team" was "working to develop the various

guidance that was necessary to respond to the pandemic," and it "published that on the Commonwealth's website and put out press releases." (ECF No. 75, pp. 27-28, 32). It also formulated the stay-at-home order. (ECF No. 75, pp. 33-34). The "policy team" was tasked with creating the distinctions between "life-sustaining" and "non-life-sustaining" businesses as well as preparing responses for the public on frequently asked questions. (ECF No. 75, pp. 21, 35). Its members consisted solely of employees from the Governor's policy and planning office, none of whom possess a medical background or are experts in infection control. (ECF No. 75, pp. 22-25, 100-01).

The Governor never attended meetings of the various teams, but he "participated in regular calls and updates with members of his administration" and he "was briefed and consulted on key matters." (ECF No. 75, p. 29). Ultimately, without ever conducting a formal vote, the teams, by consensus when "there [was] a favorite approach everyone agree[d] on," put together the scope of an order and submitted it to the Governor through his Chief of Staff for approval.[4] (ECF No. 75, pp. 45-47, 96-97). All of the orders, according to the Governor, were geared "to protect the public from the novel and completely unprecedented pandemic" and "prevent the spread of the disease." (ECF No. 75, pp. 136-37). According to the Executive Deputy Secretary for the Pennsylvania Department of Health, from a public health perspective, the intent of the orders "was to reduce the amount of interaction between individuals." (ECF No. 75, p. 209; ECF No. 37, ¶ 7).

4 For example, in regard to the July 15, 2020 Order that contained a limit of twenty-five percent of the stated fire code maximum occupancy for indoor dining, policy team members reviewed models from other states - Florida, Colorado, Texas, and California - "and then made a decision based on collective input of the policy folks, the legal folks, the Department of Health and health professionals as to what would be the best approach to move forward." (ECF No. 74, pp. 49-51). As to the provision in the Order that alcohol could only be served in the same transaction as a meal, "it was one of the features of the California order that we [i.e. the policy team] did look at and thought it made sense." (ECF No. 74, p. 59). At the end of this process, the proposal for the Order was submitted to the Governor for approval. (ECF No. 74, p. 51).

***3** The various orders issued by Defendants will be discussed with specificity in the analysis that follows as they relate to the particular legal issues in this case. That said, by way of background, the Court would note the following relevant events.

On March 13, 2020, the Governor announced a temporary closure of all K-12 Pennsylvania schools. (ECF No. 42-2). On March 19, 2020, the Governor issued an Order regarding the closure of all Pennsylvania businesses that were "non-life-sustaining."[5] (ECF No. 42-2). Enforcement of the Order was to begin on March 21, 2020 at 12:01 a.m. (ECF No. 42-2). Secretary Levine issued a similar order on March 19, 2020. (ECF No. 42-14). Defendants then issued stay-at-home orders for Allegheny County, Bucks County, Chester County, Delaware

County, Monroe County, Montgomery County, and Philadelphia County. (ECF Nos. 42-15 and 42-16). Enforcement of the Governor's Order was slated to commence on March 23, 2020 at 8:00 PM. (ECF No. 42-15). Amended stay-at-home orders were issued by Defendants from March 23, 2020 through March 31, 2020 to include other counties. (ECF Nos. 42-17 through 42-29). On April 1, 2020, Defendants ordered all citizens of Pennsylvania to stay-at-home effective immediately "except as needed to access, support, or provide life-sustaining businesses, emergency or government services." (ECF Nos. 42-30, 42-31, 47-2). Then, on April 9, 2020, the Governor extended the school closures for the remainder of the 2019-2020 academic year. (ECF No. 47-5).

5 A waiver process, whereby businesses could challenge their designation as "non-life-sustaining," existed from March 19, 2020 until April 3, 2020. (ECF No. 75, p. 226). A team of economic development professionals within the Pennsylvania Department of Community and Economic Development was assembled to review the waiver requests. (ECF No. 75, p. 214). Originally, there were twelve team members and by the end of two weeks there were forty team members plus fifty members answering the telephones. (ECF No. 75, p. 214). By the time the waiver period closed, 42,380 waiver requests were received. 6,124 were granted, 12,812 were denied, and 11,636 were determined not to need a waiver. (ECF No. 38, ¶ 14).

The Governor issued a "Plan for Pennsylvania" on or about April 17, 2020, that included a three phased reopening plan – moving from the "red phase" to the "yellow phase" to the "green phase" - with corresponding "work & congregate setting restrictions" and "social restrictions."[6] (ECF Nos. 47- and 42-81). The stay-at-home provisions of Defendants' orders were extended through June 4, 2020.[7] (ECF Nos. 42-48, 42-49, 42-50, and 42-51). On May 7, 2020, Defendants issued an order for limited opening of businesses, lifting the stay-at-home requirements in certain counties and moving them into the "yellow phase," but imposing gathering limits. (ECF Nos. 42-52 and ECF Nos. 42-53). Throughout May and June, various counties were moved by Defendants from the "yellow phase" to the "green phase." (ECF Nos. 42-54 through 42-61, and 42-63 through 42-75). The final county, Lebanon, was moved into the "green phase" effective July 3, 2020. (ECF No. 42-74). The "green phase" eased most restrictions with the continued suspension of the stay-at-home and business closure orders. (ECF No. 75, pp. 36-37, 144-45).

6 The phases were developed by members of senior staff in the Governor's Office who thought it would be "understandable" to the citizens of Pennsylvania. (ECF No. 75, p. 75). The Commonwealth partnered with Carnegie Mellon University to review demographic and health data for each county. When considering the movement of counties from the "yellow phase" to the "green phase," the Department of Health relied on four metrics:

> (1) whether the county had stable, decreasing, or low confirmed case counts for the immediately proceeding 14-day period compared to the previous 14-day period; (2) whether the contacts of cases within the county were being monitored; (3) whether the Polymerase Chain Reaction (PCR) testing positivity rate, meaning the number of positive cases per 100,000 population, had been less than 10% for the past 14 days; and (4)

whether hospital bed use was 90% per district population in the county.

(ECF No. 37, ¶ 25). As to the business closures, the Governor's office based reopening decisions "upon whether a business created a high-risk for transmission of COVID-19." (ECF No. 39, ¶ 17).

7 While the Governor's representative testified that "our approach throughout the pandemic has not been to take an aggressive enforcement approach," the fact remains that Pennsylvanians were cited for violating the stay-at-home and business closure orders. (ECF No. 74, pp. 61-69; ECF Nos. 42-102,48-7, 54-3).

***4** On June 3, 2020, the Governor renewed his proclamation of disaster emergency for ninety days. (ECF No. 42-62). On July 15, 2020, Defendants issued "targeted mitigation" orders imposing limitations on businesses in the food services industry, closing nightclubs, prohibiting indoor events and gatherings of more than 25 persons, and prohibiting outdoor gatherings of more than 250 persons. (ECF Nos. 48-5, 48-6, 54-1). Most recently, on August 31, 2020, Governor Wolf renewed his proclamation of disaster emergency for ninety days stating "the COVID-19 pandemic continues to be of such magnitude and severity that emergency action is necessary to protect the health, safety, and welfare of affected citizens of Pennsylvania." (ECF Nos. 73, 73-1). This disaster declaration allows "based on the course and development of the virus, that certain restrictions could be put back in place." (ECF No. 75, p. 37).

Plaintiffs filed their Complaint on May 7, 2020, seeking a declaratory judgment that Defendants violated certain constitutional rights through the issuance of orders designed to combat the COVID-19 pandemic. Plaintiffs are comprised of three groups. The "County Plaintiffs" consist of the Counties of Butler, Fayette, Greene, and Washington, Pennsylvania. The "Political Plaintiffs" consist of the following individuals: Mike Kelly, an individual residing in the County of Butler and a member of the United States House of Representatives; Daryl Metcalfe, an individual residing in the County of Butler and a member of the Commonwealth of Pennsylvania House of Representatives; Marci Mustello, an individual residing in the County of Butler and a member of the Commonwealth of Pennsylvania House of Representatives; and Tim Bonner, an individual doing business in the County of Butler and a member of the Commonwealth of Pennsylvania House of Representatives. The "Business Plaintiffs" consist of the following: Nancy Gifford and Mike Gifford, d/b/a Double Image; Prima Capelli, Inc.; Steven Schoeffel; Paul F. Crawford, t/d/b/a Marigold Farm; Cathy Hoskins, t/d/b/a Classy Cuts Hair Salon; R.W. McDonald & Sons, Inc.; Starlight Drive-In, Inc.; and, Skyview Drive-In, LLC. The Complaint asserted five counts under 42 U.S.C. § 1983: Count I - Violation of The Takings Clause; Count II – Substantive Due Process; Count III – Procedural Due Process; Count IV – Violation of Equal Protection; and, Count V – Violation of the First Amendment. (ECF No. 1).

On May 20, 2020, Plaintiffs filed a Motion for Speedy Hearing of Declaratory Judgment Action Pursuant to Rule 57

and a supporting brief. (ECF Nos. 9 and 10). Defendants filed their Response on May 26, 2020. (ECF Nos. 12 and 13). Telephonic oral argument occurred on May 27, 2020. By May 28, 2020 Memorandum Opinion and Order, the Court held that expedited proceedings were warranted to examine the claims in the Complaint at Count II by the Business Plaintiffs, at Count IV by all Plaintiffs, and at Count V by all Plaintiffs. The Court denied the motion as to Counts I and III. (ECF No. 15).

A Case Management Order was issued on June 2, 2020. (ECF No. 18). Expedited discovery commenced on June 12, 2020. (ECF No. 18). The parties agreed that all direct testimony for the Declaratory Judgment Hearing would be given via written Declarations and/or Affidavits and the parties filed those documents along with a Joint Stipulation of Facts and Joint Exhibits. (ECF Nos. 16, 19-34, 37-40, 42, 47, 48). Pre-hearing briefs were also submitted. (ECF Nos. 36, 40). The declaratory judgment hearing occurred over two days, July 17, 2020 and July 22, 2020, with eighteen witnesses testifying. (ECF Nos. 74 and 75). Afterward, the parties submitted comprehensive post-hearing briefs and additional adjudicative facts. (ECF Nos. 56, 59, 61, 64, 66, 67, 68, 71, 73).

III. ANALYSIS

A. The County Plaintiffs Cannot Assert Claims Under Section 1983

***5** **[1]** Defendants argue that the County Plaintiffs—Butler, Fayette, Greene, and Washington Counties—are not proper plaintiffs. They contend that the County Plaintiffs lack standing to bring an action under 42 U.S.C. § 1983. The County Plaintiffs argue that they have standing on both an individual basis and as representatives of their citizens. The Court holds that County Plaintiffs are not proper parties.

The County Plaintiffs focus their argument on general concepts of Article III standing, pointing to areas where the Counties may be able to illustrate specific harm to them, as counties, resulting from Defendants' actions. The alleged harm includes "interference with the holding of public meetings that can be attended by all residents of the Counties, negative impacts on tax revenue, negative impacts on reputation, negative impacts on the citizens of the respective Counties, and loss of access to lawyers and law offices in those Counties." (ECF No. 56, p. 30). But even if these allegations of harm could establish general Article III standing, they are not enough to confer standing under Section 1983.

[2] **[3]** Section 1983 does not confer any substantive rights, but rather, merely provides a cause of action for the deprivation of constitutional rights under the color of state law. Counties are

creatures of the state. They do not possess rights under the Constitution. They cannot assert a claim against the state—of which they are a creation—for violating rights that they do not possess. *See Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40, 53 S.Ct. 431, 77 L.Ed. 1015 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator."); *see also Pennsylvania Professional Liability Joint Underwriting Ass'n v. Wolf*, 324 F. Supp. 3d 519, 530 (M.D. Pa. 2018) ("Counties, municipalities, and other subdivisions owing their existence to the state generally cannot assert constitutional claims against their creator."); *Williams v. Corbett*, 916 F. Supp. 2d 593, 598 (M.D. Pa. 2012) (same); *Jackson v. Pocono Mountain School District*, 2010 WL 4867615, at *3 (M.D. Pa. Nov. 23, 2010) ("[A] number of Circuits, including the Second, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh, have all held that a political subdivision may not bring a federal suit against its parent state or its subdivisions on rights ....").

The County Plaintiffs have attempted to assert claims in their own right and as the representatives of their residents. While counties may undoubtedly litigate in many circumstances, as Defendants aptly note, well established law prohibits the County Plaintiffs from bringing claims of constitutional violations under Section 1983. As such, the County Plaintiffs are not proper parties and cannot obtain relief in this case. They are hereby dismissed as parties.

B. Constitutional Challenges to Defendants' Orders

1) "Ordinary" canons of constitutional review should be applied to Defendants' orders.

[4] Before moving into the substance of Plaintiffs' constitutional claims, the Court will examine what "lens" it should use to review those claims. In other words, what is the appropriate standard, or regimen of standards, that the Court must use to weigh the constitutionality of the claims? Plaintiffs base their constitutional arguments on ordinary constitutional scrutiny, whereas Defendants argue that their actions should be afforded a more deferential standard as emergency measures relating to public health.

***6** **[5]** Over the last century, federal courts have developed a regimen of tiered scrutiny for examining most constitutional issues—rational basis scrutiny, intermediate scrutiny and strict scrutiny. The appropriate standard depends on the nature of the claim and, specifically, the nature of the right allegedly infringed. In this case, Defendants point to the emergency nature of the challenged measures and correctly argue that they have broad authority under state police powers in reacting to

emergency situations relating to public health and safety. They contend that the traditional standards of constitutional scrutiny should not apply, but rather, that a more deferential standard as articulated in *Jacobson v. Massachusetts*, 197 U.S. 11, 31, 25 S.Ct. 358, 49 L.Ed. 643 (1905), should be used. Defendants contend that *Jacobson* sets forth a standard that grants almost extraordinary deference to their actions in responding to a health crisis and that, based on that deference, Plaintiffs' claims are doomed to fail. In other words, Defendants argue that no matter which traditional level of scrutiny that the underlying constitutional violation would normally require, a more deferential standard is appropriate.

In *Jacobson*, the Supreme Court upheld a Massachusetts statute empowering municipal boards of health to require that all residents be vaccinated for smallpox.[8] Jacobson was prosecuted for refusing to comply with the City of Cambridge's vaccination mandate. *Id.* at 13, 25 S.Ct. 358. He argued that the mandatory vaccine regimen "was in derogation of the rights secured to [him] by the preamble to the Constitution of the United States, and tended to subvert and defeat the purposes of the Constitution as declared in its preamble." *Id.* at 13-14, 25 S.Ct. 358. Jacobson also contended that the measure violated the Fourteenth Amendment and the "spirit of the Constitution." *Id.* at 14, 25 S.Ct. 358.

8 The statute provided an exception for children who had a certificate signed by a physician representing that they were "unfit subjects for vaccination." *Id.* at 12-13, 25 S.Ct. 358.

The Supreme Court rejected out-of-hand the arguments that the measure violated the Constitution's preamble or "spirit," explaining that only the specific, substantive provisions of the Constitution can give rise to an actionable claim of rights. The Supreme Court, likewise, rejected Jacobson's challenge under the Fourteenth Amendment. It explained that the States possess broad police powers which encompass public health measures:

> [a]lthough this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and 'health laws of every description;' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states.

Id. at 25, 25 S.Ct. 358. The Supreme Court explained that "the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactments as will protect the public health and the public safety." *Id.*

[6] Although the *Jacobson* Court unquestionably afforded a substantial level of deference to the discretion of state and local officials in matters of public health, it did not hold that deference is limitless. Rather—it closed its opinion with a *caveat* to the contrary:

> Before closing this opinion we deem it appropriate, in order to prevent misapprehension [of] our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely —that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression.

Id. at 38, 25 S.Ct. 358. There is no question, therefore, that even under the plain language of *Jacobson*, a public health measure may violate the Constitution.

Jacobson was decided over a century ago. Since that time, there has been substantial development of federal constitutional law in the area of civil liberties. As a general matter, this development has seen a jurisprudential shift whereby federal courts have given greater deference to considerations of individual liberties, as weighed against the exercise of state police powers. That century of development has seen the creation of tiered levels of scrutiny for constitutional claims. They did not exist when *Jacobson* was decided. While *Jacobson* has been cited by some modern courts as ongoing support for a broad, hands-off deference to state authorities in matters of health and safety, other courts and commentators have questioned whether it remains instructive in light of the intervening jurisprudential developments.

***7** In *Bayley's Campground, Inc. v. Mills*, —— F. Supp. 3d ——, 2020 WL 2791797 (D. Me. May 29, 2020), a district court examined whether the governor of Maine's emergency order requiring, *inter alia*, visitors from out of state to self-quarantine, was constitutional. As here, before proceeding to its analysis of the substantive legal issues, the court examined how it should weigh the issues —according to a very deferential analysis purportedly consistent with *Jacobson*, as advocated by the governor, or under "regular" levels of scrutiny advocated by the plaintiffs. The district court examined *Jacobson* and, specifically, whether it warranted the application of a looser, more deferential, standard than the "regular" tiered scrutiny used on constitutional challenges. It observed: "[i]n the eleven decades since *Jacobson*, the Supreme Court refined its approach for the review of state action that burdens constitutional rights." *Id.* at ——, 2020 WL 2791797 at *8 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 857, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)). *See also Planned Parenthood*, 505 U.S. at 857, 112 S.Ct. 2791 (citing *Jacobson*, 197 U.S. at 24-30, 25 S.Ct. 358) (affirming that "a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims."). The district court declined to apply a standard below those of the established tiered levels of scrutiny. It stated:

> [T]he permissive *Jacobson* rule floats about in the air as a rubber stamp for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review. This may help explain why the Supreme Court established the traditional tiers of scrutiny in the course of the 100 years since *Jacobson* was decided.

Bayley's Campground, at ——, 2020 WL 2791797 at *8.

[7] Justice Alito's dissent (joined by Justices Thomas and Kavanaugh) to the Court's denial of emergency injunctive relief in *Calvary Chapel Dayton Valley v. Sisolak*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 4251360 (Jul. 24, 2020) (Alito, J., dissenting), also casts doubt on whether *Jacobson* can, consistent with modern jurisprudence, be applied to establish a diminished, overly deferential, level of constitutional review of emergency health measures.[9] In arguing that the Supreme Court should have granted the requested injunction, Justice Alito stated: "[w]e have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility." *Id.* at ——, —— S.Ct. ——, 2020 WL 4251360 at *1. Justice Alito pointed out:

> For months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion. This initial response was understandable. In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency—and the opening days of the COVID-19 outbreak plainly qualify—public officials may not be able to craft precisely tailored rules. Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules. In general, that is what has happened thus far during the COVID-19 pandemic.
>
> But a public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.

Id. at ——, —— S.Ct. ——, 2020 WL 4251360 at *2. Justice Alito found unreasonable the argument that *Jacobson* could be used to create a deferential standard whereby public health measures will pass scrutiny unless they are "beyond all question a plain, palpable invasion of rights secured by the fundamental law." *Id.* at ——, —— S.Ct. ——, 2020 WL 4251360 at *5. Rather, he reasoned, "it is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to

do during the COVID-19 pandemic .... It is a considerable stretch to read the [*Jacobson*] decision as establishing the test to be applied when statewide measures of indefinite duration are challenged under the First Amendment or other provisions not at issue in that case." *Id.* at ——, —— S.Ct. ——, 2020 WL 4251360 at *5.

9 The Court is aware that neither the Supreme Court's denial of review, nor Justice Alito's dissent are precedential, however, in light of the facts and circumstances in this case, the Court finds Justice Alito's dissent instructive and persuasive regarding the issues presented.

***8** The district court in *Bayley's Campground* cited to a recent scholarly article examining the type of constitutional scrutiny that should be applied to challenges to COVID-19 mitigation strategies—Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil liberties, and the Courts: the Case Against "Suspending" Judicial Review*, 133 Harv. L. Rev. F. 179 (2020).[10] The Court has reviewed the professors' paper and finds it both instructive and persuasive. There, the learned professors argue that *Jacobson* should not be interpreted as permitting the "suspension" of traditional levels of constitutional scrutiny in reviewing challenges to COVID-19 mitigation measures. *Id.* at 182 ("In this Essay, we argue that the suspension approach to judicial review is wrong—not just as applied to governmental actions taken in response to novel coronavirus, but in general."). The professors highlight three objections to an overly deferential "suspension" model standard of review:

First, the suspension principle is inextricably linked with the idea that a crisis is of finite—and brief—duration. To that end, the principle is ill-suited for long-term and open-ended emergencies like the one in which we currently find ourselves.

Second, and relatedly, the suspension model is based upon the oft-unsubstantiated assertion that "ordinary" judicial review will be too harsh on government actions in a crisis —and could therefore undermine the efficacy of the government's response. In contrast, as some of the coronavirus cases have already demonstrated, most of these measures would have met with the same fate under "ordinary" scrutiny, too. The principles of proportionality and balancing driving most modern constitutional standards permit greater incursions into civil liberties in times of greater communal need. That is the essence of the "liberty regulated by law" described by the Court in *Jacobson.*

Finally, the most critical failure of the suspension model is that it does not account for the importance of an independent judiciary in a crisis —"as perhaps the only institution that is in any structural position to push back against potential overreaching by the local, state, or federal political branches .... Otherwise, we risk ending up with decisions like *Korematsu v. United States* [323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944)]—in which

> courts sustain gross violations of civil rights because they are either unwilling or unable to meaningfully look behind the government's purported claims of exigency.

Id. at 182-83 (internal footnotes and citations omitted). These objections, especially the problem of ongoing and indefinite emergency measures, largely mirror the concern expressed by Justice Alito in *Calvary Chapel.*

10 Lindsay F. Wiley is Professor of Law and Director, Health Law and Policy Program, American University Washington School of Law. Stephen I. Vladeck is the A. Dalton Cross Professor of Law, University of Texas School of Law. *Id.* at 179.

The Court shares the concerns expressed by Justice Alito, as well as Professors Wiley and Vladeck, and believes that an extraordinarily deferential standard based on *Jacobson* is not appropriate. The Court will apply "regular" constitutional scrutiny to the issues in this case. Two considerations inform this decision—the ongoing and open-ended nature of the restrictions and the need for an independent judiciary to serve as a check on the exercise of emergency government power.

First, the ongoing and indefinite nature of Defendants' actions weigh strongly against application of a more deferential level of review. The extraordinary emergency measures taken by Defendants in this case were promulgated beginning in March—six months ago. What were initially billed as temporary measures necessary to "flatten the curve" and protect hospital capacity have become open-ended and ongoing restrictions aimed at a very different end—stopping the spread of an infectious disease and preventing new cases from arising—which requires ongoing and open-ended efforts. Further, while the harshest measures have been "suspended," Defendants admit that they remain in-place and can be reinstated *sua sponte* as and when Defendants see fit. In other words, while not currently being enforced, Pennsylvania citizens remain subject to the re-imposition of the most severe provisions at any time. Further, testimony and evidence presented by Defendants does not establish any specified exit gate or end date to the emergency interventions. Rather, the record shows that Defendants view the presence of disease mitigation restrictions upon the citizens of Pennsylvania as a "new normal" and they have no actual plan to return to a state where all restrictions are lifted. It bears repeating; after six months, there is no plan to return to a situation where there are no restrictions imposed upon the people of the Commonwealth. Sam Robinson, a Deputy Chief of Staff to the Governor, testified as much when asked if there was a phase of reopening beyond the "green phase" where there would be no restrictions:

> ***9** Q. You can't move from green to no restrictions whatsoever? There's no way to do that under this system, right?

A. So there are a number of options for, you know, what post green potentially could look like, and that could just be entirely removal of all restrictions or replacement with other restrictions, maybe not a color-coordinated system. There are certainly other options on the July 15th order that we've referenced from last week, certainly an approach that was a change that was not strictly speaking within the red/yellow/green framework as originally contemplated.

And we are doing our best to respond to the pandemic nimbly and not being locked into a specific approach but to target areas where we see spread and things that we can do to balance the need to reopen the economy and continue moving Pennsylvania back towards the new normal that the governors and others have talked about while at the same time taking targeted mitigation steps to prevent the spread of the virus, which is what's embodied in that July 15th order.

Q. What is the new normal? What does the governor mean by the new normal? What's that mean?

A. Well, we're still evolving into it, but obviously it's more consciousness about steps to prevent the spread of COVID and ways that Pennsylvanians are having to be more conscious of those mitigation efforts and take steps to be responsible individually to protect fellow Pennsylvanians.

(ECF No. 75, pp. 70-71). Even when the existing restrictions are replaced, it appears to be the intent of Defendants to impose and/or keep in place some ongoing restrictions. Mr. Robinson testified that "early on it was sort of just assumed that beyond green was no restrictions, and that may be ultimately where we get." (ECF No. 75, p. 75). However, the position is now less clear in that Mr. Robinson hedged on whether any future period of no restrictions can be foreseen. (ECF No. 75, p. 76) ("at the point that we are ready to remove all of the restrictions, we will have a discussion about how specifically to do that. ***It may be that the whole—you know, that whole system is replaced with just very limited restrictions***.") (emphasis added).

Courts are generally willing to give temporary deference to temporary measures aimed at remedying a fleeting crisis. Wiley & Vladeck, *supra* p. 16, at 183. Examples include natural disasters, civil unrest, or other man-made emergencies.[11] There is no question, as Justice Alito reasoned in *Calvary Chapel*, that courts may provide state and local officials greater deference when making time-sensitive decisions in the maelstrom of an emergency. But that deference cannot go on forever. It is no longer March. It is now September and the record makes clear that Defendants have no anticipated end-date to their emergency interventions. Courts surely may be

willing to give in a fleeting crisis. But here, the duration of the crisis—in which days have turned into weeks and weeks into months—already exceeds natural disasters or other episodic emergencies and its length remains uncertain. Wiley & Vladeck, *supra* page 16, at 184. Faced with ongoing interventions of indeterminate length,[12] "suspension" of normal constitutional levels of scrutiny may ultimately lead to the suspension of constitutional liberties themselves.

11 *See generally Moorhead v. Farrelly*, 727 F. Supp. 193 (D. V.I. 1989) (discussing the destruction resulting from Hurricane Hugo); *United States v. Chalk*, 441 F.2d 1277 (4th Cir. 1971) (discussing widespread civil unrest resulting from racial incident); *In re Juan C.*, 28 Cal.App.4th 1093, 33 Cal.Rptr.2d 919 (Ca. 1994) (discussing measures implemented to combat widespread looting and violence resulting from Los Angeles rioting).

12 It is true that under 35 Pa.C.S.A § 7301(c), the Governor's declaration of emergency, and related measures, will expire after ninety days. However, the Governor is able to *sua sponte* issue a continued emergency declaration. In *Wolf v. Scarnati*, —— Pa. ——, —— A.3d ——, 2020 WL 3567269 (Pa. Jul. 1, 2020), the Pennsylvania Supreme Court held that a vote of the legislature was powerless to vitiate the declaration, unless the governor signed off (as in normal legislation). *See id.* at ——, 2020 WL 3567269 at *11 ("because H.R. 836 was not presented to the Governor, and, in fact, affirmatively denied the Governor the opportunity to approve or veto that resolution, H.R. 836 did not conform with the General Assembly's statutory mandate in section 7301(c) or with the Pennsylvania Constitution."). Thus, in practical effect, absent a veto-override, the Governor's orders can be reissued without limit. Professors Wiley & Vladeck recognized that this situation could lead to the situation of the permanent emergency: "[a]t least under federal law, emergencies, once declared, tend not to end; the President can unilaterally extend national emergency declarations on an annual basis in perpetuity, and can be stopped only by veto-proof supermajorities of both houses of Congress. And unless courts are going to rigorously review whether the factual justification for the emergency measure is still present[,] ... the government can adopt measures that wouldn't be possible during "normal" times long after the true exigency passed." Wiley & Vladeck, *supra* page 16, at 187. On August 31, 2020, the Governor renewed the emergency declaration, extending his extraordinary authority for an additional ninety days. (ECF No. 73-1). Again, absent an extraordinary veto-proof vote of the General Assembly, there is no limit on the number of times the Governor may renew the declaration and vest himself with extraordinary unilateral powers.

***10** **[8]** Second, ordinary constitutional scrutiny is necessary to maintain the independent judiciary's role as a guarantor of constitutional liberties—even in an emergency. While principles of balancing may require courts to give lesser weight to certain liberties for a time, the judiciary cannot abrogate its own critical constitutional role by applying an overly deferential standard.

[9] While respecting the immediate role of the political branches to address emergent situations, the judiciary cannot be overly deferential to their decisions. To do so risks subordinating the guarantees of the Constitution, guarantees which are the patrimony of every citizen, to the immediate need for an expedient solution. This is especially the case where, as here, measures directly impacting citizens are taken outside the normal legislative or administrative process by Defendants alone. There is no question that our founders abhorred the concept of one-person rule. They decried government by fiat. Absent a robust system of checks and balances, the guarantees of liberty set

forth in the Constitution are just ink on parchment. There is no question that a global pandemic poses serious challenges for governments and for all Americans. But the response to a pandemic (or any emergency) cannot be permitted to undermine our system of constitutional liberties or the system of checks and balances protecting those liberties. Here, Defendants are statutorily permitted to act with little, if any, meaningful input from the legislature. For the judiciary to apply an overly deferential standard would remove the only meaningful check on the exercise of power.

[10] Using the normal levels of constitutional scrutiny in emergency circumstances does not prevent governments from taking extraordinary actions to face extraordinary situations. Indeed, an element of each level of scrutiny is assessing and weighing the purpose and circumstances of the government's act. The application of normal scrutiny will only require the government to respect the fact that the Constitution applies even in times of emergency. As the Supreme Court has observed: "[t]he Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency." *Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 425, 54 S.Ct. 231, 78 L.Ed. 413 (1934).[13] Ordinary constitutional scrutiny will be applied.

13 In a recent case brought in the Middle District of Pennsylvania, plaintiffs brought suit against Governor Wolf and others, contending that their constitutional rights were violated as a result of the Governor's Orders, and to that extent, requested the district court to temporarily restrain the enforcement of the Orders. *Benner v. Wolf*, —— F. Supp. 3d ——, —— – ——, 2020 WL 2564920, at *1-3 (M.D. Pa. May 21, 2020). The district court addressed, *inter alia*, whether the Governor's Orders exceeded the permissible scope of his police powers, and in doing so, applied the deferential *Jacobson* standard of review. *Id.* at ——, 2020 WL 2564920 at *6. The district court held that the plaintiffs had failed to establish that the Orders were not "reasonably necessary" or "unduly burdensome" because they could not provide evidentiary support to contradict the defendant's broad policy decisions. *Id.* The immediate case, however, is readily distinguishable because the Court now has the benefit of a developed evidentiary record, which includes specific reasoning and testimony from the parties. The Court also recognizes that the Pennsylvania Supreme Court's decision in *Friends of Danny DeVito v. Wolf*, —— Pa. ——, 227 A.3d 872 (2020), addresses some of the federal constitutional issues presented in this case and the court reviewed those issues through a more deferential standard. While the Pennsylvania Supreme Court is final on questions of Pennsylvania law, it does not bind the Court on federal questions.

2) The gathering limits imposed by Defendants' orders violate the First Amendment.

***11** Defendants' July 15, 2020 Order imposes limitations on "events and gatherings" of 25 persons for indoor gatherings and 250 persons for outdoor gatherings. The Order defines "events and gatherings" as:

> ***A temporary grouping of individuals for defined purposes, that takes place over a limited timeframe, such***

> ***as hours or days.*** For example, events and gatherings include fairs, festivals, concerts, or shows and groupings that occur within larger, more permanent businesses, such as shows or performances within amusement parks, individual showings of movies on a single screen/auditorium within a multiplex, business meetings or conferences, or each party or reception within a multi-room venue.
>
> The term does not include a discrete event or gathering in a business in the retail food services industry addressed by Section 1 [of the July 15, 2020, Order].
>
> The maximum occupancy limit includes staff.

(ECF No. 48-5, Section 2) (emphasis added). The Order has no end-date or other mechanism for expiration, but rather, purports to remain in effect "until further notice." (ECF No. 48-5, Section 8). By its own language, the congregate gathering limitation imposed is broad—applying to any gathering of individuals on public or private property for any purpose—including social gatherings.[14] The July 15, 2020 Order is an amendment to the May 27, 2020 Order setting forth the parameters of the "green phase" of Defendants' reopening plan. The difference between the two orders is that the May 29, 2020 Order did not include the 25 person indoor limit, but rather provided: "[a]ny gathering for a planned or spontaneous event of greater than 250 individuals is prohibited." (ECF No. 42-58).

14 For example, the Governor's "Process to Reopen Pennsylvania" classifies the congregate limits in the category of "social restrictions." (ECF 42-81, p. 4). Mr. Robinson confirmed that they apply to purely personal or social gatherings, like weddings. (ECF No. 75, p. 54).

The gathering limits specifically exempt religious gatherings and certain commercial operations set forth in the Order and previous orders. Section 1 of the July 15, 2020 Order imposes an occupancy limit of twenty-five percent (25%) of "stated fire code maximum occupancy" for bars and, apparently, restaurants. (ECF No. 48-5, Section 1). The May 27, 2020 Order permits businesses (other than businesses in the retail food industry, personal services, such as barbers and salons, and gyms—all of which are given other guidance) to operate at either fifty percent (50%) or seventy-five percent (75%) of their building occupancy limits. (ECF No. 42-58, Section 1). Mr. Robinson confirmed that the gathering limits do not apply to normal business operations:

> [T]he 25-person restriction that we were discussing previously does not apply in the course of general business operations. So you could have more than 25 people in that store. There's no restriction of that sort that would be applicable, and I think we've tried to clarify that in many different forms, the sort of applicability of the occupancy restrictions—sorry. The discrete event limits.
>
> But to the extent—and this is just to provide an overly full answer. To

> the extent that a store had a special sales event or something of that sort, a product demonstration, they would be limited to 25 people in that specific instance. But in any other instance there would be no applicable limit within the store for their general business beyond the kind of occupancy limits that would be in place.

***12** (ECF No. 75, pp. 139-40).

The record is unclear as to whether the orders limiting the size of gatherings apply to protests. The plain language of the orders makes no exception for protests, which seemingly run directly contrary to the plain language of the May 27, 2020 Order that states, "[a]ny gathering for a planned or spontaneous event of greater than 250 individuals." (ECF No. 42-58). However, the record unequivocally shows that Defendants have permitted protests, and that the Governor participated in a protest which exceeded the limitation set forth in his order and did not comply with other restrictions mandating social distancing and mask wearing. (ECF No. 42-101).

Finally, Plaintiffs make much of the fact that Defendants have provided an exception to the congregate gathering limit as applied to a major event in central Pennsylvania referred to as "Spring Carlisle," which is an auto show and flea market. (ECF 64). After being sued in the Pennsylvania Commonwealth Court because of the impact of the congregate limits on the event, Secretary Levine settled the action by giving a substantial exception for the event. Specifically, indoor occupancy was permitted up to an occupancy of 250 individuals or 50% of the maximum building occupancy. (ECF 64-1, p. 1). Outdoor occupancy was permitted up to 20,000 individuals, which is 50% of the normal capacity. (ECF No. 64-1, p. 2).

Plaintiffs argue that the limits on gatherings imposed by Defendants violate their right of assembly and their related right of free speech. Specifically, the Political Plaintiffs (Metcalfe, Mustello, Bonner and Kelly) contend that the gathering limits unconstitutionally violate their right to hold campaign gatherings, fundraisers, and other events. Each argued that the congregate gathering limitations hindered their ability to campaign and limited their ability to meet and connect with voters. By way of example, Congressman Kelly stated:

> We were also forced to cancel multiple fundraisers and dinners. In the past, these fundraisers have financed a significant portion of my campaigns, yet for this election I had to entirely forgo holding them. My campaign was also forced to cancel a political rally for me to speak to constituents due to both travel prohibitions and congregate rules.

(ECF No. 27, p. 2). On a similar note, Representative Mustello testified that a planned fundraiser had to be scrapped after the July 15, 2020 Order decreased indoor capacity to twenty-five (25) people. (ECF No. 74, pp. 166-67). She testified that she intended to host it

outside, but she was concerned about the weather. (ECF No. 74, p. 167). Political Plaintiffs contend that the gathering limits unfairly target some gatherings, while permitting others—such as commercial gatherings or protests.

Defendants contend that the gathering limits pass constitutional muster because they are legitimate exercises of Defendants' police power in an emergency situation and are content-neutral. (ECF No. 66, p. 24). They contend that "[e]ven in a traditional public forum, the government may impose content-neutral time, place and manner restrictions provided that the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alterative channels for communication of the information." (ECF No. 66, pp. 24-25) (citing *Startzell v. City of Philadelphia*, 533 F.3d 183, 197 (3d Cir. 2008)). Defendants argue that the restrictions leave open many different avenues of campaigning and communication, such as internet, mailings, yard signs, speaking to the press, television and radio. (ECF No. 66, p. 25). Finally, Defendants reject the contention that the stated (although not in the orders themselves) permission to attend protests constituted impermissible content-based distinctions on the applicability of the limits. They point to the fact that some of the Plaintiffs attended rallies and protests against Defendants' measures and that neither they nor other protesters were subject to enforcement action, "even when social distancing protocols are not adhered to." (ECF No. 66, p. 27) (citing *Benner v. Wolf*, —— F. Supp. 3d ——, ——, 2020 WL 2564920, at *8 (M.D. Pa. May 21, 2020)).

a) The Court will apply intermediate scrutiny to Plaintiffs' challenges.

***13** **[11]** **[12]** **[13]** The Court must first determine what standard of constitutional scrutiny to apply to the congregate limits set forth in Defendants' orders. The right of assembly is a fundamental right enshrined in the First Amendment: "Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. 1, *in relevant part.* The right of assembly has long been incorporated to the States. *See De Jonge v. Oregon*, 299 U.S. 353, 361-65, 57 S.Ct. 255, 81 L.Ed. 278 (1937). Although the right to peaceably assemble is not coterminous with the freedom of speech, they have been afforded nearly identical analysis by courts for nearly a century. *See generally* Nicholas S. Brod, *Rethinking a Reinvigorated Right to Assemble*, 63 Duke L.J. 155 (2013). *See also De Jonge*, 299 U.S. at 364, 57 S.Ct. 255 ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."); *Clark v. Community for Creative Non-*

Violence, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (applying speech analysis to a gathering on the National Mall); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152-53, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (While not "speech" in the purest sense of the word, gathering, picketing, and parading constitute methods of expression, entitled to First Amendment protection.).

[14] In this case, some of the Plaintiffs seek to assemble relative to their campaigns for public office. This type of gathering is unquestionably expressive in nature and, therefore, neatly fits into the practice of looking at right of assembly challenges through the lens for free speech jurisprudence. This is the approach taken by the Eastern District of Kentucky in a recent case challenging COVID-19 congregate limits. *Ramsek v. Beshear*, ––– F. Supp. 3d ––––, 2020 WL 3446249 (E.D. Ky. Jun. 24, 2020).[15]

15 The congregate limits in question applied to "any event or convening that brings together groups of individuals, including, but not limited to, community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities." *Ramsek*, at ––––, 2020 WL 3446249 at *8. The Order was subsequently amended to permit faith-based gatherings. *Id.* at ––– n.8, 2020 WL 3446249 at *8 n.8.

[15] **[16]** *Ramsek*, like this case, was a challenge to the congregate limits imposed by the governor of Kentucky as applied to protests. Specifically, the plaintiffs argued that the limits violated their right to gather to protest elements of the governor's COVID-19 mitigation strategy. The *Ramsek* court explained that content-based time, place and manner restrictions on speech and gatherings are subject to strict scrutiny. *Id.* at ––––, 2020 WL 3446249 at *7. "A content-based restriction on speech is one that singles out a specific subject matter for differential treatment." *Id.* (citing *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 157, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015)). Content-neutral time, place and manner restrictions, on the other hand, are afforded intermediate scrutiny. *Id.* (citing *Perry v. Educ. Ass'n v. Perry Local Educator's Ass'n.*, 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)) (content-neutral time, place and manner restrictions on speech are permissible to the extent that they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."). The *Ramsek* court ultimately decided to apply intermediate scrutiny—holding that the congregate restrictions were content-neutral because they applied to all gatherings for the purpose of speech, protest, and other expressive gathering. *Id.* at ––––, 2020 WL 3446249 at *9. In doing so, the *Ramsek* court rejected the argument that the restrictions were not content-neutral because people are permitted to gather in, for example, retail establishments, airports, and bus stations. It held that those activities were not apt comparisons because they do not constitute expressive conduct. *Id.* (citing *Dallas v. Stanglin*, 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989)).

The Court questions whether the *Ramsek* court, perhaps, conflated viewpoint neutrality and content neutrality or over-weighed the need for expression for assembly to fall under the First Amendment. Moreover, the instant Defendants' restrictions are more stringent than traditional time, place and manner restrictions in that they apply to all fora, not just public. Further, the Court wonders whether—in their breadth, the orders in question implicate the right of association—as a subbranch of First Amendment assembly jurisprudence. However, because it is an established trend, if not the rule, to apply speech jurisprudence in assembly cases, the Court will apply the same approach here.

14** **[17]** The question before the Court is whether strict scrutiny or intermediate scrutiny should apply to Plaintiffs' challenge to the congregate gathering limits. Following free speech jurisprudence, Plaintiffs' challenge what are akin to time, place and manner restrictions. The Court must determine whether the restrictions are content-based or content-neutral. To do so, the Court must first determine whether the limits ban certain types of expressive gathering (political and community meetings, gatherings, etc.), while permitting others (protests). To make that determination the Court must disentangle the language of Defendants' orders from their testimony. Sarah Boateng, the Executive Deputy Secretary of the Pennsylvania Department of Health, testified that protests are permitted under Defendants' orders: "the governor and the secretary did make some public comments about protests and religious services, you know, saying ***that they have made those limited exceptions for those constitutionally protected speech, such as protests, and the individuals had the right to protest and demonstrate." (ECF No. 75, p. 176) (emphasis added). She was unable to specifically identify any specific statement or instrument amending the actual language of the orders. Having reviewed the record, the Court does not believe that the orders do, in fact, make allowance for protests. Their plain language makes no mention of protests and makes no distinction between expressive and other gatherings. The Court does not doubt Ms. Boateng's position, that the Governor and Secretary have made comments seemingly permitting protests or justifying the Governor's personal participation in them, but even under their broad emergency powers, Defendants cannot govern by comment. Rather, they are bound by the language of their orders. Those orders make no allowance for protests. As such, the orders apply to all expressive gatherings, across the board. To that end, they are content-neutral.

[18] As in *Ramsek*, Plaintiffs make much of the fact that certain gatherings are limited by a specific quota, while people are free to congregate in stores and similar businesses based on a percentage of the occupancy limit. Does permitting people to gather for retail, dining, or other

purposes based only upon a percentage of facility occupancy, while setting hard-and-fast caps on other gatherings, constitute content-based restrictions? The Supreme Court has explained that "the principle inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* Based on that definition, Defendants' orders are content-neutral. Limiting people by number for the gatherings specified in the orders, while permitting commercial gatherings based only on occupancy percentage, is not content-based in that it has nothing to do with the "message" of any expressive behavior. *See Ramsek* at ——, 2020 WL 3446249 at *9 (citing *Dallas*, 490 U.S. at 25, 109 S.Ct. 1591) ("Unlike an individual protesting on the Capitol lawn, one who is grocery shopping or traveling is not, by that action, engaging in protected speech."). Because the restrictions are content-neutral, Defendants' orders will be reviewed with intermediate scrutiny.

b) The congregate gathering restrictions fail intermediate scrutiny.

[19] **[20]** Under First Amendment jurisprudence, a non-content-based restriction is not subjected to strict scrutiny, but still must be "narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication." *Perry*, 460 U.S. at 45, 103 S.Ct. 948. Here, the Court credits the fact that Defendants' actions were undertaken in support of a significant government interest—managing the effects of the COVID-19 pandemic in the Commonwealth. The congregate limitations fail scrutiny, however, because they are not narrowly tailored.

[21] **[22]** The Supreme Court explained that "the requirement of narrow tailoring is satisfied 'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Ward*, 491 U.S. at 799, 109 S.Ct. 2746 (quoting *United States v. Albertini,* 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)) (citing *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 297, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)). Further, "this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* Additionally, "a statute is narrowly tailored if it targets and eliminates no more than the exact source

of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988).

***15** Defendants' congregate limits are not narrowly tailored. Rather, they place substantially more burdens on gatherings than needed to achieve their own stated purpose. This is not a mere supposition of the Court, but rather, is highlighted by Defendants' own actions. While permitting commercial gatherings at a percentage of occupancy may not render the restrictions on other gatherings content-based, they do highlight the lack of narrow tailoring. *See Ramsek*, at ——, 2020 WL 3446249 at *10 ("retail stores, airports, churches and the like serve as an inconvenient example of how the Mass Gatherings Order fails at narrow tailoring."). Indeed, hundreds of people may congregate in stores, malls, large restaurants and other businesses based only on the occupancy limit of the building. Up to 20,000 people may attend the gathering in Carlisle (almost 100 times the approved outdoor limit!) —with Defendants' blessing. Ostensibly, the occupancy restriction limits in Defendants' orders for those commercial purposes operate to the same end as the congregate gathering limits—to combat the spread of COVID-19. However, they do so in a manner that is far less restrictive of the First Amendment right of assembly than the orders permit for activities that are more traditionally covered within the ambit of the Amendment—political, social, cultural, educational and other expressive gatherings.

Moreover, the record in this case failed to establish any evidence that the specific numeric congregate limits were necessary to achieve Defendants' ends, much less that "[they] target and eliminate no more than the exact source of the 'evil' [they] seek to remedy." *Frisby* 487 U.S. at 485, 108 S.Ct. 2495. Mr. Robinson testified that the congregate limits were designed to prevent "mega-spreading events." (ECF No. 75, p. 56). However, when asked whether, for example, the large protests—often featuring numbers far in excess of the outdoor limit and without social distancing or masks—led to any known mega-spreading event, he was unable to point to a single mega-spreading instance. (ECF No. 75, p. 155) ("I am not aware specifically. I have not seen any sort of press coverage or, you know, CDC information about that. I have not seen information linking a spread to protests.").

Further, the limitations are not narrowly tailored in that they do not address the specific experience of the virus across the Commonwealth. Because all of Pennsylvania's counties are currently in the "green phase," the same restrictions apply to all. Pennsylvania has nearly fourteen million residents across sixty-seven counties. Pennsylvania has dense urban areas, commuter communities servicing the New York metropolitan area, small towns and vast expanses of rural communities. The virus's prevalence varies greatly over the vast diversity of the Commonwealth—as do the resources of

the various regions to combat a population proportionate outbreak. Despite this diversity, Defendants' orders take a one-size fits all approach. The same limits apply in counties with a history of hundreds or thousands of cases as those with only a handful. The statewide approach is broadly, rather than narrowly, tailored.

[23] The imposition of a cap on the *number* of people that may gather for political, social, cultural, educational and other expressive gatherings, while permitting a larger number for commercial gatherings limited only by a percentage of the occupancy capacity of the facility is not narrowly tailored and does not pass constitutional muster. Moreover, it creates a topsy-turvy world where Plaintiffs are more restricted in areas traditionally protected by the First Amendment than in areas which usually receive far less, if any, protection. This inconsistency has been aptly noted in other COVID-19 cases. As recognized by the court in *Ramsek*, "it is the right to protest—through the freedom of speech and freedom of assembly clauses—that is constitutionally protected, not the right to dine out, work in an office setting, or attend an auction." *Id.* at ——, 2020 WL 3446249 at *10. In an analogous situation examining restrictions on religious practice, while permitting retail operations, a court aptly observed that "[i]f social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services which, unlike the foregoing, benefit from constitutional protection." *Tabernacle Baptist Church, Inc. v. Beshear*, —— F. Supp. 3d ——, ——, 2020 WL 2305307, at *5 (E.D. Ky. May 8, 2020). The same applies here. The congregate limits in Defendants' orders are unconstitutional.

3) Defendants' orders violated Plaintiffs' rights to substantive due process under the Fourteenth Amendment.

***16** **[24]** Plaintiffs assert that the components of Defendants' orders closing "non-life-sustaining" businesses and imposing a lockdown violated their liberties guaranteed by the Due Process Clause of the Fourteenth Amendment. Substantive due process is not an independent right, but rather, a recognition that the government may not infringe upon certain freedoms enjoyed by the people as a component of a system of ordered liberty. Here, Plaintiffs assert two grounds whereby Defendants' orders violated substantive due process—in the imposition of a lockdown and in their closure of all businesses that they deemed to be "non-life-sustaining." While both issues fall under the general ambit of substantive due process, they implicate different underlying rights. As such, the Court will address Plaintiffs' substantive due process claims in two stages, first examining whether the component of Defendants' orders imposing a lockdown passes constitutional muster and, then,

proceeding to an examination of the business shutdown component.

a) The stay-at-home provisions.

Governor Wolf issued the first stay-at-home Order on March 23, 2020, mandating in relevant part:

> All individuals residing in the Commonwealth are ordered to stay-at-home except as needed to access, support or provide life sustaining business, emergency, or government services. For employees of life sustaining businesses that remain open, the following child care services may remain open: group and family child care providers in a residence; child care facilities operating under a waiver granted by the Department of Human Services Office of Child Development and Early Learning; and part-day school age programs operating under an exemption from the March 19, 2020, business closure Orders.
>
> A list of life sustaining businesses that remain open is attached to and incorporated into this Order. In addition, businesses that are permitted to remain open include those granted exemptions prior to or following the issuance of this Order.
>
> Individuals leaving their home or place of residence to access, support, or provide life sustaining services for themselves, another person, or a pet must employ social distancing practices as defined by the Centers for Disease Control and Prevention. Individuals are permitted to engage in outdoor activities; however, gatherings of individuals outside of the home are generally prohibited except as may be required to access, support or provide life sustaining services as outlined above.

(ECF No. 42-15). On April 1, 2020, the Order was later extended to all counties in the Commonwealth. (ECF 42-30). Although the initial stay-at-home Order had an expiration date of two weeks, it was amended by subsequent orders to extend to later dates. (ECF Nos. 42-48, 42-50). Ultimately, upon the moving of specified counties, and later all counties, into the "green phase," the stay-at-home requirements were "suspended." The suspension is not a rescission, in that Defendants may reinstate the stay-at-home requirements, *sua sponte*, at any time. Finally, the currently applicable orders, which maintain the stay-at-home provisions, albeit in suspension of operation, have no end date, applying "until further notice." (ECF Nos. 42-58, 42-59, 42-65 through 42-75, 48-5).

Plaintiffs argue that the lockdowns effectuated by the stay-at-home orders violate their substantive due process rights secured by the Fourteenth Amendment. They contend that the orders do not impose traditional disease control measures, such as quarantine or isolation, but rather involuntarily, and without due process, confine the entire population of the Commonwealth to their homes

absent a specifically approved purpose. Plaintiffs contend that the lockdown violated their fundamental right to intrastate travel and their freedom of movement. Plaintiffs further argue that, while the power to involuntarily confine individuals is generally strictly limited by law, Defendants' lockdown was overbroad and far exceeded legitimate government need and authority. They conclude that even compelling state interests "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (ECF No. 56, p. 14) (citing *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960)).

***17** Defendants first argue that the suspension of the stay-at-home orders render their consideration in this case moot. Moreover, Defendants argue that the stay-at-home orders were not actually orders at all, but merely recommendations.[16] On a substantive basis, they argue that the stay-at-home orders survive constitutional scrutiny because they do not shock the conscience. (ECF No. 66, p. 12 *et seq.* ("The Business Plaintiffs ... have not established a violation of a fundamental liberty interest and the Business Closure Orders and stay-at-home orders do not shock the conscience.")). They contend that "the touchstone of due process is protection of the individual against arbitrary action of government" and that "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." (ECF No. 66, p. 16) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 845, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)). Essentially, Defendants argue that both the stay-at-home orders and the business closure orders were a legitimate exercise of their emergency authority in "very quickly responding to a public health emergency, a pandemic, the likes of which had ... never been seen in the Commonwealth or nationally, internationally, in 100 years ...." (ECF No. 66, p. 17) (quoting ECF No. 75, p. 26).

16 The Court rejects out-of-hand any suggestion that the stay-at-home provisions of Defendants' orders were merely recommendations. The plain language of the orders shows that these provisions were mandates. Further, the record contains evidence of citations issued to Pennsylvania residents for violating the orders.

In examining this issue, the Court was faced with three major questions —1) whether it can, and/or should, consider the constitutionality of the suspended stay-at-home provisions; if so; 2) what a lockdown is, from a legal and constitutional perspective and what type of constitutional analysis should be applied; and finally 3) whether a lockdown is constitutional.

i. The Court may, and should, consider Plaintiffs' arguments about the stay-at-home provisions.

[25] Defendants argue that the question of whether the stay-at-home provisions of orders are unconstitutional is moot.[17] According to Defendants, stay-at-home orders have been suspended

in operation. As such, the citizens of the Commonwealth are free to leave their homes for any purpose. Likewise, Defendants contend that their reopening plan has permitted nearly all businesses to reopen, has eliminated the distinction between "life-sustaining" and "non-life-sustaining" businesses, and have only imposed certain operational restrictions on ongoing operations. Plaintiffs counter that the issues remain ripe for review because, according to language of the orders, the earlier, more restrictive, provisions are merely suspended, rather than rescinded and Defendants retain the authority to reimpose any and all restrictions *sua sponte* and at any time.

17 There is no question that the ongoing restrictions on gatherings are ripe for review. The mootness question is directed at issues surrounding the suspended "stay-at-home" orders and the substantially amended business closure orders.

[26] **[27]** **[28]** The doctrine of mootness is rooted in Article III of the Constitution, which gives federal courts jurisdiction over "cases" and "controversies." Federal courts can only entertain actions if they present live disputes. *Summers v. Earth Island Inst.*, 555 U.S. 488, 492-94, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009). The plaintiff in a federal action has the initial burden of showing a ripe dispute, but the burden will shift if a defendant asserts that some development has mooted elements of the plaintiff's claim. *Hartnett v. Pa. State Educ. Ass'n*, 963 F.3d 301, 305 (3d Cir. 2020). "If the defendant ... claims that some development has mooted the case, it bears the heavy burden of persuading the court that there is no longer a live controversy." *Id.* at 305-06 (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC) Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). Although a change in circumstance *may* render a case moot, it will not *always* do so. "So, sometimes a suit filed on Monday will be able to proceed even if, because of a development on Tuesday, the suit would have been dismissed for lack of standing if it had been filed on Wednesday. The Tuesday development does not necessarily moot the suit." *Hartnett*, 963 F.3d at 306.

***18** **[29]** **[30]** The "voluntary cessation" doctrine may serve as an exception to mootness. *Friends of the Earth*, 528 U.S. at 189, 120 S.Ct. 693 ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.") (citation omitted). As the Third Circuit explained,

> [o]ne scenario in which we are reluctant to declare a case moot is when the defendant argues mootness because of some action it took unilaterally after the litigation began. This situation is often called "voluntary cessation," and it "will moot a case only if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' "

Hartnett, 963 F.3d at 306 (citations omitted). Thus, "[w]hen a plaintiff seeks declaratory relief, a defendant arguing mootness must show that there is ***no***

reasonable likelihood that a declaratory judgment would affect the parties' future conduct." *Id.* (emphasis added).

Federal courts have applied the voluntary cessation doctrine in COVID-19 litigation to examine issues in governors' mitigation orders that were, seemingly, rendered moot by subsequent amendments to the orders. In *Elim Romanian Pentecostal Church et al. v. Pritzker*, 962 F.3d 341 (7th Cir. 2020), the plaintiffs challenged an order of the governor of Illinois restricting in-person religious services. After the case was filed, the governor replaced the original order with one lifting the restrictions (at least as to religious organizations). The Seventh Circuit Court of Appeals rejected the argument that the superseding order rendered moot the question of whether the revoked order violated the First Amendment. It observed that the governor could move back to the more restrictive measures at will and that the new order specifically reserved the right to do so. As such, the voluntary cessation doctrine precluded finding that the constitutional issues posed by the initial order were moot. *Elim Romanian*, 962 F.3d at 344-45.

In *Acosta v. Wolf*, 2020 WL 3542329 (E.D. Pa. June 30, 2020), the plaintiff challenged elements of Governor Wolf's emergency orders arguing, *inter alia*, that they hindered his ability to obtain the requisite number of signatures needed to appear on the ballot for United States Congress and seek an order placing him on the ballot. The district court rejected the argument that the promulgation of other, less restrictive orders rendered moot the claims. It stated:

> The "alleged violation" alleged today is the Governor's enforcement of the Commonwealth's signature requirement in light of the executive emergency orders to mitigate the COVID-19 pandemic. But even though the executive emergency orders cease on Saturday, June 5, there is still a "reasonable expectation" the Governor could reinstate the executive emergency orders or issue similar restrictive measures before the November 2020 election.

Acosta, at *2 n.7. The district court, therefore, proceeded to examine the plaintiff's complaint, but ultimately found that it failed to state claim upon which relief could be granted and was frivolous.

Here, the application of the voluntary cessation doctrine precludes a determination that the loosening of restrictions in subsequent orders renders moot Plaintiffs' constitutional challenges to elements of Defendants' March 19, 2020 Business Closure Orders and the March 23, 2020 Stay-at-Home Orders. The language of all subsequent orders merely amends the operation of those orders. It does not completely abrogate them. They remain in place, incorporated into the existing orders and are only "suspended."[18] Mr. Robinson specifically testified:

> ***19** Q. As we sit here today, is there a stay-at-home order in place?

> A. There is—there is a stay-at-home order in place, but it has been modified by the subsequent orders that have been put out.

(ECF No. 75, p. 144). He testified, regarding both the stay-at-home and the business closure provisions of Defendants' orders that "it is possible that some of these [provisions] could be reinstated." (ECF No. 75, p. 38). The language of the orders and the explanation offered by Defendants' witnesses makes clear that the people of the Commonwealth remain subject to a stay-at-home order. Although that order is suspended in operation, it remains incorporated into the most recent mitigation orders issued by Defendants and can, at their will, be reinstated to full effect. There is no question that under the voluntary cessation doctrine the Court can examine the issue, which remains fully ripe for review.

18 Q. So in the green phase, which all of Pennsylvania is in today—in the green phase here is not an elimination of the stay-at-home order but, rather, a suspension of the stay-at-home order; is that correct?
A. That is correct.
(ECF No. 75, pp. 36-37).

[31] The Court is cognizant that the voluntary cessation doctrine may create some tension with a principle of judicial restraint—that courts should generally, when possible, avoid constitutional issues. However, courts have a duty to fully examine and address issues legitimately brought to them by the parties and failure to do so in the name of restraint may very well constitute a dereliction of duty. *See Citizens United v. FEC*, 558 U.S. 310, 329, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) ("It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications. Indeed, a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling.").

Here, the Court cannot, consistent with its most fundamental duties, avoid addressing the issues raised by Plaintiffs relating to the stay-at-home orders. The record is unequivocal that those orders, albeit suspended, remain in place. In other words, all of Plaintiffs and, indeed, all of the citizens of the Commonwealth continue to be subject to stay-at-home orders that can be reinstated at the will of Defendants. Moreover, the specter of future, reinstated lockdowns remains a concern for Plaintiffs and continues to hang over the public consciousness. The Court is compelled, therefore, to address whether such lockdowns comply with the United States Constitution.

ii. Broad population lockdowns are unprecedented in American law.

[32] To determine whether Defendants' stay-at-home orders are constitutional the Court must, as in all cases, determine which level of scrutiny should apply. To do so, the Court has to determine what a population lockdown, the effect of the stay-at-home orders, is from a legal

perspective. This is not necessarily an easy task. Although this nation has faced many epidemics and pandemics and state and local governments have employed a variety of interventions in response, there have never previously been lockdowns of entire populations—much less for lengthy and indefinite periods of time.

***20** One term that has frequently been employed to describe the lockdowns is "quarantine." Quarantines have been used throughout history to slow the spread of infectious diseases by isolating the infected and others exposed to the disease. Statutes enabling quarantine in times of disease date to colonial times. *See* Laura K. Donohue, *Biodefense and Constitutional Constraints*, 4 U. Miami Nat'l Sec. & Armed Conflict L. Rev. 82, 94 (2013-2014). Pennsylvania employed quarantine provisions from the time of William Penn—mainly directed at passengers and cargo from incoming ships. *Id.* at 104-106.[19] Following independence, the states, including Pennsylvania, continued to maintain and, when necessary, employ quarantine powers. Those powers are currently set forth in the Pennsylvania Disease Prevention and Control Law of 1955. The statute empowers the state board of health to issue rules and regulations regarding quarantine and for the state, as well as local boards or departments of health, to impose a quarantine, when necessary. 35 P.S. 521.3, 521.5, 521.16. The statute defines "quarantine" as:

> **Quarantine.** The limitation of freedom of movement of persons or animals who have been exposed to a communicable disease for a period of time equal to the longest usual incubation period of the disease in such manner as to prevent effective contact with those not so exposed. Quarantine may be complete, or, as defined below, it may be modified, or it may consist merely of surveillance or segregation.
>
> (1) Modified quarantine is a selected, partial limitation of freedom of movement, determined on the basis of differences in susceptibility or danger of disease transmission, which is designed to meet particular situations. Modified quarantine includes, but is not limited to, the exclusion of children from school and the prohibition or the restriction of those exposed to a communicable disease from engaging in particular occupations.
>
> (2) Surveillance is the close supervision of persons and animals exposed to a communicable disease without restricting their movement.
>
> (3) Segregation is the separation for special control or observation of one or more persons or animals from other persons or animals to facilitate the control of a communicable disease.

35 P.S. 521.2.

19 Interestingly, William Penn ensured that Pennsylvania's use of quarantine was less severe than he had witnessed in London where, he observed, the effects of quarantine were disproportionately harmful to the poor. *Id.* at 104-06, (quoting Catherine Uwens Peare, William Penn: A Biography, 48-51 (1957)) ("[In London] Families with plague cases were boarded up into their houses for forty days without sufficient resources. Door upon door bore the great placard with its red cross and the plea, 'Lord have mercy upon us!' ").

[33] The plain language of the statute makes clear that the lockdown effectuated by the stay-at-home orders is not a quarantine. A quarantine requires, as a threshold matter, that the person subject to the "limitation of freedom of movement" be "exposed to a communicable disease." *Id.* Moreover, critically, the duration of a quarantine is statutorily limited to "a period of time equal to the longest usual incubation period of the disease." The lockdown plainly exceeded that period. Indeed, Defendants' witnesses, particularly Ms. Boateng, conceded upon examination that the lockdown cannot be considered a quarantine. (ECF No. 75, p. 209) (Q: "And you agree with me that the governor's order and the secretary's stay-at-home orders are not isolation orders and are not quarantine orders?" A: "I would agree with that."). Rather, Defendants simply classify the order as "public health mitigation." (ECF No. 75, p. 209).[20]

20 Even if the lockdown effectuated by the stay-at-home order could be classified as a quarantine, it would nevertheless far exceed the traditional understanding of a state's quarantine power. State quarantine power, "although broad, is subject to significant constitutional restraints." Wendy E. Parmet, *Quarantining the Law of Quarantine: Why Quarantine Law Does Not Reflect Contemporary Constitutional Law*, 9 Wake Forest J.L. & Pol'y 1, 4 (2018). The power to subject a citizen to quarantine is subject to both procedural and substantive due process restraints. "At a minimum, these include the requirement that quarantine be imposed only when it is necessary for public health (or is the least-restrictive alternative) and only when it is accompanied by procedural due process protections, including notice, the right to a hearing before an independent decision-maker either before or shortly after confinement, the right to counsel, and the requirement that the state prove its case with clear and convincing evidence." *Id.* at 4 (internal citations omitted). Defendants' stay-at-home orders imposed a statewide lockdown on every resident of the Commonwealth that included none of these basic constitutional safeguards.

***21** Defendants attempt to justify their extraordinary "mitigation" efforts by pointing to actions taken to combat the Spanish Flu pandemic a century ago. Ms. Boateng testified that, in response to the Spanish Flu, "much of the same mitigation steps were taken then, the closing of bars, saloons, cancellation of vaudeville shows, as they called them, and cabarets, the prohibition of large events. So some of these same actions that we're taking now had been taken in the past." (ECF No. 75, pp. 203-04). But an examination of the history of mitigation efforts in response to the Spanish Flu—by far the deadliest pandemic in American history—reveals that nothing remotely approximating lockdowns were imposed.

Records show that on October 4, 1918, Pennsylvania Health Commissioner B. Franklin Royer imposed an order which closed "all public places of entertainment, including theaters, moving picture establishments, saloons and dance

halls and prohibit[ed] all meetings of every description until further notice."[21] The order left to local officials the decision on whether to cancel school and/or religious services. The restrictions were lifted on November 9, 1918.[22] A comparative study of nonpharmaceutical interventions used in various U.S. cities in 1918-19 shows that state and local mitigation measures were of similarly short durations across the nation.[23] While, unquestionably, states and local governments restricted certain activities for a limited period of time to mitigate the Spanish Flu, there is no record of any imposition of a population lockdown in response to that disease or any other in our history.[24]

21 *Sweeping Order Issued by State Health Director*, Pittsburgh Post, Oct. 4, 1918, at 1, https://newscomwc.newspapers.com/image/87692411; https://newscomwc.newspapers.com/image/14397438.

22 *See* Edwin Kiester Jr., *Drowning in their Own Blood*, PITTMED, Jan. 2003, at 23, https://www.pittmed.health.pitt.edu/Jan_2003/PITTMED_Jan03.pdf.

23 Howard Markel et al., *Nonpharmaceutical Interventions Implemented by US Cities During the 1918-1919 Influenza Pandemic*, 298 JAMA 644, 647 (2007). The total duration of nonpharmaceutical interventions imposed by state and local mandate for Philadelphia and Pittsburgh were 51 and 53 days, respectively. *Id.* at 647, Table 1. This length was, generally, representative of the duration of interventions in most cities. *Id.* Seattle had the longest period of restrictions, nationwide, at 168 days from start to finish.

24 *See also* Greg Ip, *New Thinking on Covid lockdowns: They're Overly Blunt and Costly*, Wall St. J., Aug. 24, 2020 ("Prior to Covid-19, lockdowns weren't part of the standard epidemic tool kit, which was primarily designed with flu in mind. During the 1918-1919 flu pandemic, some American cities closed schools, churches and theaters, banned large gatherings and funerals and restricted store hours. But none imposed stay-at-home orders or closed all nonessential businesses. No such measures were imposed during the 1957 flu pandemic, the next-deadliest one; even schools stayed open.").

Not only are lockdowns like the one imposed by Defendants' stay-at-home orders unknown in response to any previous pandemic or epidemic, they are not as much as mentioned in recent guidance offered by the Centers for Disease Control and Prevention ("CDC"). For example, the *Community Mitigation Guidelines to Prevent Pandemic Influenza —United States, 2017* offers guidelines "to help state, tribal, local, and territorial health departments with pre-pandemic planning and decision-making by providing updated recommendations on the use of NPIs [non-pharmaceutical interventions]."[25] It recommends an array of personal protective measures (i.e. staying home when sick, hand hygiene and routine cleaning) and community level NPI measures that may be taken by state and local authorities. *Id.* at 2. The community level interventions include "temporary school closures and dismissals, social distancing in workplaces and the community, and cancellation of mass gatherings." *Id.* There are no recommendations in the document that even approximate the imposition of statewide (or even community wide) stay-at-home orders or the closure of all "non-life-sustaining" businesses. Indeed, even for a "Very High Severity" pandemic (defined as

one comparable to the Spanish Flu), the guidelines provide only that "CDC recommends *voluntary* home isolation of ill persons," and "CDC might recommend *voluntary* home quarantine of exposed household members in areas where novel influenza circulates." *Id.* at 32, Table 10 (emphasis added). This is a far, far cry from a statewide lockdown such as the one imposed by Defendants' stay-at-home orders.

25 Noreen Quails et al., *Community Mitigation Guidelines to Prevent Pandemic Influenza—United States, 2017* 2 (Sonja A. Rasmussen et al. eds., 2017).

***22** The fact is that the lockdowns imposed across the United States in early 2020 in response to the COVID-19 pandemic are unprecedented in the history of our Commonwealth and our Country. They have never been used in response to any other disease in our history. They were not recommendations made by the CDC. They were unheard of by the people this nation until just this year. It appears as though the imposition of lockdowns in Wuhan and other areas of China —a nation unconstrained by concern for civil liberties and constitutional norms—started a domino effect where one country, and state, after another imposed draconian and hitherto untried measures on their citizens. The lockdowns are, therefore, truly unprecedented from a legal perspective. But just because something is novel does not mean that it is unconstitutional. The Court will next attempt to apply established constitutional principles to examine this unfamiliar situation.

iii. The stay-at-home provisions of Defendants' orders are unconstitutional.

Plaintiffs argue that the lockdown implemented by the stay-at-home provisions of Defendants' orders violated the substantive due process guarantees of the Fourteenth Amendment. Specifically, they contend that it infringes upon the right to intrastate travel that has been suggested by precedent of the Supreme Court[26] and specifically adopted by the Third Circuit in *Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990). In *Lutz*, the Third Circuit examined a municipal ordinance regulating car cruising and unequivocally held that "the right to move freely about one's neighborhood or town, even by automobile, is indeed, 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history.' " *Id.* at 268.

26 *Williams v. Fears*, 179 U.S. 270, 274, 21 S.Ct. 128, 45 L.Ed. 186 (1900) ("Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any state is a right secured by the 14th Amendment and by other provisions of the Constitution.").

The Third Circuit considered what level of scrutiny should be applied to the right to intrastate travel and rejected the argument that strict, rather than intermediate scrutiny should apply:

> Not every governmental burden on fundamental rights must survive strict scrutiny, however. We believe that

> reviewing all infringements on the right to travel under strict scrutiny is just as inappropriate as applying no heightened scrutiny to any infringement on the right to travel not implicating the structural or federalism-based concerns of the more well-established precedents.

Id. at 269. By applying intermediate scrutiny, it allowed for the right to travel, like speech, to be subject to reasonable time, place and manner restrictions. *Id.*

The Court wonders whether the lockdown effectuated by the stay-at-home provisions of Defendants' orders are of such a different character than the municipal car cruising ordinance as would warrant the imposition of strict scrutiny. There is no question that requiring all citizens of the Commonwealth to stay-at-home unless they have a reason to go out approved by Defendants' orders is a far greater burden on personal autonomy than the situation in *Lutz*. In that case, the drivers were not precluded from leaving home and driving around town, but they were merely restricted from certain practices at certain times, not unlike many other traffic control policies. Herein, the stay-at-home orders strictly limited the right of movement, confining citizens to their homes unless they had a specific permissible reason to leave enumerated in Defendants' orders. Thus, the stay-at-home orders impacted liberties not merely limited to the act of traveling, but the very liberty interests arising from the fruits of travel, such as the right of association and even the right to privacy—i.e., the right simply to be left alone while otherwise acting in a lawful manner. Our Courts have long recognized that beyond the right of travel, there is a fundamental right to simply be out and about in public. *City of Chicago v. Morales*, 527 U.S. 41, 53-54, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (striking down an antiloitering ordinance aimed at combatting street gangs and observing that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."). *See also Papachristou v. Jacksonville*, 405 U.S. 156, 164-65, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) (citing a Walt Whitman poem in extolling the fundamental right to loiter, wander, walk or saunter about the community); *Bykofsky v. Borough of Middletown*, 429 U.S. 964, 97 S.Ct. 394, 50 L.Ed.2d 333 (1976) (Marshall, J., dissenting) ("The freedom to leave one's house and move about at will is of the very essence of a scheme of ordered liberty, ... and hence is protected against state intrusions by the Due Process Clause of the Fourteenth Amendment.") (internal citation and quotation marks omitted); *Waters v. Barry*, 711 F. Supp. 1125, 1134 (D.D.C. 1989) (referencing *Papachristou* and stating "[t]he right to walk the streets, or to meet publicly with one's friends for a noble purpose or for no purpose at all —and to do so whenever one pleases—is an integral component of life in a free and ordered society.").

***23** While the Third Circuit applied intermediate level scrutiny to the limited time, place and manner restrictions on the

right to intrastate travel imposed by the ordinance at issue, there are substantial grounds to hold that strict scrutiny should apply to the stay-at-home provisions of Defendants' orders. The intrusions into the fundamental liberties of the people of this Commonwealth effectuated by these orders are of an order of magnitude greater than any of the ordinances examined in right to travel cases, loitering and vagrancy cases or even curfew cases. Defendants' stay-at-home and business closure orders subjected every Pennsylvanian to a lockdown where he or she was involuntarily committed to stay-at-home unless he or she was going about an activity approved as an exception by the orders. This is, quite simply, unprecedented in the American constitutional experience.

[34] The orders are such an inversion of the usual American experience that the Court believes that no less than the highest scrutiny should be used. However, the Court holds that the stay-at-home orders would even fail scrutiny under the lesser intermediate scrutiny used by the Third Circuit in *Lutz*. A critical element of intermediate scrutiny is that the challenged law be narrowly tailored so that it does "not burden more conduct than is reasonably necessary." *Assoc. of New Jersey Rifle and Pistol Clubs, Inc. v. Attorney General New Jersey*, 910 F.3d 106, 119 (3d. Cir. 2018). The stay-at-home orders far exceeded any reasonable claim to be narrowly tailored. Defendants' orders subjected every Pennsylvanian to a lockdown where he or she was involuntarily committed to stay-at-home unless he or she was going about an activity approved as an exception by the orders. Even in the most recent, and currently applicable, iteration of Defendants' orders, while the operation of the stay-at-home provisions is "suspended," it is not rescinded and may be re-imposed at any time at the sole discretion of Defendants. Thus, Defendants' orders have created a situation where the *default* position is lockdown unless suspended at their will. When in place, the stay-at-home order requires a *default* of confinement at home, unless the citizen is out for a purpose approved by Defendants' orders. Moreover, this situation applied for an indefinite period of time. This broad restructuring of the default concept of liberty of movement in a free society eschews any claim to narrow tailoring.

In addition, the lack of narrow tailoring is highlighted by the fact that broad, open-ended population lockdowns have *never* been used to combat any other disease. In other words, in response to *every* prior epidemic and pandemic (even more serious pandemics, such as the Spanish Flu) states and local governments have been able to employ other tools that did not involve locking down their citizens. Although it is the role of the political branches to determine which tools are suitable to address COVID-19, the 2017 CDC guidance highlights the fact that governments have access to a full menu of individual and community interventions that are not as intrusive and

burdensome as a lockdown of a state's population. Finally, the Court observes that the suspension of the operation of the stay-at-home order highlights that it "burdens more conduct than is reasonably necessary." In other words, Defendants are currently using means that are less burdensome to the rights of a free people.

[35] The Court declares, therefore, that the stay-at-home components of Defendants' orders were and are unconstitutional. Broad population-wide lockdowns are such a dramatic inversion of the concept of liberty in a free society as to be nearly presumptively unconstitutional unless the government can truly demonstrate that they burden no more liberty than is reasonably necessary to achieve an important government end. The draconian nature of a lockdown may render this a high bar, indeed.

b) The business shutdown components of Defendants' orders violate the Due Process clause of the Fourteenth Amendment.

***24 [36]** The Business Plaintiffs further argue that the business closure orders violated the Due Process Clause. The Order states, in relevant part: "[n]o person or entity shall operate a place of business in the Commonwealth that is not a life-sustaining business regardless of whether the business is open to members of the public." (ECF No. 42-3, Section 1). The Order attached a list of "life-sustaining" businesses that were permitted to stay open. Defendants also set up a waiver system, whereby a business deemed to be "non-life-sustaining" could request permission to continue operations. (ECF No. 38, p. 2). Defendants decided to close the waiver process on April 3, 2020, largely because of an overwhelming number of requests. (ECF No. 38, p. 4; ECF No. 75, pp. 227-31). The record shows that Defendants never had a set definition in writing for what constituted a "life-sustaining" business. Rather, their view of what was, or was not, "life-sustaining" remained in flux. (ECF No. 75, pp. 97-98). Finally, the record shows that the definition of "life-sustaining" continued to change, even after the waiver process closed. The Business Plaintiffs argue that all of these facts highlight the constitutional infirmity of the business shutdown.

As with the lockdown, Defendants' shutdown of all "non-life-sustaining" businesses is unprecedented in the history of the Commonwealth and, indeed, the nation. While historical records show that certain economic activities were curtailed in response to the Spanish Flu pandemic, there has never been an instance where a government or agent thereof has *sua sponte* divided every business in the Commonwealth into two camps—"life-sustaining" and "non-life-sustaining"—and closed all of the businesses deemed "non-life-sustaining" (unless that business obtained a discretionary waiver). The unprecedented nature of the business closure—even in light of historic emergency situations—

makes its examination difficult from a constitutional perspective. It simply does not neatly fit with any precedent ever addressed by our courts. Never before has the government exercised such vast and immediate power over every business, business owner, and employee in the Commonwealth. Never before has the government taken a direct action which shuttered so many businesses and sidelined so many employees and rendered their ability to operate, and to work, solely dependent on government discretion. As with the analysis of lockdowns, the unprecedented nature of the business shutdowns poses a challenge to its review. Nevertheless, having reviewed this novel issue in light of established Due Process principles, the Court holds that the business closure orders violated the Fourteenth Amendment.

i. The challenges to the business closures remain ripe for review.

As with the stay-at-home component of Defendants' orders, the business closure provisions remain reviewable under the voluntary cessation doctrine. The business closure orders were never rescinded. Rather, they are merely suspended. Specifically, the May 7, 2020 Order outlining the movement of certain counties from the "red phase" to the "yellow phase" provides: "[m]y order directing the 'Closure of All Businesses That are not Life Sustaining' issued March 19, 2020, as subsequently amended, is ***suspended*** for the following counties ...." (ECF No. 42-52, Section 1:A) (emphasis added). The language of the Order makes clear that it provides no guarantee of permanence in that it states: "[w]hereas, it is necessary to relax some of the requirements of the aforementioned orders ***for a period of time*** as part of a gradual and strategic return to work." (ECF No. 42-52) (emphasis added). Following orders moving counties into the "green phase," likewise, state that the orders closing "non-life-sustaining" businesses are "suspended." (*See* e.g. ECF No. 42-58, Section 1:A). Mr. Robinson confirmed that the orders remain suspended and "it is possible that some of these provisions could be reinstated." (ECF No. 75, p. 38). Thus, Defendants' orders closing all "non-life-sustaining" businesses, imposed by them *sua sponte*, suspended by them *sua sponte*, and susceptible to *sua sponte* re-imposition at any time are appropriately before the Court.

ii. The Fourteenth Amendment guarantees a citizen's right to support himself by pursuing a chosen occupation.

***25** The Business Plaintiffs argue that the business shutdown orders violated their right to substantive due process under the Fourteenth Amendment. Specifically, they contend that the designation of some businesses—including all of their businesses—as "non-

life-sustaining" and closing them violated their right to "engage in the common occupations of life" and to engage in the pursuit of his or her "chosen profession free from unreasonable governmental interference." (ECF No. 56, p. 7 *et seq.*) (citing *McCool v. City of Philadelphia*, 494 F. Supp. 2d 307, 328 (E.D. Pa. 2007)). Defendants counter that the Fourteenth Amendment does not guarantee "any fundamental right to earn a living." (ECF No. 66, p. 15). They argue that Plaintiffs read too much into precedent that generally references the right of citizens to pursue their chosen occupations, that mere economic regulation is given little scrutiny and, that Plaintiffs were not deprived of any protected liberty interest, but rather, just temporarily prevented from operating their businesses. (ECF No. 66, pp. 14-16). Thus, Defendants argue that Plaintiffs' substantive due process claims should be rejected.

[37] **[38]** The Due Process Clause of the Fourteenth Amendment includes a substantive component that bars arbitrary, wrongful, government action "regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). Contrary to Defendants' argument, the right of citizens to support themselves by engaging in a chosen occupation is deeply rooted in our nation's legal and cultural history and has long been recognized as a component of the liberties protected by the Fourteenth Amendment. Over a century ago, the Supreme Court recognized that "[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.Ed. 131 (1915) (holding that a state anti-alien labor statute violated both equal protection and due process). Later, in striking down a law banning the teaching of foreign languages in school, the Supreme Court observed that the Fourteenth Amendment guaranteed the right, *inter alia*, "to engage in any of the common occupations of life ...." *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). The emphasis given to economic substantive due process reached its apex in the *Lochner* era, *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), and was considerably recalibrated and de-emphasized by the New Deal Supreme Court and later jurisprudence. Nevertheless, our Supreme Court has never repudiated the recognition that a citizen has the right to work for a living and pursue his or her chosen occupation.

The Third Circuit has recognized "[t]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within both the 'liberty' and the 'property' concepts of the Fifth and Fourteenth Amendments." *Piecknick v. Comm. of Pa.*, 36 F.3d 1250, 1259 (3d. Cir. 1994) (citing *Greene v. McElroy*, 360 U.S. 474, 492, 79 S.Ct.

1400, 3 L.Ed.2d 1377 (1959); *Truax*, 239 U.S. at 41, 36 S.Ct. 7). However,

> [t]he Constitution only protects this liberty from state actions that threaten to deprive persons of the right to pursue their chosen occupation. State actions that exclude a person from one particular job are not actionable in suits ... brought directly under the due process clause. It is the liberty to pursue a calling or occupation, and not the right to a specific job, that is secured by the Fourteenth Amendment.

Id. (internal citations and quotation marks omitted). There is no question, then, that the Fourteenth Amendment recognizes a liberty interest in citizens—the Business Plaintiffs here—to pursue their chosen occupation. The dispositive question is not whether such a right exists, but rather, the level of infringement upon the right that may be tolerated.

[39] [40] [41] Although federal courts have recognized the existence of a substantive due process right of a citizen to pursue a chosen occupation for over a century, there is little specific analysis on how that right should be weighed and what sort of test should be applied to allegedly infringing conduct. As a matter of general consensus, courts generally treat government action purportedly violating the right to pursue an occupation in the same light as economic legislation and use the general standard of review applied to substantive due process claims. In reviewing a substantive due process claim, the "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a government officer that is at issue." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). "Specific acts" are also known as "executive acts" in substantive due process jurisprudence. The Third Circuit has explained that "executive acts, such as employment decisions, typically apply to one person or to a limited number of persons, while legislative acts, generally laws and broad executive regulations, apply to large segments of society." *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 139 n.1 (3d. Cir. 2000). Substantive due process challenges to a legislative act are reviewed under the rational basis test. *Am. Exp. Travel Related Serv's., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 366 (3d. Cir. 2012).[27]

27 In recent years, a growing chorus of cases and commentators have questioned whether the general deference afforded to economic regulations of the right to pursue one's occupation should be reexamined, and that governmental action be subjected to greater scrutiny. *See generally*, Rebecca Haw Allensworth, *The (Limited) Constitutional Right to Compete in an Occupation*, 60 Wm. & Mary L. Rev. 1111 (2019); *see also* Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 208 (2003). The latest focus on governmental action impacting the right to earn a living centers upon occupational licensing schemes. Professor Allensworth observed, "[w]ithin the movement [to reinvigorate protections on the right to pursue an occupation] there is disagreement about what doctrinal changes are needed to resurrect this once-vibrant right. Some call for a revision of the rational basis test that would place a heavier burden on the government to justify economic regulation as 'rational.' Others see the rational basis test as beyond salvation and call for a different tier of review, such as intermediate scrutiny, for economic rights such as the right

> to be free from unreasonable licensing laws." Allensworth, *supra*, at 1128. *See also* Alexandra L. Klein, *The Freedom to Pursue a Common Calling: Applying Intermediate Scrutiny to Occupational Licensing Statutes*, 73 Wash. & Lee L. Rev. 411 (2016). There is no question that occupational licensing requirements and other, similar, restrictions on the right to pursue one's occupation are considerably different than a state-wide shutdown of all businesses deemed to be "non-life-sustaining." This is, perhaps, a case where the level of interference with the citizens' right to earn a living was so immediate and severe as to warrant a heightened level of scrutiny.

26** Before proceeding to applicable constitutional scrutiny, the Court will address the fact that, as Defendants point out, the closures of "non-life-sustaining" businesses was only temporary. Defendants hold that this precludes a claim that the closures violated the Fourteenth Amendment. Although the closures were ultimately "suspended" after a period of approximately two months (for businesses in some counties and longer for businesses in other counties), the March 19, 2020 Order has no end date. Rather, it is open-ended, remaining "in effect until further notice." (ECF No. 42-3). Moreover, even the subsequent orders suspending (not rescinding) the shutdown of "non-life-sustaining" businesses recognize only that "it is necessary to relax some of the requirements of the aforementioned orders ***for a period of time as part of a gradual and strategic return to work." (ECF No. 42-52). A total shutdown of a business with no end-date and with the specter of additional, future shutdowns can cause critical damage to a business's ability to survive, to an employee's ability to support him/herself, and adds a government-induced cloud of uncertainty to the usual unpredictability of nature and life.

Evidence of record shows that the impact of the shutdown, even though temporary, was immediate and severe on the Business Plaintiffs. For example, R.W. McDonald & Sons, a small business, estimates that it "lost approximately $300,000 in revenue[,]" and that its business has been "financially devastated." (ECF No. 30, p. 2). R.W. McDonald expressed ongoing concern that the restrictions may be re-imposed, which could be fatal. Plaintiffs Chris and Jody Bertoncello-Young explained that the losses to their small salon exceeded $150,000 and that they depleted their entire emergency fund to pay expenses that came due when their business was required to remain closed. (ECF No. 32, p. 3). The Bertoncello-Youngs also expressed concern about re-imposition of the restrictions. (ECF No. 30, p. 4). It matters little to a business owner or employee that Defendants intended for the restrictions to be temporary. They were, and remain, open-ended and subject to imposition at the sole discretion of Defendants. The fact that Plaintiffs' businesses were only temporarily shutdown does not preclude a finding that the shutdown violated their liberty interests. The nature of a state-wide shut down of "non-life-sustaining" business is such an immediate and unprecedented disruption to businesses and their employees as to warrant constitutional review.

[42] **[43]** **[44]** The Supreme Court has recognized that the "core of the concept" of substantive due process is the protection against arbitrary government action. *Lewis*, 523 U.S. at 845, 118 S.Ct. 1708 (citing *Hurtado v. California*, 110 U.S. 516, 527, 4 S.Ct. 292, 28 L.Ed. 232 (1884)).[28] Indeed, "the touchstone of due process is protection of the individual against arbitrary actions of government ...." *Id.* Rational basis review is a forgiving standard for government acts, but it "is not a toothless one ...." *Mathews v. Lucas*, 427 U.S. 495, 510, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976). As a general matter, the rational basis test requires only that the governmental action "bear[ ] a rational relationship to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). Conversely, actions which are irrational, arbitrary or capricious do not bear a rational relationship to any end. *Cty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 169 (3d. Cir. 2006) (quoting *Pace Resources, Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1035 (3d Cir. 1987)) ("Thus, for appellants' facial substantive due process challenge to the Ordinance to be successful, they must 'allege facts that would support a finding of arbitrary or irrational legislative action by the Township.' "). Even with this forgiving standard as its guide, the Court nevertheless holds that the March 19, 2020 Order closing all "non-life-sustaining" businesses was so arbitrary in its creation, scope and administration as to fail constitutional scrutiny.

[28] "As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of powers of government, unrestrained by the established principles of private right and distributive justice." *Lewis*, 523 U.S. at 845, 118 S.Ct. 1708.

***27** The record shows that the Governor's advisory team, which designated the Business Plaintiffs and countless other businesses throughout the Commonwealth as "non-life-sustaining" and, thereby, closing them, did so with no set policy as to the designation and, indeed, without ever formulating a set definition for "life-sustaining" and, conversely "non-life-sustaining." The terms "life-sustaining" and "non-life-sustaining" relative to businesses are not defined in any Pennsylvania statute or regulation. Mr. Robinson explained that Defendants' policy team used the North American Industry Classification System (NAICS) as a component of their determination of how to classify businesses. (ECF. No. 39, p. 2). The NAICS is a manual used by federal statistical agencies in classifying businesses for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. economy. (ECF. No. 39, p. 2). The NAICS does not classify businesses into "life-sustaining" and "non-life-sustaining" categories. It does not even use the terms. Rather, it merely divides the economy into "20 broad sectors and 316 industry groups." (ECF No. 39, p. 2). It was the policy team that made the decision as to

which businesses would be deemed "life-sustaining," and which would be closed. (ECF No. 75, p. 96).

The record demonstrates that the policy team's unilateral determination as to which classes of businesses would be classified as "life-sustaining" was never formalized and the team never settled on a specific definition of "life-sustaining":

> Q. Well, I'd ask you if you'd do me a favor. Would you please tell me where I could find the definition of "life-sustaining?" Because I couldn't find it—I looked—Judge, I looked in 956 pages of the NAICS document, I couldn't find it there. So where would I find it, Mr. Robinson?
>
> A. I believe that it's driven by the categorization and the determination ***—I'm not sure that we wrote down anywhere what "life-sustaining" meant***. It was policy decisions that were made by our team as to whether they considered, you know, an energy production location or utility or supermarket to be life-sustaining as distinguished from others that they did not believe. ***We didn't I believe, write down a definition specifically but just translated the sort of common understanding of life sustaining or not into that business list.***

(ECF No. 75, pp. 95-96). Mr. Robinson further testified about the lack of any set, formalized, definition for "life-sustaining":

> Q. So there's nowhere—you can't point me to anywhere where I could read the definition of life-sustaining?
>
> A. I do not believe that we ever wrote down what the definition of life-sustaining was. It was, again, just developed through the list. So the meaning is in some sense determined by what was on the list.

(ECF No. 75, p. 97). When further pressed, about a definition, Mr. Robinson testified:

> A. We—the policy team that developed the list spent time discussing for each category whether they believed that it was essential for life; and in cases where they made that determination, it was, yes, allowed to remain open. In categories where they particularly did not believe that the classification of the business type was that level of criticality, it was no, and those businesses were required to close.
>
> ***I don't believe that we spent a lot of time around the formality of kind of enshrining a definition somewhere***. We were working quickly to provide clarity to the public as to how to prevent the spread of the disease and protect public health.

(ECF No. 75, p. 98) (emphasis added).

The explanation for how Defendants' policy team chose which businesses were "life-sustaining" and which were "non-life-sustaining" is circuitous, at best. Mr. Robinson said that they

used the NAICS system to determine which businesses were "life-sustaining," although the NAICS does not actually use that categorization. He acknowledged that the team simply applied their common-sense judgment as to what was, or was not, "life-sustaining." In doing so, they did not confine themselves to "the formality of kind of enshrining a definition somewhere." So, without a definition, how can one determine which businesses can stay open and which must close? Mr. Robinson said that one should look to the policy team's list (of "life-sustaining" businesses). Essentially, a class of business is "life-sustaining" if it is on the list and it is on the list because it is "life-sustaining."

***28** To add to the arbitrary nature of the list of "life-sustaining" businesses being the definition of what is, in fact, "life-sustaining" is the fact that the list of what businesses are considered "life-sustaining" changed ten times between March 19, 2020 and May 28, 2020:

> Q. Mr. Weaver, the chart that we've referred to you've indicated is the definition of life-sustaining and non-life-sustaining. That chart has changed ten times; is that correct?
>
> A. It has, yes.

(ECF No. 75, p 226).[29] Even though, however, the classification of "life-sustaining" was never formally reduced to an objective definition in writing and Defendants' list of business types that they considered to be "life-sustaining" remained in flux, changing ten times, Defendants eliminated the ability of a business to obtain a waiver as of April 3, 2020. (ECF. No. 38, p. 4). The waiver process allowed a business that believed it had been mistakenly classified as "non-life-sustaining" to submit information to show that it should have been classified as "life-sustaining" and, thus, permitted to operate. Once the waiver process closed, a business that had been wrongly categorized had no recourse—even though the list of "life-sustaining" business continued to fluctuate:

> Q. So if I have a business and I've changed my business operations and I was previously categorized as non-life-sustaining but I've changed my business model, I've changed my way of doing business, I've got the best plan that the CDC has ever seen, I can't get my name changed—or I can't get reclassified as non-life-sustaining (sic) despite the fact that you've changed the definition of life-sustaining post closing down the waiver process; is that correct?
>
> A. Could you repeat that?
>
> Q. Sure. You've acknowledged that the definition of life-sustaining changed after the waiver process was closed?
>
> A. Correct.
>
> Q. Based upon those changes, if I looked at all those charts and I said, "wow, I'm now life-sustaining" or "I think I can meet the definition of life-

sustaining." I don't have a vehicle for you to approve my waiver?

A. Correct.

(ECF No. 75, pp. 230-31). To add to the arbitrary nature of the entire situation surrounding the business closures, Defendants closed the waiver process because the backlog of requests slowed the process down. (ECF No. 75, pp. 227-31). Defendants decided to go "from a slowed process to no process." (ECF No. 75, p. 230).

29 The initial list was published on March 19, 2020. Amendments to the list were published on March 21, March 24, April 1, April 20, April 27, April 28, May 8, May 11 and May 28. (ECF No. 75, p. 226).

The manner in which Defendants, through their policy team, designed, implemented, and administered the business closures is shockingly arbitrary. The policy team was not tasked with formulating a theoretical policy paper or standard to categorize abstract classes of business or NAICS codes. Rather, it had the authority to craft a policy, adopted wholesale by Defendants, that had an immediate impact on the Business Plaintiffs and countless other businesses, employers, and employees across the Commonwealth. Despite the fact that their decisions had the potential (and in many cases the actual effect) of destroying businesses and putting employees out of work, Defendants and their advisors never formulated a set, objective definition in writing of what constitutes "life-sustaining." The Court recognizes that Defendants were acting in haste to address a public health situation. But to the extent that Defendants were exercising raw governmental authority in a way that could (and did) critically wound or destroy the livelihoods of so many, the people of the Commonwealth at least deserved an objective plan, the ability to determine with certainty how the critical classifications were to be made, and a mechanism to challenge an alleged misclassification. The arbitrary design, implementation, and administration of the business shutdowns deprived the Business Plaintiffs and their fellow citizens of all three.

***29** Another layer of arbitrariness inherent in the business shutdown components of Defendants' orders are that many "non-life-sustaining" businesses sell the *same products* or perform the *same services* that were available in stores that were deemed "life-sustaining." For example, Plaintiff R.W. McDonald & Sons is a small appliance and furniture store that was deemed a "non-life-sustaining" business and required to close. (ECF No. 30, p. 1). But larger retailers selling the same products, such as Lowes, The Home Depot, Walmart and others remained opened. Mr. McDonald stated that his business "lost approximately $300,000 in revenue" and that his business has been "financially devastated." (ECF No. 30, p. 2). He also averred that he lost business to the big-box retailers that were permitted to remain in operation.[30] Plaintiffs Mike and Nancy Gifford and Chris and Jody Bertoncello-Young, each in the salon business, attempted to remain open to sell hair and

other styling products, but were advised that as "non-life-sustaining" businesses they had to close. (ECF Nos. 31 and 32). But those products could be purchased at "life-sustaining" big box retailers and drug stores. It is paradoxical that in an effort to keep people apart, Defendants' business closure orders permitted to remain in business the largest retailers with the highest occupancy limits.

30 R.W. McDonald & Sons applied for a waiver twice. The first request was denied. There was no follow up communication relating to the second. (ECF No. 30; ECF No. 74, pp. 138-39).

The Court recognizes that Defendants were facing a pressing situation to formulate a plan to address the nascent COVID-19 pandemic when they took the unprecedented step of *sua sponte* determining which businesses were "life-sustaining" and which were "non-life-sustaining." But in making that choice, they were not merely coming up with a draft of some theoretical white paper, but rather, determining who could work and who could not, who would earn a paycheck and who would be unemployed —and for some—which businesses would live, and which would die. This was truly unprecedented.

An economy is not a machine that can be shut down and restarted at will by government. It is an organic system made up of free people each pursuing their dreams. The ability to support oneself is essential to free people in a free economy. The late Justice William O. Douglas observed:

> The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on Politics, 'A man has a right to be employed, to be trusted, to be loved, to be revered.' It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.

Barsky v. Board of Regents of University of State of New York, 347 U.S. 442, 472, 74 S.Ct. 650, 98 L.Ed. 829 (1954) (Douglas, J, dissenting). In a free state, the ability to earn a living by pursing one's calling and to support oneself and one's family is not an economic good, it is a human good. Although jurisprudence may not afford the right to pursue one's occupation the same weight as others in our hierarchy of liberties, it cannot be given such short shrift as to allow it to be completely subordinated to an *ad hoc* and arbitrary regimen that cannot even be reduced to an objective, written definition—even where that regimen is based on good intent. Here, Defendants took the unprecedented step of closing *all* businesses that they self-deemed to be "non-life-sustaining." The record shows that in doing so

and in their manner of doing so, Defendants' actions were so arbitrary as to violate the Business Plaintiffs' substantive due process rights guaranteed by the Fourteenth Amendment.

4. The business closure provisions of Defendants' orders violated the Equal Protection Clause of the Fourteenth Amendment.

[45] Finally, the Court examines whether the business closure provisions of Defendants' orders violated the Equal Protection Clause of the Fourteenth Amendment. The Business Plaintiffs contend that Defendants' orders violated equal protection in two ways. They contend that the division of the Commonwealth into regions (on the county level) wrongly treated them dissimilarly from businesses in other similarly situated counties. They also argue that the distinction between them and other businesses that were permitted to operate was arbitrary and fails equal protection scrutiny. Defendants counter the first point by arguing that distinctions are commonly made based on county boundaries. They further argue that their decision to distinguish between "life-sustaining" and "non-life-sustaining" businesses (closing the latter) was rationally related to a legitimate government end, and, thus survives constitutional scrutiny.

***30** **[46]** **[47]** **[48]** The Equal Protection Clause of the Fourteenth Amendment forbids the states to "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. 14th Amend. Where a plaintiff in an equal protection claim does not allege that distinctions were made on the basis of a suspect classification such as race, nationality, gender or religion, the claim arises under the "class of one" theory. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). To prevail on such a claim, the plaintiff must demonstrate: 1) the defendant treated him differently than others similarly situated, 2) the defendant did so intentionally, and 3) there was no rational basis for the difference in treatment. *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d. Cir. 2006). As explained above, the rational basis test is forgiving, but not without limits in its deference. Distinctions cannot be arbitrary or irrational and pass scrutiny. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)

The Business Plaintiffs have demonstrated they were treated differently than other businesses that are similarly situated. For example, R.W. McDonald & Sons is a retailer that sells furniture and appliances—so is Walmart, Lowes and The Home Depot. The only difference is the extent of their offerings—Walmart, Lowes and The Home Depot are

larger and offer more products. However, in essence, they are the same—retailers selling consumer goods. Likewise, the Salon Plaintiffs (in their role as retailers of health and beauty products, rather than performing personal services) are similarly situated to the big box retailers and drug stores in that they sell the same health and beauty products. Again, the only distinction is size. Nevertheless, Defendants' orders treated these retailers differently than their larger competitors, which were permitted to remain open and continue offering the same products that Plaintiffs were forbidden from selling. The record unequivocally establishes that the distinction was made intentionally. Thus, the final question is whether there was a rational basis for the difference in treatment.

[49] **[50]** **[51]** Defendants are correct that the provisions of their reopening plan, which made distinctions between different regions of the Commonwealth, passes constitutional scrutiny. It is well established that states and local governments may impose requirements or restrictions that apply in one region and not in others. *See Cty. Bd. of Arlington Cty., Va. v. Richards*, 434 U.S. 5, 6-8, 98 S.Ct. 24, 54 L.Ed.2d 4 (1977). The Court holds that Defendants had a rational basis for rolling out their reopening plan on a regional basis based on counties. Doing so recognized and respected the differences in population density, infrastructure and other factors relevant to the effort to address the virus. The Business Plaintiffs point to similarity between their area and neighboring counties permitted to open earlier, but rational basis does not require the granularity of a neighborhood by neighborhood plan. Distinctions between counties are a historically accepted manner of statewide administration and pass scrutiny here.

[52] However, the manner in which Defendants' orders divided businesses into "life-sustaining" and "non-life-sustaining" classifications, permitting the former to remain open and requiring the latter to close, fails rational basis scrutiny. The Court outlined at length above the facts of record demonstrating that Defendants' determination as to which businesses they would deem "life-sustaining" and which would be deemed "non-life-sustaining" was an arbitrary, *ad hoc*, process that they were never able to reduce to a set, objective and measurable definition. As stated above in reference to the Business Plaintiffs' due process challenge, to the extent that Defendants were going to exercise an unprecedented degree of immediate power over businesses and livelihoods; to the extent that they were going to singlehandedly pick which businesses could stay open and which must close; and to the extent that they were picking winners and losers, they had an obligation to do so based on objective definitions and measurable criteria. The Equal Protection Clause cannot countenance the exercise of such raw authority to make critical determinations where the government could not, at least, "enshrine a definition somewhere." (ECF No. 75 p. 95).

***31** Finally, the record shows that Defendants' shutdown of "non-life-sustaining" businesses did not rationally relate to Defendants' stated purpose. The purpose of closing the "non-life-sustaining" businesses was to limit personal interactions. Ms. Boateng averred: "[i]n an effort to minimize the spread of COVID-19 throughout Pennsylvania, the Department [of Health] sought to limit the scale and scope of personal interaction as much as possible in order to reduce the number of new infections." (ECF No. 37, p. 2). "Accordingly, it was determined that the most effective way to limit personal interactions was to allow only businesses that provide life-sustaining services or products to remain open and to issue stay-at-home orders directing that people leave their homes only when necessary." (ECF No. 37, p. 3). But Defendants' actions did not rationally relate to this end. Closing R.W. McDonald & Sons did not keep at home a consumer looking to buy a new chair or lamp, it just sent him to Walmart. Refusing to allow the Salon Plaintiffs to sell shampoo or hairbrushes did not eliminate the demand for those products, it just sent the consumer to Walgreens or Target. In fact, while attempting to limit interactions, the arbitrary method of distinction used by Defendants almost universally favored businesses which offered more, rather than fewer products. As such, the largest retailers remained open to attract large crowds, while smaller specialty retailers—like some of the Business Plaintiffs here—were required to close. The distinctions were arbitrary in origin and application. They do not rationally relate to Defendants' own stated goal. They violate the Equal Protection Clause of the Fourteenth Amendment.

IV. CONCLUSION

The Court closes this Opinion as it began, by recognizing that Defendants' actions at issue here were undertaken with the good intention of addressing a public health emergency. But even in an emergency, the authority of government is not unfettered. The liberties protected by the Constitution are not fair-weather freedoms—in place when times are good but able to be cast aside in times of trouble. There is no question that this Country has faced, and will face, emergencies of every sort. But the solution to a national crisis can never be permitted to supersede the commitment to individual liberty that stands as the foundation of the American experiment. The Constitution cannot accept the concept of a "new normal" where the basic liberties of the people can be subordinated to open-ended emergency mitigation measures. Rather, the Constitution sets certain lines that may not be crossed, even in an emergency. Actions taken by Defendants crossed those lines. It is the duty of the Court to declare those actions unconstitutional. Thus, consistent with the reasons set forth above, the Court will enter judgment in favor of Plaintiffs.

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