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May 19, 2020

Hon. Cynthia D. Stephens
Michigan Court of Claims
P.O. Box 30185
925 West Ottawa Street
Lansing, MI 48909

By Electronic Mail Only

RE: *Michigan House and Senate v Gov. Whitmer*
Court of Claims Case No. 20-79-MZ
Supplemental Authority

Your Honor:

On May 19, 2020, the Court of Claims, Hon. Michael J. Kelly, issued its opinion denying the plaintiff's motion for a preliminary injunction in the case of *Michigan United for Liberty v Whitmer* (Docket No. 20-000061-MZ). By this correspondence, I submit that opinion as supplemental authority in the above-stated matter. I have attached a copy of the decision for your ease of reference.

In *Michigan United for Liberty*, the Court determined that the Plaintiff is unlikely to succeed on the merits of its claims because neither the Emergency Management Act, MCL 30.401 *et seq*, nor the Emergency Powers of the Governor Act, MCL 10.31 *et seq*, represent an impermissible delegation of legislative authority to the Governor. As noted by the Court, "[H]istorically, these types of challenges 'have been uniformly unsuccessful' across federal and state jurisprudence." (Op, p 4, quoting *Taylor v Smithkline Beechap Corp*, 468 Mich 1, 8 (2003).)

Respectfully,

s/ Christopher M. Allen
Christopher M. Allen
Assistant Solicitor General

CMA/jtf
Enclosure
c: Michael Williams

STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN UNITED FOR LIBERTY,

Plaintiff,

OPINION AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

v

Case No. 20-000061-MZ

GOVERNOR GRETCHEN WHITMER,

Hon. Michael J. Kelly

Defendant.
_____/

Pending before the Court is plaintiff's motion for preliminary injunction.[1] For the reasons that follow, the motion is DENIED.

I. BACKGROUND

Plaintiff's complaint and motion for preliminary injunction challenge the authority of defendant Governor Gretchen Whitmer to issue executive orders in response to the COVID-19 pandemic. Defendant cited two acts, the Emergency Management Act (EMA), MCL 30.401 *et seq.*; and the Emergency Powers of Governor Act (EPGA), MCL 10.31 *et seq.* when issuing the orders at the heart of this case. At this juncture, the facts underlying the complaint are well known to the parties and their recitation in this opinion would serve no meaningful purpose. The Court will instead constrain its time and attention to the legal issues presented in plaintiff's pleadings

[1] The Court notes and appreciates the parties' compliance with the expedited briefing schedule ordered in this case.

and briefing. Distilled to the most basic level, plaintiff is asserting that the EMA and the EPGA are unconstitutional because they represent an impermissible delegation of legislative authority to the Governor. Plaintiff has asked the Court to issue a preliminary injunction enjoining defendant from enforcing and issuing any orders under the EMA or EPGA.

II. ANALYSIS

Injunctive relief "represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Davis v Detroit Fin Review Team*, 296 Mich App 568, 613; 821 NW2d 896 (2012) (citation and quotation marks omitted). The Court utilizes four factors in determining whether to issue this extraordinary remedy:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Id*. (citation and quotation marks omitted).]

A. PLAINTIFF HAS NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS

Turning first to the likelihood of success on the merits, the Court begins by noting that plaintiff asserts facial challenges to the validity of the EMA and the EPGA. This type of challenge presents significant obstacles a litigant must overcome in order to succeed. Initially, statutes are presumed to be constitutional, and a court has a "duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Oakland Co v State*, 325 Mich App 247, 260; 926 NW2d 11 (2018). A court must "exercise the power to declare a law unconstitutional with extreme caution," and the court must not exercise that power if serious doubt exists as to the alleged constitutional invalidity. *Id*. (citation omitted). Instead, "[e]very reasonable presumption or

intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity." *Id*. (citation and quotation marks omitted).

Moreover, plaintiff's facial challenge to the constitutionality of the statutes at issue requires a particularly difficult showing. A facial challenge considers the plain language of the statute at issue and it involves a "claim that the law is invalid in toto—and therefore incapable of any valid application." *League of Women Voters of Mich v Secretary of State*, __ Mich App __, __; __ NW2d __ (Docket Nos. 350938; 351073), slip op at p. 10 (citation and quotation marks omitted). "To make a successful facial challenge to the constitutionality of a statute, the challenger must establish that no set of circumstances exists under which the act would be valid." *Oakland Co*, 325 Mich App at 260 (citation and quotation marks omitted).

Here, in order for plaintiff to demonstrate a likelihood of success on the merits of the claims asserted in its briefing, it must demonstrate that the challenged statutes contain constitutionally infirm delegations of legislative authority to the Governor. In general, the principle of separation of powers, see Const 1963, art 3, § 2, precludes the legislative branch from delegating its law-making authority to the executive or judicial branches of government, *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8; 658 NW2d 127 (2003). However, the separation of powers does not preclude this state's Legislature from "obtaining the assistance of the coordinate [b]ranches." *Id*. at 8-9, quoting *Mistretta v United States*, 488 US 361, 371; 109 S Ct 647; 102 L Ed 2d 714 (1989). Caselaw counsels that "when properly prescribed standards exist, the Legislature has not abdicated its law-making or legislative power because the agency to which the power is delegated is limited in its action by the Legislature's prescribed will; it cannot follow its own

uncircumscribed will." *Westervelt v Nat Resources Comm*, 402 Mich 412, 441; 263 NW2d 564 (1978) (opinion by WILLIAMS, J.) (quotation marks omitted). In *Taylor*, the Supreme Court remarked that, historically, these types of challenges "have been uniformly unsuccessful" across federal and state jurisprudence. *Taylor*, 468 Mich at 9.

In order to determine whether the challenged statutes at issue in this case contain sufficient standards to survive a constitutional challenge, the Court's analysis must be guided by the following criteria:

> 1) the act must be read as a whole; 2) the act carries a presumption of constitutionality; and 3) the standards must be as reasonably precise as the subject matter requires or permits. The preciseness required of the standards will depend on the complexity of the subject. [*Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 51; 367 NW2d 1 (1985).]

The Court will first address plaintiff's challenges to the EMA, which makes the Governor "responsible for coping with dangers to this state or the people of this state presented by a disaster or emergency." MCL 30.403(1). The Act permits the Governor to issue orders to implement the act and it empowers her to issue emergency and disaster declarations. MCL 30.403(3)-(4). That authority is not unchecked, however, as the statute sets forth definitions for "emergency," and "disaster" that provide some measure of guidance for the Governor's use of authority under the Act. See MCL 30.402(e); MCL 30.402(h). Furthermore, the EMA goes on to describe the authority and duties of the Governor under the Act, with MCL 30.405(1)(a)-(j) detailing ten subjects (nine particular subjects and one catch-all provision) on which the Governor can issue orders under the Act. Those orders can only be issued "upon the declaration of a state of disaster or a state of emergency . . . ." MCL 30.405(1).

When viewing the statute as a whole and considering the complexity of the subject sought to be addressed, plaintiff cannot demonstrate a substantial likelihood of success on the assertion that the EMA is an unconstitutional, standard-less delegation of legislative authority to the Governor. See *Blue Cross & Blue Shield*, 422 Mich at 51. At the outset, the Court's analysis on this issue must be informed by the notion that the EMA's very purpose is to permit the Governor to deal with a highly complex emergency or disaster situation. Caselaw cautions that the more difficult a particular subject-matter is to regulate, the more impractical it is for the Legislature to provide specific, exacting standards for the delegation of authority. *State Conservation Dep't*, 396 Mich at 309. Thus, generalized standards can be appropriate. *Id*. And here, the Court concludes that the parameters and standards set forth in the EMA, at least at this stage, are of the type that pass constitutional muster. The EMA is not an unfettered, unchecked grant of power to the Governor. Rather, the statute specifies that the Governor, in emergency or disaster situations, is to be given certain, defined authority. The fact that this authority is limited to statutorily defined "emergencies" or "disasters" provides some measure of standards. Additionally, the Legislature imposed regulations on the subject-matter to be reached by the Governor's orders, as well as with respect to the duration of the orders. See MCL 30.405(1) (prescribing the subject-matter that can be regulated by way of executive order); MCL 30.405(3)-(4) (placing a 28-day limit on certain orders issued by the Governor). The Legislature also implemented a method by which the Governor can work with the Legislature after a certain period of time. See MCL 30.403(3)-(4). In sum, while the Court acknowledges that the authority granted under the EMA is undoubtedly broad in some respects, the grant of authority does not sound in the nature of statutes that have run afoul of the non-delegation doctrine. Cf. *Blue Cross & Blue Shield*, 441 Mich at 55 (finding an impermissible delegation of authority where the statute contained a "lack of standards defining

and directing" the delegated authority). A plain reading of the EMA does not support the notion that the statute contains the kind of "uncontrolled, arbitrary power" that our Supreme Court has cautioned against in non-delegation cases. See *State Conservation Dep't*, 396 Mich at 308-309.[2]

Plaintiff's ability to succeed on its challenge to the delegation of authority contained in the EPGA is no less dubious. While the EPGA is a much less detailed act than its subsequently enacted counterpart, it nonetheless sets some standards for the Governor's exercise of authority. The authority exercised by the Governor under the EPGA can only be invoked if public safety is or will be imperiled. MCL 10.31(1) makes clear that authority under the Act is only bestowed on the Governor. "[d]uring 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 statute continues by describing that any rules or regulations imposed by the Governor must be "reasonable" and "necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1). The Court concludes that the terms "reasonable" and "necessary" carry more significance than plaintiff assigns to them, particularly when they are read in light of the statute's goals of protecting life and property and combating an emergency or disaster scenario. See *Klammer v Dep't of Transp*, 141 Mich App 253, 262; 367 NW2d 78 (1985) (concluding that a delegation of authority that empowered the decisionmaker to take action that was deemed "necessary" in response to a particular situation was a sufficiently precise standard in the context of the statute at issue). Moreover, when scanning the EPGA for additional criteria, the Court notes

[2] The Court notes that Judge Murray reached a similar decision when denying injunctive relief in the case of *Martinko v Whitmer*, Docket No. 20-00062-MM (issued April 29, 2020).

that the statute contains a list of subjects over which the Legislature granted the Governor authority, as well as one area where the Legislature expressly stated that the Governor was not permitted to act. See MCL 10.31(1) & (3) (permitting the Governor to control matters such as traffic, transportation, places of amusement and assembly, and to establish curfews, but expressly declaring that the Governor cannot seize, take, or confiscate lawfully possessed firearms or other weapons). Finally, the Act specifies that the Governor is to exercise the state's police power in order "to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster." MCL 10.32. The Court concludes at this stage of the litigation that the phrase, "adequate control," and the reference to that control lasting only for periods of public crisis or disaster guides the Governor's exercise of authority. Hence, the plain language of the act, contrary to plaintiff's contentions, describes standards and limitations on the Governor's exercise of authority under the EPGA. While the level of authority conferred upon the Governor may be broad—and at times frustrating in practice—it does not appear on plaintiff's motion to be the type that would warrant relief under the non-delegation doctrine.

Furthermore, in evaluating the EPGA, just as it did when evaluating the EMA, the Court must remain cognizant that the situation sought to be controlled by the EPGA is an unpredictable, dangerous emergency or disaster situation. A disaster or emergency is almost assuredly a dynamic, unpredictable situation fraught with complexity. It is unreasonable to expect a demanding or precise set of legislative standards be incorporated into the EPGA in order to deal with such a demanding scenario. See *State Conservation Dep't,* 396 Mich at 309 (explaining that "[t]he preciseness of the standard will vary with the complexity and/or the degree to which subject regulated will require constantly changing regulation.").

B. PLAINTIFF'S ALLEGED IRREPARABLE HARM FALLS SHORT AS WELL

Although the above analysis in and of itself would cause the Court to deny injunctive relief, the Court finds plaintiff's assertion of irreparable harm falls short of that which is required to demonstrate entitlement to preliminary injunctive relief. A "particularized showing of irreparable harm . . . is . . . an indispensable requirement to obtain a preliminary injunction." *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008) (citation and quotation marks omitted). The harm must be particularized; a "generalized argument that a constitutional violation would result in harm is insufficient because it is not particularized." *Hammel v Speaker of House of Representatives*, 297 Mich App 641, 652; 825 NW2d 616 (2012). The problem in the instant case is that plaintiff has only generally asserted the harm it allegedly suffered by generically alleging constitutional violations. Plaintiff has not articulated particularized, individual harm. Furthermore, caselaw again cautions that, in the absence of bad faith on the part of a public body—which has not been alleged in this case—"there is no real and imminent danger of irreparable injury requiring issuance of an injunction." *Davis*, 296 Mich App at 621. Plaintiff's failure to assert a particularized irreparable injury in the absence of injunctive relief represents an independent reason to deny the motion for preliminary injunction.

III. CONCLUSION

Both the EMA and the EPGA confer broad authority upon the office of the Governor. History will determine whether the Governor is judiciously exercising this authority in response to the COVID-19 pandemic. But, for the reasons stated herein:

IT IS HEREBY ORDERED that plaintiff's motion for preliminary injunction is DENIED.

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

May 19, 2020

Michael J. Kelly
Judge, Court of Claims