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 of the State of Michigan,

Defendant-Appellee.
_____/

Supreme Court No. 161917

Court of Appeals No. 353655

Court of Claims No. 20-79-MZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

GOVERNOR GRETCHEN WHITMER'S ANSWER TO THE LEGISLATIVE PLAINTIFFS' APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

The Legislative Plaintiffs filed their application within the time that this Court provided for filing their application, so this Court has jurisdiction over this application. See Order, dated June 30, 2020 (requiring filing by August 28, 2020).

STATEMENT OF QUESTIONS PRESENTED

1. The Emergency Powers of the Governor Act (EPGA) grants broad authority to the Governor to declare a state of emergency during great public crises where public safety is imperiled within the State. The Governor declared a state of emergency in response to a worldwide pandemic that has killed thousands of Michigan residents. Did the Governor act within her authority?

   Legislative Plaintiffs' answer: No.

   Governor's answer: Yes.

   Court of Appeals answer: Yes.

   Court of Claims answer: Yes.

2. The EPGA permits the Governor during public crises to issue "reasonable" orders "necessary to protect life and property" or bring the emergency under control. The Legislature may constitutionally grant broad authority to the executive branch provided there is sufficient guidance in light of the purpose of the delegation. Have the Legislative Plaintiffs proven their own law is unconstitutional?

   Legislative Plaintiffs' answer: Yes.

   Governor's answer: No.

   Court of Appeals answer: No.

   Court of Claims answer: No.

3. The Emergency Management Act requires a Governor to declare a state of emergency or disaster if the conditions in the State warrant it, and to terminate those specific declarations if the Legislature does not extend them beyond 28 days by concurrent resolution. The Governor terminated unextended declarations, but issued new ones pursuant to her ongoing statutory duty. Did the Governor act within her authority under the EMA?

   Legislative Plaintiffs' answer: No.

   Governor's answer: Yes.

   Court of Appeals answer: Did not answer.

   Court of Claims answer: No.

4. Legislative standing is available only where the body suffers an injury specific to it or to protect its legal rights. The House and Senate allege only injuries shared with the general citizenry, and any decision by this Court will not affect their constitutional authority to legislate. Do the Legislative Plaintiffs have standing?

Legislative Plaintiffs' answer:	Yes.
Governor's answer:	No.
Court of Appeals answer:	Assumed for purposes of argument.
Court of Claims answer:	Yes.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

Const 1963, art 3, § 2 provides, in pertinent part:

> The 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.

Const 1963, art 4, § 1 provides, in pertinent part:

> Except 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.

Const 1963, art 4, § 26 provides, in pertinent part:

> No bill shall be passed or become a law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days. Every bill shall be read three times in each house before the final passage thereof. No bill shall become a law without the concurrence of a majority of the members elected to and serving in each house.

Const 1963, art 4, § 33 provides, in pertinent part:

> Every bill passed by the legislature shall be presented to the governor before it becomes law, and the governor shall have 14 days measured in hours and minutes from the time of presentation in which to consider it. If he approves, he shall within that time sign and file it with the secretary of state and it shall become law. If he does not approve, and the legislature has within that time finally adjourned the session at which the bill was passed, it shall not become law. If he disapproves, and the legislature continues the session at which the bill was passed, he shall return it within such 14-day period with his objections, to the house in which it originated. That house shall enter such objections in full in its journal and reconsider the bill. If two-thirds of the members elected to and serving in that house pass the bill notwithstanding the objections of the governor, it shall be sent with the objections to the other house for reconsideration. The bill shall become law if passed by two-thirds of the members elected to and serving in that house.

Constitutional Provisions

Const 1963, art 5, § 1:

> Except to the extent limited or abrogated by article V, section 2, or article IV, section 6, the executive power is vested in the governor.

Pertinent Provisions of the Emergency Powers of the Governor Act

MCL 10.31:

> (1) 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, when public safety is imperiled, either upon application of the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police or upon his or her own volition, the governor may proclaim a state of emergency and designate the area involved. After making the proclamation or declaration, 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. Those orders, rules, and regulations may include, but are not limited to, providing for the control of traffic, including public and private transportation, within the area or any section of the area; designation of specific zones within the area in which occupancy and use of buildings and ingress and egress of persons and vehicles may be prohibited or regulated; control of places of amusement and assembly and of persons on public streets and thoroughfares; establishment of a curfew; control of the sale, transportation, and use of alcoholic beverages and liquors; and control of the storage, use, and transportation of explosives or inflammable materials or liquids deemed to be dangerous to public safety.
>
> (2) The orders, rules, and regulations promulgated under subsection (1) are effective from the date and in the manner prescribed in the orders, rules, and regulations and shall be made public as provided in the orders, rules, and regulations. The orders, rules, and regulations may be amended, modified, or rescinded, in the manner in which they were promulgated, from time to time by the governor during the pendency of the emergency, but shall cease to be in effect upon declaration by the governor that the emergency no longer exists.
>
> (3) Subsection (1) does not authorize the seizure, taking, or confiscation of lawfully possessed firearms, ammunition, or other weapons.

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.

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.

Pertinent Provisions of the Emergency Management Act

MCL 30.402(e):

"Disaster" means an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to, fire, flood, snowstorm, ice storm, tornado, windstorm, wave action, oil spill, water contamination, utility failure, hazardous peacetime radiological incident, major transportation accident, hazardous materials incident, epidemic, air contamination, blight, drought, infestation, explosion, or hostile military action or paramilitary action, or similar occurrences resulting from terrorist activities, riots, or civil disorders.

MCL 30.402(h):

(h) "Emergency" means any occasion or instance in which the governor determines state assistance is needed to supplement local efforts and capabilities to save lives, protect property and the public health and safety, or to lessen or avert the threat of a catastrophe in any part of the state.

MCL 30.402(p):

(p) "State of disaster" means an executive order or proclamation that activates the disaster response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected.

MCL 30.402(q):

(q) "State of emergency" means an executive order or proclamation that activates the emergency response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected.

MCL 30.403:

(1) The governor is responsible for coping with dangers to this state or the people of this state presented by a disaster or emergency.

(2) The governor may issue executive orders, proclamations, and directives having the force and effect of law to implement this act. Except as provided in section 7(2), an executive order, proclamation, or directive may be amended or rescinded by the governor.

(3) The governor shall, by executive order or proclamation, declare a state of disaster if he or she finds a disaster has occurred or the threat of a disaster exists. The state of disaster shall continue until the governor finds that the threat or danger has passed, the disaster has been dealt with to the extent that disaster conditions no longer exist, or until the declared state of disaster has been in effect for 28 days. After 28 days, the governor shall issue an executive order or proclamation declaring the state of disaster terminated, unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature. An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the disaster, the area or areas threatened, the conditions causing the disaster, and the conditions permitting the termination of the state of disaster. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and shall be promptly filed with the emergency management division of the department and the secretary of state, unless circumstances attendant upon the disaster prevent or impede its prompt filing.

(4) The governor shall, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists. The state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency has been in effect for 28 days. After 28 days, the governor shall issue an

executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature. An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the emergency, the area or areas threatened, the conditions causing the emergency, and the conditions permitting the termination of the state of emergency. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and shall be promptly filed with the emergency management division of the department and the secretary of state, unless circumstances attendant upon the emergency prevent or impede its prompt filing.

MCL 30.404:

(1) An executive order or proclamation of a state of disaster or a state of emergency shall serve to authorize the deployment and use of any forces to which the plan or plans apply and the use or distribution of supplies, equipment, materials, or facilities assembled or stockpiled pursuant to this act.

(2) Upon declaring a state of disaster or a state of emergency, the governor may seek and accept assistance, either financial or otherwise, from the federal government, pursuant to federal law or regulation.

(3) The governor may, with the approval of the state administrative board, enter into a reciprocal aid agreement or compact with another state, the federal government, or a neighboring state or province of a foreign country. A reciprocal aid agreement shall be limited to the furnishing or exchange of food, clothing, medicine, and other supplies; engineering services; emergency housing; police services; the services of the national guard when not mobilized for federal service or state defense force as authorized by the Michigan military act, Act No. 150 of the Public Acts of 1967, as amended, being sections 32.501 to 32.851 of the Michigan Compiled Laws, and subject to federal limitations on the crossing of national boundaries by organized military forces; health, medical, and related services; fire fighting, rescue, transportation, and construction services and equipment; personnel necessary to provide or conduct these services; and other necessary equipment, facilities, and services. A reciprocal aid agreement shall specify terms for the reimbursement of costs and expenses and conditions necessary for activating the agreement. The legislature shall appropriate funds to implement a reciprocal aid agreement.

MCL 30.405:

(1) In addition to the general authority granted to the governor by this act, the governor may, upon the declaration of a state of disaster or a state of emergency do 1 or more of the following:

(a) Suspend a regulatory statute, order, or rule prescribing the procedures for conduct of state business, when strict compliance with the statute, order, or rule would prevent, hinder, or delay necessary action in coping with the disaster or emergency. This power does not extend to the suspension of criminal process and procedures.

(b) Utilize the available resources of the state and its political subdivisions, and those of the federal government made available to the state, as are reasonably necessary to cope with the disaster or emergency.

(c) Transfer the direction, personnel, or functions of state departments, agencies, or units thereof for the purpose of performing or facilitating emergency management.

(d) Subject to appropriate compensation, as authorized by the legislature, commandeer or utilize private property necessary to cope with the disaster or emergency.

(e) Direct and compel the evacuation of all or part of the population from a stricken or threatened area within the state if necessary for the preservation of life or other mitigation, response, or recovery activities.

(f) Prescribe routes, modes, and destination of transportation in connection with an evacuation.

(g) Control ingress and egress to and from a stricken or threatened area, removal of persons within the area, and the occupancy of premises within the area.

(h) Suspend or limit the sale, dispensing, or transportation of alcoholic beverages, explosives, and combustibles.

(i) Provide for the availability and use of temporary emergency housing.

(j) Direct all other actions which are necessary and appropriate under the circumstances.

(2) Subsection (1) does not authorize the seizure, taking, or confiscation of lawfully possessed firearms or ammunition.

(3) A person who willfully disobeys or interferes with the implementation of a rule, order, or directive issued by the governor pursuant to this section is guilty of a misdemeanor.

MCL 30.416:

After the president of the United States declares an emergency or a major disaster, as defined in the disaster relief act of 1974, Public Law 93-288, 88 Stat. 143, to exist in this state, the governor may apply for, accept, and disburse grants from the federal government pursuant to the disaster relief act of 1974. To implement and administer the grant program and to make financial grants, the governor may enter into an agreement with the federal government or any officer, or agency of the federal government, pledging the state's share for the financial grants.

MCL 30.417 provides, in pertinent part:

This act shall not be construed to do any of the following:

(a) Interfere with the course or conduct of a labor dispute. However, actions otherwise authorized by this act or other laws may be taken when necessary to forestall or mitigate imminent or existing danger to public health or safety.

(b) Interfere with the dissemination of news or comment on public affairs. However, any communications facility or organization, including radio and television stations, wire services, and newspapers, may be requested to transmit or print public service messages furnishing information or instructions in connection with a disaster or emergency.

(c) Affect the jurisdiction or responsibilities of law enforcement agencies, fire fighting forces, and units or personnel of the armed forces of the United States when on active duty. However, state, local, and interjurisdictional emergency operations plans shall place reliance upon the forces available for performance of functions related to disasters or emergencies.

(d) Limit, 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 30.418:

(1) A disaster and emergency contingency fund is created and shall be administered by the director. An annual accounting of expenditures under this act shall be made to the legislature and the legislature shall annually appropriate sufficient funds to maintain the fund at a level not to exceed $10,000,000.00 and not less than $2,500,000.00. Unexpended and unencumbered funds remaining in the disaster and emergency contingency fund at the end of the fiscal year shall not lapse to the general fund and shall be carried forward and be available for expenditure in subsequent fiscal years.

(2) The director may expend money from the disaster and emergency contingency fund upon appropriation for the purpose of paying necessary and reasonable overtime, travel, and subsistence expenses incurred by an employee of an agency of this state acting at the direction of the director in a disaster or emergency related operation, and, with the concurrence of the governor or the governor's designated representative, for other needs required for the mitigation of the effects of, or in response to, a disaster or emergency.

(3) The director may place directly in the disaster and emergency contingency fund a reimbursement for expenditures out of the fund received from the federal government, or another source.

(4) If a state of major disaster or emergency is declared by the President of the United States, and when authorized by the governor, an expenditure from the fund may be made by the director upon appropriation to pay the state's matching share of grants as provided by the disaster relief act of 1974, Public Law 93-288, 88 Stat 143.

(5) The state treasurer shall direct the investment of the disaster and emergency contingency fund. The state treasurer shall credit to the disaster and emergency contingency fund interest and earnings from fund investments.

MCL 30.419:

(1) Under extraordinary circumstances, upon the declaration of a state of disaster or a state of emergency by the governor and subject to the requirements of this subsection, the governor may authorize an expenditure from the disaster and emergency contingency fund to provide state assistance to counties and municipalities when federal assistance is not available. If the governor proclaims a state of disaster or a state of emergency, the first recourse for disaster related expenses

shall be to funds of the county or municipality. If the demands placed upon the funds of a county or municipality in coping with a particular disaster or emergency are unreasonably great, the governing body of the county or municipality may apply, by resolution of the local governing body, for a grant from the disaster and emergency contingency fund. The resolution shall certify that the affected county or municipality emergency operations plan was implemented in a timely manner. The resolution shall set forth the purpose for which the assistance is sought, the extent of damages sustained, and certify an exhaustion of local efforts. The assistance under this subsection is to provide grants, excluding reimbursement for capital outlay expenditures, in mitigation of the extraordinary burden of a county or municipality in relation to its available resources. Assistance grants under this section shall not exceed the following amounts or 10% of the total annual operating budget for the preceding fiscal year of the county or municipality, whichever is less:

(a) For a county or municipality with a population under 25,000 according to the most recent federal decennial census, $250,000.00.

(b) For a county or municipality with a population of 25,000 or more and less than 75,000 according to the most recent federal decennial census, $500,000.00.

(c) For a county or municipality with a population of 75,000 or more according to the most recent federal decennial census, $1,000,000.00.

(2) The director shall promulgate rules governing the application and eligibility for the use of the state disaster and emergency contingency fund. Rules that have been promulgated prior to December 31, 1988 to implement this section shall remain in effect until revised or replaced. The rules shall include, but not be limited to, all of the following:

(a) Demonstration of exhaustion of local effort.

(b) Evidence that the applicant is a county that actively maintains an emergency management program, reviewed by and determined to be current and adequate by the emergency management division of the department, before the disaster or emergency for which assistance is being requested occurs. If the applicant is a municipality with a population of 10,000 or more, evidence that the municipality either maintains a separate emergency

management program, reviewed by and determined to be current and adequate by the emergency management division of the department, before the disaster or emergency for which assistance is being requested or occurs, or the municipality is incorporated in the county emergency management program.

(c) Evidence that the applicable county or municipal emergency operations plan was implemented in a timely manner at the beginning of the disaster or emergency.

(d) Reimbursement for expenditures shall be limited to public damage and direct loss as a result of the disaster or emergency, or expenses incurred by the applicant for reimbursing employees for disaster or emergency related activities which were not performed as a part of their normal duties, or for other needs required specifically for the mitigation of the effects, or in response to the disaster or emergency.

(e) A disaster assessment team established by the emergency management division of the department has substantiated the damages claimed by the applicant. Damage estimates submitted by the applicant shall be based upon a disaster assessment carried out by the applicant according to standard procedures recommended by the emergency management division.

INTRODUCTION

The Court of Appeals has correctly affirmed the Governor's authority to issue her executive orders in response to the COVID-19 pandemic under the Emergency Powers of the Governor Act (EPGA). That published decision resolves this case and provides the guidance necessary to others touching on the same matters. It should be left intact. In light of its EPGA ruling, the Court of Appeals properly demurred on whether the Governor has also acted within her authority under the Emergency Management Act (EMA), leaving that issue poorly presented for this Court's review – though review would only confirm that the EMA provides an independently sufficient basis for her actions. And the Legislative Plaintiffs are without standing to raise these challenges in the first place. Their proper role in the adjudication of these important issues is as amicus, not as litigants challenging their own laws. For each of these reasons, this Court should deny leave.

As to the merits, there has already been a significant amount of briefing on these legal issues in both this case and the *In re Certified* case (Docket No. 161492). The Legislative Plaintiffs have re-presented arguments that have been previously presented but also raise some additional points addressed below.

The novel coronavirus menacing this State and country is a public emergency. It has infected millions, killed hundreds of thousands, and continues to spread in our communities and across state lines. It is the gravest health crisis this country has faced in more than a century. In response, every Governor in the country declared a state of emergency. As of September 24, 2020, every state still had one. This reality informs all of the Governor's actions here.

Thus, in response to the Legislative Plaintiffs' first claim, the Governor has properly exercised her authority under the EPGA. The statutory language is clear. The pandemic presents an "emergency," one that is an immediate threat to the public's safety. The EPGA is not, as the Legislative Plaintiffs contend, a mere local act. This claim is contradicted by the EPGA's plain language. In addition, the assertion that the EPGA renders the EMA an "empty shell" both misunderstands the EMA's express contemplation of the two statutes' overlap and disregards the material distinctions between the statutes, including that the EMA provides a structure for anticipating future disasters whereas the EPGA more narrowly applies to imminent and existing emergencies, like one the state is currently facing.

The Legislative Plaintiffs decry the EPGA for providing no express role for the Legislature in making a determination of an emergency or its duration. But they are insensitive to the fact that the EPGA is not some outlier: at least twelve other states do the same. And they ignore that the Legislature at any time can terminate a Governor's EPGA declaration, or authority more generally, through legislation. This is the same basic authority the Congress has within the National Emergencies Act. The EPGA is in good company, and reflects sound governance.

In response to the Legislative Plaintiffs' second claim, the EPGA does not violate the doctrines of separation of powers or of non-delegation. Many states have emergency statutes granting their governors authority to take the kind of actions that the Governor has taken here and not one has had that authority upended.

Under the EPGA, those actions must be "reasonable" and "necessary," they must be directed at "protect[ing] life and property" or "bring[ing] the emergency situation . . . under control," and they may only be taken during a time of "public emergency" or "reasonable apprehension of immediate danger." These are real limitations. This is not a grant of unlimited executive power, and this Court has upheld similar frameworks, most notably the "necessity" standard for eminent domain, which itself is a significant grant of authority to the government. There is no durational test for Michigan's black letter law on delegation. It is either executive action or it is not. The Legislature created reasonably precise standards for the Governor given the nature of the laws at issue here.

In that vein, it is important to remember that there are actions that those who disagree with the Governor may take. The Legislature may seek to override her decision and constrain her authority. Or a party may seek judicial review of her declaration of an emergency or of her orders. And the Governor must be held to account from the people themselves, a particularly meaningful consideration, given the Governor's role as chief executive and her close proximity to the elective process. These are all checks on her authority, and they further confirm the constitutional adequacy of the EPGA's standards in delegating that authority.

With regard to the Legislative Plaintiffs' third claim, the redeclaration under the EMA, that issue is not really joined as the Court of Appeals noted once it found that the EPGA supported the Governor's actions. But on that score as well, the Governor has acted appropriately.

Under the EMA, the Governor has the authority, in fact the duty, to declare a state of disaster and a state of emergency because that is exactly what Michigan is facing. The EMA's language, and the experience of the entire country, support the declaration. Yet, the legal issue is a narrow one: did the Governor properly issue a new declaration under the EMA after the Legislature refused to extend the original one? The answer is yes. The statutory text and common sense lead to this conclusion. A plain reading of the EMA shows that it does not bar a new declaration, and engrafting such a bar into the statute only renders it unworkable and begs unanswerable questions. The EMA thus provides its own independently sufficient basis for the Governor's actions in response to this pandemic.

Lastly, the Legislative Plaintiffs' lack standing. They seek redress in this Court to nullify the Legislature's own law as unconstitutional and ask this Court to narrow the Legislature's own written language. But there is a venue designed for these very purposes: the Legislature itself. By coming to the judiciary instead of acting by their own constitutional prerogative, the Legislative Plaintiffs seek to defeat the plain authority that their own law has conferred upon the Governor. Their role as amicus in the related case, *In re Certified Questions*, is the proper one.

In the end, this Court should deny leave. The actions that the Governor has taken are authorized under Michigan law and well matched by the actions taken by Governors throughout the country. The nature of emergency response requires such executive action. The Court of Appeals published opinion correctly reflects this, and this Court should leave it intact.

STATEMENT OF FACTS AND PROCEEDINGS

Michigan is hit hard by the expanding epidemic and the Governor declares states of disaster and emergency.

On March 10, 2020, in response to the growing COVID-19 pandemic in Michigan, Governor Whitmer declared a state of emergency and invoked the emergency powers available to the Governor under Michigan law – pursuant to her authority under the Emergency Powers of the Governor Act (EPGA), the Emergency Management Act (EMA), and Article 5, § 1.[1] On April 1, the Governor issued Executive Order 2020-33, which expanded upon the prior declaration of a state of emergency and declared states of emergency and disaster across the State of Michigan. On April 7, the Michigan House and Senate approved an extension of the Governor's EMA declaration until April 30, 2020. 2020 SCR 24.

Prior to April 30, the Governor again asked the Legislature to extend the states of disaster and emergency under the EMA pursuant to MCL 30.403(3) and (4), but the Legislature did not do so. Notably, neither in public statements nor in its myriad pleadings have the Legislative Plaintiffs expressed disagreement that the conditions warranting declarations of emergency and disaster existed.

On April 30, 2020, then, the Governor issued a series of three executive orders. First, in Executive Order 2020-66, the Governor terminated the executive orders of states of emergency and disaster declared under the EMA as required by MCL 30.403(3) and (4) because the Legislature did not extend those orders.

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[1] Executive Order 2020-4, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521576--,00.html

After terminating the prior declarations, the Governor again declared a state of emergency and a state of disaster under the EMA. Executive Order 2020-68. Although the measures issued pursuant to her emergency authority had been working, "the need for them – like the unprecedented crisis posed by this global pandemic – is far from over." *Id.* Thus, the Governor stated: "I now declare a state of emergency and a state of disaster across the State of Michigan under the Emergency Management Act." *Id.* Finally, she ordered "[a]ll previous orders that rested on Executive Order 2020-33 now rest on this order." *Id.*

In the third Executive Order, the Governor reaffirmed the state of emergency under the EPGA, ordering that "[a] state of emergency remains declared across the State of Michigan under the Emergency Powers of the Governor Act of 1945." Executive Order 2020-67. Pursuant to these declarations, the Governor has issued several executive orders to stem the tide of COVID-19.

The virus rages on.

Throughout the summer months, as Michigan's response flattened the curve of the virus's spread, other States began quickly reopening. Several of those states saw dramatic increases in cases. For example, nearly every day of July, Florida saw over 9,000 confirmed infections and several days with over 100 deaths.[2]

[2] Florida Department of Health, Florida's COVID-19 Data and Surveillance Dashboard, https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429 , (last accessed September 24, 2020).

And in August and September, daily case counts have not receded across the country, even as Michigan's response has kept the virus at bay. The U.S. saw average daily case counts over 40,000 each day through August and September, and deaths hovered near 1,000 every day.[3] Recently, the United States surpassed 200,000 deaths claimed by the virus,[4] and confronts the real possibility of the dreaded "second wave" as flu season hits and cold weather forces people indoors.[5]

Given the ongoing threat, the Governor has extended the states of emergency and disaster under the EPGA and EMA.[6] The Governor's state law invocations are consistent with the nation as a whole – as of this filing, all 50 states (and several territories and the District of Columbia) have in place declared emergencies.[7] And like all 50 States, Michigan remains subject to major disaster declarations under federal law making federal funding available to combat the disease.[8]

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[3] *Covid in the U.S.: Latest Map and Case Count*, New York Times, available at https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html (last accessed September 24, 2020).

[4] *Id.*

[5] *Experts project autumn surge in coronavirus cases, with a peak after Election Day*, Washington Post, Sept 5, 2020 available at https://wapo.st/2FVbROU

[6] See Executive Order 2020-165 (extending through October 1, 2020), available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-538955--,00.html.

[7] National Governors Association, *Status of State COVID-19 executive orders*, https://www.nga.org/state-covid-19-emergency-orders/ (last accessed on September 24, 2020).

[8] FEMA, *COVID-19 Disaster Declarations*, https://www.fema.gov/disasters/coronavirus/disaster-declarations

The lower courts affirm the Governor's exercise of authority.

On May 21, 2020, the Court of Claims issued an opinion denying the Legislative Plaintiffs' requested relief. (Opinion, p 25.) The Court of Claims determined that the Legislative Plaintiffs had standing, but deemed it a "close question." (*Id.* at 7.) The court rejected the Legislative Plaintiffs' "attempt to limit the scope of the EPGA to local emergencies only." (*Id.* at 11.) It also denied the Legislative Plaintiffs' request to declare the EPGA unconstitutional as violative of the separation of powers. Thus, the Court of Claims "conclude[d] that plaintiffs have failed to establish a reason to invalidate Executive Orders that rely on the EPGA." (*Id.* at 19.) Finally, it ruled that "[t]o adopt the Governor's interpretation of the [EMA] would render nugatory the express 28-day limit." (*Id.* at 24).

The Court of Appeals assumed, without deciding, that the Legislative Plaintiffs had standing. Slip op at 1, 9. The court then held that the Governor had properly exercised her authority under the EPGA and that the EPGA was not constitutionally infirm. *Id.* at 1, 10–19. Because of that holding, the court found that the claim that the Governor lacked authority under the EMA to issue new emergency and disaster declarations was moot and that ruling on that claim "would be entirely pointless because the Governor had the authority to continue the very same state of emergency and issue the very same EOs under the EPGA." *Id.* at 19. Judge Tukel dissented and would have ruled for the Legislative Plaintiffs.

STANDARD OF REVIEW

This Court reviews questions of statutory and constitutional interpretation de novo. *Mich Dept of Transp v Tomkins*, 481 Mich 184, 190 (2008).

ARGUMENT

I. The Governor has properly exercised her authority under the Emergency Powers of the Governor Act.

Denial of leave is in order, first and foremost, because the Court of Appeals' published analysis is correct: the EPGA is constitutional, and the Governor's exercise of its grant of authority to respond to the COVID-19 pandemic has been proper. The EPGA invests the Governor with extraordinary – but not unlimited – power to respond to emergencies. The states have conferred emergency powers on their Governors. This is an essential aspect of good governance. On the basis of her emergency powers, the Michigan Governor – like Governors elsewhere – declared an emergency. And like every other state, Michigan continues to face an emergency.

Contrary to the Legislative Plaintiffs' assertion, the EPGA is not a mere local act, as its parameters operate "within the state." And the fact that it does not specifically list "epidemics" does not constrain its scope to their exclusion. Further, the fact that the Legislature created two sources of emergency power does not make the EMA mere surplusage. The Legislature specifically clarified this in enacting the EMA, and the fact is only further confirmed by the substantive differences between the two statutes. Nothing in the EPGA alters the structure of government, and there no basis for this Court to engraft the Legislative Plaintiffs' limits onto its plainly stated text.

A. The EPGA's broad, but not unlimited, grant of authority supports the Governor's declared state of emergency.

The EPGA, enacted in 1945, provides the Governor with broad powers "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state." MCL 10.31(1). This Court has termed this grant of power to be "extraordinary." *Walsh v City of River Rouge,* 385 Mich 623, 640 (1971).[9]

The Governor "may proclaim a state of emergency" during these times, or upon "reasonable apprehension of immediate danger" of such an emergency, "when public safety is imperiled." MCL 10.31(1). Upon the proclamation of 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." *Id.* Any "orders, rules, and regulations promulgated . . . are effective from the date and in the manner prescribed in the orders, rules, and regulations." MCL 10.31(2). And they "may be amended, modified, or rescinded . . . by the governor" and "shall cease to be in effect upon declaration by the governor that the emergency no longer exists." *Id.* As a whole, the EPGA must "be broadly construed to effectuate [its] purpose," which is 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." MCL 10.32.

[9] The EPGA was not hidden in a "mousehole." Contra Pls' App, p 33.

As of April 30, the State faced such a "time[ ] of great public crisis," "disaster," or "similar public emergency." MCL 10.31(1). Indeed, in April, the virus killed more Michigan residents than heart disease and cancer combined.[10] As of this filing, over 6,000 have died here, and over 200,000 have died in the United States.[11] And, as Michigan and other states have seen, this threat remains real.

These facts form the basis of the Governor's finding of a state of emergency under the EPGA, and well justify the "reasonable" and "necessary" measures she has taken "to protect life" throughout the State or bring this pandemic "under control." MCL 10.31(1). The fact that the State of Michigan remains in a state of emergency is because the State and its residents still face an emergency.

B. The Legislative Plaintiffs' narrow construction of the EPGA is not borne out by the statute's plain language, and its reliance on the use of "epidemic" in the EMA is misplaced.

In an attempt to avoid the unfavorable result that flows from the EPGA's plain and straightforward text, the Legislative Plaintiffs strain to narrowly read their own statute, suggesting that the "the EPGA is intended to apply to some subpart of the state." Pls' App, p 29. But this narrow construction is contradicted by EPGA's plain language.

[10] Michigan Department of Community Health, Number of Deaths by Select Causes of Death by Month, available at https://www.mdch.state.mi.us/osr/Provisional/MontlyDxCounts.asp

[11] See n 3.

As an initial matter, the EPGA explains that its scope is "within the state." MCL 10.31(1). The Court of Appeals' majority rightly appreciated the significance of this statement:

> The statutory language also plainly states the public emergency must exist "within the state." *Id.* Contrary to the Legislature's strained interpretation, 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. The prepositional phrase "within the state" clearly does not restrict the emergencies the EPGA contemplates to isolated emergencies in local communities. A single Michigan county can be described as being "within the state," but the same is true when discussing all 83 of Michigan's counties viewed together as a whole: they are "within the state." [Slip op, p 11.]

It is telling that even the dissenting Judge on the panel, Judge Tukel, agreed with the majority on this point: "I discern no basis for the Legislature's argument that, properly construed, the EPGA has a geographic limitation, and therefore I agree with the majority as to that point[.]" Slip op, p 7 (dissenting).[12] While that is sufficient to dispel the Legislative Plaintiffs' misunderstanding, the language of the EPGA then lists the government officials who may request this declaration, starting locally ("mayor" and "sheriff") and then moving to the statewide actors

[12] While the language "within the state" is clear by itself, when contrasted with other statutes that use contrary language regarding their scope designating only local paraments, it makes the point unmistakable that Michigan's law is statewide in scope. Compare, e.g., LA RS 14:329: 6 ("During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency *within the territorial limits of any municipality or parish*") (emphasis added); NY Exec § 24 ("in the event of a disaster, rioting, catastrophe, or similar public emergency *within the territorial limits of any county, city, town or village*") (emphasis added), with MCL 10.31(1) ("(1) During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency *within the state*") (emphasis added).

("Commissioner of the Michigan state police" and "Governor.") MCL 10.31(1). The Court of Appeals' majority also identified that point. Slip op, p 11.

Moreover, the Legislative Plaintiffs' focus on certain regional terms does not undermine these points. Pls' App, p 29 ("The statute reaffirms its local, geographic focus in repeatedly referring to an 'area,' 'section,' or 'zone.' "). Far from categorical limitations, these geographical designations only appear in two of the six illustrative actions that the Governor may wish to take, leaving the rest without any geographic designation such as the ability to "control" places of amusement and assembly on public streets, or establishing curfews. MCL 10.31(1).

This attempt to recast the intended, and plainly stated, flexibility – governing local or statewide emergencies – of the EPGA as a limitation runs against the EPGA's plain text. The Act wisely recognizes that public emergencies, and necessary responses to them, may come in many different shapes and sizes, depending on the nature of the threat to public safety. And none of it suggests that the Governor, when faced with a statewide threat to public safety, cannot declare a state of emergency commensurate with that threat.

Here, the "area" designated by the Governor is the entire State, and rightfully so, given threat posed to this State by this highly contagious, often fatal, and still untreatable virus. See MCL 10.31(1). Simply put, given the nature of this virus, there is unquestionably a "reasonable apprehension of immediate danger of a public emergency" currently present in every portion of this State. MCL 10.31(1).

The entire State is the "area involved," and the Governor is fully authorized to designate that area and respond accordingly.

And any claim that the EPGA is only designed to address local emergencies, and the EMA only statewide ones, is further belied by the language of the EMA. Pls' App, pp 30 ("Reading the EPGA's conception of an 'emergency' against the EMA's definition of 'emergency' further highlights the former's local and narrow powers."). Just as the EPGA accommodates emergencies statewide in scope, so too is the EMA filled with references to local states of emergency.

The EMA defines a "local state of emergency," MCL 30.402(j), grants local officials with the authority to declare such a state of emergency, MCL 30.410(1)(b), and enables state officials to take action when an emergency extends beyond what local efforts and capabilities can handle, see MCL 30.402(h), MCL 30.414(1). The EMA thus contemplates emergencies of various types and scales. Nothing in it supports engrafting a local limitation onto the concept of a "public emergency" in the EPGA. It also does not support a conclusion that, prior to the EMA's passage in 1976, the law contemplated no means for the State to respond to a statewide emergency. The idea that the Governor would have had to issue 83 local emergency orders is not well taken, and it has no basis in the EPGA's text.

Similarly, the Legislative Plaintiffs' effort to rely on the presence of the designation "epidemic" in the EMA does not somehow limit the scope of the EPGA. Pls' App, pp 30–31. Judge Tukel had reached that conclusion in his dissent. See slip op p 9 (dissenting). This argument suffers from at least two fatal flaws.

First, the EMA makes clear that it does not "limit, abridge, or modify" the EPGA. MCL 30.417(d). The EPGA refers to a "public emergency," and the ordinary understanding of a "public emergency" that imperils the safety of the public by threatening their lives would include an "epidemic of disease" such as COVID-19. See, e.g., *In People ex rel Hill v Bd of Ed of City of Lansing*, 224 Mich 388, 393 (1923) ("[O]f paramount necessity, a community has the right to protect itself against *an* ***epidemic*** *of disease* which *threatens the safety* of its members.") (emphasis added). As recognized by the Court of Appeals' majority, slip op, p 14, "MCL 30.417(d) does not permit us to use language in the EMA to diminish the reach and scope of the EPGA."

Thus, any effort to narrow the construction of the EPGA by relying on the language of the EMA is expressly foreclosed by the plain terms of § 17(d), whether examining the Governor's power to proclaim a state of emergency or the Governor's powers more generally. In short, nothing in the EMA constrains the Governor's powers, including under the EPGA.

Second, insofar as this argument is advanced as one of mere statutory construction, such a claim is textually unsupported. Both the EMA and the EPGA cover "disaster[s]," with the EMA expressly defining the term but the EPGA not. If the EMA's definition is treated as some sort of limitation on the EPGA, such that whatever is included in the former must be excluded from the latter, there would be nothing left to the EPGA. The definition of "disaster" in the EMA encompasses "an occurrence or threat of widespread or severe damage, injury, or loss of life or

property resulting from a natural or human-made cause." MCL 30.402(e). If all such circumstances were excised from the scope of the EPGA, what threats to public safety would be left? Indeed, even the one kind of event that appears to be indisputably within the EPGA's scope – rioting – is expressly included in the EMA:

> (e) "Disaster" means an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to . . . hostile military action or paramilitary action, *or similar occurrences resulting from terrorist activities, **riots**, or civil disorders*. [MCL 30.402(e) (emphasis added).]

Under this non-textual view, even the "riot statute" does not address riots – only the EMA does.

C. The plain reading of the EPGA does not render the EMA an "empty shell."

As stated by the Court of Appeals' majority, § 17(d) of the EMA makes clear that it "does not permit us to use language in the EMA to diminish the reach and scope of the EPGA." Slip op, p 14. The language of § 17(d) is a unique, but clear and intentional, protection of the Governor's emergency power authority.

Contrary to the Legislative Plaintiffs' argument, the doctrine of *in pari materia*, which assists in reading laws on the same subject harmoniously, is generally inapplicable to statutes that are unambiguous and do not present a "patent conflict." *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 74 n 26 (2017). And because the doctrine is most profitably applied to address statutes that do not refer to each other, it is employed to make sense of their interaction.

See, e.g., *People v Anderson,* 330 Mich App 189, 197 (2019) (the doctrine applies "even if the statutes do not refer to one another").

But there is no mystery here, the second-in-time statute – the EMA – expressly explains that it does not "[l]imit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant [the EPGA]" or any other law in place. MCL 30.417(d). Thus, the statutes themselves unambiguously tell us that they each are – and must be read as – independent, supplementary, and non-conflicting grants of authority to the Governor.

This understanding of the EMA and EPGA as overlapping authorities makes practical sense too, as the unforeseen discovery of statutory gaps in an emergency or disaster could be devastating. As MCL 30.417(d) makes clear, better to complement one authority with another.

Canons of statutory construction are tools to divine legislative meaning, not obscure it. Here, the Legislature, in enacting the EMA, made certain that the reader would not be left to guess at its intentions, and it included § 17(d) to ensure that a reviewing court would not attempt the very thing attempted here – to use the EMA to limit the Governor's other authorities, including under the EPGA.[13]

[13] The Legislative Plaintiffs' contention that the limitation of § 17(d) only protects the Governor's authority to initially "proclaim" the emergency under the EPGA, see Pls' App, p 28, while misplaced in its own right, also ignores the second clause of the provision, which provides that the EMA does not limit, modify, or abridge the "*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) (emphasis added). The EPGA is a statute.

Even with this deliberate overlap, the EMA and EPGA have distinct scopes, each with a greater and narrower authority than the other. In other words, the EMA is not an "empty shell." Pls' App, p 24.

The most obvious way in which the EMA is broader than the EPGA is its ability to anticipate emergencies, most notably in creating a contingency fund. See MCL 30.418. The fund provides that the "[L]egislature shall annually appropriate sufficient funds to maintain the fund at a level not to exceed $10,000,000.00 and not less than $2,500,000.00." *Id.* The EMA, passed in 1976, came just two years after the National Disaster Relief Act of 1974 was enacted.

The EMA makes reference to this national fund in two separate sections. See MCL 30.416, 418. The evident purpose was to ensure that the State had available funds so that it could provide "matching" funds in the event that the U.S. President declared a disaster or an emergency, and made funds available to the State. See MCL 30.418(4) (enabling the state to "pay the state's matching share of grants").

By contrast, the EPGA does not authorize the Governor to prepare for future public emergencies or potential danger that are not imminent. Rather, it empowers the Governor to act during times of an actual public emergency or in "reasonable apprehension of *immediate* danger of a public emergency." MCL 10.31(1) (emphasis added). As an example, the EMA allows the Governor to establish a contingency fund for a future tornado, while the EPGA only authorizes the Governor to take action once the tornado is imminent.

The Acts are also distinct in the scope of actors they respectively empower, with the EPGA authorizing only the Governor to take action and the EMA, by contrast, setting forth a comprehensive and coordinated emergency-response mechanism involving various actors in state and local government as well as private and volunteer personnel. See, e.g., MCL 30.408–.411. The Acts also provide their own terms and processes for invoking and exercising their grants of authority, and the EMA contains both express authorizations and limitations on the exercise of its grant of authority that are not likewise set forth in the EPGA. See, e.g., MCL 30.417(a), (c) (express limitations regarding interference with labor disputes and the jurisdiction of law enforcement agencies); MCL 30.405(1)(d), MCL 30.411 (express authorizations regarding the commandeering of private property and the provision of civil immunity).

The law thus provides more than one tool in the Governor's toolbox, without any limitation against using them in tandem. The Legislative Plaintiffs offer no good reason to doubt or disrupt that legislative choice. And the Legislative Plaintiffs' cries of surplusage also overlook the comprehensive infrastructure of actors and resources that is provided by the EMA, which includes coordination with the federal government and other states, MCL 30.404, a state emergency management apparatus, MCL 30.407, 407a, 408, the coordination with local authorities, MCL 30.409, 410, 411, 413, and contingency funds, MCL 30.418, 419. But ultimately, Section 17(d) of the EMA makes clear that the EPGA operates separately and is not limited by the EMA. Nothing more is needed.

D. The Legislative Plaintiffs' claims that Governor's use of the EPGA is unsupported by historical context and that it alters the structure of government are unavailing.

This Court's canons of construction place the statutory text – and its plain meaning – at the center of understanding the intent of the Legislature in enacting a law. Legion are the cases that provide that a statute must be applied as written when unambiguous and that no construction is permitted. See, e.g., *McQueer v Perfect Fence Co*, 502 Mich 276, 286 (2018) ("The primary rule of statutory construction is that, where the statutory language is clear and unambiguous, the statute must be applied as written"). Such is the case here.

Thus, the Court need not review the historical context of the EPGA to understand this unambiguous statute, and Plaintiffs' reliance on it, see Pls' App, pp 33–35, is misplaced. *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 497 Mich 337, 355 n 50 (2015) ("[T]he language of the [statute] is unambiguous and, as a result, the examination of legislative history 'of any form' is not proper[.]").

But if the Court does engage in such a review, the historical record supports the Governor's action. The Governor has been able to identify the sixteen times in which a prior Governor has invoked the EPGA; Governors Kelly, Williams, Romney, and Milliken all did so. See Governor's Supplement Authority in *In re Certified* (No. 161492), filed Sept 23, 2020. For the first two of these invocations, which both occurred within the first five years after the EPGA's enactment, the emergency related to wintertime coal shortages, and the Governor issued a statewide emergency, belying any contemporaneous understanding that this was a local, riot-limited act.

In 1946, Governor Harry Kelly, the year after he signed into law the EPGA, invoked it to declare a state of emergency "throughout the entire state" based on a critical coal shortage caused by a strike:

> WHEREAS, it has been represented to me by the Federal Solid Fuels Administration and Captain Donald S. Leonard, State Fuel Administrator, that the strike in the bituminous coal mines of the nation and the drastic curtailment of fuel supplies coming into the state, caused by the subsequent embargo on railroad transportation, have created *a public crisis within the State of Michigan endangering the health, safety, property and general welfare of the people of the State.*
>
> NOW THEREFORE, I, Harry F. Kelly, Governor of the State of Michigan, in accordance with the provisions of Act 302 of the Public Acts of 1945, do hereby proclaim *a state of emergency throughout the entire state*. [Appendix A (emphasis added).]

With the then-recently enacted EPGA, Governor Kelly imposed restrictions to conserve coal and transfer it from some communities to others "in dire need."[14]

In 1950, Governor G. Mennen Williams encountered the same kind of crisis, and issued the same basic proclamation under the EPGA: "the shortage of coal has created a public crisis within the State of Michigan endangering the health, safety, property and general welfare of the people of the State:"

> NOW THEREFORE, I, G. Mennen Williams, Governor of the State of Michigan, in accordance with the provisions of Act 302 of the Public Acts of 1945, *do hereby declare a state of emergency throughout the entire state*. [Appendix B, p 3 (emphasis added).]

[14] *Michigan Declares Emergency Exists*, New York Times, December 7, 1946, available at https://timesmachine.nytimes.com/timesmachine/1946/12/07/98603154.html?pageNumber=2

For this declaration, Governor Williams also issued regulations regarding the delivery of coal and the establishment of "certificates of necessity" for the use of coal that would become effective once the local chief executive certified the existence of "emergency conditions." (Appendix B, p 1.) These regulations appeared to be applicable to the entire State as the Governor provided no geographical limitation to his emergency regulations. Thus, the arguments from the Legislative Plaintiffs – see Pls' App, p 34 – that the prior executive orders were only local in nature is contradicted by these orders.[15]

Moreover, their reliance on Governor Milliken's remarks regarding the "unduly . . . limited" nature of the EPGA from the early 1970s again only supports the Governor's argument. See Pls' App, p 34. In his April 11, 1973 address to the Legislature, Governor Milliken referred to this "limited" nature of the EPGA, but explained that it was because it did not enable a planned response to *prepare* for "potential" future disasters:

> While it is possible that many of the special problems created by non-military disasters can be handled by broad interpretation of existing Michigan law, the *Governor's emergency powers are not specifically addressed to the* ***imminent potential*** *of disasters.*
>
> The existing civil defense powers of the Governor are general in nature and specify that they are to be exercised under conditions of attack. The emergency power of the Governor, set forth in Act 302 of 19-15, are pertinent to civil disturbances, and only indirectly relate to natural disasters. *The Act is silent with respect to powers necessary to combat* ***imminent disasters****.* [Appendix C, Gov Milliken's Address, p 2 (emphasis added).]

[15] These orders were uncovered by the State Archives in the second and third week of September.

As noted earlier, these comments confirm the narrower nature of the EPGA, because it does not govern preparation for future emergencies, such as the gradual rising of the Great Lakes and the potential for disaster that it presented to Michigan. *Id.* at 1 ("Waters bordering our shores have reached record high levels, and are going higher"). The EMA provided the authority for the infrastructure to make contingency plans for such "potential" disasters.

No better is the claim that the EPGA "alters" the structure of government in Michigan, Pls' App, pp 35–41; *id.* at 37 ("Courts in Michigan and across the country have recognized that during emergencies – and specifically epidemics – legislation should continue to come from the Legislature"). Nothing in the EPGA bars the Legislature from enacting laws right now. In fact, as the Legislative Plaintiffs' amicus brief in the *In re Certified* case cataloged, the Legislature has passed "about 240 bills and adopted 60 resolutions" since the beginning of the crisis. See Amicus Brief, Aug 20, 2020, p 11. The fact that the Legislature has given emergency powers to the Governor has not stripped the Legislature itself of power. It has enabled the Governor to act in a manner uniquely suited to that executive office and uniquely needed in times of emergency, with the Legislature at all times fully free and able to exercise its legislative authority.

In advancing this line of argument, the Legislative Plaintiffs' underlying suggestion is that Michigan is out of step with the rest of the country by conferring authority on the Governor regarding an emergency without providing an express role for the Legislature in the exercise of that authority.

But there are at least twelve other states – like Michigan and the EPGA – that provide for no express role for the Legislature in the origination of the decision to declare an emergency, to extend it, or to terminate it.[16] The Governors in these states have invoked their authority under these laws in response to the COVID-19 pandemic. Here, as elsewhere, Michigan and its Governor are no outlier. The EPGA's plain text is clear, its grant of emergency-response authority is sound and sensible, and the Governor has duly invoked it in this time of public emergency.

II. The Emergency Powers of the Governor Act is constitutional and does not reflect an improper delegation by the Legislature and does not violate the Michigan Constitution's Separation of Powers.

Just as in other states, the Legislature here has properly delegated emergency-response authority to the Governor to take reasonable and necessary action to protect Michigan residents in times of crisis. The Legislative Plaintiffs argue that the EPGA is an improper delegation and violates the separation of powers because it lacks sufficient standards to guide the Governor. Not so.

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[16] See Delaware, Del Code Ann title 20, § 3115(c); Illinois, 20 ILCS 3305/7; Kentucky, KY ST § 39A.100(1); Massachusetts, Chapter 639, § 5 of the Acts of 1950: Civil Defense Act; Mississippi, Miss Code Ann § 33-15-11; New Jersey, NJSA 26:13-3; New Mexico, NM Stat Ann § 12-10A-5; Ohio, OH ST § 5502.22; South Carolina, SC Code Ann § 1-3-420; South Dakota, SD Codified Laws § 34-48A-5(2); Tennessee, Tenn Code Ann § 58-2-107(b); and Wyoming, Wyo Stat Ann § 19-13-104. See National Conference of State Legislatures, "Legislative Oversight of Emergency Executive Powers," listing these twelve states as providing "No relevant provisions found" regarding the Legislature's role. https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx (last accessed September 24, 2020). The attorneys for the Governor reviewed these twelve schemes and found no statutory provisions conferring any express role on the Legislature in the Governor's decision regarding a state of emergency.

Rather, to the contrary, the EPGA's standard compares favorably to the most analogous case under this Court's precedent – with "necessity" as the standard for eminent domain – which it found did not violate the doctrine. Nor does the EPGA.

A. The Legislature is not barred from delegating power as long as it provides adequate guidance.

The Michigan Constitution provides for the separation of powers among the three branches of state government:

> The 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. [Art 3, § 1.]

But Michigan courts have never interpreted the separation of powers doctrine to mean there can never be any overlapping of functions between branches. See *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 752 (1982) ("while art. 3, § 2, of the constitution provides for strict separation of power, this has not been interpreted to mean that the branches must be kept wholly separate"), citing *People v Piasecki*, 333 Mich 122, 146 (1952); *In re Southard*, 298 Mich 75, 83 (1941).

The separation of powers doctrine "ha[s] led to the constitutional discipline that is described as the nondelegation doctrine." *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8 (2003). While the legislative power – the power "to make, alter, amend, and repeal laws" – sits with the Legislature, *Harsha v City of Detroit*, 261 Mich 586, 590 (1933), both the U.S. Supreme Court and this Court "ha[ve] recognized that the separation of powers principle, and the nondelegation doctrine in particular, do not prevent [the legislative branch] from obtaining the assistance of the coordinate Branches." *Taylor*, 468 Mich at 8 (internal quotes omitted).

The Michigan doctrine of non-delegation has been expressed in terms of a "standards test." *Westervelt v Natural Resources Comm*, 402 Mich 412, 437 (1978) (Williams, J., lead opinion); *id.* at 454 (Ryan, J., concurring). In *Blue Cross & Blue Shield of Mich v Milliken*, this Court outlined the three core components of the test:

> (1) the act must be read as a whole;
> (2) the act carries a presumption of constitutionality; and
> (3) the standards must be as reasonably precise as the subject matter requires or permits. [422 Mich 1, 51–52 (1985).]

As a part of this inquiry, "[t]he preciseness required of the standards will depend on the complexity of the subject." *Id.* See also *State Conservation Department v Seaman*, 396 Mich 299, 309 (1976) (outlines same test).

Significantly, Michigan law is clear that the Legislative Plaintiffs' claim, which is based on the separation of powers, is evaluated under this "standards test" to determine if there is a separation of powers violation:

> *With respect to the separation of powers*, the Legislature does not "delegate" or "abdicate" its power to an administrative agency if the challenged legislation *contains standards as reasonably precise* as the subject matter requires or permits[.] [*Westervelt*, 402 Mich at 438 (cleaned up; emphasis added) (Williams, J.).],

Stated differently, under the "standards test," there is no violation of the separation of powers when the Legislature has not abdicated its lawmaking power. See *id.* at 441 (Williams J., lead opinion) ("when properly prescribed 'standards' exist, the Legislature has not abdicated its law-making or 'legislative' power because the agency to which the power is delegated is limited in its action by the Legislature's prescribed will"). The Court of Appeals below correctly recognized this. Slip op, p 7 ("The 'standards test' satisfies the Separation of Powers Clause").

The Legislative Plaintiffs' suggestion that the EPGA is unconstitutional because it "alters" the structure of government, see Pls' App, p 35, is thus not only unfounded, but also untethered from the settled standard governing that constitutional inquiry.

It is also worth noting that the standards test does not provide a durational limit. There is nothing that supports the idea that what is executive action properly delegated by the Legislature on day 1 somehow becomes legislative power on day 29, or at six months. Either the standards guiding the exercise of authority are sufficiently precise or they are not. Given the varied and complex nature of emergencies, the EPGA's standards meet that requisite level of precision. And given the ongoing nature of this particular emergency, there is an ongoing need for executive action under that statute.

B. The Legislature's delegation of emergency powers, requiring "reasonable" action "necessary to protect life and property or to bring the emergency . . . under control," is constitutional.

The Legislature did not grant the Governor a blank check. The EPGA provides the Governor the authority, after declaring a state of emergency, to promulgate "reasonable" orders that are "necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1). Thus, there are several limits on the Governor's authority. Her orders may come only upon (and so long as there is) a "public emergency" or a "reasonable apprehension of immediate danger" of an emergency, and the orders must not only be "reasonable" *and* "necessary," they must be directed at protection of "life and property" or "bring[ing] the emergency . . . under control" in the "affected area." *Id.*

Under this Court's precedent, these standards are more than constitutionally adequate. The most analogous case, *Mich State Hwy Comm v Vanderkloot*, 392 Mich 159 (1974), examines "necessity" as a standard for the Department of Transportation to exercise its authority to take property under eminent domain. While this is different than the emergency powers under the EPGA or the EMA, it is nonetheless a huge grant of authority. This Court determined that "the standard 'necessity' as utilized in [the Highway Condemnation Act] is a sufficient standard for delegation of eminent domain authority [because] [i]t is a standard as reasonably precise as the subject matter requires or permits[.]" *Id.* at 173, (internal quotes, ellipses deleted), citing *Osius v St Clair Shores*, 344 Mich 693, 698 (1956). This Court has reached the same conclusion for other, similar standards. See, e.g., *Smith v Behrendt*, 278 Mich 91, 97–98 (1936) ("special cases" was a proper delegation for oversize loads); *GF Redmond & Co v Michigan Sec Comm'n*, 222 Mich 1, 7 (1923) ("good cause" was sufficient for licensing).

The Legislative Plaintiffs rely primarily on *Blue Cross & Blue Shield of Michigan*, see Pls' App, pp 49–50, which is distinguishable. This Court determined that "the power delegated to the Insurance Commissioner" regarding approval of actuarial risk factors "is completely open ended." 422 Mich 1, 53 (1985). And for good reason. The commissioner's authority was not guided at all. Instead, the commissioner was granted complete authority to " 'approve' or 'disapprove' the proposed risk factors; the basis of the evaluation is not addressed." *Id.* *Blue Cross*

is a poor comparison, as are the other cases that the Legislative Plaintiffs cite in their brief.[17]

And of course, the standards imposed on the Governor's authority under the EPGA are not read in a vacuum; the "subject matter" of the delegation guides how strictly or narrowly drawn the standards must be. *Blue Cross,* 422 Mich at 51–52. Public emergencies are not static events, nor do they unfold predictably. Response to such crises warrant nimbleness to meet the needs of the moment. There is no specific one-size-fits-all response to a complex and ongoing emergency. The standards test duly requires that this be recognized and respected in evaluating the constitutionality of the Legislature's delegation.

C. The Legislative Plaintiffs' arguments that the standards are insufficient to guide the EPGA are misplaced.

The gravamen of the Legislative Plaintiffs' central thesis is that the EPGA confers too much power with too few limitations. This claim is wrong for three reasons.

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[17] The Legislative Plaintiffs cite to *Milford v People's Cmty Hosp Auth*, 380 Mich 49, 61–62 (1968) ("the best interest of the hospital and its patients"); *Hoyt Bros v City of Grand Rapids*, 260 Mich 447, 451 (1932) ("worthy" charities). Unlike the arbitrary standards identified in those cases, the statutory standards in the EPGA are real ones, rooted in law, and ones in which the Executive may be subject to real challenge. Cf. *Slis v State*, ___ Mich App ___, ___ 2020 WL 2601577, at *19 (2020), ("we nonetheless *cannot conclude* that the [agency's] finding [related to vaping] is *reasonable*") (emphasis added), lv den ___ Mich ___ ; 2020 WL 5591425 (September 18, 2020).

First, the context of a developing "crisis, disaster, rioting, catastrophe, or similar public emergency," MCL 10.31(1), counsels granting substantial leeway to the decisionmaker. The subject matter here requires the broadest level of leeway permissible under the nondelegation doctrine. If "the management of natural resources is a difficult and complex task," *Seaman*, 396 Mich at 311, the response to a rapidly developing and ever-changing public health crisis is even more so. The Court of Appeals majority's analysis on this point was spot on:

> Considering the complexity of the subject matter and the myriad unfathomable forms that a public emergency could take, we find this language is as reasonably precise as the subject matter requires or permits. *Indeed, more exacting standards would likely be overly confining and unnecessarily bind a governor's hands in any effort to mitigate and control an emergency at the very time he or she must need to be nimble.* [Slip op, p 17 (emphasis added).]

The Legislature Plaintiffs further make the point that with the greater grant of authority, the standards must be more precise. Pls' App, p 45. See also *Whitman v Am Trucking Associations*, 531 US 457, 475 (2001) ("the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred"). But the U.S. Supreme Court has not required a "definite criterion" even for a "*sweeping* regulatory scheme." *Id.* In fact, the U.S. Supreme Court identified the *virtually identical standards* as here – "imminent" and "necessary" – as sufficient to justify a broad grant of authority:

> [W]e did not require the statute to decree how "*imminent*" was too imminent, or how "*necessary*" was necessary enough, or even – most relevant here – how "hazardous" was too hazardous. [*Id.*]

This discussion came in the context of the Court's review of Congress's delegation to the EPA to regulate ozone and particulate matter. The broad delegation was to regulate air quality for the entire country; Congress required the EPA "establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air." *Whitman,* 531 U.S. at 473. "Requisite," in turn, "means sufficient, but not more than necessary." *Id.* Writing for the majority, Justice Scalia described this delegation as "*well within* the outer limits of our nondelegation precedents." *Id.* at 474 (emphasis added). *Whitman* also found these limits "strikingly similar" to those affirmed in *Touby v United States,* 500 US 160 (1991), which provided that the Attorney General could add a substance to the schedule of prohibited drugs when "necessary to avoid an imminent hazard to the public safety." *Id.* at 163.

The same basic standards are present here. For an emergency that imperils "public safety," the EPGA requires both that there be at least a reasonable apprehension of "immediate" danger of an emergency, and that the actions the Governor take be both "reasonable" and "necessary" to protect life or property from that danger or bring the situation under control. MCL 10.31(1). As the Court of Appeals noted here, slip op, p 18, the standards the Legislature created in the EPGA are as precise as the subject matter requires and permits.

Second, the actual standards by which the Governor may act under the EPGA are similar to those under the EMA. Indeed, under § 3 of the EMA, the Governor may "issue executive orders, proclamations, and directives having the

force and effect of law to implement this act." MCL 30.403(2). While there are some limitations, this general statement is given form in § 5, which provides for suspension of regulatory statutes where "necessary," MCL 30.405(1)(a), for the provision of state resources where "reasonably necessary," MCL 30.405(1)(b), and for the direction of "all other actions which are necessary and appropriate under the circumstances," MCL 30.405(1)(j). Yes, the same language and kinds of standards as established in the EPGA. Tellingly, the Legislative Plaintiffs do not challenge the EMA on this ground, see Pls' App, pp 41–58, even though its grant of authority ultimately rests on same general standards that guide the EPGA.

Third, it is not as if Michigan is alone in providing a significant grant of power that is limited by standards based on a higher level of generality. The EMA was modeled after a national template that has "been adopted in other states." Janice Selberg, Michigan Bar Journal, "Powers of the Governor: Sources," (July 2020), pp 52–53, quoting from the State Police of HB 5314 in 1976.[18] Yet the

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[18] According to *Health Security,* Vol 17, No. 2, 2019, "An Assessment of State Laws Providing Gubernatorial Authority to Remove Legal Barriers to Emergency Response," p 3, Michigan's emergency powers laws are like to the majority of states:

> A majority of states have broad statutes enabling the governor to temporarily change statutes or regulations during a declared emergency. In total, 42 states explicitly permit the governor to change statutes or regulations during an emergency. In 35 states, governors are explicitly permitted to suspend or amend both statutes and regulations that interfere with an efficient, effective response to an emergency to an emergency. [Figures and footnotes omitted.]

https://www.nga.org/wp-content/uploads/2019/06/An-Assessment-of-State-Laws-Providing-Gubernatorial-Authority-to-Remove-Legal-Barriers-to-Emergency-Response.pdf

Legislative Plaintiffs have cited no cases in which a court has apparently stepped in to nullify these grants.[19] Neither case law, common practice, nor common sense signals that standards guiding emergency response authority should, let alone must, be any more precise than the EPGA's.

D. The Governor is exercising executive authority that is subject to significant limitation under the EPGA.

The essential fact is that the executive authority the Governor is wielding is just that, executive authority. She is not engaging in lawmaking. None of the Governors are. She is using the tools the Legislature gave her to carry out the task it entrusted to her.

It is a little like the Michigan statute that enables police officers to issue lawful orders in traffic, which if violated, are misdemeanors. See MCL 257.602.[20] In that setting, it is necessary for the police to exercise executive authority. They are not acting like a legislature, and they are not creating laws. But the police officer's orders have the force and effect of law. The same is true here, but on a broader scale.

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[19] Insofar as the Legislative Plaintiffs rely on *Wisconsin Legislature v Palm*, 942 NW2d 900 (WI 2020), that case is distinguishable and, if anything, belies their position. See *id.* at 914 ("[T]he Governor's emergency powers are not challenged by the Legislature, and [the agency official] does not rely on the Governor's emergency powers. *Constitutional law has generally permitted the Governor to respond to emergencies without the need for legislative approval.*") (emphasis added).

[20] MCL 257.602 provides: "A person shall not refuse to comply with a lawful order or direction of a police officer when that officer, for public interest and safety, is guiding, directing, controlling, or regulating traffic on the highways of this state."

It is easy to understand why this is so. The Governor is best equipped to address the exigencies of an emergency, not the Legislature. While legislative deliberation ordinarily is valuable, a fast-moving, contagious disease requires an agile and flexible response, not Robert's Rules of Order. The Legislature knows that to meet the moment, proper delegation to the executive is the wisest course, which is why it granted the authorities it did to the Governor. This pandemic has only confirmed the prescience of that judgment.

The Legislative Plaintiffs warn of "indefinite" rule by the Governor "on practically every imaginable topic." See Pls' App, p 47. This argument overlooks the important limitations on the Governor's authority but also fails to explain why an express durational limit would change the nature of her authority.

The standards test does not require any such express durational limit. Nor could it really. Either the Legislature has created sufficiently precise standards or it has not. The Constitution does not countenance its violation for a single day, let alone 30 days. As the Legislative Plaintiffs point out, Pls' App, p 43, "Emergency does not create power." *Home Bldg & L Ass'n v Blaisdell*, 290 US 398, 425 (1934). But regardless, the authority under the EPGA *is* durationally limited. It is limited by the circumstances of the emergency, and can last only so long as they do.[21]

[21] With this line of argument, the Legislative Plaintiffs appear really to complain that the emergency has passed. That is not a challenge to the EPGA, but to the Governor's exercise of authority under it. Such a challenge is generally subject to judicial review, but it is not one that is presently before this Court.

The sufficiency of the EPGA's standards is further confirmed by their comparison against the three "check[s]" explained in *Westervelt*, which define the fundamental constitutional role the standards must play:

> [W]ithout such language, there would not exist an effective measure by which the [1] Legislature, [2] the courts, and [3] the public might "check" agency action.

[402 Mich at 439 (Williams, J., lead opinion).]

All three checks are present here.

The Legislature's check.

If the Legislature does not support the actions that the Governor is taking under the EPGA, it may pass a law. Cf. *Dodak v State Admin Bd*, 441 Mich 547, 558 (1993) ("If the Legislature disagrees with [the executive's view of the law], it can work a political resolution of the disagreement by expressly repealing [it]"). That this law would have to override a Governor's veto does not undermine this check, but only helps define its nature. Indeed, this is the same basic position of the Congress under the National Emergencies Act (NEA). To terminate a state of emergency, it has to pass a "joint resolution," which requires "the President's signature." *Beacon Products v Reagan,* 814 F2d 1, 3 (CA 1, 1987) (Breyer, J.).[22]

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[22] The Congress amended the NEA in 1985 – requiring a joint resolution for any effort by Congress to terminate a state of emergency – to correct the legislative veto problem. *See id.*; Act of Aug 16, 1985, Pub L 99–93, § 801, 99 Stat 448 (1985).

See also *Wolf v Scarnati,* ___ Pa ___ 2020 WL 3567269, *19 (July 1, 2020) ("[B]ecause the General Assembly intended that H.R. 836 terminate the Governor's declaration of disaster emergency without the necessity of presenting that resolution to the Governor for his approval or veto, we hold, pursuant to our power . . . that H.R. 836 is a legal nullity . . . .").

In other words, it is just like passing a law. And the federal courts have apparently referred to this opportunity as the ability of the Congress to "review" the President's action under the NEA. See, e.g., *United States v Amirnazmi*, 645 F3d 564, 577, 581 n 26 (CA 3, 2011); 50 USC 1622(b). The Michigan Legislature may essentially do that right now, and need not wait for six months, as the NEA invites. *Id.* at 573 ("After each six-month interval, Congress 'shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated."). No legal roadblock is stopping the Legislature from doing so right now.

The courts' check.

The EPGA always requires the presence of a public emergency or reasonable apprehension of immediate danger. MCL 10.31(1). Once the emergency ends, so does the Governor's authority. The presence of an emergency is subject to judicial review. See *Straus v Governor*, 459 Mich 526, 533 (1999), quoting *People ex rel Johnson v Coffey,* 237 Mich 591, 602 (1927) ("[The Governor's] decision of disputed question of fact is final. His finding of fact*, if it has evidence to support it*, is conclusive on this court.") (emphasis added). The same is true of any order issued under the authority of the EPGA based on the existence of the emergency.

The Legislative Plaintiffs have not sought that review, but they are challenging the constitutionality of the EPGA itself. See slip op, p 18 ("We 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.").

The public's check.

And finally, the Governor is accountable to the people, not only in an electoral sense, but also as a public servant. This is what happens in a democracy, and especially so for the Governor, as the chief executive official with the "high[est] degree of proximity to the elective process." *Westervelt*, 402 Mich at 449 (Williams, J. lead opinion). This extremely high degree of public visibility and accountability ensures the strength of this check on the Governor's exercise of authority under the EPGA, and only further confirms that the EPGA's standards are constitutionally sufficient to guide that exercise of authority.

III. The Governor has properly exercised her authority under the Emergency Management Act.

As the Court of Appeals duly recognized, because the EPGA is constitutional and the Governor has validly invoked its authority to respond to the COVID-19 pandemic, there is no need to address whether she has also acted properly under the EMA. Given the absence of a full analysis of this question by the Court of Appeals, it is not well presented for this Court's review. And given the Court of Appeals' correct analysis of the EPGA (as well as the Legislative Plaintiffs' lack of standing to raise either challenge), this Court should have no occasion to reach it here. But should this Court choose to do so, it will find the Governor's response to this pandemic well supported by the EMA.

On April 30, 2020, Michigan was facing a disaster and an emergency. Indeed, it still is. Nonetheless, despite the ongoing emergency and disaster, the Legislative Plaintiffs claim that, as of April 30, the Governor cannot issue a new declaration under the EMA because the Legislature refused to extend her prior declaration. But the EMA does not create that limit. To the contrary, it mandates the opposite: if emergency or disaster conditions exist, the Governor is duty-bound by the EMA to issue a declaration and activate that statute's emergency-response powers and resources to protect this State and its residents. That corresponds with the plain text of the EMA, and it makes eminent practical sense.

A. The Governor properly declared a disaster and an emergency under the EMA.

First enacted in 1976, the EMA sets forth several independent, related obligations regarding state and local responses to emergencies and disasters in the State. For the Governor, the EMA grants her the important responsibility to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency." MCL 30.403(1). This broad charge places the Governor at the forefront of emergency and disaster responsiveness. To that end, she possesses the authority to "issue executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(2).

Consistent with the EMA's broad authority, the Governor has the obligation to declare states of disaster and emergency if the pertinent conditions exist. She "*shall*, by executive order or proclamation, declare a state of disaster if he or she finds a disaster has occurred or the threat of a disaster exists." MCL 30.403(3)

(emphasis added). Similarly, she "*shall*, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists." MCL 30.403(4) (emphasis added). These provisions mirror one another. And the EMA expressly defines "state of disaster" and "state of emergency" independently from "disaster" and "emergency." "[D]isaster" and "emergency" refer to conditions that the Governor may find to exist in the State.[23]

Distinctly, "state of emergency" and "state of disaster" – both of which were declared in Executive Order 2020-68 – are defined as types of executive orders or proclamations that the Governor must issue upon finding certain conditions exist. " '[S]tate of disaster [or emergency]' means *an executive order or proclamation* that activates the disaster [or emergency] response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected." MCL 30.402(p), (q) (emphasis added).

In short, "state of emergency" and "state of disaster" are *species of executive orders* that activate certain response efforts and resources and must be issued when "emergency" or "disaster" conditions are found to exist. This plainly stated distinction is important to properly understanding the interplay between the Governor's termination of her prior declarations and her issuance of a new one.

As the EMA makes clear, "if [the Governor] finds that an emergency [or disaster] has occurred or that the threat of an emergency [or disaster] exists," the Governor "*shall*" declare so. MCL 30.403(3), (4). Under longstanding Michigan

[23] The EMA defines both "disaster" and "emergency." See MCL 30.402(e), (h).

precedent, "the word 'shall' is ordinarily construed in its imperative sense, excluding the idea of discretion." *State Bd of Ed v Houghton Lake Cmty Sch*, 430 Mich 658, 670 (1988); see also *Sauder v Dist Bd of Sch Dist No 10*, 271 Mich 413, 418 (1935) (a statute that uses "shall" "is imperative" when "the public are interested"). The Governor thus has a *duty* to declare a state of emergency or disaster if one is occurring.

And just as the Governor is required to *declare* a state of disaster or emergency, i.e., issue such an executive order, if the conditions merit it, she also has the duty to "terminate" that order if the conditions cease or the Legislature refuses to extend it by resolution. MCL 30.403(3), (4). That termination, however, expressly extends only to the order itself. What does not terminate under the EMA is the Governor's duty to issue declarations, and activate the statute's emergency-response mechanism, whenever the conditions on the ground warrant it.

And that is precisely what the Governor did on April 30 when the Legislature declined to extend the Governor's executive orders declaring states of emergency and disaster under the EMA, even as the State undisputedly continued to face emergency and disaster conditions as a result of the pandemic. On April 30, then, in accordance with the mandate that the Governor "terminate" the state of emergency and disaster declarations under the EMA absent legislative extension, MCL 30.403(3), (4), the Governor so terminated. (EO 2020-66.)

But the conditions on the ground remained dire. On that day alone, more than 100 Michigan residents died from the virus and over 1,100 were confirmed

infected.[24] Thus, the Governor rightly found "that an emergency [or disaster] has occurred or that the threat of an emergency [or disaster] exists" (EO 2020-68), triggering her duty under the EMA to declare as such. MCL 30.403(3), (4).

B. The Legislative Plaintiffs' construction of the EMA conflicts with its plain text and is unworkable.

The text of the EMA is unambiguous. It requires the Governor to terminate the order declaring a disaster or emergency declaration after 28 days if the Legislature does not extend the order's duration. See MCL 30.403(3), (4). But the EMA is silent about the termination of one order foreclosing the issuance of a subsequent one. Nothing in the EMA bars that action.

This silence, coupled with the EMA's ongoing emergency-response mandate to the Governor, compels only one result. The EMA does not impose a limit on the Governor to declare a disaster or emergency anew if the circumstances warrant it. This Court does not have the authority to engraft limitations where the Legislature has not created them. Rather, the Court applies the statute as written where the statutory language is clear. *Hamed v Wayne Co,* 490 Mich 1, 8 (2011). No construction is permitted. *Id.*

For this Court to enter the fray and impose an extra-textual limiting principle on the Governor's authority would only put the courts in between the two coordinate branches without any textual mooring. The Legislative Plaintiffs'

[24] MLive, *Thursday, April 30: Latest developments on coronavirus in Michigan*, available at https://www.mlive.com/public-interest/2020/04/thursday-april-30-latest-developments-on-coronavirus-in-michigan.html

construction of the EMA as barring a "new" declaration creates unanswered questions: Does an intensification of the original threat constitute grounds for a new declaration? How much of an intensification would suffice? If one minute is not enough, how much time has to pass before it becomes a "new" emergency? Four weeks? Six months? The EMA does not answer these questions, nor do the Legislative Plaintiffs, as there is no guidance to this Court as to how it might derive one.

If, in enacting the EMA, the Legislature had intended to retain ultimate control over the Governor's issuance of declarations, it could have sought to retain that authority. Other States have done just that. See, e.g., Ark Code Ann § 12-75-107(c)(1) ("The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time."); Me Rev Stat tit 37-B, § 743(2) ("The Legislature, by joint resolution, may terminate a state of emergency at anytime.").

But the Legislature did not attempt to reserve this authority. Instead, it gave the Governor an ongoing duty to declare a state of emergency or disaster whenever one exists, with a periodic obligation to terminate, re-evaluate, and re-declare if warranted. And so the Governor has done.

C. The requirement that the Governor does not circumvent the Legislature's role in the EMA.

The Legislative Plaintiffs contend that this plain reading renders the Legislature's authority to extend the duration of the disaster or emergency "meaningless" or an "absurd result." Pls' App for Lv, pp 53–54. The Governor disagrees. The requirement that the Governor must issue a new declaration under the EMA gives rise to three distinct limitations on her authority.

First, while a Governor's factual finding of an emergency is entitled to great deference, it is not beyond judicial review. See *Straus*, 459 Mich at 533. Accordingly, any declaration under the EMA is subject to judicial review on the question whether the definition of "disaster" or "emergency," MCL 30.402(e), (h), was satisfied – a review that, for most emergencies and disasters, will only become more difficult to satisfy as time passes.

Second, any declaration under the EMA may be subject to a legislative override, Const 1963, art 4, § 33 (two-thirds vote), by repeal or amending the EMA to bar the Governor from issuing a new declaration. This is the way the legislative process works.

Third, the Governor is accountable not only to the co-equal branches of government, but also directly to the People, before whom she must stand for reelection. The EMA requires the Governor to show her work, and the People may hold her accountable. With a new declaration comes renewed public scrutiny of the Governor's actions, the nature of the crisis, and the reasons supporting the declaration. MCL 30.403(3).

D. The Legislature's construction of the EMA could yield a legislative veto problem.

This Governor's understanding of the EMA is not only borne out by the text, it is consistent with the principles of proper delegation. The Legislature may delegate authority to the Governor provided it prescribes standards for guidance that are reasonably precise in light of the subject matter of the delegation.

But once the Legislature does so, it may not retain a legislative veto. See *Blank v Dep't of Corrections*, 462 Mich 103, 113 (2000) (Kelly, J., lead opinion). The concept is that the Legislature may delegate certain authority, but may not then effectively retain the "right to approve or disapprove" the Governor's later exercise of that authority.

The concept of an improper legislative veto was outlined by the U.S. Supreme Court in *INS v Chadha*, 462 US 919, 959 (1983). In *Blank*, this Court applied *Chadha* in considering the constitutionality of a 1977 amendment to the Administrative Procedures Act, which required an administrative agency to "obtain the approval of a joint committee of the Legislature or the Legislature itself before enacting new administrative rules." 462 Mich at 108 (Kelly, J.). The lead opinion framed the issue as "whether the Legislature, upon delegating [rulemaking authority to an executive-branch agency], may retain the right to approve or disapprove rules proposed by [the agency]." *Id.* at 113. It reasoned that the Legislature's approval or disapproval of an agency rule is "inherently legislative" and "subject to the enactment and presentment requirements." *Id.* at 115–116.

The only way in which the EMA runs up against the legislative veto problem is if the Court were to adopt the Legislative Plaintiffs' construction. On April 30, the Governor had the duty to terminate her declared states of emergency and disaster under the EMA, and to declare new ones if emergency or disaster conditions existed. They existed, so she declared. The Legislature could bar it, but only through legislative enactment. See *Blank*, 462 Mich at 119.

There was no such enactment, and no bar to the Governor re-declaring as authorized and required under the EMA. As such, the Governor's redeclaration was proper, and the EMA provided its own, independently sufficient basis for her ongoing response to the COVID-19 pandemic.

IV. The Legislative Plaintiffs lack standing.

Last comes the threshold issue that the Court of Appeals assumed without deciding (and that the Legislative Plaintiffs have omitted from their application): whether the Legislative Plaintiffs have standing to bring these challenges. They do not, and that deficiency provides another reason for this Court to deny the application. The Court of Appeals (like the Court of Claims) should not have reached the substance of any of the Legislative Plaintiffs' challenges. Nonetheless, it did, and the end result was a published, substantively correct confirmation of the Governor's exercise of authority under the EPGA. The best course at this juncture is for this Court to leave that opinion intact.

Dissatisfied by the Governor's issuance of Executive Orders 2020-67 and 2020-68, the Legislative Plaintiffs have a clear, unique, and powerful remedy: they can change the law, even over the Governor's objection. Instead, they have chosen to sue the Governor, asking for a judicial solution to a political problem. This, they lack standing to do. The Legislative Plaintiffs cannot claim an institutional interest in the enforcement of already-enacted legislation, nor can they ask this Court to remove a law from the books when they have the constitutional means to do so themselves. Justice Clement previously noted that plain fact: "as an institution,

[the Legislature] is exactly as free to enact legislation – whether responsive to this pandemic or otherwise – as it was before any of the Governor's executive orders were entered." *House of Reps v Governor*, 943 NW2d 365, 366 (Mich 2020) (Docket No. 161377) (Clement, J., concurring in denial of leave).

The Legislative Plaintiffs' generalized interest in the relief they seek – and their legal ability to secure the same – shows they lack standing.

Standing is a threshold issue that may not merely be assumed; a party without standing is not a proper party to litigate a case.[25] "Standing is the legal term used to denote the existence of a party's interest in the outcome of the litigation . . . ." *Allstate Ins Co v Hayes*, 442 Mich 56, 68 (1993) (citations omitted). A litigant meeting the requirements of MCR 2.605 "is sufficient to establish standing to seek a declaratory judgment." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372 (2010).

Moreover, a litigant may have standing if it "has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large." *Id.* at 372. As with an individual legislator, to establish standing, a legislative body must allege that it has been deprived of a cognizable interest peculiar to the body. *Tennessee General Assembly v US Dep't of State*, 931

[25] While standing in Michigan is a prudential doctrine that may be "ignored" in the Court's discretion, *Lansing Bd of Ed*, 487 Mich at 357, it has done so in rare cases, and apparently only when the parties had not disputed standing. *Id.* at 357 n 3 (collecting cases where the Court decided substantive issues even though there was a question of standing, though not advanced by the opposing party). Thus, while this Court has, on rare occasion, resolved cases with questions of standing, it does not appear to do so where the issue is squarely presented.

F3d 499, 507 (CA 6, 2019). Importantly, a "generalized grievance that the law is not being followed" is insufficient to establish standing. *Dodak*, 441 Mich at 556; see also *League of Women Voters v Secy of State*, ___ Mich App ___, ____ (No. 350938), slip op at 6, lv den July 31, 2020 (No. 161671).

The Legislative Plaintiffs claim that laws are "not being followed," *Dodak*, 441 Mich at 556, and assert that their *own law* – the EPGA – *is unconstitutional* and must be struck down. Even if they were correct, the Legislative Plaintiffs have not identified how their "authority to enact laws" is legally affected, *League of Women Voters*, slip op at 6, let alone how they have asserted a cognizable legal interest in the unconstitutionality of their own duly enacted statute.

The Legislature retains full authority to rescind or amend these laws and thus can point to no supposed harm that is outside of its control to rectify; its decision to bring a political dispute for judicial resolution should not be permitted.

The Legislative Plaintiffs seek to nullify the Governor's acts of declaring states of emergency and disaster under the EMA and the EPGA. But constraining the Governor's executive authority will not affect the Legislature as an institution entrusted with passing laws. Neither of the challenged executive orders affects the Legislature's legal or constitutional rights. All they do is declare the existence of a state of emergency and disaster. The Legislature could not violate the declarations even if it wished to. The Legislative Plaintiffs' success in this case would only infringe upon the separation of powers by invalidating the Governor's implementation of the law and her exercise of the powers vested in her by law.

Under *Dodak*, and consistent with the Court of Appeals' decision in *League of Women Voters*, the Legislative Plaintiffs cannot obtain that relief here.

What is more, their alleged injuries are not personal or unique to them. As the Court of Appeals noted in *League of Women Voters*, "once the votes of legislators have been counted and the statute enacted, their special interest as lawmakers has ceased." ___ Mich App at ___; slip op at 7. So too here, once the Legislature passed the EMA and the EPGA, it exercised its legislative power. Execution of those laws is the purview of the executive. Const 1963, art 5, §§ 1, 8. Whether framed as allegedly unlawful or unconstitutional, however, the alleged injury or deprivation is no different than that accruing to the ordinary citizen.

By acting pursuant to the legislatively granted authority, the Governor neither infringed nor diluted the Legislature's constitutional power to pass laws. To the contrary, the Legislature admittedly introduced dozens of bills during the early stages of the pandemic (Compl, ¶ 43), and has not been stripped of its authority to pass legislation and work with the Governor. This ongoing authority is reflected by Public Acts 147–149 of 2020, a set of bills passed by the Legislature and signed by the Governor just last month regarding the public-school year. All legislative tools remain on the table and available for amending or repealing the laws.[26] See *House of Reps*, 943 NW2d at 366 (Clement, J., concurring in denial of leave) ("[A]s an

[26] The Michigan Constitution provides that "[n]o bill shall become a law without the concurrence of a majority of the members elected to and serving in each house." Const 1963, art 4, § 26. "Every bill passed by the legislature shall be presented to the governor before it becomes law[.]" Const 1963, art 4, § 33. If the Governor vetoes a bill, the Legislature may override it by a two-thirds vote in each house. *Id.*

institution, [the Legislature] is *exactly as free to enact legislation* . . . as it was before any of the Governor's executive orders[.]") (emphasis added). That the Governor may *also* act (per the Legislature's delegation), does not inhibit the Legislature's constitutional authority.

As *Dodak* emphasized, "Courts are reluctant to hear disputes that may interfere with the separation of powers between the branches of government." 441 Mich at 555. Extending standing doctrine via a "novel" theory advanced by the Legislative Plaintiffs, *House of Reps*, 943 NW2d at 368 (Clement, J., concurring in denial of leave), would unnecessarily inject this Court into a political dispute, see *Dodak*, 441 Mich at 555–556. This Court should avoid that foray.[27]

As a second point, the Legislative Plaintiffs cannot meet their obligation to show that an actual controversy exists under MCR 2.605. MCR 2.605 states that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment."

[27] Below, the Legislative Plaintiffs claim to have standing to challenge the Governor's declarations of emergency and disaster under the EMA because, as they contend, their inaction was not given the effect of nullifying the Governor's authority under the terms of that statute. See MCL 30.403(3) and (4). See Pls' Mich Ct App Br, p 26. But even if this Court deemed this "a special injury," it would not create standing to challenge the Governor's invocation of the EPGA, which provides *no role* for the Legislature. But the Court of Appeals did not consider the merits of the Governor's actions under the EMA. Thus, the Legislative Plaintiffs would have standing only to raise a claim that has not yet been passed on by the Court of Appeals. This is another reason to deny leave to appeal.

Where no such actual controversy exists, a plaintiff does not have standing to bring a declaratory action. *City of South Haven v Van Buren Cty Bd of Comm'rs*, 478 Mich 518, 533–534 (2007). "In general, 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct *in order to preserve his legal rights*." *Shavers v Attorney General*, 402 Mich 554, 588 (1978) (emphasis added).

Here, the gravamen of the Legislative Plaintiffs' complaint is that they passed laws that are not being followed by the Governor, or that their own law (the EPGA) violates the Michigan Constitution. But if that were enough to create standing, the Legislature could bring a lawsuit against any government entity that arguably failed to enforce or comply with a statute, or has allegedly violated the Constitution. Green-lighting legislative lawsuits on such a broad scale would yield an end-run around the extant legislative and political processes. This Court should not permit it.

CONCLUSION AND RELIEF REQUESTED

This Court should deny the application for leave to appeal and leave the Court of Appeals' published decision in place. If this Court grants the application, it should reject the Legislative Plaintiffs' challenges to the constitutionality of the EPGA and to the Governor's declarations of emergency and disaster under the EPGA and EMA.

Respectfully submitted,

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