

**STATE OF MICHIGAN
IN THE COURT OF CLAIMS**

MICHIGAN HOUSE OF
REPRESENTATIVES
and MICHIGAN SENATE,
Plaintiffs,

Case No.: 20-000079-MZ
Honorable Cynthia Diane Stephens

v.

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

AMICUS CURIAE BRIEF OF MICHIGAN UNITED FOR LIBERTY

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INTEREST OF AMICUS

Michigan United for Liberty (MUFL) is a non-profit advocacy organization formed as a result of the use of the executive orders issued by the Michigan Governor in response to the COVID-19 health concern. With more than 8,000 in-person and online members, MUFL encourages to and strongly advocates the principle that our “unalienable rights cannot be restricted or rescinded for any reason.” Proper administration and application of Michigan’s Constitution and the rights therein is of paramount importance to MUFL and its members.

MUFL currently has a separate legal action pending against Governor Gretchen Whitmer in this Court and the outcome of this case could affect their legal interests and positions in that case. See *MUFL v Whitmer*, COC Case No. 20-000061-MZ.

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

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STATUTES

Emergency Powers of Governor Act of 1945,
1945 PA 302, as amended, MCL 10.31-10.33 *in passim*

Emergency Management Act,
1976 PA 390, as amended, MCL 30.401-30.421 *in passim*

OTHER AUTHORITY

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AMICUS CURIAE BRIEF

COVID-19 has assaulted us. Michigan and her citizens must and will respond. The question is how we will. This current lawsuit pending between two branches of state government, being presented to the third, is nothing short of a constitutional crisis created by our state leaders of yesteryear. However, resolution of the case is simple—*follow the Constitution*. In the fights between and among political parties and politics (and against general fear of the unknown of COVID-19), our republic's tree is strong if we respect the strength of its roots. If we destroy those strong roots (as some shockingly suggest we must), the tree of freedom and liberty will undoubtedly fall against the storm COVID-19 is currently hammering against our branches. Unilateral executive authority is the opposite of our democracy and our constitutional principles, and will topple the tree.

Michigan's Strength Is Using, Not Abandoning, Our Constitution

“All political power is inherent in the people” of this State. Const 1963, art I, § 1. Through the Michigan Constitution of 1963, the citizens of Michigan both established the architecture of and set limitations on their government and of those who govern. These confines are absolute, inviolable, and without exception. As a state, our government is instituted to protect the public health and the public safety of the citizenry. *Jacobson v*

Massachusetts, 197 US 11, 25 (1905). However, that protection is from more than mere pandemics. Realizing that centralized powers also makes powerful leaders deafened to the pleas of the governed, the citizens of this State—its People—decentralized the “powers of government... into three branches: legislative, executive and judicial.” Const 1963, art III, § 2. That separation was explicit and no accident as “[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.” *Id.*

“The legislative power of the State of Michigan is vested in a senate and a house of representatives.” Const 1963, art IV, § 1. “Simply put, legislative power is the power to make laws.” *SBC Mich v PSC (In re Compl of Rovas)*, 482 Mich 90, 98; 754 NW2d 259 (2008). “The executive power is vested in the governor.” Const 1963, art V, § 1. “The governor shall take care that the laws be faithfully executed.” Const 1963, art V, § 8. The Executive Branch “cannot exercise legislative power by creating law or changing the laws enacted by the Legislature.” *SBC Mich*, 482 Mich at 98.

Yet, after World War II, the Michigan Legislature created the *Emergency Powers of Governor Act of 1945*, 1945 PA 302, as amended, MCL 10.31-10.33 (the “EPGA”). The statute is structurally and facially unconstitutional because it purports to empower the Executive Branch to

create new law or change the laws enacted by the Legislature to handle emergencies upon a declaration of the same. See MCL 10.31. The current governor has done so to levels never before seen in this State's history. See List of Executive Orders, *available at* <http://legislature.mi.gov/doc.aspx?ExecutiveOrders> <last visited May 13, 2020>. It also criminalizes noncompliance with those laws enacted or amended by the Executive Branch. MCL 10.33.

This post-WWII enactment by Legislature nearly three quarters of a century ago (and signed in law by then Governor Harry Kelly) expressly violates what the People mandate of their government by their Constitution. As such, it is a legal nullity. *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135, 144-145, 253 NW2d 114 (1977) (“an unconstitutional statute is void ab initio... That this rule has been consistently followed in Michigan there can be no doubt.”). A statute's longevity does not support its propriety. Due to the societal good fortune enjoyed by our State, the EPGA has never needed to be challenged, questioned, or resolved by the judicial branch. Why? Because Michigan has been blessed with the absence of any major statewide emergency in its statehood. However, this long-time godsent inopportunistly prevented this judicial branch of government to answer the constitutional question—until now. See *Kyser v Kasson Twp*, 486 Mich 514,

535; 786 NW2d 543 (2010) (the “judicial branch interprets and applies [the law and constitution] in cases properly before the courts.”).¹

Follow Our Constitution

Many may ask—what is a governor to do in times of crisis when the current laws are believed to be ill-equipped to handle the emergency? The Constitution, again, provides the answer. For “disasters occurring in this state caused by enemy attack on the United States,” the Legislature can take immediate steps. Const 1963, art IV, § 39. For anything else, “the governor may convene the legislature on extraordinary occasions.” Const 1963, art V, § 15.^{2,3} At this session, the governor can provide “information as to the affairs of the state and recommend measures he [or she] considers necessary or desirable.” Const 1963, art V, § 17. While in that session and with the approval of People’s representatives, the Legislature can enact any needed new laws or amend incompatible ones to aid in the response to the extraordinary occasion or crisis. Upon such passage, the governor must then

¹ In 1976, the Legislature enacted the *Emergency Management Act*, 1976 PA 390, as amended, MCL 30.401-30.421. It suffers from the same exact fate as EPGA—it is a violation of the separation of powers provisions of the Michigan Constitution.

² COVID-19 is easily an “extraordinary occasion.”

³ If there is a concern about the safety of legislators from COVID-19, the Constitution also provides that “the governor may convene the legislature at some other place when the seat of government becomes dangerous from any cause.” Const 1963, art V, § 16.

“take care” that these new and amended laws “be faithfully executed.” Const 1963, art V, § 8.

Read The Owner’s Manual

The Michigan Constitution was enacted by the People of the State of Michigan to provide enough protection from one branch of government becoming too controlling and authoritative. Yet at the same time, there are clear processes and procedures to make any needed changes to our laws to respond to any emergency. Our Constitution is not a mere guideline, a list of recommendations, or a wish list. It is the foundation of our state government and all officers—from the legislators, to the governor, to this Court’s assigned jurist—took public oaths to “solemnly swear” to “support the constitution of this state” and to “faithfully discharge the duties of the office” each holds. Each participant in this lawsuit knows their respective duties, as the Constitution—like an owner’s manual—has already outlined them. This Court should steer free from politically siding with one side but instead fault both. The Court is asked to direct these parties to adhere to their oaths and “faithfully discharge” their constitutional duties as the People have prescribed. In short, when all else fails, read and follow the owner’s manual.

CONCLUSION

This case is not about emergency powers from trite statutes. It is not resolvable on the supposed intent of the Legislature of yesterday or the current good intentions of the governor in this inter-branch dispute. Rather, the resolution of this case is controlled by what the People—the citizenry of this State—demands through the current Constitution of 1963. The Legislatures and Governors of the past have disappointingly violated the structure, procedures, standards, and limits created by the People when they enacted the *Emergency Powers of Governor Act of 1945* and the *Emergency Management Act*. We are now paying the price for that improper waywardness. However, the answer is not asking this Court to rewrite or ignore the Constitution but instead faithfully return to the foundational governing directives. It also could not hurt to provide a stern and direct reminder to all these elected officials of their oaths of office.

RELIEF REQUESTED

WHEREFORE, Amicus Michigan United for Liberty, by their counsel, respectfully suggest that this Court to declare that the *Emergency Powers of Governor Act of 1945* and the *Emergency Management Act* violate the Michigan Constitution and instead order the other two branches to follow the constitutional procedures outlined above.

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RESPECTFULLY SUBMITTED:



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