STATE OF MICHIGAN

COURT OF CLAIMS

ASSOCIATED BUILDERS & CONTRACTORS OF MICHIGAN, and DJ'S LAWN SERVICE, INC., d/b/a DJ'S LANDSCAPE MANAGEMENT,

Plaintiffs,

v

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, DANA NESSEL, in her official capacity as Michigan Attorney General, and ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services,

Defendants.
_____/

OPINION AND ORDER REGARDING PLAINTIFFS' MAY 21, 2020 MOTION FOR IMMEDIATE DECLARATORY JUDGMENT ON COUNT I

Case No. 20-000092-MZ

Hon. Christopher M. Murray

Pending before the Court is plaintiffs' May 21, 2020 motion for immediate declaratory judgment on Count I of their complaint. For the reasons that follow, the motion is GRANTED. In light of the informative briefing submitted by the parties, and because the motion addresses pure legal issues, this matter will be decided without oral argument. See LCR 2.119(A)(6).[1]

I. BACKGROUND

This case arises out of Executive Order No. 2020-97. The order is one of many executive orders issued in response to the COVID-19 pandemic. Amongst other things, the order states that

[1] Plaintiffs' motion to file a reply brief in excess of the page limitations is granted.

"businesses must do their part to protect their employees, their patrons, and their communities," and imposes a number of duties and obligations on businesses that the Governor has permitted to re-open. Section 1 of the order contains 18 specific steps that must be followed by any business that requires employees to leave their homes or residences for work. The order also contains numerous industry-specific obligations. Section 11 of the order declares that the substantive provisions of the order:

> have the force and effect of regulations adopted by the departments and agencies with responsibility for overseeing compliance with workplace health-and-safety standards and are fully enforceable by such agencies. Any challenge to penalties imposed by a department or agency for violating any of the rules described in sections 1 through 10 of this order will proceed through the same administrative review process as any challenge to a penalty imposed by the department or agency for a violation of its rules.

The order continues in § 12 by declaring that any business that violates the substantive provisions of the order "has failed to provide a place of employment that is free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to an employee, within the meaning of the Michigan Occupational Safety and Health Act, MCL 408.1011." In effect, the order declares that a violation of the order is a per-se violation of the Michigan Occupational Safety and Health Act (MIOSHA). MIOSHA provides a range of penalties for violation of the statute, including fines ranging up to $70,000 and a felony conviction punishable by up to three years' imprisonment. MCL 408.1035.

Plaintiffs filed a six-count complaint in this Court. Their motion for declaratory relief focuses exclusively on Count I, which alleges that, to the extent § 12 of EO 2020-97 incorporates MIOSHA's penalty provisions, it imposes penalties in excess of what the Governor is permitted to authorize under her statutory authority to issue executive orders in response to an emergency situation. Count I also asserts that § 11 of EO 2020-97 violates the Administrative Procedures Act

(APA), MCL 24.201 *et seq.*, because the dictates of the order did not undergo the formal notice-and-comment procedures mandated by the APA, yet the order purports to give the order's requirements the force and effect of rules and regulations adopted by departments charged with overseeing workplace-safety standards.

II. STANDING

Defendants first oppose the request for injunctive relief by asserting that plaintiffs lack standing to challenge EO 2020-97. "[A] litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Lansing Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). Here, plaintiffs seek declaratory relief under MCR 2.605. There must be a "case of actual controversy" in order for a litigant to obtain relief under MCR 2.605(A)(1). "An 'actual controversy' . . . exists when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve that plaintiff's legal rights." *League of Women Voters of Mich v Secretary of State*, __ Mich App __, __; __ NW2d __ (2020) (Docket Nos. 350938; 351073), slip op at 7. In the case of organizations seeking to advocate on behalf of their members, an organization is deemed to have standing if the members of the organization have a sufficient interest. *Lansing Schs Ed Ass'n*, 487 Mich at 373 n 21.

The Court concludes an actual controversy exists. Initially, it cannot be discounted that plaintiff DJ's Lawn Service is one of the few entities that, until very recently, has been able to operate within this state. The same is true of plaintiff Associated Builders and Contractors, which represents hundreds of construction-related firms. Thus, plaintiffs are or represent some of the few entities that are—or were at the time of its issuance—actually subject to EO 2020-97. Furthermore, plaintiffs have established an actual controversy because they are subject to the

penalties incorporated into the Executive Order, even for inadvertent violation of one of the many standards imposed in the order. As explained by the Court of Appeals in *Strager v Olsen*, 10 Mich App 166, 171; 159 NW2d 175 (1968), "[a] declaratory action is a proper remedy to test the validity of a criminal statute where it affects one in his trade, business or occupation." A litigant need not be arrested in order to obtain declaratory relief regarding the validity of an act, nor does a litigant need to violate the statute in order to seek declaratory relief. *Id*. See also *Kalamazoo Police Supervisor's Ass'n v City of Kalamazoo*, 130 Mich App 513, 518; 343 NW2d 601 (1983). Plaintiffs seek a declartion of their rights before an alleged violation of the Executive Order—which order allegedly contains penalties beyond what the Governor has statutory authority to employ—gives rise to the imposition of impermissible penalties against plaintiffs and/or plaintiff's members. This is sufficient for purposes of a standing inquiry, and it defeats defendant Attorney General's assertion that this case is not ripe for adjudication. See *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 496-497; 815 NW2d 132 (2012). The threat of enforcement, combined with the far-reaching effects of the order, the swiftness with which the order was enacted, the ambiguous nature of certain provisions of the order,[2] and the constantly changing landscape created by the Governor's Executive Orders, convince the Court that plaintiffs have asserted a risk of enforcement that is more than merely hypothetical. See *Strager*, 10 Mich App at 172.

[2] Plaintiffs submitted an affidavit from Ken Misiewicz, the president and chief executive officer of a mechanical contractor that is a member of plaintiff Associated Builders and Contractors. Mr. Misiewicz highlighted his concerns with his company's perceived inability to comply with some of the provisions of the order. Thus, and notwithstanding the above, the Court would find that Mr. Misiewicz, at a minimum, has established a substantial risk of enforcement of EO 2020-97's penalty provisions to his company, and that plaintiff Associated Builders and Contractors has standing as a result. See *Lansing Schs Ed Ass'n*, 487 Mich at 373 n 21.

III. PLAINTIFFS ARE ENTITLED TO DECLARATORY RELIEF

Turning now to the merits of the motion, plaintiffs argue that the Governor exceeded her statutory authority by effectively bootstrapping into EO 2020-97 penalties that are found in MIOSHA. The Court agrees. Executive Order 2020-97 indicates that it was issued pursuant to two statutes: (1) the Emergency Powers of Governor Act (EPGA), MCL 10.31 *et seq.*; and (2) the Emergency Management Act (EMA), MCL 30.401 *et seq*.[3] The EPGA unambiguously provides that the violation of any order issued under the Act "*shall be punishable as a misdemeanor*, where such order, rule or regulation states that the violation thereof shall constitute a misdemeanor." MCL 10.33 (emphasis added).[4] Likewise, the EMA makes violation of an order issued pursuant to the Act a misdemeanor. See MCL 30.405(3) (providing that "[a] person who willfully disobeys or interferes with the implementation of a rule, order, or directive issued by the governor pursuant to this section is guilty of a misdemeanor."). Neither act sets forth an express length of imprisonment or the precise amount of the fine associated with a misdemeanor conviction; hence, the default punishments of 90 days' imprisonment and a fine of not more than $500 apply. See

[3]The only question presented by this motion is the validity of penalties beyond those provided in the EMA and EPGA.

[4] Defendant Attorney General's briefing highlights that a violation of an order issued under the EGPA is only a misdemeanor "where such order . . . states that the violation thereof shall constitute a misdemeanor." The Attorney General notes that the statute is silent as to greater penalties, and infers from this silence that greater penalties may be enforced if the Governor chooses to do so. The Attorney General misreads the statute. The qualifying language in the EPGA states that violation of an order constitutes a misdemeanor if, and only if, the order declares the same. This language, which specifies the only time a criminal penalty may attach to a violation of the order, does not invite the imposition of a greater penalty than the only penalty expressly listed. If the Legislature wished to authorize a penalty in addition to the misdemeanor penalty expressly stated in the statute, it could have expressly done so, and the Court declines to infer the same from silence. See *Pohutski v Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (explaining that "courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature.").

MCL 750.504 ("If a person is convicted of a crime designated in this act or in any other act of this state to be a misdemeanor for which no punishment is specially prescribed, the person is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $500.00, or both.").

Examining the plain language of the EMA and the EPGA, as the Court must do, see *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 85; 878 NW2d 816 (2016), it is readily apparent that one, and only one, penalty is permitted for a violation of an executive order issued under either act. If there are to be penalties imposed for violation of an executive order issued under these statutes, then both acts only permit misdemeanor penalties for the violation of any such executive orders. There is simply no room within the unambiguous statutory language for adding additional penalties, let alone incorporating different, and more severe, penalties from a separate statutory scheme such as the felony charges and increased fines set forth in MIOSHA.[5] "Michigan recognizes the maxim *expressio unius est exclusio alterius*; that the express mention in a statute of one thing implies the exclusion of other similar things." *AFSCME v Detroit*, 267 Mich App 255, 260; 704 NW2d 712 (2005) (citation and quotation marks omitted). Here, the Legislature's decision to expressly limit the range of available penalties for violation of an executive order issued under the two emergency statutes indicates a clear intent to prohibit the imposition of any other penalties. The incorporation of MIOSHA's felony charges and increased fines for a violation of the executive order was plainly outside the Governor's authority under the EMA and EPGA. Any penalties or fines beyond those for misdemeanors that are incorporated

[5] None of the defendants dispute this interpretation of §§ 11 and 12, i.e., that the order incorporates the penalties contained within MIOSHA.

into the executive order are void. See *Senghas v L'Anse Creuse Pub Schs*, 368 Mich 557, 560; 118 NW2d 975 (1962) (discussing *ultra vires* acts). Section 12 of EO 2020-97 must be stricken from the order.

In arguing for a different result, defendants make little effort to engage the plain language of the EMA and EPGA. Rather, they argue that activity which violates EO 2020-97 will always be a violation of MIOSHA, thereby rendering plaintiffs' concerns irrelevant. This argument may or may not be true as a practical point, but it surely does not address the legal issue presented. If there is indeed overlap between what is a violation of the executive order and of MIOSHA[6], then any violation of the order must be punishable by a misdemeanor, while any violation under MIOSHA will be subject to the penalties available under that separate statutory scheme.

Defendant Attorney General's contention that the EPGA and EMA are irrelevant to the analysis because the Governor possessed general, undefined constitutional authority to issue EO 2020-97, misses the mark. According to the Attorney General, the Governor merely provided guidance to executive branch departments and agencies as to how they should interpret and enforce MIOSHA. See Const 1963, art 5, § 8 (providing that each principal department "shall be under the supervision of the governor" and that the Governor "shall take care that the laws be faithfully

[6] Adopting defendants' position would mean that EO 2020-97 was essentially a hollow exercise by the Governor. If MIOSHA already covered the entirety of the rules outlined in EO 2020-97, the order would serve little meaningful purpose. Moreover, defendants' assertions about the redundant nature of EO 2020-97 are belied by a review of the order. The order contains numerous requirements that are specific to COVID-19 and the related challenges faced by particular industries. Compare EO 2020-97, with MCL 408.1011 and Mich Admin Code, R 408.10001 *et seq*. For instance, EO 2020-97 has provisions about water-coolers that do not have a comparable counterpart in MIOSHA. Defendants have made no effort to explain how this or other COVID-19-specific facets of the order are already incorporated into MIOSHA.

executed."). EO 2020-97 did much more than provide guidance and ensure that the law was faithfully executed. Indeed, the order created scores of new restrictions and demands and attempted to make these new restrictions and demands subject to penalties beyond what the Legislature granted. The Governor's "real control over the executive branch," see *House Speaker v Governor*, 443 Mich 560, 562; 506 NW2d 190 (1993), as set forth in the Constitution does not include the power to issue orders containing penalties beyond what the authorizing legislation permits. The Attorney General's reference to the Governor's control over the executive branch fails to address the relevant concerns presented.

Finally, and because the penalties imposed under MIOSHA cannot be incorporated into the order, no penalties may be imposed "by a department or agency for violating any of the rules described in" the order, contrary to what § 11 of EO 2020-97 dictates. Instead, the only penalty that may be imposed for a violation of the order is that which is expressly stated in the EMA and in the EPGA: a misdemeanor, criminal violation. The penalty may only be rendered through the appropriate criminal procedures. See MCL 30.405(1)(a)("This power does not extend to the suspension of criminal process and procedure."). Any other attempt to incorporate different penalties or enforcement methods into EO 2020-97 is beyond the authority granted to the Governor under the EMA and EPGA. Section 11 of EO 2020-97 must be stricken as well.

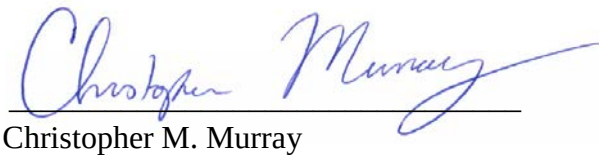
IV. CONCLUSION

IT IS HEREBY ORDERED that plaintiffs are entitled to immediate declaratory relief on Count I, which contains their claim that the Governor's incorporation of MIOSHA's penalties into Executive Order No. 2020-97 was an impermissible act. Thus, to the extent §§ 11-12 of EO 2020-97 purport to make a violation of the same a per se violation of MIOSHA, thereby incorporating

impermissible penalties and/or enforcement methods into the order, the same are null and void. EO 2020-97 otherwise remains enforceable and in effect.

This is not a final order and it does not resolve the last pending claim or close the case.

Dated: June 4, 2020



Christopher M. Murray
Judge, Court of Claims