STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Plaintiffs-Appellants,

v

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

Defendant-Appellee.

_____/

Supreme Court No. 161917

Court of Appeals No. 353655

Court of Claims No. 20-000079-MZ

Filed Under AO 2019-6

BRIEF OF HOUSE DEMOCRATIC LEADER CHRISTINE GREIG AND THE HOUSE DEMOCRATIC CAUCUS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE GOVERNOR WHITMER

Samuel R. Bagenstos (P73971)
625 S. State St.
Ann Arbor, MI 48109
(734)647-7584
sbagen@gmail.com

Nathan Triplett (P76683)
Democratic Legal Counsel
Michigan House of Representatives
PO Box 30014
Lansing, MI 48909-7514
517-373-5894
NTriplett@house.mi.gov

Attorneys for Amici Curiae

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases:

Constitutional and Statutory Provisions, Executive Orders, and Rules:

Other Authorities:

QUESTIONS PRESENTED

Amici, House Democratic Leader Christine Greig and the Members of the House Democratic Caucus, file this brief to address the following questions:

1. Whether the Emergency Powers of the Governor Act and the Emergency Management Act authorize the executive orders Governor Whitmer has issued to respond to the COVID-19 crisis.

   Amici answer: Yes.

2. Whether the Governor's executive orders violate the constitutional separation of powers.

   Amici answer: No.

INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

This Court's "goal in interpreting a statute is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Malpass v Dept of Treasury*, 494 Mich 237, 247–48; 833 NW2d 272, 277 (2013) (internal quotation marks omitted). As the Court has repeatedly recognized, "[t]he touchstone of legislative intent is the statute's language." *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78, 84–85 (2008). If statutory text is "clear and unambiguous," this Court "enforce[s] the statute as written." *Id.* (internal quotation marks omitted).

As we demonstrated in our *amicus* brief in the companion case *In re Certified Questions*, No. 161492, the text of the Emergency Powers of the Governor Act, MCL 10.31 *et seq.*, decisively supports the Governor's actions. And that is true even on the definitions offered by Plaintiffs here.

In their application for leave, Plaintiffs ritualistically nod to the principle that "the language of the statute" is "the best indicator" of legislative intent. App. for Leave 51 (internal quotation marks omitted). But theirs is an ersatz textualism. Plaintiffs point to a dizzying array of canons of construction. See *id.* at 23 (canon against surplusage); *id.* at 24 (*in pari materia* canon); *id.* at 26 (canon that the specific controls the general); *id.* (last-in-time canon); *id.* at 33 (elephants-in-mouseholes canon); *id.* at 41 (canon of constitutional avoidance). But they do so, not for the permissible purpose of identifying the plain meaning of the text, but instead to desperately avoid that plain meaning. And in doing so they run headlong into other canons, notably that repeals by implication are disfavored.

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[1] Pursuant to MCR 7.212(H)(3), *Amici* state that no counsel for a party authored this brief in whole or in part, nor did anyone, other than *Amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of the brief.

Plaintiffs' efforts to avoid the plain meaning of the EPGA's text are unavailing. This Court has recently explained, quoting the U.S. Supreme Court, that

> "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."

People v Pinkney, 501 Mich 259, 285 n.63; 912 NW2d 535, 549 n.63 (2018) (quoting *Connecticut Nat'l Bank v Germain*, 503 US 249, 253-254 (1992)). "If a statute is unambiguous, a court should not apply preferential or 'dice-loading' rules of statutory interpretation." *People v Hall*, 499 Mich 446, 454; 884 NW2d 561, 565 (2016) (internal quotation marks omitted).

As Justice Viviano put it just this year, "when the ordinary meaning of the text runs contrary to a canon, we must follow the text." *Honigman Miller Schwartz & Cohn LLP v City of Detroit*, No. 157522, 2020 WL 2530162, at *19 (Mich, May 18, 2020) (Viviano, J, concurring). The decision of the Court of Appeals fully accords with that rule. See slip op. 14 ("We cannot employ statutory-construction principles or doctrines used to discern legislative intent to produce an interpretation that conflicts with an explicit declaration of the Legislature's intent.").

In the end, the plaintiffs' argument rests on nothing more than heated rhetoric about the separation of powers. But once the rhetoric is stripped away, the law is clear: The Governor has done nothing more than exercise the powers the Legislature gave her in the EPGA. And the EPGA readily satisfies the standards this Court has elaborated in its separation of powers jurisprudence. The Governor's actions were thus fully legal.

Plaintiffs emphasize that "[t]he Michigan Constitution gives the role of protecting public health to the *Legislature*." App. for Leave 39

(emphasis in original). Quite so. And the Legislature acted to protect the public health when it enacted the EPGA—the very statute that the Plaintiffs are seeking to distort beyond recognition and have declared unconstitutional. The Court of Appeals was right to "find it more than a bit disconcerting that the very governmental body that delegated authority to governors to confront public emergencies—and holds and has held the exclusive power to change it—steps forward 75 years later to now assert that it unconstitutionally delegated unconstrained authority." Slip op. 18.

In reality, Plaintiffs do not seek to defend the powers of the Legislature. Plaintiffs, who represent the majority party in the Legislature and not the Legislature as a whole, seek this Court's assistance in a political battle to change the law to conform to their policy preferences. Plaintiffs have made little discernable effort to respond to the present pandemic in the time since COVID-19 was first identified in Michigan, nor have they sought to amend either statute at issue in the present action through the ordinary legislative process.[2] Instead, they ask the judicial branch to intervene, cast aside our Constitution's carefully crafted design, and rewrite the law to their liking. This Court should decline the invitation and remit the parties to the political process, as the People intended when they ratified our Constitution.

House Democratic Leader Christine Greig and the Members of the House Democratic Caucus, as *Amici*, are members of the Legislature who do not support the position that has been taken in their name in this litigation. They submit this brief to vindicate the powers of the

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[2] Plaintiffs assert that such an amendment would face a "certain veto." App. for Leave 40. But the Governor's veto power is just as much a part of the constitutionally mandated legislative process as is the Legislature's power to pass laws. Const 1963, art 4, § 33. To coin a phrase, that power gives the Legislature an "incentive to cooperate" with the Governor "to reach legislative consensus." Cf. App. for Leave 38. Having refused to respond to that incentive, Plaintiffs now ask this Court to remove it.

Legislature—by giving full effect to the text of the laws the Legislature has adopted, and by ensuring that the Legislature's power is not hamstrung in the future by an unduly restrictive nondelegation doctrine.

ARGUMENT

I. Plaintiffs Disregard the Plain Text of the Emergency Powers of the Governor Act and the Emergency Management Act

The Court of Appeals held (slip op. 10-16) that Governor Whitmer's executive orders validly rest on the powers the Legislature granted her in the Emergency Powers of the Governor Act of 1945, MCL 10.31 *et seq*. That holding was correct. Plaintiffs contend that the EPGA does not apply here. They say it applies—or, at least, this Court should *read* it to apply—only to local rather than statewide emergencies. Although they make a feint at arguing that such a reading follows from the EPGA's text, the Court of Appeals correctly rejected that argument. Plaintiffs principally contend that the enactment of the Emergency Management Act of 1976, MCL 30.401 *et seq*.—more than 30 years after the EPGA—should be read to narrow the Governor's authority under the earlier statute.

The Court of Appeals correctly held that "the plain and unambiguous language of the EPGA and the EMA does not support the Legislature's position." Slip op. 10. Although Plaintiffs insist that "[n]ot even one word can be sacrificed" in interpreting a statute (App. for Leave 24), their position would disregard and distort numerous words in both the EPGA and the EMA.

A. The Plain Text of the EPGA Authorizes the Governor's Emergency Orders

As we argued in our *amicus* brief in the companion *In re Certified Questions* case (at 5-9), the text of the EPGA plainly authorizes Governor Whitmer's orders—notably including the current version of her "safe start" order, EO 2020-160. We will not repeat here the arguments we made there. We limit this brief to responding to Plaintiffs' contentions that are not specifically before this Court in the companion case.

"During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind," the EPGA authorizes the Governor to "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). Plaintiffs do *not* argue that the pandemic falls outside of the ordinary meaning of a "great public crisis," nor do they argue that Governor Whitmer's orders fall outside of the boundaries of "reasonable orders, rules, and regulations." MCL 10.31(1). Nor could they plausibly make such a claim.

They argue instead that "[t]o give the EMA effect, the EPGA should be appropriately confined to local emergencies—or, at the very least, circumstances other than epidemics." App. for Leave 22. Literally nothing in the text of the EPGA supports that reading.

Plaintiffs first note that "the EPGA does not mention epidemics." *Id.* at 29. But as we showed in our brief in the *Certified Questions* case (at 9), the COVID-19 pandemic plainly fits within the statute's "great public crisis," "disaster," "catastrophe," and "similar public emergency" language. The Legislature used broad language in describing the predicate for the Governor's invocation of her power under the EPGA, and it specifically instructed courts to interpret the statute "broadly" to "effectuate th[e] purpose" of "invest[ing] the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster." MCL 10.32. To refuse to apply the EPGA's broad language simply because the statute does not detail each of the many contexts to which it plainly applies would be to usurp the power of the Legislature. See Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts § 9 (2012) ("[T]he presumed point of using general words is to produce general coverage—not to leave room for courts to recognize ad hoc exceptions.").

Plaintiffs next point to the statute's use of the word "within." App. for Leave 29. The EPGA applies to an emergency "within the

state," MCL 10.31(1)—language that, Plaintiffs assert, means that the emergency must affect some smaller area than the State as a whole. App. for Leave 29. But the plain meaning of the word "within"—*according to the very definition offered by Plaintiffs*—is "'on the inside or on the inner-side' or 'inside the bounds of a place or region.'" *Id.* (internal quotation marks omitted; quoting *Webster's Third New International Dictionary* 758 (1993)). The EPGA's use of the phrase "within the state" thus draws a distinction between what is inside and what is outside the State. It authorizes the Governor to address emergencies inside of Michigan and does not allow her to regulate conduct outside of the State. But it does not in any way imply a limitation to something smaller than the entire area of the State. Textually and grammatically speaking, an emergency that exists in every part of Michigan remains a disaster that is "within" Michigan. The Court of Appeals understatedly characterized Plaintiffs' interpretation as "strained," because "an emergency 'within' our state can patently encompass not only a local emergency but also a statewide emergency affecting all of Michigan. There can be no dispute that the spread of COVID-19 was and is occurring 'within the state' of Michigan." Slip op. 11.

Equally strained is Plaintiffs' reliance on the EPGA's use of the word "area." See MCL 10.31(1) ("the governor may proclaim a state of emergency and designate the area involved"). Plaintiffs assert that the word "establish[es] that the Governor's power is intended to reach some subpart of the state as a whole." App. for Leave 29. Again, though, that assertion conflicts with *the very definition offered by the Plaintiffs themselves*: "'a particular extent of space or one serving a special function,' such as 'a geographic region.'" *Id.* (quoting Merriam-Webster's Online Dictionary, Area https://bit.ly/3c17JYu). Although this language would certainly embrace a region that is smaller than the State, it also plainly embraces the entire State. The entire State, after all, may be readily described as "the area within the boundaries of the State of Michigan"—something that is plainly an "extent of space."

The statute's use of the word "area"—like its use of the words "zone" and "section," cf. App. for Leave 29—merely requires the

Governor to describe where the emergency exists and where her orders, rules, and regulations apply. See MCL 10.31(1) (Governor must "designate the area involved," and her orders may include "designation of specific zones within the area" for particular restrictions, as well as traffic control "within the area or any section of the area"). It does not express or imply any limitation on the geographic scope of the Governor's power within the State. As the Court of Appeals correctly concluded, "Were we to exclude the 'state' as a whole from constituting the 'area' subject to an order, rule, or regulation under the EPGA, we would be reading language into an unambiguous statutory provision and rewriting the plain language of the EPGA. That we may not do." Slip op. 12.

Plaintiffs assert that the EPGA's use of the singular "area" contrasts with the EMA's use of the plural "areas." The difference, they contend, demonstrates that the former statute limits the Governor's power to a subset of the State. App. for Leave 30. Leave aside the difficulty of using a statute enacted in 1976 to explain what the Legislature intended when it adopted a different statute three decades earlier—a matter we discuss in the next two sections. Plaintiffs' argument makes no sense even on its own terms. Whether "area" is used in the singular or the plural has literally nothing to do with whether the term can embrace the whole of the State. And the difference is meaningless in any event: The Legislature has specifically provided that "[e]very word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number." MCL 8.3b. The same result would follow even absent that direction, for it is "a matter of common sense and everyday linguistic experience" that singular terms in statutes are read to include the plural. See Scalia & Garner, *supra* § 14.

Plaintiffs note that the EPGA refers to "rioting," MCL 10.31(1), which they describe as "a local problem." App. for Leave 30. But of course "statewide rioting can happen." COA slip op. 11. And "rioting is but one example of a public emergency listed in MCL 10.31(1)." *Id.* A "great public crisis, disaster, … catastrophe, or similar public

emergency," MCL 10.31(1), could easily happen statewide. And although Plaintiffs assert that "great public crisis" refers to a crisis that is "both 'great' … *and* local," App. for Leave 31, there is literally no language in the statute that purports to limit the phrase in that way.

Nor are Plaintiffs' efforts to rely on statutory structure any more availing. Plaintiffs argue that "[t]he specific examples of power [the EPGA] offers are all directed to local issues (particularly civil unrest), including the power to control traffic, implement curfews, control 'ingress,' control 'places of amusement and assembly,' and regulate alcohol and explosive sales." App. for Leave 32. But every one of these examples of power could be appropriate responses to a statewide emergency. As the Court of Appeals explained (at 12), "all of the specific examples of orders, rules, and regulations can apply in a limited manner at a local level or in an extensive manner at a statewide level." And, once again, the EPGA contains absolutely no language that purports to confine these powers to local dangers.

The Court of Appeals was thus correct to conclude (at 12) that Plaintiffs' interpretation conflicts with "the plain and unambiguous language of the EPGA." Plaintiffs nonetheless say that reading the EPGA according to its plain text would violate the principle that the Legislature does not "hide elephants in mouseholes." Mot. for Leave 33 (quoting *People v Arnold*, 502 Mich 438, 480 n.18; 918 NW2d 164 (2018)). But what the U.S. Supreme Court recently said in a different context is equally applicable here: Even assuming that the Governor's power under the EPGA is an elephant, "where's the mousehole*?"* *Bostock v. Clayton Cty, Georgia*, 140 SCt 1731, 1753 (2020). The EPGA "is written in starkly broad terms." *Id.* And the statute's breadth was no accident. It is precisely what the Legislature intended. See MCL 10.32 ("It is hereby declared to be the legislative intent to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. The provisions of this act shall be broadly construed to effectuate this purpose."). "This elephant has never hidden in a mousehole; it has been standing before us all along." *Bostock*, 140 SCt at 1753.

B. Nothing in the EMA Justifies Disregarding the Plain Text of the EPGA

The plain text of the EPGA thus does not support a limitation of that statute to merely "local" emergencies. Nor does it support an exclusion of "epidemics" from the statute's broad triggering language. Nonetheless, Plaintiffs argue that this Court should read such a limitation into the statute—or adopt "another limited reading" of some sort—out of fear that the subsequently adopted EMA would otherwise be rendered "surplusage." App. for Leave 23. The Court of Appeals correctly rejected that argument.

What we said about the surplusage and *in pari materia* canons in our brief in the companion *Certified Questions* case (at 12-14) fully applies here. As the Court of Appeals concluded (slip op. 14), the Plaintiffs invoke these canons, not to identify the intent of the Legislature, but to circumvent the plain and unambiguous text of the EPGA and the EMA. This Court has repeatedly rejected any such use of canons of construction. See p. 2, *supra*.

Plaintiffs argue that it is inappropriate to "interpret one statute to erase another." App. for Leave 24. But it is Plaintiffs' argument that would "erase" statutory text. Plaintiffs would erase the broad language defining a predicate "emergency" under the EPGA, MCL 10.31(1), substituting for it a localized definition (or a definition that contains an unprincipled exclusion of "epidemics") that has no support in the text of that statute. Plaintiffs would also erase the language that the Legislature specifically included in the EPGA requiring courts to "broadly construe[]" the statute's provisions "to effectuate th[e] purpose" of "invest[ing] the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster." MCL 10.32.

Perhaps most notably, Plaintiffs would erase the EMA's savings clause. That clause provides that the EMA "shall not be construed to," among other things, "[l]imit, modify, or abridge the authority of the

governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of the Michigan Compiled Laws, or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of this state independent of, or in conjunction with, this act." MCL 30.417(d).

If the plain language of the EPGA granted the Governor authority to respond to a statewide pandemic—as it did—then it would be inconsistent with the savings clause to read the EMA as taking away that authority. Repeals by implication are always disfavored. See *Int'l Bus Machines Corp v Dep't of Treasury*, 496 Mich 642, 651–52; 852 NW2d 865, 871–72 (2014) (presuming "that if the Legislature had intended to repeal a statute or statutory provision, it would have done so explicitly" and refusing to find a repeal by implication unless "two statutes are so incompatible that both cannot stand") (internal quotation marks omitted). All the more so when the Legislature has specifically provided that a new statute merely adds to, and does not detract from, a prior law.

Plaintiffs assert that their argument would "not 'limit, modify, or abridge' the Governor's ability to *proclaim* a state of emergency, but only her ability to *extend* a declaration of emergency over the Legislature's objection." App. for Leave 28 (emphasis in original). But that argument entirely ignores the savings clause's "or exercise any other powers vested in him or her" language. MCL 30.417(d). That language makes clear that the EMA preserved not just the authority to "proclaim" an emergency but also all of the other powers attendant to such a proclamation under the EPGA.

The point is not, as Plaintiffs suggest (App. for Leave 28), "that MCL 30.417(d) prevents a court from reconciling the statutes." The point is that MCL 30.417(d) *already reconciles* the EPGA and the EMA. It does so by making clear that the EMA merely adds to, and does not detract from, the broad power granted by the text of the EPGA. It would contravene that provision to read the EMA as imposing limitations that do not appear in the earlier statute's plain language.

Plaintiffs assert that "fundamental principles of statutory construction prohibit[]" construing "two statutes ... to confer entirely overlapping powers." App. for Leave 28. But the most fundamental principle of statutory construction is to apply rather than distort the plain language. That is the "'first canon'" of construction, and where the text is clear it "'is also the last.'" *Pinkney*, 501 Mich at 285 n.63; 912 NW2d at 549 n.63 (quoting *Germain*, 503 US at 254). Here, the plain language of the two statutes unambiguously confers substantially overlapping powers, and this Court must follow that language.

It bears emphasis that the powers do not *completely* overlap. As we showed in our brief in the companion *Certified Questions* case (at 14), there are some authorities that the Governor can exercise only pursuant to the EMA and not the EPGA. Notably, nothing in the text of the EPGA authorizes the Governor to enter into interstate compacts or grant immunities from liability—two powers the EMA specifically delegates. But in any event, the overlap between the powers granted by the EPGA and those granted by the EMA is not a basis for disregarding the unambiguous text of the two statutes.

Plaintiffs assert that to give full effect to the plain language of the EPGA and the EMA would be to "*insist[]* on statutory conflict, while the law insists on the opposite." App. for Leave 28 (emphasis in original). But Plaintiffs mistake overlap for conflict. Unlike in cases in which the courts of this State have found an irreconcilable conflict between two statutes,[3] here there is no conflict whatsoever. It is perfectly possible to

[3] The decision in *Michigan Deferred Presentment Servs. Ass'n v Comm'r of Office of Fin. & Ins. Regulation*, 287 MichApp 326, 334; 788 NW2d 842, 846–47 (2010), offered a paradigm case. There, the Legislature had adopted two statutes that addressed the same subject matter: One "grant[ed] treble damages plus costs to the entity given an NSF check"; the other limited liability "to the face amount on the check plus a returned check charge of $25." *Id.*, 287 MichApp at 334; 788 NW2d at 846. It was impossible for both statutes to operate at the same time.

give full effect to the statutory text of *both* the EPGA *and* the EMA. The Court of Appeals properly did so.

C. Arguments Based on Asserted Expectations of the Legislature Cannot Trump the Unambiguous Statutory Text

Plaintiffs argue that the *intent* of the EPGA was to address "local riots." App. for Leave 33. But that argument disregards the plain text of the EPGA, which has always included "rioting" as only *one* of the bases for an emergency proclamation, along with "great public crisis, disaster," and "catastrophe." MCL 10.31(1). "When the Legislature's language is clear," courts "are bound to follow its plain meaning." *Gardner*, 482 Mich at 59; 753 NW2d at 90. As this Court has explained, "[t]he Legislature is fully capable of amending statutory language if it sees fit to do so." *Id.* at 59-60; 753 NW2d at 90. This Court may not distort the words the Legislature actually adopted.

In any event, as the Court of Claims concluded, the legislative history cited by the Plaintiffs "does not even address or suggest the local limit [they] attempt to impose on the EPGA"; instead, they "rely on mere generalities and anecdotal commentary." Ct. Cl. Op. 15. Plaintiffs suggest that Governor Milliken, in proposing the EMA in 1973, asserted a belief that the EPGA did not give sufficient authority to respond to "a statewide, natural disaster." App. for Leave 34. It is not clear how the views expressed by a *Governor* in 1973 are pertinent to what the *Legislature* meant when it enacted a statute in 1945. See *Baumgartner v Perry Pub. Sch.*, 309 Mich App 507, 520; 872 NW2d 837, 844 (2015) (noting that, even where resort to legislative history is appropriate, "those types of legislative history that do not necessarily reflect the intent of the Legislature as a body are significantly less useful than those that do") (internal quotation marks omitted). Cf. *Pension Ben. Guar. Corp. v LTV Corp.*, 496 US 633, 650 (1990) (noting that "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress") (internal quotation marks omitted). Those views certainly could not trump the plain statutory text.

For whatever it is worth, Governor Milliken did *not* say that the EPGA failed to give the Governor authority to respond to disasters. To

the contrary, he specifically found it "possible that many of the special problems created by non-military disasters can be handled by broad interpretation of existing Michigan law." 1973 House Journal 861. His concern was that the existing law was not sufficiently *specific* in the authorities it gave the Governor, because it was not "specifically addressed to the imminent potential of disasters." *Id.*

Even if Governor Milliken *did* believe in 1973 that the EPGA would not be applied to give him authority in this area, and even if we could heroically assume that the Legislature in 1945 shared that belief and did not anticipate the statute's application to pandemics like the present one, Cf. App. for Leave 30 (quoting Judge Tukel's dissent below), that would be irrelevant. "[T]he fact that a statute can be applied in situations not expressly anticipated by [the Legislature] does not demonstrate ambiguity. It demonstrates breadth." *Pennsylvania Dep't of Corr. v. Yeskey*, 524 US 206, 212 (1998) (internal quotation marks omitted).

Plaintiffs' argument "impermissibly seeks to displace the plain meaning of the law in favor of something lying beyond it." *Bostock,* 140 SCt at 1750. Because the plain text of the EPGA reaches statewide disasters including pandemics, that is the end of the matter. "Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations." *Id.* at 1754.[4]

II. The Orders Do Not Violate the Separation of Powers

Plaintiffs argue that Governor Whitmer's emergency orders constitute lawmaking in violation of the constitutional separation of powers. The Court of Appeals correctly rejected that argument. Slip op. 16-21.

As we have shown, the Governor's orders rested on the authority the Legislature itself granted her in the Emergency Powers of the

[4] Plaintiffs' reliance on the canon of constitutional avoidance (App. for Leave 41) fails for the same reason, as we showed in our brief in the companion *Certified Questions* case (at 13 n.5).

Governor Act. They can therefore violate the separation of powers only if the EPGA itself violates the constitutional nondelegation doctrine. See *Westervelt v. Nat. Res. Comm'n*, 402 Mich 412, 430–31; 263 NW2d 564, 571–72 (1978). As the Court of Appeals properly held, the statute fully satisfies the standards set forth in the cases applying that doctrine: "The standards found in the EPGA are sufficiently broad to permit the efficient administration of carrying out the policy of the Legislature with regard to addressing a public emergency but not so broad as to leave Michiganders unprotected from uncontrolled, arbitrary power." Slip op. 18. Governor Whitmer, by exercising the authority granted to her by the statute, is doing exactly what Plaintiffs themselves say is permissible: She is executing, not making, the laws. App. for Leave 42. Accordingly, her orders are constitutional.

Plaintiffs' arguments on the separation of powers substantially duplicate the arguments made by the plaintiffs in the companion *Certified Questions* case. We will not repeat here the points we made in our *amicus* brief there (at 15-23). As we showed there, the EPGA contains "'standards'" that limit the Governor's actions and are "'as reasonably precise as the subject-matter requires or permits.'" *Westervelt*, 402 Mich at 425; 263 NW2d at 574 (quoting *Osius v City of St. Clair Shores*, 344 Mich 693, 698; 75 NW2d 25, 27 (1956)). The EPGA requires the Governor's orders to be "reasonable" and within the realm of what could be considered "necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

Plaintiffs argue that "reasonable" and "necessary" are insufficiently specified. App. for Leave 47. Those arguments conflict with both the statutory text and the cases that bind this Court.

Considering the grammar and structure of the statutory text, it should be apparent that "to protect life or property [etc.]" is an operative provision—a standard that governs the Executive Branch—and not merely a generic policy goal. Cf. App. for Leave 47 (arguing that reading the "to protect life or property" language as limiting the Governor "confuses the statute's *goals* with its *standards*"). The relevant language does not appear in a prefatory provision, or one stating general

statutory purposes. Rather, it appears in the very sentence authorizing the Governor to issue "orders, rules, and regulations," and it specifically modifies that noun phrase. It thus provides the "'defined legislative limits' and 'ascertained conditions' (*i.e.*, 'standards')," *Westervelt*, 402 Mich at 431; 263 NW2d at 572 (quoting *People v. Soule*, 238 Mich 130, 139; 213 NW 195, 197-98 (1927)), that restrict the Governor's discretion.

As for the terms "reasonable" and "necessary," these are generally understood in the law to provide binding standards that guide and limit primary conduct. "Reasonable care," which frequently determines what steps individuals and entities must take to prevent harm to others, is perhaps the most ubiquitous liability rule applied by courts throughout the State and Nation. And, as we showed in our brief in the *Certified Question* case (at 21-23) the terms "reasonable" and "necessary" compare favorably to the "quite general" terms that the Michigan courts have found in the past to impose sufficient limitations to satisfy the nondelegation doctrine. *G.F. Redmond & Co. v Michigan Sec Comm'n*, 222 Mich 1, 5; 192 NW 688, 689 (1923).

Plaintiffs assert that the EPGA impermissibly delegates to the Governor "the power to declare what shall constitute a crime, and how it shall be punished." App. for Leave 50 (internal quotation marks omitted). Not so. It was the Legislature who specified "what shall constitute a crime"—the violation of the Governor's lawful orders—as well as "how it shall be punished"—as a misdemeanor. See MCL 10.33 ("The violation of any such orders, rules and regulations made in conformity with this act shall be punishable as a misdemeanor, where such order, rule or regulation states that the violation thereof shall constitute a misdemeanor."). The same was true of the statute that this Court upheld against a nondelegation attack in *Westervelt*, 402 Mich at 420; 263 NW2d at 567 (noting that "[v]iolation of any of these rules is stated to be a misdemeanor").

Indeed, laws that allow criminal punishment of the violation of lawful orders by executive-branch officials are ubiquitous. See, *e.g.*, MCL 257.602a(2) (making it a felony, punishable by up to two years' imprisonment, for a driver to fail to comply with a police officer's lawful order to stop). Plaintiffs' broad understanding of the nondelegation

doctrine would thus threaten the constitutionality of a wide array of statutes the Legislature has previously adopted.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

/s Samuel R. Bagenstos
Samuel R. Bagenstos (P73971)
625 S. State St.
Ann Arbor, MI 48109
734-647-7584
sbagen@gmail.com

Nathan Triplett (P76683)
Democratic Legal Counsel
Michigan House of Representatives
PO Box 30014
Lansing, MI 48909-7514
517-373-5894
NTriplett@house.mi.gov

Attorneys for Amici Curiae

Dated: August 31, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 5,416 countable words. The document is set in Century Schoolbook. The text is in 12-point type with 18-point line spacing and 6 points of additional spacing between paragraphs.

/s Samuel R. Bagenstos
Samuel R. Bagenstos (P73971)
625 S. State St.
Ann Arbor, MI 48109
734-647-7584
sbagen@gmail.com