

STATE OF MICHIGAN
COURT OF APPEALS

ERIC OSTERGREN and JASON GILLMAN, JR.,

Plaintiffs-Appellants,

v

GOVERNOR and STATE OF MICHIGAN,

Defendants-Appellees.

UNPUBLISHED

March 18, 2021

No. 353732

Court of Claims

LC No. 20-000053-MZ

Before: MARKEY, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Plaintiffs appeal an order granting summary disposition to defendants in this action asserting that defendant Governor of Michigan lacked authority to suspend provisions of the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, in response to the COVID-19 pandemic. We dismiss the appeal as moot because the challenged executive order has been rescinded.

On March 10, 2020, in response to COVID-19, the Governor issued EO 2020-04, which declared a state of emergency under the Emergency Powers of the Governor Act of 1945 (EPGA), MCL 10.31 *et seq.*, and the Emergency Management Act of 1976 (EMA), MCL 30.401 *et seq.* See *In re Certified Questions*, ___ Mich ___, ___; ___ NW2d ___ (2020) (Docket No. 161492); slip op at 3 (summarizing some of the Governor’s executive orders relating to the COVID-19 pandemic). On April 1, 2020, the Governor “issued EO 2020-33, which declared a ‘state of emergency’ under the EPGA and a ‘state of emergency’ and ‘state of disaster’ under the EMA.” *Certified Questions*, ___ Mich at ___; slip op at 3. The Governor asked the Legislature to extend the states of emergency and disaster by 70 days. *Id.* The Legislature adopted a resolution “extending the state of emergency and state of disaster, but only through April 30, 2020.” *Id.*, citing Senate Concurrent Resolution No. 2020-24.

On April 5, 2020, the Governor issued EO 2020-38 in response to the COVID-19 pandemic. Citing her authority under the EMA and the EPGA, the Governor extended deadlines for responding to FOIA requests. EO 2020-38 provided, in relevant part:

To mitigate the spread of COVID-19, protect the public health, and provide essential protections to vulnerable Michiganders, it is crucial that all Michiganders

limit in-person contact to the fullest extent possible. This includes practicing social distancing and restricting in-person work and interaction to only that which is strictly necessary. At the same time, and as memorialized by Michigan’s Freedom of Information Act (“FOIA”), 1976 PA 442, as amended, MCL 15.231 *et seq.*, it remains the public policy of this state—and a priority of my administration—that Michiganders have access to “full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees,” so that they “may fully participate in the democratic process.” MCL 15.231(2). To balance this core priority with the steep and urgent demands posed by the COVID-19 pandemic, *it is reasonable and necessary to provide limited and temporary extensions of certain FOIA deadlines*, so that Michiganders may remain informed and involved in their government during this unprecedented crisis without unduly compromising the health and safety of this state and its residents. [EO 2020-38 (emphasis added).]

EO 2020-38 further provided that “[s]trict compliance with the required response periods set forth” in various provisions of the FOIA was “temporarily suspended.” EO 2020-38 extended the five-day response period set forth in MCL 15.235(2) to 10 days for FOIA requests received at a public body’s physical office by mail, hand delivery, or facsimile. A request was deemed to have been actually received under EO 2020-38 when an employee of the public body physically opened the envelope containing the request or physically took a faxed request from a fax machine. If COVID-19 interfered with the timely grant or denial of a FOIA request, the public body was permitted to extend the response period for as long as the public body deemed necessary but no longer than until the expiration of EO 2020-38 or any order that followed from EO 2020-38. Also, if a FOIA request required an in-person search or inspection of public records, the public body was permitted to defer that portion of the request until the expiration of EO 2020-38 or any order that followed from it. Under EO 2020-38, public bodies were to respond to FOIA requests as expeditiously as possible and by electronic means when possible. EO 2020-38 stated that it was to take immediate effect and continue through June 4, 2020, at 11:59 p.m.

On April 7, 2020, plaintiffs commenced this action seeking declaratory and injunctive relief with respect to EO 2020-38. Plaintiffs alleged that they were Michigan residents who had made or would be making FOIA requests for government records. Plaintiffs challenged the validity of EO 2020-38, asserting that it suspended and altered provisions of the FOIA in contravention of the FOIA and the Michigan Constitution. Plaintiffs contended that EO 2020-38 was not authorized by the EMA or the EPGA. Plaintiffs asked for a declaration that EO 2020-38 exceeded the Governor’s authority and was unlawful. Plaintiffs also asked for preliminary and permanent injunctive relief to bar the enforcement and utilization of EO 2020-38.

The parties filed competing motions for summary disposition, and on May 21, 2020, the trial court granted summary disposition to defendants. The trial court ruled that the EPGA authorized the issuance of EO 2020-38 and that the EPGA was not an unconstitutional delegation of legislative authority. The trial court did not address whether EO 2020-38 was authorized by the EMA.

On June 4, 2020, plaintiffs filed the instant appeal from the trial court’s order granting summary disposition to defendants. Meanwhile, on June 3, 2020, the Governor issued EO 2020-

112.¹ In EO 2020-112, the Governor noted that, on June 1, 2020, she issued EO 2020-110, “which moved the state to Stage 4 of the Michigan Safe Start Plan, terminating the requirement that Michiganders stay home unless critical work or activity to sustain or protect life requires it.” EO 2020-112 further stated, “In light of this transition, the temporary extension of certain FOIA deadlines provided by [EO] 2020-38 will no longer be necessary as soon as public bodies have an opportunity to plan for a return to normal FOIA response processes.” EO 2020-112 concluded, “[EO] 2020-38 is temporarily extended and will remain in effect through June 10, 2020. Effective June 11, 2020 at 12:01 a.m., [EO] 2020-38 is rescinded.”

Plaintiffs argue on appeal that the Governor lacked authority to issue EO 2020-38 under the EPGA and the EMA. We need not address those issues, however, because we agree with defendants that this appeal is moot because EO 2020-38 has been rescinded.²

As a general rule, an appellate court will not decide moot issues. A case is moot when it presents only abstract questions of law that do not rest upon existing facts or rights. An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief. [*B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) (citations omitted).]

See also *Garrett*, 314 Mich App at 449 (“A matter is moot if this Court’s ruling cannot for any reason have a practical legal effect on the existing controversy.”) (quotation marks and citation omitted). Plaintiffs seek declaratory and injunctive relief with respect to EO 2020-38. But EO 2020-38 no longer exists. It was rescinded effective on June 11, 2020. See EO 2020-112. There is thus no meaningful relief that this Court can grant plaintiffs. Any ruling by this Court would have no practical legal effect on an existing controversy. Therefore, this appeal is moot.

We will review a moot issue “if it is publicly significant, likely to recur, and yet likely to evade judicial review.” *Barrow v Detroit Election Comm*, 305 Mich App 649, 660; 854 NW2d 489 (2014) (quotation marks and citation omitted). The issues raised by plaintiffs regarding the scope of the Governor’s authority are not likely to recur and evade judicial review. As noted, EO 2020-38 has been rescinded since June 2020. Moreover, the Supreme Court has now clarified the limitations on the Governor’s emergency authority to address the COVID-19 pandemic. On October 2, 2020, the Supreme Court issued its opinion in *Certified Questions* and held as follows:

¹ Given that EO 2020-112 was issued after the trial court issued the May 21, 2020 order from which this appeal arises, a copy of EO 2020-112 is not in the lower court record, but EO 2020-112 is appended to defendants’ brief on appeal. Also, this Court may take judicial notice of an executive order. See MRE 201(e) (“Judicial notice may be taken at any stage of the proceeding.”); *Hatch v Maple Valley Twp Unit Sch*, 310 Mich 516, 533; 17 NW2d 735 (1945) (taking judicial notice of an executive order); *Johnson v Dep’t of Natural Resources*, 310 Mich App 635, 649; 873 NW2d 842 (2015) (taking judicial notice of a public record under MRE 201).

² We review de novo whether an issue is moot. *Garrett v Washington*, 314 Mich App 436, 449; 886 NW2d 762 (2016).

first, the Governor did not possess the authority under the [EMA] to declare a “state of emergency” or “state of disaster” based on the COVID-19 pandemic after April 30, 2020; and second, the Governor does not possess the authority to exercise emergency powers under the [EPGA] because that act is an unlawful delegation of legislative power to the executive branch in violation of the Michigan Constitution. Accordingly, the executive orders issued by the Governor in response to the COVID-19 pandemic now lack any basis under Michigan law. [*Certified Questions*, ___ Mich at ___; slip op at 2-3.]

On October 12, 2020, the Supreme Court issued an order in *House of Representatives v Governor*, 949 NW2d 276, 276 (Mich, 2020), reversing this Court’s

holding that the Governor possesses the authority to issue executive orders under the [EPGA]. As stated in [*Certified Questions*], the [EPGA] is incompatible with the Constitution of our state, and therefore, executive orders issued under that act are of no continuing legal effect.

Given the rescission of EO 2020-38 and the Supreme Court’s recent decisions clarifying the Governor’s emergency authority to address the COVID-19 pandemic, the issues raised by plaintiffs in this appeal are not likely to recur yet evade judicial review. This appeal is therefore dismissed as moot. See *B P 7*, 231 Mich App at 360 (dismissing appeal as moot). Accordingly, we do not address the substantive issues raised on appeal.

Dismissed as moot.

/s/ Ja/ne E. Markey
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola