STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN HOUSE OF REPRESENTATIVES
and MICHIGAN SENATE,

Plaintiffs/Appellants,

Docket No. 353655
LC No. 20-000079-MZ

v.

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

Defendant/Appellee.

_____/

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THE LONANG INSTITUTE'S MOTION
FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The LONANG Institute moves this Court for leave to file a brief as amicus curiae in this Court, and states in support of its motion:

1. The LONANG Institute is a Michigan-based, nonprofit and nonpartisan research and educational institute concerned with application of the "Laws of Nature And of Nature's God" a phrase used in the United States Declaration of Independence, 1776. The "law of nature" was a common term used by historic legal writers. The framers of the Declaration of Independence made the extraordinary claim that the laws of nature and of nature's God served as legal authority justifying the people in declaring independence and establishing certain principles

of human freedom that preexisted the existence of civil governments. This same law also presupposed that any such government to be created was obliged to secure those freedoms, not alienate them.

2. The LONANG Institute has a deep interest in the outcome of this matter. The Governor's executive orders offend law itself. They violate the separation of powers as constitutionally mandated. They constitute the exercise of legislative power while posing as executive in nature. They trample down due process and the Article I rights of the people, and constitute unlawful preventative detention of persons who have done nothing to their neighbor except breathe. They resurrect the spirit of Monarchy, of Queen Anne and King George I and revive the slave codes of our former British and continental masters. They ignore human liberties, impair our freedoms and subject ten million people to the policeman's club and jailhouse for nothing more than the attempted enjoyment of Constitutional rights and basic human freedom. These orders are not sustainable under any construction of the emergency acts of the legislature.

3. The Institute hopes that its discussion of the Colonial Acts of 1705 and 1723, in particular, will aid the Court in recalling that governmental prohibitions on social gathering and travel, except by permission, are nothing new. The Constitution's Articles on Executive and Legislative power are also discussed with a specific focus on how to tell the difference between each power without regard to their appearance, but rather by examination of their purpose and nature.

4. As friend of the Court, the Institute seeks to present to the Court a different perspective regarding the issues in this case then those presented by the parties.

5. Michigan's judicial policy favors amicus filings. *Grand Rapids v Consumers Power Co*, 216 Mich 409, 414-415; 185 NW 852 (1921).

WHEREFORE, The LONANG Institute requests that this Court enter an order granting this Motion for Leave to File Amicus Curiae Brief and accept for filing the proposed amicus curiae brief, which is attached as **Exhibit A**.

Date: June 19, 2020.

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EXHIBIT A

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AMICUS BRIEF OF LONANG INSTITUTE

"Under the law of nature, all men are born free,
every one comes into the world with a right to his own person,
which includes the liberty of moving and using it at his own will.
This is what is called personal liberty and is given him by the author of nature,
because [it is] necessary for his own sustenance."

Thomas Jefferson,
Argument in *Howell v. Netherland*
April 1770,[1]

[1] Paul Leicester Ford, ed., The Writings of Thomas Jefferson (New York: G. P. Putnam's Sons, 1892), 1:373–381.

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INTRODUCTION

As with multiple executive orders which preceded it, Executive Order 2020-92 declared:

> "3. Subject to the exceptions in section 8 of this order, all individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence. Subject to the same exceptions, all public and private gatherings of any number of people occurring among persons not part of a single household are prohibited."

Section 8 provides that "individuals may leave their home or place of residence, and travel as necessary," and that "[A]ll other travel is prohibited." The Governor has ordered all persons within the State of Michigan to stay at home, and that all lawful travel from the home is prohibited unless the Governor specifically permits such travel. Order 2020-96 repeated this metallic command.[2]

Michigan has a population of 9,925,568 million persons. The Governor's order directed that 9,925,568 million persons must stay at home unless she specifically permits them to leave home. She claims this authority is granted to her under State law and the Constitution of the State of Michigan. The Governor also affirmed her prerogative to "maintain, intensify, or relax the restrictions" in her orders. Any question of mootness should be discarded based on her affirmative declarations that she reserves the prerogative to intensify even her most aggressive

[2] Order 2020-96, which followed, contained the same language, but allowed social gatherings of up to 10 persons. It was effective through May 28, 2020, and then extended through June 12, 2020 by Executive Order 2020-100. Executive Order 2020-21, initially ordered all people in Michigan to stay home. Executive Orders 2020-42, 2020-59, 2020-70, 2020-77, 2020-92, and 2020-96 followed suit. Executive Order 2020-110 lifted the requirement that Michiganders stay at home effective June 1, 2020, but prohibited indoor social gathering of more than 10 unrelated persons and outdoor social gatherings of more than 100 persons. The Governor, however, reserved to herself the prerogative to "maintain, intensify, or relax the restrictions in this order." On June 5, 2020, she issued Executive Order 2020-115, which prohibited indoor social gatherings of more than 50 unrelated persons and outdoor social gatherings of more than 250 persons. The Governor again reiterated her prerogative to "maintain, intensify, or relax the restrictions in this order."

orders.[3] Nor is this controversy mooted by the Governor's manumission of ten million persons from their homes under Executive Order 2020-110.[4] The Court of Claims has examined these claims of authority; approving some and disapproving others. See Michigan House of Representatives, and Michigan Senate, v. Governor Gretchen Whitmer, Case No. 20-000079-MZ, (Mich. Ct. Cl., May 21, 2020) (Governor's action of re-declaring the same emergency violated the provisions of the Emergency Management Act (EMA), but not the Emergency Powers of Governor Act (EPGA)). From this decision the Plaintiffs appealed.

Rather than locking down the entire state, she should have quarantined the sick after an individualized determination established a virial condition. "Courts may be controlled by the determination of an executive board skilled as to what constitutes a dangerous communicable disease and may not attempt to review such classification; but the method adopted or exercised to prevent the spread thereof must bear some true relation to the real danger, and be reasonable, having in mind the end to be attained, and must not transgress the security of the person beyond public necessity." Rock v. Carney, 216 Mich. 280, 296, 185 N.W. 798, 799 (1921). If the Governor or a health officer had power at all to examine any person to determine whether he or she had any sickness or disease, neither had the right to "exercise such power without reasonable

[3] The Governor asserts that: "The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945 provides that, after declaring a state of emergency, "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." MCL 10.31(1)."

[4] "With this order, I find it reasonable and necessary to move the state to Stage 4 of the Michigan Safe Start Plan. As a result, Michiganders are no longer required to stay home."

cause, such cause to precede the examination and not to depend on the result thereof, and in any event had no right to examine [a person] as long as [that person] had no accuser."[5]

The Governor's Orders provide for no mechanisms to make an individualized determination of infection, nor would same justify her mass confinement of healthy persons contrary to due process. The proper and lawful response was to quarantine the identified sick, not the unidentified healthy.

ARGUMENT

I. Laws Requiring Sheltering In Place And Prohibiting Social Gatherings Imposed Upon African-American Slaves Residing In The Royal Colony Of Virginia While Governed By English Monarchs Demonstrate That Governor Whitmer's Executive Orders Have Historical Precedent.

In 1624 King James I of England revoked the Charter of the Virginia Company and established Virginia as a Royal or Crown Colony of the King. It then became a dependent territory of the United Kingdom administered by a Governor who was directly controlled and appointed by the government on behalf of the Monarch. The colonial legislature of Virginia was the General Assembly, which governed in conjunction with the appointed Governor who, in 1705, was Lord George Hamilton, 1st Earl of Orkney. He governed *in absentia* from England, so Lieutenant Governor Col. Edward Nott served in his stead in the Colony.

A. An Act Concerning Servants and Slaves (1705).

In 1705, Anne was Queen of Great Britain, serving from 1702 to 1714. In October 1705, in the fourth year of Queen Anne's reign, the Virginia colonial legislature enacted a law concerning servants and slaves. Article 32 thereof declared "that no master, mistress, or overseer

[5] "If the health officer had power at all to examine plaintiff, he had no right to exercise it without reasonable cause; such cause to precede examination and in no way to depend upon the result of examination. In any event, the defendant had no right to suspect and examine plaintiff so long as she had no accuser." Rock v. Carney, 216 Mich. 280, 299, 185 N.W. 798, 800 (1921).

of the family, shall knowingly permit any slave, not belonging to him or her, to be and remain upon his plantation, above four hours at any one time, without the leave of such slave's master, Mistress, or overseer, on penalty of one hundred and fifty pounds of tobacco to the informer."

Article 35 also declared: "that no slave go armed with gun, sword, club, staff, or other weapon, nor go from off the plantation and seat of land wherein such slave shall be appointed to live, without a certificate in writing, for so doing, from his or her master, mistress, or overseer" subject to twenty lashes on the bareback "well laid" for violations thereof.

Finally, Article 15 declared: "that no person whatsoever shall, buy, sell, or receive, to, or from, any servant, or slave, any coin or commodity whatsoever, without the leave, license, or consent of the master or owner of said servant, or slave." (William Waller Hening, ed., *The Statutes at Large; Being a Collection of All the Laws of Virginia from the First Session of the Legislature, in the Year 1619*, (Philadelphia: R. & W. & G. Bartow, 1823), 3:447–463.)[6] See Exhibit 1.

Restating each of the foregoing in language of current common usage, Article 32 prohibited "social gatherings" of any number or slaves for more than four hours without the permission of the master. Article 35 required a slave to "shelter in place" by prohibiting him or her from leaving their assigned residence without the written permission of the master. It also prohibited slaves from bearing offensive weapons including guns. Article 15 ordered all retail stores and businesses in the Commonwealth closed to slaves by prohibiting them from engaging in commerce with slaves without the written consent of their master.

As with multiple executive orders which preceded it, Executive Order 2020-92 followed suit. Without regard to the citizenship of Michigan residents, the order declares that "all

[6] https://www.encyclopediavirginia.org/_An_act_concerning_Servants_and_Slaves_1705

individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence." The order permits an individual to leave home only with the written permission of the Governor. The Governor has granted permission to certain persons in certain instances as stated in each order she decrees, in Q&A pages she posts on the State of Michigan websites, and in press conferences she gives at her pleasure. Article 35 and the Governor's Executive Order 2020-92 are in agreement on the principle that a person's freedom of movement may be prohibited except where permitted by leave of the state.

The spirit, if not the letter of Article 35, is also copied in the Governor's executive orders. Article 35 prohibited a slave from going "from off the plantation and seat of land wherein such slave shall be appointed to live, without a certificate in writing of his or her master, mistress, or overseer." Order 2020–92 likewise prohibited "all public and private gatherings of any number of people occurring among persons not part of a single household" by any person living in Michigan. The only exception for a slave to leave the plantation is with permission of his or her "overseer." The only exception for an individual to leave his home is with the permission of the Governor.

Article 35 prohibited slaves from leaving their homes carrying guns and weapons. This precluded a slave from traveling to the seat of the General Assembly to protest relevant stay at home, shelter in place, and travel bans. The presence of arms, coupled with controversial debate on the legislative floor, constituted a potentially dangerous combination well worth the legislature taking action to block the possession and carrying of weapons.

The Michigan Attorney General's opinion 7311, issued May 11, 2020, affirms the authority of the Michigan State Capital Commission to prohibit firearms within the seat of Michigan government. This opinion came on the heels of a situation where armed persons who

declined to shelter in place pursuant to the Governor's order and who refused to remain in their homes or only travel when permitted, nevertheless left their homes armed. They traveled to the capital bearing those arms. The Attorney General's opinion states that "moments of controversial debate on the legislative floors inside the Capitol building—situations when emotions and passions are known to run high" were present. In other words, the Attorney General thinks this is a potentially dangerous combination--arms coupled with controversial debate on the legislative floor. Article 35 likewise appears to support the Attorney General's Opinion.

Yet, Article 35's prohibition on slaves leaving home (or from leaving home carrying guns and weapons) is nevertheless a like prohibition as found in the now rescinded Order 2020-96, section 8c. This section prohibits all travel except as specifically written in the Order itself. Unless the Governor gives an individual written authority to travel, that individual is prohibited from traveling. Under Article 35, unless the slave's "master, mistress, or overseer" gave the slave authority to travel in writing in a certificate, that individual is prohibited from traveling.

Finally, Article 15, which ordered retail stores and businesses closed to slaves by prohibiting them from engaging in commerce with slaves without the written consent of their master, is no different in principle than many executive orders. Executive Order 2020-20 imposed such restrictions, which were then supplemented by the restrictions on in-person work, travel, and gatherings imposed by Executive Order 2020-42. Executive Orders 2020-20 and 2020-42 were then replaced by Executive Orders 2020-43 and 2020-59, respectively. In Executive Orders 2020-42, 2020-59, 2020-69, 2020-70, 2020-77, 2020-92, and 2020-96, the Governor extended her initial order, modifying its scope as needed and appropriate to match the ever-changing circumstances as her sole discretion warranted.

Executive Order 2020-110 and 2020-115, are simply the most recent incarnations; barring businesses from engaging in commerce with individuals. To one degree or another, they all declare that no person whatsoever shall, buy, sell, or receive, to, or from, any individual in Michigan, any coin or commodity whatsoever, without the leave, license, or consent of the Governor of the State of Michigan. She now stands as the new "overseer" of 10 million people, dwarfing the slave population in Virginia which in 1740 stood at about 60,000 persons.

B. <u>An Act for the Better Government of Bond and Free Persons (1723).</u>

Queen Anne died in 1714 and was followed by George I of Great Britain. George I was the King of Great Britain and Ireland and ruled from 1714 to the time of his death in 1727. While the Virginia colony retained the same governor as under Queen Anne, a new Lieutenant Governor, Col. Hugh Drysdale, was appointed to govern the royal colony. The General Assembly enacted a law in 1723 serving several purposes including "for the better government of Negroes, Mulattos, and Indians, bond or free."

Article 8 of the Act declared: "that from henceforth no meetings of Negroes, or other slaves, be allowed, on any pretense whatsoever, (except as is hereafter excepted.)" The legislature further prohibited "any such meetings, or [to] suffer more than five Negroes or slaves, . . . to be and remain upon any plantation or quarter, at any one time" which was not the slaves' assigned place of residence. In other words, social gatherings of more than five persons outside the slaves' assigned residence was prohibited.

Article 9 permitted masters with more than one residence or plantation to permit their slaves to meet "by the license of such owner, or his or her overseer, at any of the quarters or plantations to such owner belonging, nor to restrain the meeting of any number of slaves, on their own owners are overseers business, at any public mill, so as such meeting be not in the night, or

on a Sunday." In other words, the slaves were permitted to travel between residences or plantations of the master with the Master's permission. Article 11 made it clear that the Justice of the Peace could punish such unlawful meetings. Article 12 made it clear that every Sheriff could also suppress and disburse such unlawful meetings and arrest the malefactors. (William Waller Hening, ed., *The Statutes at Large; Being a Collection of All the Laws of Virginia from the First Session of the Legislature, in the Year 1619* (Richmond, Virginia: R. & W. & G. Bartow, 1823), 4:126–134.) [7] See Exhibit 2.

By now it should be apparent that the Governor's orders prior to 2020-96, ordered that "all individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence" and that "all public and private gatherings of any number of people occurring among persons not part of a single household are prohibited" except as permitted.

Prior order permitted specific types of gatherings of 10 or less (to attend a funeral and addition recovery). Beginning with Executive Order 2020–92, social gatherings of no more than 10 persons were permitted in two regions of the State. Then 2020-96 permitted social gatherings of no more than 10 persons statewide. Order 2020-110 permitted indoor social gatherings of no more than 10 unrelated persons and outdoor social gatherings of no more than 100 persons. Executive Order 2020-115 increased those limits to 50 and 250, respectively.

But prior executive orders, such as 2020-77, were harsher in comparison to Articles 8 and 9 of the General Assembly's 1723 law. That law permitted any number of slaves to congregate and meet at their assigned residence or plantation. The Governor's prior orders simply banned all

[7] https://www.encyclopediavirginia.org/_Act_directing_the_trial_of_Slaves_committing_capital_crimes_and_for_the_more_effectual_punishing_conspiracies_and_insurrections_of_them_and_for_the_better_government_of_Negros_Mulattos_and_Indians_bond_or_free_1723

social gatherings in a person's own home of people other than those related by blood or marriage.

The 1723 law permitted slaves to travel between multiple residences, but the Governor's earlier orders prohibited travel between individual Michigander's residences. The 1723 order prohibited five or more slaves from socially gathering outside their residences at another's dwelling or plantation, but the Governor's prior order prohibited all individuals from socially gathering at another dwelling.

In summary, the General Assembly's Acts of 1703 and of 1723 under the rule of English Monarchs share a common set of prohibitions with Governor Whitmer's Executive Orders. Each prohibits leaving one's home without permission. Each prohibits social gathering without permission. Each prohibits travel without permission. The Acts demonstrates that a slave's personal liberty may be abridged for the protection and security of the people. The Governor's Executive Orders, likewise, demonstrate that a citizen's personal liberty may be abridged for their own purported protection and security.

Can abridgment of the personal liberties of slaves be legally justified? Can abridgment of the personal liberties of citizens be legally justified? ***Is there a Constitutional basis to establish a slave ought to be free from laws compelling sheltering in place and banning unapproved travel, while at the same time a free person ought to be treated like a slave by compelling sheltering in place and banning unapproved travel?***

Yet, despite the Governor's inadvertent adoption and perpetuation of both the letter and spirit of these apparently living and breathing legislative measures--measures that *prohibit personal liberty except where permitted,* Amicus offers arguments to the contrary for consideration.

II. The Constitutional Power Of The Executive Branch Does Not Include Legislative Power, Regardless Of The Construction Placed On Any Subordinate Emergency Power Statute.

A. Power Sharing is Constitutionally Prohibited.

The Michigan Constitution Art. V, Sec. 1 declares: "[E]xcept to the extent limited or abrogated by article V, section 2, or article IV, section 6, the executive power is vested in the governor."[8] Likewise, Article IV, Sec. 1 provides that: "[E]xcept to the extent limited or abrogated by article IV, section 6 or article V, section 2, the legislative power of the State of Michigan is vested in a senate and a house of representatives." Article III, Sec. 2 reaffirms the distinctive nature of each power and prohibits power sharing arrangements. It states: "[T]he 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."

This is the Constitutional lens through which MCL 30.403(1)-(2) and MCL 10.31(1) must be viewed.

In these three provisions the Michigan Constitution provides this Court with all the legal authority it needs to decide the question before it: Is Executive Order 2020-92 (including its predecessors and all successors, such as, Orders 2020-96, 2020-110 and 2020-115) the exercise

[8] Referencing a similar grant of executive power to the President in Article II of the United States Constitution, Justice Jackson remarked: "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. Continental European examples were no more appealing. And if we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian. I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641, 72 S. Ct. 863, 873, 96 L. Ed. 1153 (1952).

of legislative power under any Emergency Act? No Act of the legislature, emergency or otherwise, can extend to the Executive branch any legislative power. No Governor has authority to "safeguard" the people from their own freedoms. Nor may the legislature grant such authority. If any Act is so construed, then Article 3, Section 2, puts its foot down and prohibits the legislature from sharing it with the Governor. It, likewise, prohibits the Governor from exercising it.[9]

Separation of powers is not new territory for Michigan Courts. The Michigan Constitution provides that the Legislature is to exercise the "legislative power" of the State, Const. 1963, Art. IV, § 1, the Governor is to exercise the "executive power," Const. 1963, Art. V, § 1, and the judiciary is to exercise the "judicial power," Const. 1963, Art. VI, § 1. The importance of these allocations of power is reaffirmed in Const. 1963, Art. III, § 2, which states: "[T]he 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." By separating the powers of government, the framers of the Michigan Constitution sought to disperse governmental power and thereby limit its exercise. Nat'l Wildlife Fed'n v. Cleveland Cliffs Iron Co., 471 Mich. 608,

[9] "In deciding this question [as to the authority of the governor], recurrence must be had to the constitution. That furnishes the only rule by which the court can be governed. That is the charter of the governor's authority. All the powers delegated to him by, or in accordance with that instrument, he is entitled to exercise, and no others. The constitution is a limitation upon the powers of the legislative department of the government, but it is to be regarded as a grant of powers to the other department. Neither the executive nor the judiciary, therefore, can exercise any authority nor power except such as is clearly granted by the constitution." Field v. People ex rel. McClernand, 2 Scam. 80; 3 Ill. 79, 80 (1839), Cooley, *Const. Limitations*, fn. 2, pp. 115-116. Section 12 of Article V of the 1870 Illinois Constitution overruled Field v. People ex rel. McClernand, which held that the Governor's removal power was not to be implied as an inherent part of the executive power; rather, the Governor had only the power of removal expressly provided by the Illinois Constitution.

613, 684 N.W.2d 800, 805–06 (2004), *overruled on other grounds* by Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 487 Mich. 349, 792 N.W.2d 686 (2010). See also Judicial Attorneys Ass'n v. State, 459 Mich. 291, 296, 586 N.W.2d 894, 896 (1998) (The power of each branch of government within its separate sphere necessarily includes managerial administrative authority to carry out its operations.)

Justice Thomas Cooley wrote on this subject as well. He stated that: "[T]he legislative power is the authority, under the Constitution, to make laws, and to alter and repeal them. Laws, in the sense in which the word is here employed, are rules of civil conduct, or statutes, which the legislative will has prescribed." He further states: "[T]he laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws" quoting Swift v. Tyson, 41 US 1, 18 (1842) (overruled on other grounds in Erie R. Co. v. Tompkins, 304 U.S. 64, 71, 58 S. Ct. 817, 819, 82 L. Ed. 1188 (1938)).

He also quotes Chief Justice Marshall, Ch. J., in Wayman v. Southard, 23 US 1, 46 (1825) that: "[T]he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law." See Thomas Cooley, *A Treatise on the Constitutional Limitations* (Little, Brown & Co., 1871) at 88, 90-92.

B. Enacting And Repealing Rules Generally Applicable To The Body Of People Is Legislative In Nature. An Executive Order Binding 10 Million People Is A Rule Of General Applicability And Therefore The Exercise Of Legislative, Not Executive Power.

As noted above, legislative power pertains to making law. Laws bind the people generally within the legislature's jurisdiction. The executive, on the other hand, implements the laws the legislature has made. The executive does not make law, set aside law, or suspend laws. The legislature alters or repeals laws pertaining to the whole people. The executive proclaims

and rescinds orders pertaining to the executive branch. The legislature establishes how long the law is in effect; establishing a sunset date in the law. The Governor does not.

Into which camp do these statements fall? "All individuals currently living within the State of Michigan are ordered to stay at home." "All public and private gatherings of any number of people occurring among persons not part of a single household are prohibited." "Individuals may leave their home or place of residence, and travel as necessary, ... All other travel is prohibited."

These statements apply to the entire population of persons within Michigan, about 10 million people. They do not merely apply to executive branch personnel. The Governor has no constitutional authority to bind the personal conduct of any individual State citizen who is unconnected with the executive branch by way of employment, much less the entire population of the State. An Executive Order which claims to bind 10 million people, being the entire population of the State, is a rule of general applicability and therefore, the exercise of legislative, not executive power. The Governor's statements fall into the legislative camp, because legislative power pertains to making laws and laws bind the people at large state-wide.

C. Prohibiting Conduct Is A Legislative Power. Executive Power Does Not Include The Power To Summarily Suspend The Constitutional Rights Of One Person, Let Alone 10 Million People.

These statements by the Governor prohibit all individual social gatherings and travel except as permitted. Prohibiting conduct is a legislative function. The entire criminal code of Michigan is built on this foundation.[10]

[10] However, not even the criminal code assumes as its foundational principle that all conduct is prohibited except that which the Code permits. Nor did the infamous Russian Soviet Federative Socialist Republic Penal Code, Article 58, effective February 25, 1927, assume that all conduct was prohibited except that which the Code permitted.

A review of MCL 10.31(1) and predominately MCL 30.403(3)-(4), suggest no such power to prohibit all individual social gatherings and travel except as permitted is given to the Governor. The Governor has power to alter and modify State functions within her branch and other related functions under MCL 30.405. She does not have power to order people to stay at home, prohibit the right of assembly with as many people as one would desire, alienate the free exercise of religion with as few or many people as one's conscience dictates, or close firearm retailers.

These rights are guaranteed by the Michigan Constitution, not Executive (or legislative) good will. See Article I, Sections 3 (assembly), 4 (religion), 5 (speech and press), and 6 (bear arms). These rights are not rights merely to be borne in one's home while "sheltering in place." These rights are rights to be enjoyed when and where Michigan citizens desire, not when and where the Governor of the State of Michigan might permit.

The execution of constitutionally recognized Executive power is plenary to secure these rights. The Governor, however, invokes this power to alienate these rights. Executive power does not include the power to summarily suspend the Constitutional rights of one person, let alone 10 million people. If rights are to be suspended, alienated or deprived, that is the province of the judiciary after due process, and a finding of guilt for the commission of a crime established by the legislature.

The private interests of 10 million people affected by the official action of the Governor, "is the most elemental of liberty interests—the interest in being free from physical detention by one's own government." Foucha v. Louisiana, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"); see also Parham v. J. R., 442 U.S.

584, 600, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) (noting the "substantial liberty interest in not being confined unnecessarily"). "In our society liberty is the norm," and detention without trial "is the carefully limited exception." United States v. Salerno, 481 U.S. 739, 746, 755, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). "We have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty," Foucha, *supra*, at 80, 112 S.Ct. 1780 (quoting *Salerno, supra*, at 750, 107 S.Ct. 2095). See Hamdi v. Rumsfeld, 542 U.S. 507, 529–30, 124 S. Ct. 2633, 2646, 159 L. Ed. 2d 578 (2004).

The United States Supreme Court has forcefully stated that in the context of the government's detention of an alleged enemy combatant during military operations in Afghanistan without any due process, that "as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat." See Ex parte Milligan, 4 Wall., at 125 ("[The Founders] knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen"). . . . We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails." Hamdi v. Rumsfeld, 542 U.S. 507, 530–31, 124 S. Ct. 2633, 2647, 159 L. Ed. 2d 578 (2004).

The Governor's Orders pay no attention whatsoever to any of these principles. Her "shelter in place" and "no unpermitted travel" home detention of 10 million people of unknown, possible, suspected, and future COVID-19 carriers without any due process is clearly not "as critical as the Government's interest may be in detaining" or quarantining those persons who either have the virus display symptoms, or have tested positive for the virus and, as such, who actually could pose an immediate health threat to the State's "security." Under the Governor's Orders, all persons are simply lumped together without regard to actual risk.

The Supreme Court recalled that history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat. The Governor's Orders both teach and demonstrate that mass detention is not simply a footnote of the past.

D. Prohibiting Human Liberty Except When And Where The Governor Permits, Is The Lawless Use Of Law, Not Lawful Executive Power.

Finally, in addition to its due process failures, the Governor's order is built on a lawless foundation—all conduct is prohibited unless the Executive permits it. This operative assault on the very notion of human liberty translates into a ban on all lawful and constitutionally protected conduct, unless she permits it in her orders, at her beck and call. This assumption remains in effect as long as her declared emergency remains in effect.

A government that starts with the assumption that it may punish all conduct except that which it specifically permits at its sole discretion is a totalitarian one, *i.e.*, of or relating to centralized control by an autocratic leader or hierarchy. This legal assumption embedded in the Governor's order should stab the judicial conscience to the marrow. The legislature did not empower the Governor pursuant to State law, to prohibit social gatherings and travel, and to ban all lawful and constitutionally protected conduct, "by her leave."

Nor could the legislature empower or authorize the Governor to apply or enforce a misdemeanor and fine penalty in any emergency statute. The legislature cannot transfer to the executive the exclusive legislative power to define crimes. The executive does not enjoy the constitutional power to both define and punish crimes. The fact that the legislature has decided the punishment of unwritten future criminal conduct in advance does not cure the defect. It merely makes it all the more odious as it lumps together at the present time, every person's possible future conduct and punishes them all as misdemeanors. The authority to define misdemeanors is not an executive one, but a legislative one. The executive branch has no authority to amend the criminal code.

Neither the executive, nor the legislature has any lawful authority to declare that the future exercise of Michigan Constitutional rights is a misdemeanor if the Governor has a mind to make it so, privately drafts an order defining the exercise of such rights as crimes in the dead of night, and issues her statecraft (now over 115 of them) the next morning. That she alleges they are based "facts and science" she downloads from the internet and her subordinates approve, does not justify the executive exercise of legislative power or the lawless use of law.

The Governor does enjoy a limited executive power in emergency situations as provided for by the various statutory grants principally authorizing it to be exercised over the executive branch in this or that instance. But those statutes can never create any constitutionally exercised executive power to bind 10 million people, prohibit all individual social gatherings and travel except as permitted, suspend the Constitutional rights of the people guaranteed to them under Article I of the Michigan Constitution, dissipate the due process liberty guarantees enjoyed by

free men and women, or rewrite and update the criminal code of Michigan. Otherwise, there appears to be no objective limit to the exercise of such a power.[11]

If, on the basis of statutory construction, either the Emergency Management Act or the Emergency Powers of Governor Act are construed to permit the Governor to prohibit all social gatherings and travel except as permitted, or enforce laws she has written, then those Acts must be found to be unconstitutional as applied, because they violate the separation of powers required by the Michigan Constitution.

CONCLUSION

The People of Michigan, when gracefully called upon, have amply demonstrated recognition of their own vulnerability to the virus. The people are capable of self-government. They are capable of understanding their own financial interests. They are capable of understanding their own medical interests and circumstances that directly threaten their own body, health and life. They are able to take steps to voluntarily govern themselves in matters of personal liberty to ensure their own protection and safety.

The Governor's orders involuntarily degrade this self-government. They violate the separation of powers as constitutionally mandated. They constitute the exercise of legislative

[11] By leaving one's home, one runs the risks of being in an automobile accident and also of being hit and possibly killed by a drunk or drugged driver. This is statistically verified. See the 2018 Michigan Annual Drunk Driving Audit issued by The Michigan State Police. The 2018 report notes that there was a total of 312,798 crashes from all causes. A total of 4593 people were injured in alcohol-only crashes. 799 people were injured in crashes involving both drugs and alcohol. There were 174 alcohol-only crashes that were fatal just last year. May the Governor declare an Automobile Accident or Drunk Driving Emergency and order that 10 million people stay at home to avoid this risk--a risk which is known from history and not based on the speculation of physicians and economists?
What of those dangers posed from within the home? Last year, residential structure fires in Michigan killed 139 people and – according to the National Fire Incident Reporting System (NFIRS) – Michigan fire departments responded to 13,909 residential structure fires in 2018. Would this Court affirm an Executive Order declaring this a state of emergency and sustain an accompanying order that all persons be removed from their homes to avoid death by residential fire.

power while posing as executive in nature. They trample down due process and the Article I rights of the people, and constitute unlawful preventative detention of persons who have done nothing to their neighbor except breathe. Her orders govern the entire population. They are not confined to the executive branch. They prohibit lawful social gatherings and travel. They pervert liberty into government authorized and permissive only conduct. They enslave the free. They resurrect the spirit of Monarchy, of Queen Anne and King George I. They revive the slave codes of our former British and continental masters. They ignore liberties, impair our freedoms and subject ten million people to the policeman's club and jailhouse for nothing more that the attempted enjoyment of Constitutional rights and basic human freedom. They are not sustainable under any construction of the emergency acts of the legislature because they are totalitarian and because they are not executive in nature.

Date: June 19, 2020.

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STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN HOUSE OF REPRESENTATIVES
and MICHIGAN SENATE,

Plaintiffs/Appellants,

Docket No. 353655
LC No. 20-000079-MZ

v.

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

Defendant/Appellee.
_____/

Exhibit 1

Encyclopedia Virginia
VIRGINIA HUMANITIES

Primary Resource

"An act concerning Servants and Slaves" (1705)

In "An act concerning Servants and Slaves," passed by the General Assembly in the session of October 1705, Virginia's colonial government collects old and establishes new laws with regards to indentured servants and slaves.

Transcription from Original

I.

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> *Be it enacted, by the governor, council, and burgesses, of this present general assembly, and it is hereby enacted, by the authority of the same,* That all servants brought into this country without indenture, if the said servants be christians, and of christian parentage, and above nineteen years of age, 'till they shall become twenty-four years of age, and no longer.

II.

Provided always, That every such servant be carried to the county court, within six months after his or her arrival into this colony, to have his or her age adjudged by the court, otherwise shall be a servant no longer than the accustomary five years, although much under the age of nineteen years; and the age of such servant being adjudged by the court, within the limitation aforesaid shall be entered upon the records of the said court, and be accounted, deemed, and taken, for the true age of the said servant, in relation to the time of service aforesaid.

III.

And also be in enacted, by the authority aforesaid, and it is hereby enacted, That when any servant sold for the custom, shall pretend to have indentures, the master or owner of such servant, for discovery of the truth thereof, may bring the said servant before a justice of the peace; and if the said servant cannot produce the indenture then, but shall still pretend to have one, the said justice shall assign two months time for the doing thereof; in which time, if the said servant shall not produce his or her indenture, it shall be taken for granted that there never was one, and shall be a bar to his or her claim of making use of one afterwards, or taking any advantage by one.

IV.

And also be in enacted, by the authority aforesaid, and it is hereby enacted, That all servants imported and brought into this country, by sea or land, who were not christians in their native country, (except Turks and Moors in amity with her majesty, and others that can make due proof of their being free in England, or any other christian country, before they

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> were shipped, in order to transportation hither) shall be accounted and be slaves, and such be here bought and sold notwithstanding a conversion to christianity afterward.

V.

And be it enacted, by the authority aforesaid, and it is hereby enacted, That if any person or persons shall hereafter import into this colony, and here sell as a slave, any person or persons that shall have been a freeman in any christian country, island, or plantation, such importer or seller as aforesaid, shall forfeit and pay, to the party from whom the said freeman shall recover his freedom, double the sum for which the said freeman was sold. To be recovered, in any court of record within this colony, according to the course of the common law, wherein the defendant shall not be admitted to plead in bar, any act or statute for limitation of actions.

VI.

Provided always, That a slave's being in England, shall not be sufficient to discharge him of his slavery, without other proof of his being manumitted there.

VII.

And also be in enacted, by the authority aforesaid, and it is hereby enacted, That all masters and owners of servants, shall find and provide for their servants, wholesome and competent diet, clothing, and lodging, by the discretion of the county court; and shall not, at any time, give immoderate correction; neither shall, at any time, whip a christian white servant naked, without an order from a justice of the peace: And if any, notwithstanding this act, shall presume to whip a christian white servant naked, without such order, the person so offending, shall forfeit and pay for the same, forty shillings sterling to the party injured: To be recovered, with costs, upon petition, without the formal process of an action, as in and by this act is provided for servants complaints to be heard; provided complaint be made within six months after such whipping.

VIII.

And also be it enacted, by the authority aforesaid, and it is hereby enacted, That all servants, (not being slaves,) whether imported, or become servants of their own accord here, or bound by any court or church-wardens, shall have their complaints received by a justice of the peace, who, if he find cause, shall

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> bind the master over to answer the complaint at court; and it shall be there determined: And all complaints of servants, shall and may, by virtue hereof, be received at any time, upon petition, in the court of the county wherein they reside, without the formal process of an action; and also full power and authority is hereby given to the said court, by their discretion, (having first summoned the masters or owners to justify themselves, if they think fit,) to adjudge, order, and appoint what shall be necessary, as to diet, lodging, clothing, and correction: And if any master or owner shall not thereupon comply with the said court's order, the said court is hereby authorised and impowered, upon a second just complaint, to order such servant to be immediately sold at an outcry, by the sheriff, and after charges deducted, the remainder of what the said servant shall be sold for, to be paid and satisfied to such owner.

IX.

Provided always, and be it enacted, That if such servant be so sick and lame, or otherwise rendered so uncapable, that he or she cannot be sold for such value, at least, as shall satisfy the fees, and other incident charges accrued, the said court shall then order the church-wardens of the parish to take care of and provide for the said servant, until such servant's time, due by law to the said master, or owner, shall be expired, or until

such servant, shall be so recovered, as to be sold for defraying the said fees and charges: And further, the said court, from time to time, shall order the charges of keeping the said servant, to be levied upon the goods and chattels of the master or owner of the said servant, by distress.

X.

And be it also enacted, That all servants, whether, by importation, indenture, or hire here, as well feme coverts, as others, shall, in like manner, as is provided, upon complaints of misusage, have their petitions received in court, for their wages and freedom, without the formal process of an action; and proceedings, and judgment, shall, in like manner, also, be had thereupon.

XI.

And for a further christian care and usage of all christian servants, *Be it also enacted, by the authority aforesaid, and it is hereby enacted,* That no negros, mulattos, or Indians, although christians, or Jews, Moors,

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> Mahometans, or other infidels, shall, at any time, purchase any christian servant, nor any other, except of their own complexion, or such as are declared slaves by this act: And if any negro, mulatto, or Indian, Jew, Moor, Mahometan, or other infidel, or such as are declared slaves by this act, shall, notwithstanding, purchase any christian white servant, the said servant shall, *ipso facto*, become free and acquit from any service then due, and shall be so held, deemed, and taken: And if any person, having such christian servant, shall intermarry with any such negro, mulatto, or Indian, Jew, Moor, Mahometan, or other infidel, every christian white servant of every such person so intermarrying, shall, *ipso facto*, become free and acquit from any service then due to such master or mistress so intermarrying, as aforesaid.

XV.

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> *And also be it enacted, by the authority aforesaid, and it is hereby enacted,* That no person whatsoever shall, buy, sell, or receive of, to, or from, any servant, or slave, any coin or commodity whatsoever, without the leave, licence, or consent of the master or owner of the said servant, or slave:

And if any person shall, contrary hereunto, without the leave or licence aforesaid, deal with any servant, or slave, he or she so offending, shall be imprisoned one calender month, without bail or main-prize; and then, also continue in prison, until he or she shall find good security, in the sum of ten pounds current money of Virginia, for the good behaviour for one year following; wherein, a second offence shall be a breach of the bond; and moreover shall forfeit and pay four times the value of the

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things so bought, sold, or received, to the master or owner of such servant, or slave: To be recovered, with costs, by action upon the case, in any court of record in this her majesty's colony and dominion, wherein no essoin, protection, or wager of law, or other than one imparlance, shall be allowed.

XVI.

Provided always, and be it enacted, That when any person or persons convict for dealing with a servant, or slave, contrary to this act, shall not immediately give good and sufficient security for his or her good behaviour, as aforesaid: then in such case, the court shall order thirty-nine lashes, well laid on, upon the bare back of such offender, at the common whipping-post of the county, and the said offender to be thence discharged of giving such bond and security.

[…]

XVIII.

[…]

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And if any woman servant shall have a bastard child by a negro, or mulatto, over and above the years service due to her master or owner, she shall immediately, upon the expiration of her time to her then present master or owner, pay down to the church-wardens of the parish wherein such child shall be born, for the use of the said parish, fifteen pounds current money of Virginia, or be by them sold for five years, to the use aforesaid: And if a free christian white woman shall have such bastard child, by a negro, or mulatto, for every such offence, she shall, within one

month after her delivery of such bastard child, pay to the church-wardens for the time being, of the parish wherein such child shall be born, for the use of the said parish fifteen pounds current money of Virginia, or be by them sold for five years to the use aforesaid: And in both the said cases, the church-wardens shall bind the said child to be a servant, until it shall be of thirty one years of age.

XIX.

And for a further prevention of that abominable mixture and spurious issue, which hereafter may increase in this her majesty's colony and dominion, as well by English, and other white men and women intermarrying with negroes or mulattos, as by their unlawful coition with them, *Be it enacted, by the authority aforesaid, and it is hereby enacted,* That whatsoever English, or other white man or woman, being free,

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shall intermarry with a negro or mulatto man or woman, bond or free, shall, by judgment of the county court, be committed to prison, and there remain, during the space of six months, without bail or mainprize; and shall forfeit and pay ten pounds current money of Virginia, to the use of the parish, as aforesaid.

XX.

And be it further enacted, That no minister of the church of England, or other minister, or person whatsoever, within this colony and dominion, shall hereafter wittingly presume to marry a white man with a negro or mulatto woman; or to marry a white woman with a negro or mulatto man, upon pain of forfeiting and paying, for every such marriage the sum of ten thousand pounds of tobacco; one half to our sovereign lady the Queen, her heirs and successors, for and towards the support of the government, and the contingent charges thereof; and the other half to the informer; To be recovered, with costs, by action of debt, bill, plaint, or information, in any court of record within this her majesty's colony and dominion, wherein no essoin, protection, or wager of law, shall be allowed.

[…]

XXIII.

And for encouragement of all persons to take up runaways, *Be it enacted, by the authority aforesaid, and it is hereby enacted,* That for the taking up of

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every servant, or slave, if ten miles, or above, from the house or quarter where such servant, or slave was kept, there shall be allowed by the public, as a reward to the taker-up, two hundred pounds of tobacco; and if above five miles, and under ten, one hundred pounds of tobacco: Which said several rewards of two hundred, and one hundred pounds of tobacco, shall also be paid in the county where such taker-up shall reside, and shall be again levied by the public upon the master or owner of such runaway, for re-imbursement of the same to the public. And for the greater certainty in paying the said rewards and re-imbursement of the public, every justice of the peace before whom such runaway shall be brought, upon the taking up, shall mention the proper-name and sur-name of the taker-up, and the county of his or her residence, together with the time and place of taking up the said runaway; and shall also mention the name of the said runaway, and the proper-name and sur-name of the master or owner of such runaway, and the county of his or her residence, together with the distance of miles, in the said justice's judgment, from the place of taking up the said runaway, to the house or quarter where such runaway was kept.

XXIV.

Provided, That when any negro, or other runaway, that doth not speak English, and cannot, or through obstinacy will not, declare the name of his or her masters or owner, that then it shall be sufficient for the said justice to certify the same, instead of the name of such runaway, and the proper name and sur-name of his or her master or owner, and the county of his or her residence and distance of miles, as aforesaid; and in such case, shall, by his warrant, order the said runaway to be conveyed to the public gaol, of this country, there to be continued prisoner until the master or owner shall be known; who, upon paying the charges of the imprisonment, or giving caution to the prison-keeper for the same, together with the reward of two hundred or one hundred pounds of tobacco, as the case shall be, shall have the said runaway restored.

XXV.

And further, the said justice of the peace, when such runaway shall be brought before him, shall, by his warrant commit the said runaway to the next constable, and therein also order him to give the said runaway so many lashes as the said justice shall think

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fit, not exceeding the number of thirty-nine; and then to be conveyed from constable to constable, until the said runaway shall be carried home, or to the country gaol, as aforesaid, every constable through whose hands the said runaway shall pass, giving a receipt at the delivery; and every constable failing to execute such warrant according to the tenor thereof, or refusing to give such receipt, shall forefeit and pay two hundred pounds of tobacco to the church-wardens of the parish wherein such failure shall be, for the use of the poor of the said parish: To be recovered, with costs, by action of debt, in any court of record in this her majesty's colony and dominion, wherein no essoin, protection or wager of law, shall be allowed. And such corporal punishment shall not deprive the master or owner of such runaway of the other satisfaction here in this act appointed to be made upon such servant's running away.

[…]

XXIX.

And be it enacted, by the authority aforesaid, and it is hereby enacted, That if any constable, or sheriff, into whose hands a runaway servant or slave shall be committed, by virtue of this act, shall suffer such runaway to escape, the said constable or sheriff shall be liable to the action of the party agrieved, for recovery of his damages, at the common law with costs.

[…]

XXXII.

And also be it enacted, by the authority aforesaid, and it is hereby enacted, That no master, mistress, or overseer of a family, shall knowingly permit any slave, not belonging to him or her, to be and

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remain upon his or her plantation, above four hours at any one time, without the leave of such slave's master, mistress, or overseer, on penalty of one hundred and fifty pounds of tobacco to the informer; cognizable by a justice of the peace of the county wherein such offence shall be committed.

[…]

XXXIV.

And if any slave resist his master, or owner, or other person, by his or her order, correcting such slave, and shall happen to be killed in such correction, it shall not be accounted felony; but the master, owner, and every such other person so giving correction, shall be free and acquit of all punishment and accusation for the same, as if such incident had never happened: And also, if any negro, mulatto, or Indian, bond or free, shall at any time, lift his or her hand, in opposition against any christian, not being negro, mulatto, or Indian, he or she so offending shall, for every such offence, proved by the oath of the party, receive on his or her bare back, thirty lashes, well laid on; cognizable by a justice of the peace for that county wherein such offence shall be committed.

XXXV.

And also be it enacted, by the authority aforesaid, and it is hereby enacted, That no slave go armed with gun, sword, club, staff, or other weapon, nor go from off the plantation and seat of land where such slave shall be appointed to live, without a certificate of leave in writing, for so doing, from his or her master, mistress, or overseer: And if any slave shall be found offending herein, it shall be lawful for any person or persons to apprehend and deliver such slave to the next constable or head-borough, who is hereby enjoined and required, without further order or warrant, to give such slave twenty lashes on his or her bare back, well laid on, and so send him or her home: And all horses, cattle, and hogs, now belonging, or that hereafter shall be-

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> long to any slave, or of any slaves mark in this her majesty's colony and dominion, shall be seised and sold by the church-wardens of the parish, wherein such horses, cattle, or hogs shall be, and the profit thereof applied to the use of the poor of the said parish: And also, if any damage shall be hereafter committed by any slave living at a quarter where there is no christian overseer, the master or owner of such slave shall be liable to action for the trespass and damage, as if the same had been done by him or herself.

XXXVI.

And also it is hereby enacted and declared, That baptism of slaves doth not exempt them from bondage; and that all children shall be bond or free, according to the condition of their mothers, and the particular direction of this act.

XXXVII.

And whereas, many times, slaves run away and lie out, hid or lurking in swamps, woods, and other obscure places, killing hogs, and committing other injuries to the inhabitants of this her majesty's colony and dominion, *Be it therefore enacted, by the authority aforesaid, and it is hereby enacted,* That in all such cases, upon intelligence given of any slaves lying out, as aforesaid, any two justices (*Quorum unus*) of the peace of the county wherein such slave is supposed to lurk or do mischief, shall be and are impowered and required to issue proclamation against all such slaves, reciting their names, and owners names, if they are known, and thereby requiring them, and every of them, forthwith to surrender themselves; and also impowering the sheriff of the said county, to take such power with him, as he shall think fit and necessary, for the effectual apprehending such out-lying slave or slaves, and go in search of them: Which proclamation shall be published on a Sabbath day, at the door of every church and chapel, in the said county, by the parish clerk, or reader, of the church, immediately after divine worship: And in case any slave, against whom proclamation hath been thus issued, and once published at any church or chapel, as aforesaid, stay out, and do not immediately return home, it shall be lawful for any person or persons whatsoever, to kill and destroy such slaves by such ways and means as he, she, or they shall think fit, without accusation or impeachment of any crime for the same: And if any slave, that hath run a-

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> way and lain out as aforesaid, shall be apprehended by the sheriff, or any other person, upon the application of the owner of the said slave, it shall and may be lawful for the county court, to order such punishment to the said slave, either by dismembring, or any other way, not touching his life, as they in their discretion shall think fit, for the reclaiming any such incorrigible slave, and terrifying others from the like practices.

XXXVIII.

Provided always, and it is further enacted, That for every slave killed, in pursuance of this act, or put to death by law, the master or owner of such slave shall be paid by the public:

XXXIX.

And to the end, the true value of every slave killed, or put to death, as aforesaid, may be the better known; and by that means, the assembly the better enabled to make a suitable allowance thereupon, *Be it enacted,* That upon application of the master or owner of any

such slave, to the court appointed for proof of public claims, the said court shall value the slave in money, and the clerk of the court shall return a certificate thereof to the assembly, with the rest of the public claims.

XL.

And for the better putting this act in due execution, and that no servants or slaves may have pretense of ignorance hereof, *Be it also enacted,* That the church-wardens of each parish in this her majesty's colony and dominion, at the charge of the parish, shall provide a true copy of this act, and cause entry thereof to be made in the register book of each parish respectively; and that the parish clerk, or reader of each parish, shall, on the first sermon Sundays in September and March, annually, after sermon or divine service is ended, at the door of every church and chapel in their parish, publish the same; and the sheriff of each county shall, at the next court held for the county, after the last day of February, yearly, publish this act, at the door of the court-house: And every sheriff making default herein, shall forfeit and pay six hundred pounds of tobacco; one half to her majesty, her heirs, and successors, for and towards the support of the government; and the other half to the informer. And every parish clerk, or reader, making default herein, shall, for each time so offending, forfeit and pay six hundred

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> pounds of tobacco; one half whereof to be to the informer; and the other half to the poor of the parish, wherein such omission shall be : To be recovered, with costs, by action of debt, bill, plaint, or information, in any court of record in this her majesty's colony and dominion, wherein no essoin, protection, or wager of law, shall be allowed.

XLI.

And be it further enacted, That all and every other act and acts, and every clause and article thereof, heretofore made, for so much thereof as relates to servants and slaves, or to any other matter or thing whatsoever, within the purview of this act, is and are hereby repealed, and made void, to all intents and purposes, as if the same had never been made.

Author
General Assembly

Transcription Source
William Waller Hening, ed., *The Statutes at Large; Being a Collection of All the Laws of Virginia from the First Session of the Legislature, in the Year 1619,* (Philadelphia: R. & W. & G. Bartow, 1823), 3:447–463.

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Related Articles

General Court Responds to Runaway Servants and Slaves (1640)
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"Negro womens children to serve according to the condition of the mother" (1662)
"An act prohibiting servants to goe abroad without a lycense" (1663)
"An act declaring that baptisme of slaves doth not exempt them from bondage" (1667)
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"Act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and Indians, bond or free" (1723)
Denying Free Blacks the Right to Vote (1724, 1735)

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STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN HOUSE OF REPRESENTATIVES
and MICHIGAN SENATE,

Plaintiffs/Appellants,

Docket No. 353655
LC No. 20-000079-MZ

v.

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

Defendant/Appellee.
_____/

Exhibit 2

Encyclopedia Virginia
VIRGINIA HUMANITIES

Primary Resource

"An Act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and *Indians*, bond or free" (1723)

In "An Act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and *Indians*, bond or free," passed by the General Assembly in the session of May 1723, Virginia's colonial government establishes laws with regards to the punishment of slaves and the overall government of slaves, free blacks, and Indians.

Transcription from Original

I.

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> WHEREAS the laws now in force, for the better ordering and governing of slaves, and for the speedy trial of such of them as commit capital crimes, are found insufficient to restraint heir tumultuous and unlawful meetings, or to punish the secret plots and conspiracies carried on amongst them, and known only to such, as by the laws now established, are not accounted legal evidence: And it being found necessary, that some further provision be made, for detecting and punishing all such dangerous combinations for the future,

II.

Be it enacted, by the Lieutenant-Governor, Council, and Burgesses, of this present General Assembly, and it is hereby enacted, by the authority of the same, That if any number of negros, or other slaves, exceeding five, shall at any time hereafter consult, advise, or conspire, to rebel or make insurrection, or shall plot or conspire the murder of any person or persons whatsoever, every such consulting, plotting, or conspiring, shall be adjudged and deemed felony; and the slave or slaves convicted thereof, in manner herein after directed, shall suffer death, and be utterly excluded the benefit of clergy, and of all laws made concerning the same.

III.

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> *And be it further enacted, by the authority aforesaid*, That every slave committing such offence, as, by the laws, ought to be punished with death, or loss of member, shall be forthwith committed to the common goal of the county, within which the said offence shall be committed, there to be safely kept; and that the sheriff of such county, upon such commitment, shall forthwith certify the same, with the cause thereof, to the Governor or Commander in Chief of this His Majesty's Colony and Dominion, for the time being, who is thereupon desired and impowered to issue a commission of Oyer and Terminer, to such persons as he shall think fit: Which persons, forthwith after the receipt of such commission, are impowered and required to cause the offender to be publicly arraigned and tried, at the court-house of the said county, and to take for evidence, the confession of the offender, the oath of one or more credible witnesses, or such testimony of Negroes, Mulattos, or Indians, bond or free, with pregnant circumstances, as to them shall seem convincing, without the solemnity of a jury: And the offender being by them found guilty, to pass such judgment upon such offender, as the law directs, for the like crimes; and on such judgment, to award execution.

IV.

And to the end, such Negros, Mulattos, or Indians, not being christians, as shall hereafter be produced as evidences, on the trial of any slave for capital crimes, may be under the greater obligation to declare the truth, *Be it enacted*, That where any such Negro, Mulatto, or Indian, shall upon due proof made, or pregnant circumstances appearing before any county court within this colony, be found to have given a false testimony, every such offender shall, without further trial, be ordered by the said court to have one

ear nailed to the pillory, and there to stand for the space of one hour, and then the said ear to be cut off; and thereafter, the other ear nailed in like manner, and cut off, at the expiration of one other hour; and moreover, to order every such offender thirty-nine lashes, well laid on, on his or her bare back, at the common whipping-post.

V.

And be it further enacted, That at every such trial of slaves committing capital offences, the person who shall be first named in the commission, sitting on such trial, shall, before the examination of every Negro,

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> Mulatto, or Indian, not being a christian, charge such evidence to declare the truth; which charge shall be in the words following, viz:

'YOU are brought hither as a witness; and, by the direction of the law, I am to tell you, before you give your evidence, that you must tell the truth, the whole truth, and nothing but the truth; and that if it be found hereafter, that you tell a lie, and give false testimony in this matter, you must, for so doing, have both your ears nailed to the pillory, and cut off, and receive thirty-nine lashes on your bare back, well laid on, at the common whipping-post.'

VI.

Provided always, and it is hereby intended, That the master or owner of any slave, to be arraigned and tried, by virtue of this act, may appear at the trial, and make what just defence he can for such slave, so that such defence do not relate to any formality in the proceedings on the trial.

VII.

And be it further enacted, by the authority aforesaid, and it is hereby enacted, That when any slave shall be convicted, by virtue of this act, the commissioners that shall sit on trial, shall put a valuation in money, upon such slave so convicted, and certify such valuation to the next assembly, that the said assembly may be enabled to make a suitable allowance thereupon to the master or owner of such slave.

VIII.

And whereas many inconveniences have arisen, by the meetings of great numbers of negros and other slaves: For prevention thereof, *Be it enacted, by the authority aforesaid, and it is hereby enacted*, That from henceforth no meetings of negros, or other slaves, be

allowed, on any pretence whatsoever, (except as is hereafter excepted.) And that every master, owner, or overseer of any plantation, who shall, knowingly or willingly, permit any such meetings, or suffer more than five negros or slaves, other than the negros or slaves belonging to his, her, or their plantations or quarters, to be and remain upon any plantation or quarter, at any one time, shall forfeit and pay the sum of five shillings, or fifty pounds of tobacco, for each negro or slave, over and above such number, that shall at any time hereafter so unlawfully meet or assemble, on his, her, or their plantation, to the informer: To be

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recovered, with costs, before any justice of the peace of the county where such offence shall be committed.

IX.

Provided always, That nothing herein contained, shall be construed to restrain the negros, or other slaves, belonging to one and the same owner, and seated at distinct quarters or plantations, to meet, by the licence of such owner, or his or her overseer, at any of the quarters or plantations to such owner belonging; nor to restrain the meeting of any number of slaves, on their owner's or overseer's business, at any public mill, so as such meeting be not in the night, or on a Sunday; nor to restrain their meeting on any other lawful occasion, by the licence, in writing, of their master, mistress, or overseers; nor to prohibit any slaves repairing to and meeting at church to attend divine service, on the lord's day, or at any other time set apart by lawful authority, for public worship: But that all and every such meetings, shall be accounted lawful meetings; any thing in this act contained to the contrary thereo notwithstanding.

X.

And be it further enacted, by the authority aforesaid, That if any white person, free negro, mulatto, or Indian, shall at any time hereafter be found in company with any such slaves, at any such unlawful meetings, as aforesaid, or harbor or entertain any negro, or other slave whatsoever, without the consent of their owners, he, she, or they, so offending, upon being thereof lawfully convicted, shall forfeit and pay the sum of fifteen shillings, or one hundred and fifty pounds of tobacco, to the informer: To be recovered, with costs, before any justice of the peace; and upon failure to make present paiment, shall have and receive, on his, her, or their bare backs, for every such offence, twenty lashes, well laid on. And every negro, mulatto, or indian slave, who shall come or assemble to such unlawful meetings, shall, upon information thereof made to any justice

of the peace of the county where such offence shall be committed, for every such offence, have and receive, on his or her bare back, any number of lashes, not exceeding thirty-nine.

XI.

And be it further enacted, by the authority aforesaid, and it is hereby enacted, That every justice of the peace of any county wherein such unlawful meetings shall happen, upon his own knowledge, or upon information thereof to him made, within ten days after such

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offence committed, shall forthwith issue his warrant to apprehend all such persons, who so met or assembled, and cause such offenders to be brought before him, or some other justice of the peace of the said county:—And that ever such justice, who shall fail in his duty herein, shall forfeit and pay the sum of fifty shillings, or five hundred pounds of tobacco, for every such offence.

XII.

And be it further enacted, by the authority aforesaid, That every sheriff, under-sheriff, or constable, who, upon his or their own knowledge, or upon information thereof to him or them made, of any such unlawful meetings, as aforesaid, shall fail forthwith to endeavour to suppress and disperse the same, and to carry the offenders before some justice of the peace, in order for the said offenders to receive due punishment, the sheriff, for every offence by him committed, shall forfeit and pay the sum of fifty shillings, or five hundred pounds of tobacco: Both which several fines, of fifty shillings, or five hundred pounds of tobacco, herein before-mentioned, shall be to the informer; and may be recovered, with costs, in any court or courts of record within this colony and dominion, by action of debt, bill, plaint or information, wherein no essoin, protection, or wager of law, shall be allowed, or any more than one imparlance. And the under sheriff, or constable, failing to perform his or their duty herein, for every offence by him or them committed, shall forfeit and pay twenty shillings, or two hundred pounds of tobacco, to the informer: To be recovered, with costs, before any justice of the peace of the county where such offence shall be committed.

XIII.

And be it further enacted, by the authority aforesaid, That if any negro, mulatto, or Indian slave, shall at any time hereafter presume to come and be upon the plantation of any person or persons whatsoever, without the leave or consent, in writing, of his or her

master, owner, or overseer, and without the consent and approbation of the owner or overseer of such plantation, it shall and may be lawful to and for the master, owner, or overseer of any such plantation or quarter, to correct and give such slave or slaves ten lashes, well laid on, on his or her bare back, for every such offence.

XIV.

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> *And be it further enacted, by the authority aforesaid*, That no negro, mulatto, or Indian whatsoever; (except as is hereafter excepted,) shall hereafter presume to keep, or carry any gun, powder, shot, or any club, or other weapon whatsoever, offensive or defensive; but that every gun, and all powder and shot, and every such club or weapon, as aforesaid, found or taken in the hands, custody, or possession of any such negro, mulatto, or Indian, shall be taken away; and upon due proof thereof made, before any justice of the peace of the county where such offence shall be committed, be forfeited to the seisor and informer, and moreover, every such negro, mulatto, or Indian, in whose hands, custody, or possession, the same shall be found, shall, by order of the said justice, have and receive any number of lashes, not exceeding thirty-nine, well laid on, on his or her bare back, for every such offence.

XV,

Provided nevertheless, That every free negro, mullatto, or indian, being a house-keeper, or listed in the militia, may be permitted to keep one gun, powder, and shot; and that those who are not house-keepers, nor listed in the militia aforesaid, who are now possessed of any gun, powder, shot, or any weapon, offensive or defensive, may sell and dispose thereof, at any time before the last day of October next ensuing. And that all negros, mullattos, or indians, bond or free, living at any frontier plantation, be permitted to keep and use guns, powder, and shot, or other weapons, offensive or defensive; having first obtained a licence for the same, from some justice of the peace of the county wherein such plantations lie; the said licence for the same, from some justice of the peace of the county wherein such plantations lie; the said licence to be had and obtained, upon the application of such free negros, mullattos, or indians, or of the owner or owners of such as are slaves; any thing herein contained to the contrary thereof, in any wise, notwithstanding.

XVI.

And be it further enacted, by the authority aforesaid, That if in the dispersing of any unlawful assemblies, pursuit of rebels or conspirators, or seizing the arms and ammunition of such as are prohibited by this act to keep the same, any slave shall happen to be killed or destroied, the court of the county where such slave shall be killed, upon application of the owner of such slave, and due proof thereof made, shall put

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> a valuation in money, upon such slave so killed, and certify such valuation to the next session of assembly, that the said assembly may be enabled to make a suitable allowance thereupon to the master or owner of such slave.

XVII.

And be it further enacted, by the authority aforesaid, That no negro, mullatto, or indian slaves, shall be set free, upon any pretence whatsoever, except for some meritorious services, to be adjudged and allowed by the governor and council, for the time being, and a licence thereupon first had and obtained. −− And that, where any slave shall be set free by his master or owner, otherwise than is herein before directed, it shall and may be lawful for the churchwardens of the parish, wherein such negro, mullatto, or indian, shall reside for the space of one month, next after his or her being set free, and they are hereby authorized and required, to take up, and sell the said negro, mullatto, or indian, as slaves, at the next court held for the said county, by public outcry; and that the monies arising by such sale, shall be applied to the use of the said parish, by the vestry thereof.

XIII.

And forasmuch, as the act passed in the fourth year of the reign of her late Majesty Queen Anne, intituled, *An act concerning servants and slaves*, whereby power is given to the county court, to order the dismembring of incorrigible runaways and other slaves, hath not had the intended effect, by reason of some misconstructions of the powers thereby granted, *Be it enacted*, That where any slaves shall hereafter be found notoriously guilty of going abroad in the night, or running away, and lying out, and cannot be reclaimed from such disorderly courses, by the common methods of punishment, it shall and may be lawful, to and for the court of the county, upon complaint and proof thereof to them made, by the owner of such slave, to order and direct every such slave to be punished, by dismembring, or any other way, not touching life, as the said county court shall think fit.

XIX.

And, for preventing all doubts which may arise, upon the construction of this, or any other act of assembly of this colony, touching the death of slaves under correction, or lawful punishment, *Be it enacted, by the authority aforesaid*, That if any slave shall happen to die by means of such dismembring, by order of the county court, or for or by reason of any stroke or

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> blow given, during his or her correction; by his or her owner, for any offence by such slave committed, or for or by reason of any accidental blow whatsoever, given by such owner; no person concerned in such dismembring correction, or accidental homicide, shall undergo any prosecution or punishment for the same; unless upon examination before the county court, it shall be proved, by the oath of one lawful and credible witness, at the least, that such slave was killed wilfully, maliciously, or designedly; neither shall any person whatsoever, who shall be indicted for the murder of any slave, and upon trial, shall be found guilty only of manslaughter, incur any forfeiture or punishment for such offence or misfortune.

XX.

Provided always, That nothing herein contained, shall be construed, deemed, or taken, to defeat or barr the action of any person or persons, whose slave or slaves shall happen to be killed by any other person whatsoever, or whose slaves shall happen to die thro' the negligence of any surgeon, or other person, undertaking the dismembring or cure of such slave, liable to such punishment by this act: But that all and every owner or owners of such slave or slaves, shall and may bring his or her action, for recovery of damages for such slave or slaves so killed or dying, as if this act had never been made.

XXI.

And be it further enacted, by the authority aforesaid, That all free negros, mullattos, or indians, (except tributary indians to this government) male and female, above the age of sixteen years, and all wives of such negros, mullattos, or indians, (except before excepted) shall be deemed and accounted tithables; any law, custom, or usage, to the contrary, in any wise, notwithstanding.

XXII.

And be it further enacted, by the authority aforesaid, That where any female mullatto, or indian, by law obliged to serve 'till the age of thirty or thirty-one years, shall during the time of her servitude, have any child born of her body, every such child shall serve the master or mistress of such mullatto or indian, until it shall attain the same age the mother of such child was obliged by law to serve unto.

XXIII.

And be it further enacted, by the authority aforesaid, and it is hereby enacted and declared, That no free negro, mullatto, or indian whatsoever, shall

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hereafter have any vote at the election of burgesses, or any other election whatsoever.

XXIV.

And be it further enacted, That the churchwardens of each parish, within this his Majesty's colony and dominion, at the charge of their parish, shall provide a true copy of this act, and cause entry thereof to be made in the register book of each parish; and shall, on some Sunday in the months of April and October, yearly, after divine service ended, at the door of every church and chapel in their parish, publicly read the same. And the sheriff of each county shall, at the court held for the county, in the months of June or July, yearly, publish this act, at the door of the courthouse of the said county. And every churchwarden and sheriff making default herein, shall, for each time so offending, forfeit and pay five hundred pounds of tobacco, to the informer: To be recovered, with costs, by action of debt, in any court or courts of record within this colony and dominion. And the minister or reader making default herein, shall, for each time so offending, forfeit and pay two hundred pounds of tobacco, to the informer: To be recovered, with costs, before any justice of the peace of the county wherein such default shall happen.

XXV.

And be it further enacted, by the authority aforesaid, and it is hereby enacted, That the act of assembly, made in the fourth year of the reign of our late sovereign lady Queen Anne, intituled, An Act for the speedy and easy prosecution of Slaves committing capital crimes, be from henceforth repealed and made void, to all intents, constructions, and purposes.

Author
General Assembly

Transcription Source

William Waller Hening, ed., *The Statutes at Large; Being a Collection of All the Laws of Virginia from the First Session of the Legislature, in the Year 1619* (Richmond, Virginia: R. & W. & G. Bartow, 1823), 4:126–134.

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