STATE OF MICHIGAN

IN THE SUPREME COURT, COURT OF APPEALS,
ALL CIRCUIT COURTS & ALL DISTRICT COURTS

IN THE MATTER OF:
ENFORCEMENT OF EMERGENCY POWER EXECUTIVE ORDERS
AFTER APRIL 30, 2020

ALL PROSECUTING ATTORNEYS IN MICHIGAN
ALL CITY ATTORNEYS IN MICHIGAN
ALL LAW ENFORCEMENT AGENCIES IN MICHIGAN

LETTER TO ALL PROSECUTING ATTORNEYS AND CITY ATTORNEYS IN MICHIGAN

LEGAL ANALYSIS CORRECTING AG NESSEL'S MAY 4TH GUIDANCE TO LAW ENFORCEMENT: ALL EMERGENCY POWER EXECUTIVE ORDERS ARE UNENFORCEABLE AS A MATTER OF LAW AS AFTER APRIL 30, 2020

ANY LAW ENFORCEMENT OFFICER, PROSECUTING ATTORNEY OR CITY ATTORNEY WHO ATTEMPTS TO ENFORCE SAID ORDERS AFTER APRIL 30, 2020 VIOLATES THE OATH OF OFFICE AND ACTS BEYOND THE SCOPE OF GOVERNMENTAL AUTHORITY

Katherine L. Henry (P71954)
Attorney, Mediator, Restorative Justice Facilitator
Katherine Henry, P.C.
KHenry4MI@gmail.com
616-303-0183
Admitted in:
United States Supreme Court
State of Michigan
US District Court, Eastern District of MI
US District Court, Western District of MI
Saginaw Chippewa Tribal Court

Gregory R. Todd (P70978)
Attorney
Polaris Law, PLC
Greg@PolarisLawPLC.com
616-422-5291
Admitted in:
State of Michigan

Respectfully Submitted: May 8, 2020

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QUESTIONS ADDRESSED

I. Are Governor Whitmer's Emergency Power Executive Orders lawful and, therefore, legally enforceable after April 30, 2020?

Attorney General Nessel answers: YES
Amicus Curiae answers: NO

II. Are law enforcement officers, prosecuting attorneys, and city attorneys attempting to enforce these executive orders violating their oath of office, and stepping beyond the bounds of their governmental authority?

Attorney General Nessel answers: NO
Amicus Curiae answers: YES

INTRODUCTION AND STATEMENT OF INTEREST

These are confusing times. Never before have we had a governor shut down literally every aspect of our lives. The people of Michigan are confused, angry, and needing answers. Some groups are advocating for civil disobedience in response to their outrage over governmental actions. Katherine Henry and Gregory Todd are advocating for civil *obedience*, as the Emergency Power Executive Orders lost all lawful authority as of April 30, 2020. Attorney General Nessel issued a letter of guidance to all law enforcement officers on May 4, 2020 directing them to enforce Executive Order (EO) 2020-69 and 2020-70. This letter constituted a grave miscarriage of justice, as it provides direction to law enforcement officers across the state based on purposefully incomplete analysis and circular

reasoning, while simultaneously engaging in political attacks against the legislators who have publically explained the governor's actions from April 30th on are outside the scope of her lawful authority.

Attorneys submitting this letter, Katherine Henry and Gregory Todd, are licensed to practice in the State of Michigan. Katherine Henry is also admitted to practice in the United States Supreme Court, US District Court in the Western District of Michigan, US District Court in the Eastern District of Michigan, and Saginaw Chippewa Tribal Court. It is the DUTY of ALL attorneys licensed to practice in Michigan, as well as ALL elected and appointed government officials in Michigan, to abide by their oath of office to support and defend the United States and Michigan Constitutions above all else. In faithfully discharging the duties of office, every public official may only enforce restrictions upon the people that comply with the United States and Michigan Constitutions *and* the laws of the State of Michigan. Since our chief executive officer is issuing unlawful executive orders, and our chief law enforcement officer is demanding enforcement of those orders, it becomes the duty of others in our state (like Katherine Henry and Gregory Todd) who have sworn the aforementioned oath to help correct the blatant misstatements of law, so that our laws may be appropriately enforced across our state. Thus, Katherine Henry and Gregory Todd submit this letter as Amicus Curiae.

LEGAL ANALYSIS: HOW THIS AFFECTS YOU

We already know that we are in a situation like nothing we have experienced before. But much of that has been in the realm of the medical professionals and policy makers. What Governor Whitmer did on April 30th (and May 1st and 7th) pushed the situation into *your* realm. And if that wasn't enough, the letter AG Nessel wrote May 4th placed you in a predicament that prosecuting attorneys across our state have never quite seen. If you aren't careful, and instead just do as you're told, you will directly violate your oath of office, as well as the oath you took when being sworn in to practice law here in Michigan. We all know the "I was just following orders" excuse doesn't work, so the question on whether to enforce these executive orders now becomes - do you feel confident in your own understanding of the law on point to make that decision?

AG Nessel wrote her letter "to clarify that . . . [EO 2020-69 and EO 2020-70] are valid and enforceable." However, she engages in largely circular analysis that only mentions a couple portions of the Emergency Powers of Governor Act (EPGA) of 1945. She conveniently leaves out controlling portions of both our statutes and Constitutional provisions. Am I trying to pull you into a debate on the constitutionality of the EPGA? No. I am simply trying to make sure you understand that all of the Governor's current EOs (and any subsequent ones also based on her emergency powers) are not lawful under our statutes as currently written, and therefore, are not enforceable.

EMERGENCY POWERS STATUTORY AUTHORITY & STATUTORY LIMITATIONS

You likely already know the governor's emergency powers are derived from both the EPGA *and* the Emergency Management Act (EMA) of 1976. MCL 10.31 states that 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 . . . 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 . . . necessary to protect life and property or to bring the emergency situation within the affected area under control." Likewise, MCL 30.403 (3) requires the "governor shall, by executive order or proclamation, declare a state of disaster," or emergency per subsection (4), for a disaster or threat of disaster. It was under this power that she issued EO 2020-4, declaring a state of emergency in Michigan on March 10, 2020.

You are also likely aware that Art. IV §4 of the US Constitution guarantees our "Republican Form of Government" for every State, and that our *state* government has its powers "divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch." *Const 1963, art III, § 2.* Thus, an exercise of emergency powers by the governor, in a manner which uses the power to write EOs that have the effect of law without complying with the constitutional requirements of enacting laws (where the power originates in the legislative branch), is only even *arguably* constitutional if it is done within the time limit requirements laid out in MCL 30.403. In other words, it is reasonable to conclude that by exercising emergency powers that allow her to issue legally enforceable orders, the governor is "exercising powers properly belonging to another branch [namely, the legislature]." And the best argument for allowing such an exercise of emergency power is that the time limitations and other requirements of both the EMA and EPGA keep such an exercise of legislative power in check by, for example, requiring legislative approval of any extensions of this power.

Thus, we must realize that although MCL 10.31 states that the state of emergency "shall cease to be in effect upon declaration by the governor that the emergency no longer exists," MCL 30.403 *requires* that "[a]fter 28 days, the governor *shall* … declar[e] the state of emergency terminated, unless" the legislature votes to extend it. Therefore, with the state of emergency being issued on March 10, 2020, it was set to expire as a matter of law on April 7, 2020. However, the legislature voted to extend the state of emergency until April 30, 2020. However, the legislature did not vote to extend the state of emergency any further, thus necessitating its termination as a matter of law on April 30, 2020.

UNILATERAL EXTENSIONS VIA RESCINDING AND REISSUING

In her May 4th letter, AG Nessel claims that in EO "2020-66, the Governor terminated the states of disaster and emergency that had been previously declared under EMA, and then, in [EO] 2020-68, reissued a declaration of states of disaster and emergency under the EMA." However, this clear attempt to circumvent the 28-day requirement does not comport with the notions of statutory construction and interpretation, or in preserving the separation of powers, as described above. Indeed, the language of the law is very clear. MCL 30.403 contemplates that emergency conditions may very well last beyond the initial 28 day period. The statute specifically says that the ONLY way the governor can extend the state of emergency is if she makes a request to the legislature to extend it for a specific number of days AND both houses of the legislature approve that extension. Democratic House Minority Leader Christine Greig even acknowledged this very statutory language in her April 4th letter to

Speaker of the House Lee Chatfield. Indeed, Speaker Chatfield replied in his letter dated April 4th that EO "2020-33 did not restart the twenty-eight day timeframe required by statute and make a legislative extension on April 7th unnecessary. By its own terms, that order is merely an 'expansion' of the original declaration and thus subject to the same time constraints. Your interpretation results in an obvious absurdity - that any governor could just revise and reissue declarations in perpetuity, rendering the clear language of the law and the legislative branch meaningless."

Moreover, "[s]tatutory language should be construed reasonably, keeping in mind the purpose of the act."[1] Given the explicit 28-day time limit required, it is not reasonable to interpret MCL 30.403 to allow a governor to circumvent the 28-day time limit by simply issuing new orders that address the same emergency conditions of the original order.

Every governor we've had since the EMA was enacted understands the 28-day limitation only gets extended through the legislature. As Speaker Chatfied wrote on April 4, 2020, "[s]ince 1977, there have been thirty-five [35] states of emergencies and fifty-two [52] states of disaster declared by the governor's office. In total, four [4] states of emergencies and six [6] states of disasters have been extended by the Legislature. None of these emergencies or disasters have been extended unilaterally by the governor, reflecting the twenty-eight day limit written into state law."

RELYING ONLY UPON MCL 10.31

The governor derives her powers of declaring a state of emergency from two portions of our laws. The first is MCL 10.31, enacted in 1945, and found in the chapter of our laws which spells out all of the governor's rights and responsibilities. The second is MCL 30.403, part of the EMA enacted in 1976, which expands upon the EPGA, providing definitions, applications of emergency powers, and time frames required in these situations. These statutes must *both* be followed in the governor's exercise of emergency powers.

In EO 2020-67, the Governor claims her powers under MCL 10.31 and MCL 30.403 are "independent authorities." However, that is clearly not how our laws work, and regardless of her citing MCL 10.31, the time limits of MCL 30.403 still apply. Indeed, "all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other."[2] In other words, the emergency powers given to the governor in MCL 10.31 (the statute that has no "end date") must be read in conjunction with the definitions, requirements, and timeframes of the EMA. Thus, when she utilizes power given to her under MCL 10.31 (where the emergency "shall cease to be in effect upon declaration by the governor"), MCL 30.403 requires that "[a]fter 28 days, the governor *shall* … declar[e] the state of emergency terminated," unless the legislature votes to extend it. In other words, when the legislature did not vote to extend her police powers beyond April 30th, the police powers, along with all of the EOs she's issued upon them, immediately ceased to have legal authority.

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[1] Winkler v. Marist Fathers of Detroit, Inc., 321 Mich App 436, 446 (2017), citing Twentieth Century Fox Home Entertainment, Inc. v. Dep't of Treasury, 270 Mich App 539, 544 (2006).
[2] State Treasurer v. Schuster, 456 Mich 408, 417 (1998).

If the Governor were allowed to create an executive order under MCL 10.31 and ignore the requirements of MCL 30.403, that would mean she gets to pick and choose which laws apply to her actions. That reasoning would be seriously flawed, as it would render all restrictions upon her exercises of authority as unenforceable. "I am not bound by the legal requirements of XYZ law, because I did not reference that law when I took this action." Quite frankly if that's how it works, I then choose to not follow *any* executive orders - or the 70mph speed limit on I96, because I don't like them and I'd rather just follow the other laws. But in all seriousness, that would render the exercise of emergency power entirely unconstitutional as a direct violation of the requirements of Art. III § 2.

Clearly the Governor herself even recognizes that a "statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme."[3] That is why she references the EMA of 1976 *and* the EPGA of 1945 in each of her executive orders. But regardless of her understanding of it, statutes must still be interpreted in harmony with the *entire* statutory scheme.

MCL 30.417's EFFECT ON MCL 10.31

Some argue the 28-day timeframe of MCL 30.403 does not apply to emergency powers exercised by a governor under MCL 10.31 due to the language in MCL 30.417(d). MCL 30.417 (part of the EMA) states that the EMA "shall not be construed to . . . limit, modify, or abridge the authority of the governor **to proclaim** a state of emergency pursuant to . . . 10.31" or exercise powers under other relevant laws. First, MCL 30.403 and MCL 10.31 clearly refer to the exact same kind of emergency conditions requiring extraordinary government action. Second, MCL 30.403 does not "limit, modify, or abridge the authority of the governor **to proclaim** a state of emergency." In fact, MCL 30.403 bolsters the governor's authority **to proclaim** a state of emergency by giving such proclamations full "force and effect of law," while MCL 30.405 adds "additional powers of governor," and MCL 30.402 (e) and (h) add additional circumstances which may qualify for exercise of these emergency powers.

However, a few state that MCL 30.417 (d) "has rendered [the entire EMA] basically an empty shell because it defers entirely to the coverage of the old law [MCL 10.31]." We must remember, though, that "[s]tatutory language should be construed reasonably, keeping in mind the purpose of the act."[4] It is not reasonable to read MCL 30.417 (d) as rendering the entirety of the EMA "an empty shell deferring completely to the coverage of MCL 10.31." Further, no reasonable court would read MCL 30.417 to mean that the legislature enacted the EMA with the sole purpose of deferring to the EPGA.

Also, it is a long-accepted principle of statutory construction that "[s]tatutes which may appear to conflict are to be read together and reconciled, if possible."[5] With this in mind, we can address the assertion that MCL 10.31 and MCL 30.403 are at odds with regard to time frames. MCL 30.403 requires action by the 28th day, while MCL 10.31 is *silent* on the issue. Thus, the language of both laws reveals that MCL 30.403 is *not* in conflict with MCL 10.31, but rather supplements it. Additionally,

[3] Winkler v. Marist Fathers of Detroit, Inc., 321 Mich App 436, 446 (2017), citing Walters v. Leech, 279 Mich App 707, 710 (2008), and Wayne Co. v. Auditor General, 250 Mich 227, 233 (1930).
[4] Winkler v. Marist Fathers of Detroit, Inc., 321 Mich App 436, 446 (2017), citing Twentieth Century Fox Home Entertainment, Inc. v. Dep't of Treasury, 270 Mich App 539, 544 (2006).
[5] People v. Bewersdorf, 438 Mich 55, 68 (1991).

"[i]f statutes lend themselves to a construction that avoids conflict, that construction should control.[6] Moreover, a "statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme."[7] Thus, you cannot read MCL 30.417 (d) to say that all the other provisions of MCL 30.401 - 30.421 are "basically an empty shell [that] defers entirely to [MCL 10.31]." In other words, despite these absurd claims about MCL 30.417 (d), ALL provisions of MCL 30.401 - 30.421 are in full force and effect. After all, it is not reasonable to interpret the new law as saying it has zero force and effect and that it is simply reaffirming every provision of the old law.

EMERGENCY POWERS AND THE CONSTITUTION

We all know that the US Constitution and Michigan Constitution provide individual protections against government interference with our fundamental liberties. But in times of widespread threat and vast uncertainty, clearly the government is allowed to infringe upon those rights for a little while, right? Without taking up that deep constitutional discussion, the EMA actually makes it quite clear for us. The entirety of the EPGA and nearly all of the EMA deal with enhanced police powers for times of public crisis or disaster. Nowhere in any of those statutory provisions does it say that these powers may be exercised in such a manner to infringe upon Constitutional rights. But, if we're being honest, that's because it's a given - no statute is allowed to abridge or diminish the freedoms guaranteed to us in either the Michigan or United States Constitutions.

But the EMA goes one step further. In MCL 30.421, the legislature anticipated an even more concerning threat to the people of the State of Michigan. This provision gives the governor even greater police powers in some respects. However, even in a "heightened state of alert," of even greater police powers, the legislature made it clear that constitutional protections must still be observed. Moreover, MCL 30.421 decrees that the governor's powers "under this act [the EMA] . . . *shall* be consistent with the provisions of the state constitution of 1963 and the federal constitution . . . " Furthermore, MCL 30.421 prohibits prosecutors from prosecuting any violations of the EOs in any "manner that violates any constitutional provision." Prosecutors are further prohibited, in the prosecution of violations of EOs, from prosecuting "conduct presumptively protected by the first amendment to the constitution of the United States." This isn't a carveout for certain individual behaviors; this is a stern reminder to prosecutors of the *restraints placed upon the government* in regulating the people, *even in the most heightened state of alert* our state could ever experience.

We all know what a presumption does - it switches the burden of proof. So, while asserting a defense is typically a burden of proof borne by the defendant, it actually rests on the government to prove that a person "violating" an "emergency powers" executive order is *not* exercising his religious beliefs, his *unabridged* freedom of speech, his right to peaceably assemble or his right to petition the government for a redress of grievances. Considering that the main point in *all* the EOs "is to keep

[6] Walters v Leech, 279 Mich App 707 (2008), citing House Speaker v State Admin Bd, 441 Mich 547, 568-569 (1993).
[7] Winkler v. Marist Fathers of Detroit, Inc., 321 Mich App 436, 446 (2017), citing Walters v. Leech, 279 Mich App 707, 710 (2008), and Wayne Co. v. Auditor General, 250 Mich 227, 233 (1930).

people away from each other" (according to AG Nessel's 5/4/20 letter), it's pretty clear that you will not be able to meet this burden of proof.

So, as you think about how this all applies to how you will do your job during these challenging times, please consider that "we the people . . . secure[d] the Blessings of Liberty to ourselves and our Posterity" by establishing the Constitution of the United States. *US Const. Preamble.* Those blessings of liberty were not given to us by the government, but by God. As such, "we, the people of the State of Michigan, grateful to Almighty God for the blessings of freedom and earnestly desiring to secure these blessings **undiminished** to ourselves and our posterity," established our state Constitution of 1963. *Preamble.* These liberties are to be exercised by all people unabridged and undiminished, during times of emergency or not. Governors must exercise emergency powers consistent with the state and federal constitutions, which both declare our individual rights *and* the restrictions upon governmental action. Prosecutors are expressly prohibited from prosecuting EO "violations" that violate *any* constitutional provision, or where such conduct is presumptively protected by the first amendment. These words are clear - as is the fact that the EMA reinforces our constitutional freedoms, not diminishes them.

COMMON SENSE AND THESE EXECUTIVE ORDERS

Despite rumors to the contrary, having a law degree does not give us license to insert complexity or confusion where it does not exist. AG Nessel claims the governor terminated the states of disaster and emergency in EO 2020-66, and "reissued a declaration of states of disaster and emergency under the EMA" in EO 2020-68. That is certainly what the governor tried to do, but what sense does that make? Either an emergency necessitates the exercise of police powers or it does not. It's not a light switch that can be turned on and off. And where in the EMA is the authority to do this? It isn't. With "all political power . . . inherent in the people" (Const 1963, art 1, § 1), government officials cannot act without the authority to do so expressly provided by law.

Then consider the sequence in which AG Nessel discusses these executive orders. She first explains that EO 2020-**66** terminated the emergency, then jumps to how EO 2020-**68** "reissued" the emergency. She goes *back* to EO 2020-**67**, calling it the "*third* order" in the series of three . . . which declares the emergency *remains*. So, the governor declared COVID19 was *no longer* a statewide emergency *or* disaster, *then* somehow a *continuing* statewide emergency, then a *new* statewide emergency and disaster. This defies all common sense. This COVID19 situation is just that - *one* situation. It is not something that can be conveniently chopped up into various COVID19 "emergencies" and "disasters" that are started, bifurcated, ended, continued, then started. Especially when the ending, continuation and start are all done, in that order, in the same afternoon.

AG Nessel then blames "legislator commentary" for "creat[ing] confusion among law enforcement officials tasked with enforcing the orders," and claims the orders' legality is based on their reasonableness. But it is not reasonable to issue executive orders like they're going out of style (77 in just over 2 month's time), treating statutory emergencies like a mere term of art instead of the actual urgent situations these emergency powers were meant to address. It is not reasonable for a governor to exercise powers properly belonging to the legislature, especially for longer than the statute

specifically allows. It is not reasonable to interpret MCL 30.403 to allow a governor to circumvent the 28-day time limit by simply issuing new orders that address the same emergency conditions of the original order. It is not reasonable to think this particular governor gets to unilaterally extend the state of emergency/disaster when none of the 87 prior such declarations were extended without the legislature. It is not reasonable for EOs to be issued based on selective compliance with statutory provisions. It is not reasonable to assume that the legislature enacted the EMA with the sole purpose of deferring to the EPGA. It is not reasonable to issue or enforce EOs that infringe upon constitutional rights, especially when those rights are explicitly preserved in the language of the EMA itself. It is not reasonable to enforce EOs explicitly focused on "keeping people away from each other," when those same people are *guaranteed* the right to assemble, collectively worship, express their speech, and petition the government. Nor is it reasonable to issue emergency declarations and terminations like a light switch being turned on and off.

WHERE DOES THAT LEAVE YOU?

ALL executive orders issued by Governor Whitmer in 2020 are based on emergency powers. With the emergency lawfully ending on April 30th, all of those emergency powers came to an immediate end. Without such emergency powers, ALL executive orders became UNENFORCEABLE as a matter of law. This includes the stay-at-home order, the order restricting "non-essential" medical and dental services, the order releasing prisoners early, the order cancelling the rest of the school year, the order extending FOIA deadlines, the order restricting access to loved ones at care facilities, the order cutting off kids in juvenile detention centers from their families and support services, the order closing movie theaters and gyms, the order limiting restaurants to take-out service, the order amending the OMA, the order allowing restricted access to governmental services, the order restricting access to places of public accommodation, and *every* other order that has been issued. All individuals are, therefore, now lawfully allowed to travel, assemble, worship, conduct business, go to places of public accommodation, and exercise all of their other rights *without* any attempt by law enforcement, prosecuting attorneys, or places of public accommodation to infringe upon those rights.

All elected and appointed government officials, law enforcement officers, and prosecuting attorneys swore an oath to uphold the laws and constitution of the State of Michigan and the United States. Thus, ANY of those individuals who attempt to enforce these executive orders would be directly violating that oath, and acting outside the scope of their governmental authority. Moreover, any public officer attempting to enforce these clearly unlawful executive orders will be guilty of malicious prosecution.[8] Such action would also be an abuse of process, as enforcement of such clearly unlawful executive orders is not legitimate, regular, or legal.[9]

[8] Malicious prosecution is both a common law and statutory cause of action. Drouillard v Metropolitan Life Ins Co, 107 Mich App 608 (1981). The applicable statute is MCL 600.2907, which provides for civil and criminal liability.
[9] Abuse of process is not covered by statute. However, abuse of process is recognized as a common law claim. Peisner v Detroit Free Press, 68 Mich App 360 (1976).