IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, and JEFFERY GULICK,

Plaintiffs,

vs.

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, and ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services,

Defendants.

Case No. 1:20-cv-00414

Hon. Paul L. Maloney

PLAINTIFFS' BRIEF REGARDING CERTIFICATION OF STATE-LAW ISSUES TO THE MICHIGAN SUPREME COURT

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Introduction

The Defendants have repeatedly asked this Court to permit the Michigan state courts to resolve the state-law issues that this Court proposes to certify to the Michigan Supreme Court. Although permanently abstaining from deciding the state-court issues would not be appropriate, the Plaintiffs agree that it would be appropriate to certify these issues to the Michigan Supreme Court in order to permit the state courts an opportunity to rule on them in the first instance. In the event that the Supreme Court does not accept the certified questions, then this Court will be able to resolve the state-law issues on the merits, having given the state courts an opportunity to rule on them.

Argument

Local Civil Rule 83.1 authorizes this Court to certify an issue for decision to the Michigan Supreme Court. The local rule provides that the order of certification shall be accompanied by written findings that: (a) the issue certified is an unsettled issue of state law; (b) the issue certified will likely affect the outcome of the federal suit; and (c) certification of the issue will not cause undue delay or prejudice. *Id*. The order of certification must also include citation to authority authorizing the state court involved to resolve certified questions. *Id*. Finally, in cases certified to the Michigan Supreme Court, this Court must also approve a statement of facts to be transmitted to the Michigan Supreme Court by the parties as an appendix to the briefs that the parties will file in the Michigan Supreme Court. *Id*. Each of these requirements is or can be met here.

I. The Michigan Supreme Court has authority to accept certified questions.

First, it is abundantly clear that the Michigan Supreme Court has the authority to accept certified questions from this Court. *See* MCR 7.308(A)(2)(a). *See also, e.g.*, *In re Certified Question from U.S. Dist. Court for W. Mich.*, 825 N.W.2d 566, 572–73 (Mich. 2012) (Young, C.J.,

dissenting) ("I continue to believe that this Court lacks the constitutional authority to issue advisory opinions other than as described in article 3, § 8 of Michigan's 1963 Constitution. My position regarding the Court's constitutional authority did not prevail, and I accept that the Court has determined otherwise.").

II. The Court's proposed questions are unsettled issues of state law.

This Court proposes to certify two questions of state law to the Michigan Supreme Court. (Order, DE 23, PageID.1092). The Defendants agree that these state-law issues are unsettled issues that the Michigan courts have not definitively resolved. In fact, the Defendants have repeatedly asked this Court to abstain from deciding these questions, arguing that these issues are "best left to the Michigan courts." (Governor's Motion to Dismiss, DE 24-2, PageID.1131; *see also* AG's Motion to Dismiss, DE 27, PageID.1399-1400).

Although formal invocation of an abstention doctrine is not necessary in this case, the Plaintiffs agree that it would be appropriate under the circumstances to provide the state courts an opportunity to resolve these issues in the first instance through certifying the question to the Michigan Supreme Court. Specifically, the Plaintiffs agree with both of the Court's proposed questions, with a slight edit to Question No. 1, as reflected in bold type below:

1. Whether, under the Emergency Powers of the Governor Act, MCL § 10.31, et seq., or the Emergency Management Act, MCL § 30.401, et seq., Governor Whitmer has the authority **after April 30, 2020** to issue or renew any executive orders **related to the COVID-19 pandemic**.

2. Whether the Emergency Powers of the Governor Act and/or the Emergency Management Act violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution.

The fact that similar issues are currently percolating in the Michigan appellate courts does not obviate the need for certification. First, on June 4, 2020, the Michigan Supreme

Court denied applications for leave to bypass the Michigan Court of Appeals and appeal directly to the Supreme Court in two cases challenging the Governor's orders on state-law grounds, *House of Representatives v. Whitmer*, Michigan Supreme Court Docket No. 161377 (**Exhibit 1**, Order Denying Bypass), and *Martinko v. Whitmer*, Michigan Supreme Court Docket No. 16133 (**Exhibit 2**, Order Denying Bypass). Thus, the Michigan courts are not close to resolution of this issue.

Second, in the cases that are pending in the Michigan courts, the Defendants are actively urging the Michigan state courts to avoid ruling on the merits of the claims, arguing either that the plaintiffs lack standing or that their claims are moot. For example, in *House of Representatives v. Whitmer*, the Governor filed an answer and a cross-bypass application in which her lead argument was that the Legislature lacks standing to challenge her conduct under the Emergency Powers of the Governor Act ("EPGA") and the Emergency Management Act ("EMA"). (**Exhibit 3**, Answer, at 13-19). If the Governor prevails on her standing argument in *House of Representatives v. Whitmer*, then the Michigan courts will never reach the merits of the state-law issues that are raised in that case. This is eminently possible. In fact, Justice Clement's concurrence in the denial of the Legislature's bypass application expresses concern that "the theory by which the Legislature asserts standing to bring this suit in the first place is entirely novel in Michigan." (**Exhibit 1**, Order at 5 (Clement, J., concurring)).

Similarly, in *Martinko v. Whitmer*, the Governor filed an answer asserting that (1) the plaintiffs' claims were all moot, because Governor Whitmer rescinded the particular executive orders that they challenged, and (2) the plaintiffs did not have standing to assert that the Governor's executive orders violate Michigan non-delegation principles because those arguments were never raised in the trial court. (**Exhibit 4**, Answer, at 11-12, 28-29). As indicated, the Michigan Supreme Court agreed with the Governor and denied the bypass application. (**Exhibit 2**).

In short, the Defendants are actively arguing in those other cases that the Michigan courts should not address the merits of the state-law claims that this Court proposes to certify to the Michigan Supreme Court. Even if the Michigan Legislature's lawsuit makes its way back to the Michigan Supreme Court, it is very possible that the Michigan courts will deny the Legislature's challenge to the Governor's executive orders for lack of standing without reaching the merits of the state constitutional issues. Certifying those questions to the Supreme Court in this case will provide the Supreme Court the opportunity to reach the merits of those issues, in the event that the Legislature's lawsuit is determined to be procedurally defective.

Given the Defendants' position that the state-law claims should be resolved in the state courts, certifying the questions to the Supreme Court provides the state courts with the most ready opportunity to do what the Defendants wish.

III. The certified issues will affect the outcome of the Plaintiffs' claims.

There is no real dispute that the certified issues will affect the Plaintiffs' claims for declaratory relief on Counts One and Two of their complaint. If the Michigan Supreme Court finds that the Governor may not exert her emergency powers under the EPGA or the EMA to issue COVID-19 related executive orders after April 30, 2020, then the Plaintiffs will be entitled to judgment in their favor on Counts One and Two.

Defendants have previously argued—and presumably will argue again—that the Plaintiffs' claims are moot. As the Plaintiffs have already explained, that is not true.

First, the Governor continues to issue new executive orders, invoking her authority under the EPGA and the EMA and imposing new requirements on the Plaintiffs. As of the date of this filing, medical providers like Grand Health Partners, Wellston Medical Center, and Primary Health Services (collectively, the "Providers") are permitted to provide non-essential medical treatment, but may only do so consistent with Executive Order 2020-97. That executive order

requires that the Providers comply with a host of new sanitation and workflow requirements. (EO 2020-97, DE 21-1, PageID.1073-1074). Outpatient healthcare facilities like the facilities operated by the Providers must comply with no fewer than 17 additional sanitation requirements that are specific to medical treatment facilities. (*Id*., PageID.1082-1083).

The Governor specifically invoked her powers under the EPGA and the EMA in order to issue Executive Order 2020-97. (*Id*., PageID.1072-1073). If the Governor may not properly invoke her powers under the EPGA or the EMA, then Executive Order 2020-97 is invalid and may not be applied to the Plaintiffs. The Governor continues to assert her authority under the EMA and the EPGA to issue executive orders that proscribe certain aspects of the Plaintiffs' conduct; the Plaintiffs continue to claim that the Governor may no longer issue orders under the EMA and the EPGA related to the COVID-19 pandemic and that the orders that apply to them are not enforceable. Given these circumstances, it is not evident why the Defendants continue to argue that this case is moot. It unmistakably is not.

Second, as Plaintiffs previously explained in greater detail (Reply, DE 21, PageID.1049-1052), Governor Whitmer's rescission of her prior executive orders that specifically precluded the Plaintiffs from providing or receiving any non-essential medical treatment whatsoever is merely a voluntary cessation that does not moot the case, because it is eminently capable of reversal and repetition. "[I]f the discretion to effect the change lies with one agency or individual, or there are no formal processes required to effect the change, significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768-69 (6th Cir. 2019). That is clearly the case here.

Justice Clement made a similar point when explaining her vote to deny the Michigan Legislature's bypass application: "Until a vaccine for COVID-19 is invented, our society

will be living with the risk of the spread of this disease and the argued necessity of emergency measures to mitigate that spread. There is little prospect of these disputes being rendered moot . . ." (**Exhibit 1**, Order at 5 (Clement, J., concurring)). The Defendants' argument that the Plaintiffs' claims are moot is not a valid reason to oppose certification to the Michigan Supreme Court of the state-law questions that this Court has proposed.

IV. Certification will not cause undue delay or prejudice.

The Plaintiffs have an interest in speedy resolution of this matter. Nevertheless, given the relatively streamlined process for briefing certified questions before the Michigan Supreme Court, *see* MCR 7.308(A)(3), the Plaintiffs have not identified any undue delay or prejudice that would be occasioned by certifying the Court's proposed questions to the Michigan Supreme Court.

V. The relevant facts are undisputed.

Both Local Civil Rule 83.1 and MCR 7.308(A)(2)(b)(ii) require a statement of facts to be submitted to the Michigan Supreme Court. The facts relevant to the Court's proposed questions are undisputed.

The Plaintiffs propose that, for purposes of certifying questions to the Michigan Supreme Court, the statement of facts should include the facts as recounted in the following Paragraphs of the Verified Complaint: 19 through 25, and 29 through 80. (Complaint, DE 1, PageID.1-21). The Plaintiffs also propose including these additional relevant facts:

1. During a press conference on May 1, 2020, Governor Whitmer admitted that it was no longer necessary to prohibit non-essential medical procedures. Governor Whitmer stated, "We are encouraging anyone who has been holding off on surgery that really needs to be done, to get that scheduled and to proceed. Early on, it was really necessary because we had so few N95 masks, and gloves, and all of the important things that we needed to keep people safe as we were dealing with this influx of COVID-19 patients, so that we could use all of that PPE. Now, we've been able to build up enough that we can proceed with these other procedures, and we are

encouraging hospital systems to move forward with that. . . . [A]s for oncology surgeries, as for knee surgeries, those are things that should be scheduled and we're encouraging people to get that done."

2. On June 1, 2020, Governor Whitmer issued Executive Order 2020-110 ("EO 2020-110"), asserting her authority under both the EPGA and the EMA and imposing various requirements on individuals and businesses in light of the COVID-19 pandemic.

3. Paragraph 3 of EO 2020-110 provides, "Any business or operation that requires its employees to leave their home or place of residence for work is subject to the rules on workplace safeguards in Executive Order 2020-97 or any order that may follow from it."

4. Governor Whitmer issued Executive Order 2020-97 ("EO 2020-97") on May 21, 2020, asserting her authority under both the EPGA and the EMA.

5. Paragraph 1 of EO 2020-97 requires all businesses with in-person workers to comply with several specific workplace sanitation and safety protocols, as outlined in the order, including social distancing measures, personal protective equipment protocols, and employee screening protocols.

6. Paragraph 9 of EO 2020-97 requires outpatient healthcare facilities and other medical providers to comply with additional industry-specific sanitation and safety protocols, including specific waiting room procedures, limitations on the number of patient appointments, and enhanced telehealth and telemedicine procedures.

7. Grand Health Partners, Wellston Medical Center, and Primary Health Services (collectively, the "Providers") operate outpatient healthcare facilities and medical offices and are required to comply with EO 2020-110 and EO 2020-97.

In the event that additional input on or stipulations regarding the statement of facts would be useful to the Court, the Plaintiffs would welcome the opportunity to discuss with the Court the appropriate contours of the statement of facts.

<u>Conclusion</u>

The Plaintiffs agree that it would be appropriate to certify the following questions to the Michigan Supreme Court:

1. Whether, under the Emergency Powers of the Governor Act, MCL § 10.31, et seq., or the Emergency Management Act, MCL § 30.401, et seq., Governor Whitmer has the authority

after April 30, 2020 to issue or renew any executive orders related to the COVID-19 pandemic.

2. Whether the Emergency Powers of the Governor Act and/or the Emergency Management Act violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution.

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Dated: June 5, 2020

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EXHIBIT

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Order

Michigan Supreme Court
Lansing, Michigan

June 4, 2020

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

161377 & (7)(13)(14)(15)(18)

HOUSE OF REPRESENTATIVES and SENATE,
Plaintiffs-Appellants/
Cross-Appellees,
and

JOHN F. BRENNAN, MARK BUCCHI, SAMUEL H. GUN, MARTIN LEAF, and ERIC ROSENBERG,
Intervenors-Appellants,

v

SC: 161377
COA: 353655
Court of Claims: 20-000079-MZ

GOVERNOR,
Defendant-Appellee/
Cross-Appellant.
____/

On order of the Court, the motions for immediate consideration and the motion to file brief amicus curiae are GRANTED. The application for leave to appeal prior to decision by the Court of Appeals and the application for leave to appeal as cross-appellant are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court before consideration by the Court of Appeals. The prospective intervenors' motion to docket is DENIED.

BERNSTEIN, J. (*concurring*).

I agree with my fellow Justices that this case presents extremely significant legal issues that affect the lives of everyone living in Michigan today. And that is exactly why I join the majority of this Court in denying the parties' bypass applications—*because* I believe that a case this important deserves full and thorough appellate consideration.

Additionally, with the issuance of Executive Order No. 2020-110, "shelter in place" is no longer mandated in the state of Michigan. While recognizing that not all restrictions have been lessened (and acknowledging the possibility of future restrictions being reimplemented), I believe the parties and this Court would benefit most from having the vital constitutional issues of this case fully argued in the Court of Appeals before receiving a final determination from our Court. See *League of Women Voters v Secretary of State*, 505 Mich 931 (2019) (denying the plaintiffs' bypass application). Cases of the ultimate magnitude, such as this one, necessitate the complete and comprehensive consideration that our judicial process avails.

The significance of this case is undeniable. And with many of the restrictions on

daily life having now been lifted, our eventual consideration of these issues must receive full appellate consideration before our Court can most effectively render a decision on the merits of this case.

CLEMENT, J. (*concurring*).

In this case, the Legislature advances several arguments asking us to hold that a law it enacted 75 years ago, 1945 PA 302, codified at MCL 10.31 *et seq*., is unconstitutional or the Governor's actions are beyond the statutory authority contained in that statute, and that the Governor's executive orders issued under that statute in response to the COVID-19 pandemic are consequently invalid. Contrary to what is suggested by the dissents from the Court's order today, the Legislature is not litigating the civil liberties of all Michiganders. Moreover, to read the dissents, one might be left with the impression that this Court has declined altogether to decide this case. It has not—it has only declined to decide the case before the Court of Appeals does. I believe this is both compelled by our court rules and advisable as a matter of prudence. Because I believe the Court neither can nor should review this case before the Court of Appeals does, I concur with the Court's order denying these bypass applications.

I believe, first, that the rules governing bypass applications are not satisfied here. Given that "the supreme court shall have . . . appellate jurisdiction as provided by rules of the supreme court," Const 1963, art 6, § 4, whether the rules have been satisfied is seemingly of its own jurisdictional and constitutional significance. Our rules provide that, to grant a bypass application, "[t]he application must show" either that "delay in final adjudication is likely to cause substantial harm" or that "the appeal is from a ruling that . . . any . . . action of the . . . executive branch[] of state government is invalid[.]" MCR 7.305(B)(4)(a) and (b). I do not believe the Legislature satisfies either requirement. In its bypass application, the Legislature argues that the "substantial harm" prong is satisfied because "Michiganders . . . are living under a cloud of ambiguity" given the debate over whether the Governor's executive orders responding to the COVID-19 pandemic are actually legal. But this case is not a class action filed on behalf of all Michiganders to litigate their civil liberties—it is a suit filed by the Legislature asserting that certain of its institutional prerogatives have been infringed by the Governor's actions. The Legislature shows no substantial harm *to the Legislature* caused by going through the ordinary appellate process. As an institution, it 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.[1] As to the "invalidity of executive action"

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[1] Justice VIVIANO argues that the Legislature's separation-of-powers argument, if vindicated, would be a "substantial harm," and that "[a]t the bypass stage, we need not decide the merits of the Legislature's separation-of-powers argument." I agree that we need not decide those merits, and we are not by denying this bypass application. Given the novelty of the Legislature's standing argument, however, I do not believe it can show

prong, the Legislature argues that "this appeal involves a ruling that has already declared" Executive Order No. 2020-68 invalid. However, the Legislature does not appeal *that* ruling—rather, it appeals the ruling that Executive Order No. 2020-67 and its successors *are* valid. In my view, the Legislature's inability to satisfy MCR 7.305(B)(4) is fatal to its bypass application.[2] Since the Michigan Constitution commits to us the ability to prescribe our own appellate jurisdiction, we are obliged to scrupulously adhere to the restrictions we have imposed on ourselves if we are to sit in judgment of the constitutionality of 1945 PA 302 and the Governor's actions under it.[3]

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that it has suffered a substantial harm at this point with the certainty required to justify the extraordinary act of granting a bypass appeal. After Court of Appeals review, the Legislature would need to show only that either "the issue involves a substantial question about the validity of a legislative act," "the issue has significant public interest and the case is one . . . against . . . an officer of the state . . . in the officer's official capacity," or that "the issue involves a legal principle of major significance to the state's jurisprudence." MCR 7.305(B)(1) through (3). I predict these showings will be much easier to make.

[2] Justice ZAHRA argues that "even assuming there is a shortcoming in the Legislature's application, that defect is cured by the Governor's" bypass cross-appeal, but I disagree. The court rules list what an application for leave to appeal "must show," MCR 7.305(B), and the Legislature's application does not make the required showing. There is no indication under the rule that a party who fails to make a required showing can have its application rehabilitated by the other side. I am also unpersuaded by Justice VIVIANO's citation of the rules of the Supreme Court of the United States. Justice VIVIANO does not deny that the language used there is different from our rules and requires a showing only "that the case is of such imperative public importance as to justify deviation from normal appellate practice . . . ." Sup Ct Rule 11. Our general rules governing leave to appeal require a similar showing, see MCR 7.305(B)(1) through (3), but for a bypass application our rules require the *additional* showing, beyond the importance of the issues, of either substantial harm or that the case is an appeal from a ruling that certain legislative or executive actions are invalid, MCR 7.305(B)(4). I do not believe such a showing is made here. Nor do I believe that the decisions of other state supreme courts, with different court rules, should control our application of our court rules.

[3] Justice VIVIANO asserts that "[i]t is indisputable that our Court has jurisdiction over this case," but with a plurality of this Court concluding otherwise, it is plainly disputable. An application "must show" the items included in the list. MCR 7.305(B). Echoing that language, commentary on our rules also characterizes it as mandatory. See Gerville-Réache, *Expediting Review*, § 7.23, p 199 in Michigan Appellate Handbook (Shannon & Gerville-Réache eds, 3d ed, January 2018 update) (remarking that a bypass application "must show" the grounds listed in MCR 7.305(B)(4)). Moreover, the original form of the rule provided only that bypass applications show that "delay in final adjudication is likely to result in substantial harm"; the additional option in MCR 7.305(B)(4)(b) that a bypass

I also concur with denying the Governor's bypass cross-appeal. "It is a general rule in this state . . . that only a party aggrieved by a decision has a right to appeal from that decision," meaning that " '[a] party who could not benefit from a change in the judgment has no appealable interest.' " *Ford Motor Co v Jackson (On Rehearing)*, 399 Mich 213, 225-226 (1976) (citation omitted). It is, at minimum, uncertain to me whether the Governor is aggrieved by the decision of the Court of Claims such that she would have appellate standing at this juncture. On the one hand, the Court of Claims ruled that EO 2020-68 was an invalid evasion of the requirement under MCL 30.403(3) and (4) of the Emergency Management Act (EMA), MCL 30.401 *et seq*., that the Legislature approve disaster and emergency declarations after 28 days; invalidating EO 2020-68 falls within the terms of MCR 7.305(B)(4)(b) and is arguably the sort of appealable interest an appealing party must possess. However, the Court of Claims also ruled that MCL 10.31(1) was an adequate basis for all of the Governor's substantive orders that have purported to regulate much of life in Michigan after April 30, 2020.[4] Because no substantive regulation issued by the Governor has been held invalid, I question whether the Court of Claims' ruling that EO 2020-68 invalidly evaded the EMA is anything more than an advisory opinion.[5] And, because "it is only opinions issued by the Supreme

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application can also show that it is an appeal from a ruling that various forms of law or government action are invalid was added in 2002. See 466 Mich lxxxvi, lxxxix (2002). Since such a judicial declaration would already have fallen within the grounds listed in MCR 7.305(B)(1) through (3), the fact that MCR 7.305(B)(4)(b) was added to MCR 7.305(B)(4) indicates that we understood it to be mandatory for bypass applications; otherwise, it would be redundant of what is already stated in MCR 7.305(B)(1) through (3). Our past practice also indicates it is mandatory, as we have denied bypass applications on the basis that the grounds in the rule were not satisfied. See *White v Detroit Election Comm*, 495 Mich 884 (2013); *Barrow v Detroit Election Comm*, 495 Mich 884 (2013). (Note that at the time *White* and *Barrow* were decided, this requirement was found at MCR 7.302(B)(4). It was moved to MCR 7.305(B)(4) as part of a general rewrite of the rules governing practice in this Court. See 497 Mich xcxi, cxcv (2015).)

[4] The Legislature approved an extension of the Governor's initial emergency declaration under the EMA until April 30, see 2020 SCR 24, but did not adopt further extensions.

[5] On the other hand, the Governor may have a viable *contingent* cross-appeal, in which she challenges the decision of the Court of Claims to the extent that the appellate courts reverse the Court of Claims' decision upholding her executive orders under MCL 10.31(1). If "the cross-appellant, like any appellant, must be an aggrieved party in some respect, meaning it must be able to identify a concrete and particularized injury that can be redressed in the context of the cross-appeal," Rose, *Appeals of Right in the Court of Appeals*, § 4.46, p 100, in Michigan Appellate Handbook (Shannon & Gerville-Réache eds, 3d ed, January 2018 update), it may be that the Governor's interest in maintaining any cross-appeal would be contingent on the outcome of the Legislature's appeal. Given

Court and published opinions of the Court of Appeals that have precedential effect under the rule of stare decisis," *Detroit v Qualls*, 434 Mich 340, 360 n 35 (1990), the Court of Claims' remarks about EO 2020-68 will not control future litigation over the propriety of the Governor's actions under the EMA—even future COVID-19 litigation.[6] The Governor appears aware of this reality, because when she announced a subsequent extension of the COVID-19 state of emergency in Executive Order No. 2020-99, she continued to declare emergencies under both MCL 10.31(1) and—"[s]ubject to the ongoing litigation"—the EMA. Given my qualms, I am not convinced that Justice ZAHRA is correct to allege that the Governor's bypass cross-appeal "cure[s]" any defects in the Legislature's application. I am also unmoved by the fact that both parties ask us to grant these bypass applications. This Court writes the court rules; I do not believe the parties can rewrite the rules for us by their mutual agreement so as to bootstrap their way to jurisdiction.

I also do not believe it would be prudent to hear this case at this juncture. The statutes at issue have seen very little litigation arise under them, meaning there is little on-point authority. Moreover, the theory by which the Legislature asserts standing to bring this suit in the first place is entirely novel in Michigan. Further appellate review and development of the arguments will only assist this Court in reaching the best possible answers.[7] Until a vaccine for COVID-19 is invented, our society will be living with the

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these uncertainties, however, at minimum I do not believe it would be wise to exercise any discretion we may have to hear this case without allowing it full appellate review. For all these reasons, I do not think the Governor's bypass cross-appeal rehabilitates the Legislature's defective initial bypass application.

[6] Justice VIVIANO questions whether my reasoning renders the bypass appeal provision nugatory given that, in bypassing the Court of Appeals, a party will necessarily "be appealing a nonbinding decision." But this is clearly incorrect. Had the Governor been told that her substantive executive orders were invalid, she would have been ordered by a court to stop doing something she was doing, and exposed to contempt sanctions if she did not, without regard to whether the reasoning was binding on future disputes. I question whether the Court of Claims' ruling here aggrieved the Governor because it essentially answered the hypothetical question of whether her executive orders *would* be valid *if* MCL 10.31(1) were not an adequate basis for them. Such a ruling does not appear to control her current orders, nor is its reasoning binding on future disputes. It is, at minimum, a sufficiently uncertain question that I do not believe this Court can properly predicate its review of this case on this foundation.

[7] As Justice VIVIANO points out in his dissent, there are numerous cases relating to COVID-19 making their way through our state and federal courts. While many of these cases raise issues distinct from those raised by the Legislature in this case, in at least one, the Court of Appeals has granted leave to appeal on a very similar issue—"whether the trial court abused its discretion in ruling that plaintiff's claim regarding the

risk of the spread of this disease and the argued necessity of emergency measures to mitigate that spread. There is little prospect of these disputes being rendered moot, and I have little doubt that the Court will take them up in the future.

I also disagree that this Court should heavy-handedly direct the Court of Appeals in its management of this litigation. First of all, if there is a need for expedited consideration, the parties are free to request it from the Court of Appeals, which is better positioned to know how best to balance the need for expeditious review with the resources it has available to scrutinize the arguments being made. I disagree with Justice VIVIANO that the Court of Appeals will simply put this case on any "conveyor belt," and I believe they will recognize "this is no ordinary case." Second, the cases in which we most often direct expedited review are election cases in which the parties have externally imposed deadlines they must satisfy to submit paperwork or print ballots. See, e.g., *League of Women Voters v Secretary of State*, 505 Mich 931 (2019). Third, I believe many of the observations that justify denying this bypass application also justify declining to order an extraordinary schedule in the Court of Appeals. Justice ZAHRA argues that "the people of this state have a great interest in the final disposition of these issues," but the people of this state are not a party to the case—the Legislature is, suing in its institutional capacity and arguing that its prerogatives are being violated. Until a final judicial resolution of these issues is reached, the Legislature is free in the interim to avail itself of the ordinary legislative process under the Constitution. That this Court has resolved this bypass application in less than two weeks is, I believe, evidence enough that we are treating these issues with appropriate urgency.

As noted, the issue before us is not whether we will *ever* decide these issues, but rather whether we will decide them before the Court of Appeals has considered them. Because I conclude that we neither can nor should grant these bypass applications, I concur with our order denying them.

MCCORMACK, C.J., and CAVANAGH, J., join the statement of CLEMENT, J.

MARKMAN, J. (*dissenting*).

I dissent from the majority's decision to deny the parties' applications to bypass the Court of Appeals in order to expedite the final resolution of the present dispute. Indeed, in all likelihood, the consequence of our decision today will be to ensure that this Court never issues a meaningful decision concerning the nature and required procedures of the emergency authority of this state. For the following reasons, I would grant these

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unconstitutionality of the [emergency powers of the governor act], MCL 10.31 *et seq.*, was unlikely to succeed." *Mich United for Liberty v Governor*, order of the Court of Appeals, entered May 29, 2020 (Docket No. 353643).

applications.

First, I would grant the applications because they pertain to an issue of the greatest practical importance to the more than 10 million people of this state: the validity of executive orders declaring a state of emergency and thereby enabling a single public official to restrict and regulate travel, assembly, business operations, educational opportunities, freedoms and civil liberties, and other ordinary aspects of the daily lives of these people, including matters of crime and punishment and public safety. To put it even more specifically, the present applications place into question the entirety of the processes and procedures by which the executive orders that have defined nearly every minute, and nearly every aspect, of the lives of "we the people" of Michigan for more than the past two months were fashioned into law.

Second, I would grant the applications because, notwithstanding their vast differences in apprehending the legal and constitutional preconditions required of an emergency order, the parties *commonly* argue that this Court should grant their bypass applications in light of the profound significance and practical impact of the present emergency orders.

Third, I would grant the applications because they implicate a "case or controversy" of the greatest historical consequence between the two representative and accountable branches of our state government: each in concurrence seeking the counsel of the third branch as to what is demanded by the constitutional charter that has guided the people's government for the past 185 years. The Governor contends that her office possesses the authority to issue the executive orders in response to the present emergency, while the Legislature in response contends that her office lacks such authority absent its own participation. Put simply, what is at issue is how the extraordinary emergency powers of government are to be invoked and how the decision-makers of our two most fundamental constitutional institutions are respectively to be engaged.

Fourth, I would grant the applications because time is an altogether relevant consideration to what is required of this judiciary. Our state continues in the midst of an emergency in which both the lives and the liberties of its people are being lost each day. By today's action, it is unlikely that this Court will ever decisively resolve the present dispute and thus that whatever errors or excesses may have been made in the course of the present emergency will never be pronounced or remedied but left only to be repeated on the occasion of what inevitably will arise some day as our next emergency.

Fifth, I would grant the applications because this case cries out for the most expedited and final review of the highest court of this state. If there is a matter, if there is an obligation, that compels the most urgent action of this Court, it is the present matter, our present obligation. This case defines the very purpose and the fundamental

responsibility of a supreme court of this union of states. By our decision to deny the applications for bypass, we bypass an exercise of authority to decide what is perhaps the most substantial dispute ever presented to this Court, not only diminishing our standing among the judicial institutions of our federal system but diminishing our relevance within the judicial institutions of this state itself.

ZAHRA, J., joins the statement of MARKMAN, J.

ZAHRA, J. (*dissenting*).

I dissent from this Court's order denying both litigants' applications for leave to appeal from the Court of Claims, thereby leaving intact without immediate review the Governor's various emergency orders issued in response to the COVID-19 pandemic and the Court of Claims order ruling in part that the Governor acted erroneously under MCL 30.401 *et seq*. I would grant the applications and decide the matters forthwith. I also dissent from this Court's inexplicable failure to direct the Court of Appeals to hear this case on an expedited basis. This case presents palpable constitutional questions that are of compelling interest to every resident, business, and employer in Michigan. The instant matter is arguably the most significant constitutional question presented to this Court in the last 50 years. By granting both applications, this Court could put to rest with finality whether and to what extent the legislation on which the Governor relied to issue the serial emergency COVID-19 orders remains a valid source of legal authority for those orders. Admittedly, deciding these difficult questions is no easy task. But the people of this state rightly demand that this Court resolve such difficult questions. Because each resident's personal liberty is at stake, it is emphatically our duty to decide this case. I dissent from the Court's failure to immediately undertake this duty.

Life for people throughout Michigan was turned on its head when on March 10, 2020, in response to the COVID-19 pandemic that threatened widespread contagion, serious and sometimes fatal illness, and a critical overload to our health system, the Governor issued Executive Order No. 2020-4, declaring a state of emergency under the authority of two separate statutory delegations of emergency authority: 1945 PA 302, known as the "emergency powers of the governor act" (EPGA), MCL 10.31 *et seq*.; and the Emergency Management Act (EMA), MCL 30.401 *et seq*. The EMA carries a 28-day limit on the amount of time in which the Governor can issue orders under a state of emergency before the act requires the Governor to declare an end to the emergency, unless both houses of the Legislature extend the period through a resolution.[8]

[8] MCL 30.403(3). The Governor, however, argues that the Court of Claims erred by concluding that she cannot issue new orders reinstituting the effect of her prior orders at the end of each order issued under the EMA.

Over the next several weeks, the Governor issued numerous additional statewide orders generally requiring people to stay at home unless their departure from home was essential, closing all nonessential[9] businesses, closing all schools before the end of the school year, and seriously restricting travel, assembly, and other aspects of daily life. Law and nonemergency medical offices throughout Michigan were closed indefinitely. Both houses of the Michigan Legislature granted the Governor an extension of authority to April 30, 2020, but neither the House of Representatives nor the Senate passed a resolution to grant any further extension. On the day the EMA expressly required the declaration of emergency to be rescinded, the Governor rescinded the declaration and, within minutes, declared another statewide emergency on the basis of COVID-19, ordering that all the previous orders should now be considered effective under the new order. The Governor separately declared a state of emergency under the EPGA and ordered that all previous orders should be considered effective under that declaration as well.

People throughout Michigan were understandably frustrated over their inability to leave home to, among other things, work, engage in commerce, obtain preventative health care, visit friends and family, and maintain their personal appearance with salon and grooming services. Sporadic peaceful protests broke out throughout the state in which some residents practiced civil disobedience. The political branches of government divided over the issue. The Legislature believed it should be permitted a seat at the table in crafting emergency orders, and the Governor proclaimed unilateral authority to act.

The Michigan House of Representatives and the Michigan Senate sued the Governor in the Court of Claims, seeking a declaratory ruling that the Governor's authority under the EMA had expired and that the EPGA pertained only to local matters and did not authorize a statewide declaration of emergency. The Governor responded that each source of statutory authority continued to provide her with the power to issue orders for the protection of the public health. The Court of Claims agreed with the Legislature that the Governor's authority under the EMA had expired, but held that the EPGA granted the Governor independent authority to issue orders that would protect lives and control the emergency situation created by COVID-19. That same day, the Legislature filed an application for leave to appeal in the Court of Appeals and filed in this Court an application for leave to appeal under MCR 7.305(B)(4), which permits "an appeal before a decision of the Court of Appeals."

The Governor filed a brief in response to the Legislature's application in this Court as well as an application for leave to appeal challenging two holdings of the Court

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[9] Many of the Governor's orders distinguished essential from nonessential activity. Still, in other areas, the people were left to wonder whether certain activities in which they wished to engage were permitted under the various orders. See note 3 of this statement.

of Claims: (1) the conclusion that the Legislature has standing to bring a declaratory action, and (2) the holding that Executive Order No. 2020-68 was invalid because the Governor's authority to act under the EMA had expired.

Significantly, both of our coequal branches of government (the parties to this litigation) recognize the gravity of this matter and have asked this Court to resolve the constitutional questions before the Court without the benefit of intermediary (and prolonged) review from our Court of Appeals. Because MCR 7.305(B)(4) is perfectly satisfied,[10] this Court should forthwith decide the following three questions:

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[10] Not only would I accept the parties' olive branch and address this matter to maintain comity within our state government, our court rules, namely MCR 7.305(B)(4), emphasize this Court's defined role to determine matters in which:

> (a) delay in final adjudication is likely to cause substantial harm, or
>
> (b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branches of state government is invalid[.]

My concurring colleagues, by contrast, believe a bypass of the Court of Appeals is not warranted because the Legislature has failed to satisfy the requirements of MCR 7.305(B)(4). In arguing its case to bypass the Court of Appeals, the Legislature asserts:

> Delaying final adjudication would do "substantial harm," as citizens and lawmakers would be left in a state of uncertainty at a time when confident decision-making is a requirement for survival. Michiganders are living under and attempting to interpret orders that never should have been implemented over their Legislature's objection; at the very least, they are living under a cloud of ambiguity that can be rectified by this Court. MCR 7.305(B)(4)(a). The *ultra vires* nature of the Governor's actions puts at risk people who are relying on governmental direction to guide their conduct. Lastly, this appeal involves a ruling that has already declared one related "action of the . . . executive branch[] of state government invalid." MCR 7.305(B)(4)(b). [Alterations in original.]

I am persuaded that the requirements of MCR 7.305(B)(4) are satisfied. As representatives of the people, the Legislature clearly has an interest in providing certainty "at a time when confident decision-making is a requirement for survival." It is no secret that many residents and businesses have struggled to understand the Governor's emergency executive orders related to the COVID-19 virus. See DesOrmeau, *After 102 Executive Orders, Confusion is Commonplace on What's Allowed in Michigan and What Isn't* <https://www.mlive.com/public-interest/2020/05/after-101-executive-orders-confusion-is-commonplace-on-whats-allowed-in-michigan-and-what-isnt.html> (accessed June 2, 2020) [https://perma.cc/K5WK-4RCY]. Further, the Governor makes

(1) whether the Michigan Senate and the Michigan House of Representatives have standing in this case to seek declaratory relief in the Court of Claims,

(2) whether the Governor has continuing authority under the Emergency Management Act (EMA), MCL 30.401 *et seq*., to issue emergency executive orders related to the COVID-19 virus, and

(3) whether the Governor has continuing authority under the emergency powers of the governor act (EPGA), MCL 10.31 *et seq*., to issue emergency executive orders related to the COVID-19 virus.

The members of this Supreme Court, Michigan's court of last resort, have been elected to serve as the final arbiters of law and constitutional questions that are of significant public interest and importance to our state. No issue is of greater public interest or importance than the resolution of whether the Governor was within her constitutional authority to deprive the 10-million-plus residents and the thousands of business owners of Michigan of their personal freedom and economic liberty. Unlike the legislative and executive branches of government, which make and enforce laws through a political process, the judiciary is the nonpolitical branch of government charged with the extremely limited but all-important role of interpreting only those laws and constitutional questions presented in cases and controversies brought to the Court by adversaries in litigation. It is exactly because this Court is the pinnacle of the apolitical branch of government and limited in the scope of its duties that the people trust and accept our resolution of disputes, even when we are sharply divided when rendering our opinions. This is all the more true where, as here, the case presents a constitutional question of significant magnitude that divides our political branches of government. The people of Michigan expect this Court to resolve this dispute. We should do so.

And yet, beyond declining to grant the Legislature's application, the Court's majority also fails to order the Court of Appeals to hear and resolve these issues on an expedited basis. I make no attempt to explicate this failure. Again, both of our coequal branches of government have asked for these significant constitutional questions to be answered as soon as possible. And the people of this state have a great interest in the final disposition of these issues as soon as possible. To the extent a majority of this Court

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no attempt to rebut the Legislature's assertion that it has been particularly harmed by the Governor's usurpation of Legislative power through her emergency executive orders.

Moreover, even assuming there is a shortcoming in the Legislature's application, that defect is cured by the Governor's application, which expressly invites a challenge to the Court of Claims' holding that the Governor's actions were invalid under the EMA. See MCR 7.305(B)(4)(b). Again, both of our coequal branches of government want these questions answered. We should honor their requests.

has concluded that the wisdom of our intermediate appellate court is essential to our resolution of these weighty issues, there is no reason why this Court should not order the Court of Appeals to hear and decide these questions forthwith. The Court's failure to, at a minimum, require the Court of Appeals to decide these cases on an expeditious basis fails to accord the respect due to our coequal branches of government and displays insensitivity to the people of this state who are entitled to know with certainty whether the constraints of liberty imposed by the emergency orders under which they labor are constitutionally permissible.

MARKMAN, J., joins the statement of ZAHRA, J.

VIVIANO, J. (*dissenting*).

The Court today turns down an extraordinary request by the leaders of our coequal branches of government to immediately hear and decide a case that impacts the constitutional liberties of every one of Michigan's nearly 10 million citizens.[11] See *Walsh v River Rouge*, 385 Mich 623, 639 (1971) ("The invocation of a curfew or restriction on the right to assemble or prohibiting the right to carry on businesses licensed by the State of Michigan involves the suspension of constitutional liberties of the people."). Because I believe we are duty-bound to give our immediate attention to this case, I cannot join an order that nonchalantly pushes it off for another day.

The Governor and the Legislature do not seem to agree on many things these days, but they both agree that this case merits our immediate attention. In addition, since they individually and collectively represent every single resident of our state, one can surmise that the views of the Governor and Legislature represent the diverse views of large numbers of our citizens. They are crying out to this Court for help because there is a significant amount of confusion in our state over what the Governor's executive orders mean and whether they are enforceable.[12] And the instant case is not the only one involving questions regarding the validity of the Governor's actions to combat COVID-

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[11] Justice CLEMENT is of course correct that this case does not involve a direct claim of a constitutional rights violation. But, since the validity of the Governor's executive orders are at stake, and it is indisputable that those orders impinge on the constitutional liberties of our citizens, it is rudimentary logic—not hyperbole—to say that the case impacts the civil liberties of our citizens.

[12] See, e.g., DesOrmeau, *After 102 Executive Orders, Confusion is Commonplace on What's Allowed in Michigan and What Isn't* <https://www.mlive.com/public-interest/2020/05/after-101-executive-orders-confusion-is-commonplace-on-whats-allowed-in-michigan-and-what-isnt.html> (accessed June 2, 2020) [https://perma.cc/K5WK-4RCY].

19.[13] A substantive ruling on the merits of this case by our Court would not only provide clarity to the Governor, the Legislature, and the public, but it would also assist the lower courts as they continue to address these issues in other matters.

I agree with Justice ZAHRA that both applications easily satisfy the requirements of our bypass rule, MCR 7.305(B)(4). As an initial matter, it is clear that our Court has jurisdiction here under MCR 7.303, which governs the jurisdiction of the Supreme Court. Under MCR 7.303(B)(1), we have discretion to "review by appeal a case pending in the Court of Appeals or after decision by the Court of Appeals (see MCR 7.305)." Contrary to Justice CLEMENT's suggestion, we have never held that the grounds for discretionary appeal are jurisdictional—I see no reason to do so now. It is indisputable that our Court has jurisdiction over this case, if we choose to assert it.

The Legislature's bypass application clearly shows that a "delay in final adjudication is likely to cause substantial harm.]" MCR 7.305(B)(4)(a). The second question presented in the application is "whether the Emergency Powers of the Governor Act [MCL 10.31 *et seq*.] is consistent with the separation-of-powers doctrine in the Michigan Constitution, where the act . . . results in the usurpation of the Legislature's role in formulating public policy[.]" The Legislature further asserts that "COVID-19 presents real problems that call for a comprehensive and deliberative governmental response. The Court should restore the proper constitutional order and allow the branches to get to work—together."[14] In short, the Legislature is arguing that because the

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[13] There are at least five other cases involving challenges to COVID restrictions in the lower courts: *Martinko v Governor* (Docket No. 353604); *Slis v Michigan* (Docket No. 351211); *Dep't of Health & Human Servs v Manke* (Docket No. 353607); *Mich United for Liberty v Governor* (Docket No. 353643); and *Associated Builders & Contractors of Mich v Governor* (Docket No. 20-000092-MZ). Cases concerning the restrictions are also proliferating in the federal courts. See *Mitchell v Whitmer* (Case No. 1:20-cv-00384) (WD Mich); *League of Indep Fitness Facilities & Trainers, Inc v Whitmer* (Case No. 1:20-cv-00458) (WD Mich); *Allen v Whitmer* (Case No. 2:20-cv-11020) (ED Mich); *Mich United Conservation Clubs v Whitmer* (Case No. 1:20-cv-00335) (WD Mich); *Mich Nursery & Landscape Ass'n v Whitmer* (Case No. 1:20-cv-331) (WD Mich); *Beemer v Whitmer* (Case No. 1:20-cv-323) (WD Mich); *VanderZwaag v Whitmer* (Case No. 1:20-cv-325) (WD Mich); *Martinko v Whitmer* (Case No. 2:20-cv-10931) (ED Mich); *Thompson v Whitmer* (Case No. 1:20-cv-00428) (WD Mich); *Midwest Institute of Health, PLLC v Whitmer* (Case No. 1:20-cv-00414) (WD Mich); *Otworth v Whitmer* (Case No. 1:20-cv-00405-PLM-RSK) (WD Mich); *Signature Sotheby's Int'l Realty, Inc v Whitmer* (Case No. 1:20-cv-00360) (WD Mich). More are sure to follow.

[14] See also Michigan Legislature's Emergency Bypass Application for Leave to Appeal, p 27 ("In effectively exercising standardless lawmaking authority to formulate public policy rather than the democratic process, the Governor has usurped the Legislature's

Governor has claimed the authority to exercise core legislative powers for an indefinite period, the Legislature has been displaced from its normal constitutional role as the branch with "the authority to make, alter, amend, and repeal laws." *Harsha v Detroit*, 261 Mich 586, 590 (1933). See Const 1963, art 4, § 1 (stating that with certain exceptions not relevant here, "the legislative power of the State of Michigan is vested in a senate and house of representatives"); Const 1963, art 4, § 51 ("The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health."). At the bypass stage, we need not decide the merits of the Legislature's separation-of-powers argument. It is enough to recognize the obvious, substantial, and ongoing institutional harm that is being caused if the Legislature's claim has merit.

Justice CLEMENT asserts, not incorrectly, that the Legislature still has the power to enact laws. But that misses the point of the Legislature's claim. Absent the Governor's extraordinary exercise of core legislative powers during the pandemic, the normal constitutional order would prevail and the Governor and the Legislature would be compelled to work together to shape the public policy of our state. Instead of needing a supermajority vote to override the Governor's veto and restore the *status quo ante*, the Legislature could enact laws and present them to the Governor by a simple majority vote of each house. And the Governor would have an incentive—the one our founders built into our system of government—to work with Legislature to develop bills that she found acceptable and would be willing to sign into law. The Legislature's position, in short, is that by her ongoing and broad exercise of the legislative power, the Governor has usurped its power and diminished its institutional role. Being sidelined from its role in shaping public policy during this pandemic is undoubtedly a substantial harm to the institutional prerogatives of the Legislature.

The concurring justices give even shorter shrift to the Governor's bypass application. For one thing, Justice CLEMENT's concurrence never mentions or purports to apply our bypass rule with regard to the Governor's application. Instead it offers a series of suppositions on topics other than whether the Governor is appealing the invalidation of executive action, which is all that MCR 7.305(B)(4)(b) requires and which is precisely what the Governor seeks to appeal here. The Court of Claims invalidated an executive order, No. 2020-68, which the Governor issued under the Emergency Management Act (EMA), MCL 30.401 *et seq*.

Justice CLEMENT seems to agree that the Governor has met the requirements of MCR 7.305(B)(4)(b). The thrust of Justice CLEMENT's argument is that the Governor

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power."); *id*. at 33 ("Nor can the Governor usurp the lawmaking power merely because she disagrees with the Legislature's response to the COVID-19 crisis.").

might not be an aggrieved party because, even though the court struck down her order under the EMA, she was able to retain all her substantive regulations in an identical order under the emergency powers of the governor act (EPGA). But the Governor has good reason for feeling that she is aggrieved even if her regulations remain standing at this point in the proceedings. "[T]o have standing on appeal [i.e., to be an aggrieved party], a litigant must have suffered a concrete and particularized injury" arising from the judgment below. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291 (2006).[15] The Governor argues that the "EMA provides for a more extensive structure of governmental action in response to an emergency, and a more detailed set of powers for the Governor to implement in that response." A comparison of the two statutes at issue displays the EMA's more elaborate provisions. Compare MCL 10.31 (setting forth the Governor's general authority to promulgate orders after proclaiming a state of emergency) with, e.g., MCL 30.408 and MCL 30.409 (establishing emergency manager coordinators across various institutions and entities) and MCL 30.411 (providing limited immunity). And, importantly, the Governor contends that the EMA not only empowers her to act but affirmatively *requires* her to declare an emergency or disaster. Whether these provisions and others differentiate the EMA from the EPGA, so that the statutes do not conflict, goes to the merits of the statutory issue in this case, and thus I would not now suggest an answer. It is enough here that the Governor has raised a colorable argument that the decision below struck down her executive order, effectively cabined her statutory tools, and required her to disregard statutory obligations. This constitutes a concrete and particular injury.

Moreover, consider the implications of Justice CLEMENT's hunch about the Governor's aggrieved-party status. If the Legislature successfully appealed its claims—either here or in the Court of Appeals—and the EPGA no longer authorized Executive Order No. 2020-68, then the Governor would need to fall back on the EMA. But by that point it would doubtless be too late for her to appeal.[16] In other words, the Governor would become aggrieved only when it would be too late for her to do anything about it.[17]

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[15] See also *Attorney General v Bd of State Canvassers*, 500 Mich 907, 908 n 6 (2016) (ZAHRA and VIVIANO, JJ., concurring) (" 'Aggrieved' is a term of art defined as 'having legal rights that are adversely affected; having been harmed by an infringement of legal rights.' An 'aggrieved party' is 'a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment.' Thus, to be 'aggrieved,' a party must demonstrate that it has been harmed in some fashion.") (citations omitted).

[16] Under Justice CLEMENT's logic, it would not be enough for the Governor that the Legislature could satisfy the bypass rule in order for her to bring her appeal.

[17] In addition, Justice CLEMENT's reminder that the Court of Claims' decision is not binding is irrelevant: it would seemingly always be the case that a party seeking to bypass

In sum, because the Governor is appealing the invalidation of her executive actions, her bypass application satisfies MCR 7.305(B)(4)(b). And she also has claimed sufficient injury from the judgment below. If the majority wishes to deny the application on other grounds, so be it. But it should not pretend the Court's hands are tied by our procedural rules.[18]

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the Court of Appeals will be appealing a nonbinding decision. If this is a meaningful consideration in rejecting a bypass, then one wonders why we have the rule at all.

[18] By denying the bypass, the majority has not only written the bypass court rule out of the rulebook, it has also put us at odds with the highest courts of many other states who have not faltered in their responsibility to timely address the significant legal issues arising from their states' responses to the COVID-19 pandemic. The Pennsylvania Supreme Court, exercising immediate jurisdiction in a challenge to executive orders, said it well: "[T]his case presents issues of immediate and immense public importance impacting virtually all Pennsylvanians and thousands of Pennsylvania businesses, and that continued challenges to the Executive Order will cause further uncertainty." *Friends of Danny DeVito v Wolf*, ___ Pa ___, ___ (2020) (Docket No. 68 MM 2020), slip op at 17. In a similar case, the Kansas Supreme Court exercised expedited original jurisdiction, explaining that such jurisdiction lay when the court "determine[s] the issue is of sufficient public concern. Under the circumstances our state faces, we easily do." *Kelly v Legislative Coordinating Council*, ___ Kan ___, ___ (2020) (Docket No. 122765), slip op at 9 (citation omitted). See also *In re State of Texas*, ___SW3d___ (2020) (Docket No. 20-0394) (addressing whether COVID-19 justified voting by mail); *Seawright v New York City Bd of Elections*, ___ NY2d ___ (2020) (Slip Op No. 02993) (addressing election requirements in light of COVID-19); *Wisconsin Legislature v Palm*, ___ Wis 2d___, ___; 2020 WI 42, ¶ 10 (Wis, May 13, 2020) (exercising original jurisdiction—which covered cases " 'that should trigger the institutional responsibilities of the Supreme Court' "—over the legislature's challenge of executive orders because the "order . . . impacts every person in Wisconsin, as well as persons who come into Wisconsin, and every 'non-essential business' ") (citation omitted); *Cal Attorneys for Criminal Justice v Newsom*, order of the California Supreme Court, entered May 13, 2020 (Case No. S261829), p 1 ("This mandate proceeding, like others that have recently come before this court, raises urgent questions concerning the responsibility of state authorities during the current pandemic to protect the health and safety of inmates . . . in light of the spread of the novel coronavirus . . . ."); *id.* at 4 (Liu, J., dissenting) ("As a prudential matter, we exercise [original mandamus] jurisdiction 'only in cases in which "the issues presented are of great public importance and must be resolved promptly." ' If there is any case where exercising our mandamus jurisdiction is appropriate, this is it.") (citations omitted); *Comm for Pub Counsel Servs v Chief Justice of the Trial Court*, 484 Mass 1029, 1029 (2020) (denying reconsideration of earlier holding that the court had superintending authority "to stay a final sentence that is being served, absent a pending

appeal or a motion for new trial"); *Goldstein v Secretary of the Commonwealth*, 484 Mass 516 (2020) (addressing an election-signature requirement in light of COVID); *In re Abbott*, ___SW3d___, 63 Tex Sup Ct J 909 (2020) (holding that trial judges lacked standing to challenge an executive order applying to bail decisions); *Comm for Pub Counsel Servs v Chief Justice of the Trial Court*, 484 Mass 431, 446 (2020) (exercising general superintendence, under which the court could "remedy matters of public interest 'that may cause further uncertainty within the courts' ") (citation omitted); *Christie v Commonwealth*, 484 Mass 397 (2020) (hearing petition for immediate release from custody due to COVID-19 concerns under the court's general superintendence power); *In re Interrogatory on House Joint Resolution 20-1006*, ___P3d___, ___; 2020 CO 23, ¶ 28 (Colo, 2020) ("We conclude that the interrogatory [by the General Assembly asking for guidance in light of conditions posed by COVID-19 on a constitutional requirement] now before us presents an important question upon a solemn occasion. Accordingly, we exercise original jurisdiction. The General Assembly and the public at large urgently need an answer to the interrogatory to avoid uncertainty surrounding the length of the remaining regular session and its impact on pending bills and bills yet to be introduced."); cf. *Strizich v Mont Dep't of Corrections*, order of the Montana Supreme Court, entered May 5, 2020 (Case No. OP 20-0225) (declining to consider petition for injunctive relief because the case, involving COVID-19 and state correctional facilities, was fact-intensive); *Disability Rights Mont v Mont Judicial Districts 1-22*, order of the Montana Supreme Court, entered April 14, 2020 (Case No. OP 20-0189) (denying petition to exercise mandamus power because the request involved factual issues and the legal contention failed on the merits).

It is noteworthy, too, that in the United States Supreme Court, the significance of the issues would alone justify bypassing the court of appeals. See also Sup Ct Rule 11 ("A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such *imperative public importance* as to justify deviation from normal appellate practice and to require immediate determination in this Court.") (emphasis added). Indeed, "[t]he writ . . . has been granted in some of the most important cases in [the last] century." Lindgren & Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup Ct Rev 259, 259 (1986); see *Dames & Moore v Regan*, 453 US 654, 667-668 (1981) ("Arguing that this is a case of 'imperative public importance,' petitioner then sought a writ of certiorari before judgment. Because the issues presented here are of great significance and demand prompt resolution, we granted the petition for the writ, adopted an expedited briefing schedule, and set the case for oral argument on June 24, 1981.") (citations omitted).

* * *

This case involves some of the most important legal principles that can arise in a free society. The parties' briefs reverberate with weighty assertions about our constitutional structure, as well as the need for and the scope of the Governor's emergency powers. These issues, and how we decide them, will have a direct impact on the constitutional liberties of every person who lives or owns property in, or simply visits, our state while the restrictions are in place. On a fundamental and practical level, they impact how our friends and neighbors live their lives on a daily basis, where they can go, with whom, how and when they can practice their religion, whether they can go out to eat or to the hardware store or to the beach—in short, nearly every decision they make about nearly everything that they do. Our Court exists to vindicate the constitutional rights of our citizens and to be the final expositor of state law; thus, we are uniquely situated to provide a prompt and final resolution of the issues presented in this case.

The leaders of our state government believe we should hear this case now. I agree. But instead of rising to the occasion, the majority order dodges these issues for now and defers them to the lower courts so they can weigh in first. Ordinarily, I would agree with this approach. But this is no ordinary case. It should not simply go on the conveyor belt with all of the others. Because my colleagues have decided to put it there at least for the time being, I respectfully dissent.

s0601

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 4, 2020

Clerk

EXHIBIT

2

Order

Michigan Supreme Court
Lansing, Michigan

June 4, 2020

161333 & (6)

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

STEVE MARTINKO, MICHAEL LACKOMAR, WENDY LACKOMAR, MARK GARMO, and STEVE HUDENKO,
Plaintiffs-Appellants,

v

SC: 161333
COA: 353604
Ct of Claims: 20-000062-MM

GOVERNOR OF MICHIGAN, DEPARTMENT OF NATURAL RESOURCES DIRECTOR, and ATTORNEY GENERAL,
Defendants-Appellees.

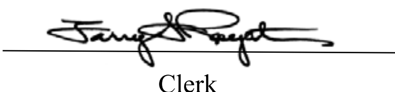
_______________________________________/

On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal prior to decision by the Court of Appeals is treated as an application for leave to appeal the May 26, 2020 order of the Court of Appeals. The application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

b0601

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 4, 2020



Clerk

EXHIBIT

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STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Plaintiffs-Appellants/
Cross-Appellees,

v

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

Defendant-Appellee/
Cross-Appellant.

______________________________________/

Supreme Court No. 161377

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 EMERGENCY BYPASS APPLICATION FOR LEAVE TO APPEAL AND BRIEF IN RESPONSE TO PLAINTIFFS' EMERGENCY BYPASS APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The Michigan House of Representatives and Michigan Senate (Legislative Plaintiffs) sought an immediate declaratory judgment that Governor Whitmer exceeded her authority under the Emergency Powers of the Governor Act (EPGA) and the Emergency Management Act (EMA) during the COVID-19 pandemic. MCL 10.31 et seq; MCL 30.401 et seq.

The Court of Claims issued an opinion denying Plaintiffs' request for declaratory relief and entered a final order. (5/21/20 Ct of Claims Op and Order, p 25.) In its opinion, the Court of Claims found that the Governor's declaration pf emergency and accompanying executive orders constituted a valid exercise of her authority under the EPGA. (*Id.* at 2.)

The Court of Claims also determined that the Legislative Plaintiffs have standing in this case (*id.* at 4–9), and that the Governor acted outside of her authority when issuing Executive Order 2020-68 pursuant to the EMA, (*id.* at 2, 19–25.) The Governor seeks leave to appeal these adverse rulings.

The Plaintiffs filed a claim of appeal in the Court of Appeals on May 22, 2020, and later that day, in this Court, filed an emergency application for leave to appeal the Court of Claims decision "before a decision of the Court of Appeals" (bypass application). MCR 7.305(B)(2). The Governor similarly filed a cross-claim of appeal on May 29, and here files an omnibus response to the Legislative Plaintiffs' bypass application and bypass application regarding the two adverse rulings against her.

The Governor asks this Court to grant her bypass application and the Legislative Plaintiffs' bypass application, and to hear them on an expedited basis.

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STATEMENT OF QUESTIONS PRESENTED[1]

1. 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?

   Governor's answer: No.

   Legislative Plaintiffs' answer: Yes.

   Court of Claims answer: Yes.

   Court of Appeals' answer: Did not answer.

2. The Emergency Powers of the Governor Act 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 public health pandemic that has killed thousands of Michiganders. Did the Governor act within her statutory grant of authority?

   Governor's answer: Yes.

   Legislative Plaintiffs' answer: No.

   Court of Claims answer: Yes.

   Court of Appeals' answer: Did not answer.

[1] Issues 2 and 3 are the subject of the Legislative Plaintiffs' bypass application, and Issues 1 and 4 are the subject of the Governor's bypass application as well as alternative bases to affirm the lower court's decision in response to the Plaintiffs' bypass application.

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3. The Emergency Powers of the Governor Act 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 an unconstitutional delegation?

   Governor's answer: No.

   Legislative Plaintiffs' answer: Yes.

   Court of Claims answer: No.

   Court of Appeals' answer: Did not answer.

4. 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?

   Governor's answer: Yes.

   Legislative Plaintiffs' answer: No.

   Court of Claims answer: No.

   Court of Appeals' answer: Did not answer.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

Const 1963, art 5, § 1 provides:

> 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.

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.

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Pertinent Provisions of the Emergency Powers of the Governor Act

MCL 10.31 provides:

> (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.

MCL 10.32 provides:

> 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.

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Pertinent Provisions of the Emergency Management Act

MCL 30.402(e) provides:

> "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) provides:

> (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) provides:

> (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) provides:

> (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 provides:

> (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.

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(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.

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MCL 30.417 provides, in pertinent part:

> This act shall not be construed to do any of the following:
>
> * * *
>
> (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.

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INTRODUCTION

The Legislative Plaintiffs come to the judiciary seeking only to build a constitutional crisis atop a public health crisis in Michigan. The law requires putting that effort to rest.

Unfortunately, the scourge of COVID-19 will not lie down. The novel coronavirus that causes COVID-19 has rapidly spread across the planet, infecting millions, and killing hundreds of thousands in just a few months. In response, jurisdictions the world over have imposed bold measures to stem the viral tide that has overwhelmed healthcare systems.

At home, Michigan is one of the states hardest hit by the pandemic. Since March 18, COVID-19 has claimed at least 5,372 lives, and countless others have suffered the excruciating health effects of the virus. Through wicked happenstance of this novel virus, many who are infected escape symptoms but unwittingly spread the virus to others, who may end up on ventilators, or worse. Such disparities still perplex medical experts, which only highlights the uncertainty ahead.

In response to the threat of the pandemic, Governor Gretchen Whitmer declared states of emergency and disaster. Consistent with her duties to protect the health and welfare of the State and its citizens and respond to emergencies within its borders, the Governor put measures in place to suppress the spread of the virus, incrementally loosening restrictions as the public health permits. Because of these efforts, the disease's spread has been slowed and countless lives have been saved. But the crisis is not over, and the virus remains highly contagious, still untreatable, and potentially poised for resurgence.

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The Legislative Plaintiffs deny none of this, but ask this Court to invalidate the Governor's emergency response authority and declare their own delegation of this authority unconstitutional. Past Legislatures have thought better of putting a slow and fractious multi-member body in charge of responding to emergencies that demand a rapid, coordinated, and nimble response. Through two laws—the Emergency Powers of the Governor Act (EPGA) and the Emergency Management Act (EMA)—the Legislature vested such responsibility in the executive branch.

The Legislative Plaintiffs, of course, remain free to amend these laws, even over the Governor's objection, if they are dissatisfied with the authority generations have vested in the Governor or the Governor's due exercise of that authority. But they have not done so. The courts are not the proper branch for lawmaking, and the Legislative Plaintiffs lack standing to bring this suit. The Legislative Plaintiffs have failed to show a sufficient injury to an institutional interest, and their action against the Governor raises separation of powers concerns. Moreover, nothing in the declaratory relief they seek is necessary to guide their future conduct and preserve their legal rights—they only seek to affect the *Governor's* rights.

They fare no better on the merits of their challenges to the Governor's exercise of her emergency authority. Under the EPGA, the Legislature plainly granted the Governor authority to proclaim an emergency and reasonably guided her discretion in doing so. And while the Legislative Plaintiffs attempt to engraft limitations on this authority and cast doubt on its constitutionality, settled caselaw and the EPGA's plainly stated text make short work of those arguments, just as the

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Court of Claims did. The Governor's declaration and reaffirmation of an emergency under the EPGA are valid, as are the executive orders issued under that authority.

Independently, the EMA contains authority that is activated upon the Governor's declaration of a state of emergency or disaster. Importantly, the EMA *requires* the Governor to issue those declarations if the conditions warrant it. If the declarations of states of emergency or disaster—which are defined by the act as "executive order[s]"—are not extended by the Legislature after 28 days, the Governor must terminate those executive orders. While the Court of Claims agreed with the Legislative Plaintiffs' contention that the Governor ignored this limitation, she in fact adhered closely to it and the EMA's other mandates—she timely terminated the earlier declarations and then issued new ones, consistent with her legal duty to do so when disaster or emergency conditions afflict our State.

The Legislative Plaintiffs frame the Governor's actions—particularly her new declarations—as unprecedented. But that flips the conversation on its head. The pandemic that Michigan is facing is unprecedented, as is the Legislative Plaintiffs' refusal to ratify the declarations the Governor issued—declarations whose factual basis they do not and cannot dispute. That refusal may be their right under the EMA, but the Governor's responsibility to act in response to the ongoing emergency and disaster remains her duty.

Even if this Court were to find that the Governor exceeded her authority under the EMA, that leaves her declaration under the EPGA undisturbed, as the

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Court of Claims concluded. Because the Governor's declarations here work as a belt and suspenders, even if the belt is removed, the suspenders remain.

The Legislative Plaintiffs' overarching claim is that the Governor has acted beyond her constitutional role (despite the Legislature granting her the very authority she has invoked and exercised). Yet rather than act with their own most fundamental power—to amend the laws they now challenge—they filed suit. But there is no legal basis for this Court to upend the status quo in the midst of this public health crisis. The Constitution grants the Legislature the tools to do just that if it so chooses—to amend its own laws, by veto override if it must. This Court should not short circuit that route still available to the Legislature, one that runs through their own chambers.

This case warrant answers from this State's highest court because the issues involve the constitutional validity of the EPGA, MCR 7.305(B)(1), have "significant public interest," MCR 7.305(B)(2), and touch on the Governor's emergency authority and the propriety of the Legislative Plaintiffs' standing, MCR 7.305(B)(3). Although the status quo will not cause substantial harm to the public because the Governor's measures to protect the public health remain valid under the decision below, MCR 7.305(B)(4)(a), the Governor's full authority to respond to a public crisis is currently undercut by part of the Court of Claims ruling, MCR 7.305(B)(4)(b).

The Governor asks this Court to grant her bypass application, and agrees that the Court should grant Legislative Plaintiffs' own bypass application, to decide these important and consequential questions.

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STATEMENT OF FACTS AND PROCEEDINGS

COVID-19 infects the globe.

SARS-CoV-2 is similar to other coronaviruses (a large family of viruses that cause respiratory illnesses), but the strain is "novel," *i.e.*, never-before-seen. This means that there is no general or natural immunity built up in the population, no vaccine, and no known treatment to combat the virus itself.

It is widely known and accepted that the virus is highly contagious, spreading easily from person to person via "respiratory droplets."[2] Experts agree that being anywhere within six feet of an infected person puts you at a high risk of contracting the disease, called COVID-19.[3] But even following that advice is not a sure-fire way to prevent infection. The respiratory droplets from an infected person can land on surfaces, and be transferred many hours later to the eyes, mouth, or nose of others who touch the surface. Moreover, since many of those infected experience no symptoms or only mild ones, a person could spread the disease before he even realizes he is sick.[4] Everyone is vulnerable either as a potential victim of this scourge or a carrier of it to a potential victim.

[2] World Health Organization, *Modes of transmission of virus causing COVID-19*, available at https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations.

[3] Centers for Disease Control, *Social Distancing, Quarantine, and Isolation*, available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html.

[4] (*Id.*)

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Because there is no way to immunize or treat for COVID-19, the Centers for Disease Control and Prevention have indicated the best way to prevent illness is to "avoid being exposed."[5] And as experience from prior pandemics such as smallpox and the 1918 Spanish Influenza have indicated, early intervention to slow transmission is critical.

In keeping with this advice, governmental entities have stressed the critical import of "social distancing," the practice of avoiding public spaces and limiting movement.[6] The objective of social distancing is what has been termed "flattening the curve," that is, reducing the speed at which COVID-19 spreads. If the disease spreads too quickly, the limited resources of our healthcare system could easily become overwhelmed.[7]

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 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.[8]

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[5] (*Id.*)

[6] (*Id.*)

[7] See *New York Times, Flattening the Coronavirus Curve* (March 27, 2020), available at https://www.nytimes.com/article/flatten-curve-coronavirus.html.

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

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On March 13, 2020, Governor Whitmer issued an executive order prohibiting assemblages of 250 or more people in a single shared space with limited exceptions, and ordering the closure of all K-12 school buildings.[9] Yet, even in the face of the social distancing recommendations and the six-foot rule of thumb, on Saturday, March 14, the public was out in droves. On March 16, 2020, the Governor ordered various places of public accommodation, like restaurants, bars, and exercise facilities, to close their premises to the public.[10]

Subsequently, on March 23, 2020, again in response to the spreading pandemic in Michigan, Governor Whitmer issued an executive order which essentially ordered all persons not performing essential or critical infrastructure job functions to stay in their place of residence, other than to obtain groceries, care for loved ones, engage in outdoor activity consistent with social distancing, and other limited exceptions (the Stay Home Order).[11] Several other orders intended to address the pandemic in Michigan were issued pursuant to her authority under the EPGA and the EMA.[12]

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[9] Executive Order 2020-5, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521595--,00.html.

[10] Executive Order 2020-9, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521789--,00.html. (Replaced by Executive Order 2020-20).

[11] Executive Order 2020-21, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html. That order was to continue through April 13, 2020; however, on April 9, 2020, the Governor issued Executive Order 2020-42, extending the Stay Home Order through April 30, 2020, at midnight. Executive Order 2020-42, available at https://content.govdelivery.com/attachments/MIEOG/2020/04/09/file_attachments/1423850/EO%202020-42.pdf.

[12] See generally "Executive Orders" http://www.legislature.mi.gov/(S(wskfimad5qtw1lrxuwq3z3jb))/mileg.aspx?page=executiveorders

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On April 1, the Governor issued Executive Order 2020-33, which expanded upon the prior declaration of a state of emergency and, consistent with the virus's aggressive and destructive spread, declared states of emergency and disaster across the State of Michigan. Under the EMA (though not the EPGA), the declarations must be terminated after 28 days absent resolution by both houses of the Legislature. MCL 30.403(3), (4). On April 7, the Michigan House and Senate approved an extension of the Governor's declaration until April 30, 2020.[13]

As required by the EMA, the Governor terminates the states of emergency and disaster under the EMA after the Legislature refuses to extend them.

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 pleading to this Court have the Legislative Plaintiffs expressed disagreement that the conditions persist that warrant declarations of emergency and disaster.[14]

On April 30, 2020, then, the Governor issued three executive orders. First, in Executive Order 2020-66 (App'x A), 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 refused to extend those executive orders.

[13] 2020 SCR 24.

[14] To the contrary, the Senate Majority Leader, the very morning after refusing to extend the prior declarations, responded with indignation when asked if the emergency was over: "No, not at all. Hell—heck no. I'd like to know where you would even come up with that question." See https://jtv.tv/senate-majority-leader-shirkey-on-legislative-showdown/ (thirty seconds into the interview).

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Although noting that "the threat and danger posed to Michigan by the COVID-19 pandemic has by no means passed, and the disaster and emergency conditions it has created very much exist," the Governor recognized that the Legislature—"despite the clear and ongoing emergency and disaster conditions afflicting our state—has refused to extend [the states of emergency and disaster] beyond today." *Id.* Accordingly, she was required by the EMA's plain language to issue an order "terminat[ing]" the states of emergency and disaster. *Id.*

Because the COVID-19 crisis persists, the EMA requires her to declare a state of disaster and emergency, which she promptly does.

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 (App'x B). She also explained the basis for this new declaration. 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.* COVID-19, she said,

> remains present and pervasive in Michigan, and it stands ready to quickly undo our recent progress in slowing its spread. Indeed, while COVID-19 initially hit Southeast Michigan hardest, the disease is now increasing more quickly in other parts of the state. For instance, cases in some counties in Western and Northern Michigan are now doubling every 6 days or faster. [*Id.*]

The Governor further found, "[t]he health, economic, and social harms of the COVID-19 pandemic thus remain widespread and severe, and they continue to constitute a statewide emergency and disaster." *Id.* Accordingly, the Governor stated: "I now declare a state of emergency and a state of disaster across the State

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of Michigan under the Emergency Management Act." *Id.* Finally, the Governor ordered that "[a]ll previous orders that rested on Executive Order 2020-33 now rest on this order." *Id.*

The Governor reaffirms her declaration of the state of emergency under the EPGA.

In the third Executive Order issued that day, 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 (App'x C). And like in Executive Order 2020-68, she ordered "Executive Order 2020-33 is rescinded and replaced. All previous orders that rested on Executive Order 2020-33 now rest on this order." *Id.*

The Court of Claims denies declaratory relief and affirms the Governor's authority under the EPGA.

The Legislative Plaintiffs brought suit, seeking an expedited declaratory judgment that the Governor's authority to act under the EMA ended April 30, 2020; the EPGA does not provide authority for the Governor's COVID-19 executive orders; the Governor has no lawmaking power under Const 1963, art 5, § 1; and the Governor's ongoing COVID-19 executive orders violate the separation of powers. (Compl Request for Relief.)

On May 21, 2020, the Court of Claims issued an opinion and order denying the Plaintiffs' requested relief. (5/21/20 Op and Order, p 25) (App'x D). First, the Court of Claims determined that the Legislative Plaintiffs have standing, but

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deemed it a "close question." (*Id.* at 7.) The court construed the Legislative Plaintiffs' claimed injury as being "that EO 2020-67 and EO 2020-68 nullified the decision of the Legislature to not extend the state of emergency or disaster." (*Id.* at 8.) More specifically, the court found the Legislative Plaintiffs' allegation to be "the Governor eschewed the Legislature's role under the EMA and nullified an act of the legislative body as a whole," an injury "unique to the Legislature." (*Id.* at 8–9.)

The court also held that that Executive Order 2020-67 (the EPGA declaration) was a valid exercise of the "broad authority" by the Governor. (*Id.* at 10.) The court rejected the Legislative Plaintiffs' "attempt to limit the scope of the EPGA to local or regional emergencies only," relying heavily on the Legislature's plain statutory purpose in MCL 10.32 to confer " 'sufficiently broad power' on the Governor in order to enable her to respond to public disaster or crisis." (*Id.* at 11, quoting MCL 10.32.) The court rejected the attempt to impose "artificial barriers on the Governor's authority to act," noting that a "particularly strained reading of the plain text of the EPGA" was required to reach the Legislative Plaintiffs' result. (*Id.* at 12.) Recognizing the Legislative Plaintiffs' "selectively rely on parts of the statute and ignore the contextual whole," the court affirmed the Governor's authority to issue state-wide declarations under the EPGA. (*Id.* at 13–14.)

The court had no difficulty squaring this reading with the existence of the EMA, explaining that "while both statutes permit the Governor to declare an emergency, the EMA equips the Governor with more sophisticated tools and options at her disposal." (*Id.* at 14.) And, citing MCL 30.417(d)—which makes clear that

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the EMA does not "[l]imit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to [the EPGA]"—the court relied on the Legislature's own textual "explicit recognition" in refusing to narrow the EPGA or the EMA as the Legislative Plaintiffs desire. (*Id.* at 15.)

The court also denied the Legislative Plaintiffs' request to declare the EPGA unconstitutional as violative of the separation of powers. The court properly balanced the complexity of the underlying subject matter—response to an unknown future emergency situation—with the sufficient guidance the Legislature provided. (*Id.* at 16–18.) As the court summed up, citing several Michigan decisions:

> The Legislature's use of the terms "reasonable" and "necessary" are not trivial expressions that can be cast aside as easily as plaintiffs would have the Court do. Rather than being mere abstract concepts that fail to provide a meaningful standard, the terms "reasonable" and "necessary" have historically proven to provide standards that are more than amenable to judicial review. [*Id.* at 18.]

Given the validity of the EPGA and the validity of the Governor's declaration under it, 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.) The court, again, denied the relief requested by the Legislative Plaintiffs. (*Id.* at 25.)

Even though the court denied Legislative Plaintiffs' relief, the opinion determined that the Governor acted outside of her authority with respect to her April 30 declarations under the EMA. See Op and Order, pp 2–3 ("This court finds that . . . Executive Order No. 2020-68 exceeded the authority of the Governor under the EMA."); p 19 ("The Legislature contends that the issuance of EO 2020-68 was ultra vires, and this Court agrees" that 2020-68 is ultra vires).

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After describing the broad authorities a Governor has under the EMA, the court accurately noted that, in Executive Order 2020-66, the Governor "expressly terminated the previously issued states of emergency and disaster—not because the disaster or emergency condition ceased to exist—but because a period of 28 days had expired," which is consistent with the statutory language in MCL 30.403(3) and (4). As the court correctly put it, "The Governor *"shall"* terminate the state of emergency or disaster *unless* the Legislature grants a request to extend it." (*Id.* at 23.) But the court found the Governor's new declarations as contrary to that language, stating, "To adopt the Governor's interpretation of the statute would render nugatory the express 28-day limit." (*Id.* at 24.) The court also disagreed that, construed in this way, the 28-day limit is an unconstitutional legislative veto, describing it as "a standard imposed on the authority so delegated." (*Id.* at 25.)

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 Legislative Plaintiffs lack standing.

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 perceived legislative problem.

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This, they cannot do. The Legislative Plaintiffs cannot claim an institutional interest in the enforcement of already-enacted legislation, and have not claimed an injury distinct from the citizenry at large. This Court should determine that the Legislative Plaintiffs lack standing.

A. The Legislative Plaintiffs lack standing because they have no special interest in challenging the executive orders of the Governor that differs in any way from the general interest of the citizenry at large.

"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 F3d 499, 507 (CA 6, 2019), citing *Ariz State Legislature v Ariz Independent Redistricting Comm*, 135 S Ct 2652, 2664 (2015). Importantly, a "generalized grievance that the law is not being followed," is insufficient to establish standing. *Dodak v State Admin Bd*, 441 Mich 547, 556 (1993) (citation omitted); see also *League of Women Voters of Michigan v Secy of State*, ___ Mich App ___, ____ (Docket No. 350938), slip op at *6, app for lv pending 938 NW2d 244 (Mich 2020).

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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. 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. Indeed, that is explicitly the relief that the Legislative Plaintiffs seek. Under *League of Women Voters* and *Dodak*, they cannot obtain that relief here.

The Legislative Plaintiffs claim that the Governor's actions violate the EPGA and the EMA. But even if that were true (it is not), such an alleged injury is not personal or unique to them. As the court 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 its laws, it exercised its legislative power. Execution of the laws is the purview of the executive. Const 1963, art 5, §§ 1, 8.

The Legislative Plaintiffs fare no better by attempting to cast their claims as Michigan constitutional violations. Whether they frame the Governor's action as allegedly unlawful or unconstitutional, they lack standing to challenge the actions for the same reasons. In either instance, the alleged injury or deprivation is no different than that accruing to the ordinary citizen.[15]

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[15] Below, Plaintiffs relied heavily on the *Arizona State Legislature* case for the proposition that a legislature has an interest in protecting its lawmaking power from infringement. (5/15/2020 Hr'g Tr, p 10.) But *Arizona State Legislature* merely

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The Legislative Plaintiffs' case is that the Governor did not follow the EMA and EPGA when declaring states of emergency and disaster—a claim of statutory interpretation—and that their own law is unconstitutional. The Governor has not asserted an inherent authority to act with legislative authority, only that the Legislature granted her authority by statute, which she has exercised. By acting as she did, the Governor did not work any infringement upon or dilution of the Legislature's constitutional power to pass laws, or any other constitutionally granted authority. See *Tennessee Gen Assembly*, 931 F3d at 512 (noting that legislative standing is proper upon an allegation of "interference with a legislative body's specific powers . . . or a constitutionally assigned power").

To the contrary, the Legislature admittedly introduced dozens of bills during the pandemic (Compl, ¶ 43), and is not hampered from continuing to do so. Any and all legislative tools remain on the table and available for amending or repealing the laws on the books. That the Governor may *also* act (per the Legislature's own delegation), does not squeeze out the Legislature from acting concurrently.

To sum it up, per the Court of Appeals in *League of Women Voters*:

> [T]he Legislature is suing to reverse actions by the [Governor], a member of the Executive Branch. The Legislature is thus plainly challenging the actions of members of the Executive Branch. *Dodak* stands for the proposition that courts should not confer standing in

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stands for the proposition that, where a legislative body alleges that it is effectively *barred* from exercising its constitutional authority, it has standing. *Id.* at 2663–2664; see also *Tennessee Gen Assembly*, 931 F3d at 511 (explaining that state legislatures had been found to have standing when they "alleged that an action at the state legislative level had interfered with their federal constitutional prerogatives"). That is miles from this case.

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> matters that have the real possibility of infringing upon the separation of powers. [*League of Women Voters*, slip op at *7.]

And *League of Women Voters* is all the more persuasive on this point because, in that case, the Legislature sought to *protect* the constitutionality of its laws. ___ Mich App at ___; slip op at *9 ("To accept the Legislature's argument that it has standing here would open the door for the Legislature to seek a declaratory judgment whenever the constitutionality of a statute was challenged."). Here, the Legislative Plaintiffs ask this Court to *invalidate one of its own laws*, seeking a declaration that the EPGA is unconstitutional. If the Legislature lacks standing to attempt to enforce its own laws, it must lack standing to nullify them.

Finally, there is no room for concern in this case that, without standing for these plaintiffs, the executive's actions might evade judicial review.[16] A private party would have standing to challenge the Governor's declarations if the litigant could point to an alleged harm stemming from one of the Governor's substantive executive orders premised on her declarations under the EMA and/or the EPGA.

B. The Legislative Plaintiffs cannot meet their obligation to show that an actual controversy exists under MCR 2.605.

Nor can the Legislative Plaintiffs generate standing by framing their claims as requests for declaratory relief. 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

[16] See e.g., *League of Women Voters of Michigan v Secretary of State* (Docket No 160907-8), March 11, 2020 Oral Argument, Viviano, J., questioning at 52:26. Available at https://www.youtube.com/watch?v=9_AxvQNoa_4

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judgment." 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). See also *Assoc Builders & Contractors v Dep't of Consumer & Indus Servs Director*, 472 Mich 117, 126 (2005), overruled in part on other grds, 487 Mich at 371 n 18.

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 an actual controversy, the Legislature would have standing to bring a lawsuit against any government entity that has allegedly violated the Constitution or failed to enforce or comply with a statute. That outcome would be both an abuse of the court system and an improper curtailing of the legislative and political processes.

Nor do the Legislative Plaintiffs adequately explain how declaratory relief is needed here to guide their future conduct in order to preserve their *legal* rights. *Lansing Sch Ed Ass'n,* 293 Mich App at 515. To be sure, the future conduct that the Legislative Plaintiffs seek to "guide"—that is, curtail—is the that of the Governor, not the Legislature. The law does not provide standing for the Legislature to seek declaratory relief. As the Court of Appeals concluded in *League of Women Voters*:

> No declaratory judgment is necessary to guide the Legislature's future conduct in order to preserve its legal rights. The Legislature's

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> authority to enact laws is separate and distinct from this Court's role in determining whether any law passes constitutional muster. These "rights" and obligations of the two separate branches of government will remain the same, no matter what the outcome in this matter, such that the preservation of the Legislature's legal rights is not at issue. [*League of Women Voters*, ___ Mich App at ___, slip op at *7.]

The Legislative Plaintiffs contend that they have a special right that is affected in a manner different from the citizenry at large in their right to enact legislation—but this is more spin than reality. There is nothing in the Governor's actions that interferes with the Legislature's ability to legislate. In fact, the complaint specifically alleges that the "Legislature has introduced almost 100 bills on COVID-19 related issues." (Compl, ¶ 43.) The Legislative Plaintiffs' claim for declaratory relief fails because there is no threat to their power to enact legislation, including their power to amend or repeal the very laws they challenge. [17]

In sum, the Legislative Plaintiffs' concern here is the Governor's actions, not infringement of its own institutional rights or responsibilities. They have no special interest in challenging the Governor's executive orders or advancing a strained interpretation of their own laws. Therefore, and in light of the separation-of-powers concerns pervading this suit, the Legislative Plaintiffs lack standing.

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[17] The Michigan Constitution provides that "[n]o bill shall become 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.*

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II. The Governor has the authority under the EPGA to declare a state of emergency and to issue orders to protect the health and safety of the State and its people.

Even if the Legislative Plaintiffs could seek their requested relief from this Court, they have not shown entitlement to it. The EPGA grants the Governor broad police powers in times of public emergency to protect life and property and bring the emergency to its end.

A. The State is generally granted broad latitude to respond to public health crises.

Faced with "great danger[ ]," state actors are permitted great latitude to secure the public health. *Jacobson v Commonwealth of Massachusetts,* 197 US 11, 29 (1905). In *Jacobson*, the Supreme Court considered a claim that the Massachusetts' mandatory vaccination law, which applied to every person in Cambridge due to a growing smallpox epidemic, violated the defendant's Fourteenth Amendment right "to care for his own body and health in such way as to him seems best." 197 US at 26. The Supreme Court upheld this sweeping, invasive measure as a proper exercise of the States' police power because of the exigencies and dangerousness of the public health crisis. It affirmed that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. As the Court stated,

> in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. [*Id.* at 29.]

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In upholding the law, the Court refused to "usurp the functions of another branch of government" by second-guessing the executive's exercise of police power in such circumstances. *Id.* at 28. As *Jacobson* illustrates, the police power has long been recognized as a fundamental and central means by which States can respond in an effective fashion to an imminent threat to its citizens' health and safety.

B. Consistent with the proper exercise of police power, the Legislature enacted the EPGA.

Through the EPGA, the Legislature has ensured that the Governor, who holds the executive power, has the necessary tools to deal with emergencies and disasters in this State, such as the crisis presented by COVID-19. Const 1963, art 5, § 1. The EPGA does not deprive the Legislature of any of its lawmaking tools or powers, and throughout this crisis, the Legislature has retained and been free to use them. But rather than exercise that lawmaking authority to amend the EPGA or EMA, the Legislative Plaintiffs asks this Court to misconstrue them.

1. 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). 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." *Id.*

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

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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.

Our State is undoubtedly facing a "time[ ] of great public crisis," "disaster," or "similar public emergency," wherein "public safety is imperiled." MCL 10.31(1). The world over has been ravaged by the COVID-19 crisis, with serious, often fatal, consequences for many due to the virus's easy and rapid transmission. States of emergency exist across our country too, with orders effectuating social distancing. Since the virus's origin in China, it has traveled to nearly every country on Earth, killing over 350,000 people. Indeed, in April, it killed more Michiganders than heart disease and cancer combined.[18] As of filing, over 5,000 have died here, and over 100,000 have died in the United States.[19]

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[18] 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

[19] *New York Times*, *An Incalculable Loss* (May 27, 2020), available at https://www.nytimes.com/interactive/2020/05/24/us/us-coronavirus-deaths-100000.html

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These undisputed (and undisputable) facts form the basis of the Governor's finding that a state of emergency exists under the EPGA, and well justify the "reasonable" and "necessary" measures she has taken "to protect life" throughout the State and bring this pandemic "under control." MCL 10.31(1).

2. The Legislative Plaintiffs' narrow construction of the EPGA is not borne out by the statute's plain language, and their heavy reliance on the alleged history of the act 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 EPGA is limited to quelling riots and other uprisings of local concern. (Pls Bypass App, pp 20–24.) But this narrow construction is unwarranted for as many as six reasons.

First, such a limited reading is directly contrary to the Legislature's own (duly enacted) direction, which mandates that the act be "broadly construed to effectuate [its] purpose," which was plainly stated:

> 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. [MCL 10.32.]

Second, the Legislative Plaintiffs proffer *a geographical limitation*—an interpretation of the statute that limits a declaration's reach to only local subsets of the State. (Pls Bypass App, pp 20–22) ("These words—'area,' 'zone,' and 'section'—all establish that the Governor's power is intended to reach some subpart of the state as a whole."). This is an attempt to recast the intended, and plainly stated,

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flexibility of the EPGA as a limitation. The EPGA provides that, when declaring an emergency, the Governor must "designate the area involved." MCL 10.31(1). The EPGA then provides an illustrative, and expressly non-exhaustive, list of "orders, rules, and regulations" that the Legislature suggested may be appropriate in response to an emergency—which occasionally includes reference to "zones" or "section[s]," but just as often does not. *Id.*

All of this 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 the nature of the threat posed to this State (indeed the world) by this highly contagious, often fatal, and still untreatable virus. See MCL 10.31(1) (permitting a declaration during a "public emergency" or "reasonable apprehension of immediate danger of a public emergency").

Simply put, given the nature of this virus and the current limitations on our ability to test for, trace, and contain it, 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 State is the "area involved," and

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under the plainly stated language and intent of the EPGA, the Governor is fully authorized to designate that area and respond accordingly.[20]

Also, 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 Bypass App, pp 15–20.) Just as the EPGA plainly accommodates emergencies statewide in scope, so too is the EMA filled with references to the authority for addressing local states of emergencies. It 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 provides guidance where a local emergency extends "beyond the control of the county," MCL 30.414(1). It also leads to the unfounded conclusion that, prior to the passage of the EMA 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 is wholly unsupported by the text or express purpose of the EPGA. (See 5/22/20 Ct of Claims Op, p 12 ("Under plaintiffs' view, if that emergency became too large and it affected the entire state, the Governor would have to pick and choose which citizens could be assisted by the powers granted by the EPGA[.]").)

[20] Similarly misguided is the suggestion that a statewide declaration is contrary to the EPGA because it contemplates that the Governor may act during times of public emergency "within" the State. But even adopting the Legislative Plaintiffs' definition of "within"—" 'Within' means 'on the inside or on the inner-side' or 'inside the bounds of a place or region' " (Pls Bypass App, pp 20, ultimately quoting *Webster's Third New International Dictionary* 758 (1993))—the designated area meets that definition. The entirety of the state is "inside the bounds" of the State.

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Third, like squeezing water from a stone, the Legislative Plaintiffs wish to engraft yet another limitation on the EPGA—let us call it the "rioting" limitation—in order to shrink the EPGA's authority to reach only local emergencies of a very specific sort. (Pls Bypass App, pp 17–18, 25.) This, too, fails. While the Legislative Plaintiffs' chosen specific term—rioting—is certainly covered by the EPGA, it sits adjacent "great public crisis," which is quite general (and perfectly applicable), as are "disaster" and "catastrophe." MCL 10.31. And the trusty canon of construction *ejusdem generis* is a handy reference, which applies "where a general term follows a series of specific terms," requiring "the general term [to be] interpreted to include only things of the same kind, class, character, or nature as those specifically enumerated." *Neal v Wilkes*, 470 Mich 661, 669 (2004) (cleaned up). With "public emergency" as the general term, the "similar" specific terms must inform the general term's scope. The ample breadth of "public emergency" is confirmed by the distinct specific terms. The broad terms used by the Legislature, in conjunction with the liberal-construction requirement in MCL 10.32, confirm that the Governor's declaration under the EPGA is appropriate.

Fourth, the Legislative Plaintiffs stitch together their own narrative of the history and motivations behind the enactment of the EPGA. (Pls Bypass App, pp 24–26.) Plaintiffs, of course, have told the story that helps their case, leaning heavily on a circumscribed review of prior *Governors*' understanding of the law which definitionally bears little on the *Legislature's* intent—the proper focus of statutory construction. As the Court of Claims found, the proffered history is

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"particularly unpersuasive" because it "does not even address or suggest the local limit plaintiffs attempt to impose on the EPGA" and "rel[ies] on mere generalities and anecdotal commentary." (5/21/20 Ct of Claims Op and Order, p 15.)

But the accuracy or completeness of that history is fundamentally beside the point. The Legislature made its intentions in enacting the EPGA perfectly clear in the language of the statute itself, and Plaintiffs cannot rewrite those intentions to meet their own considerations. "Because the statute is clear, there is no ambiguity that would permit or justify looking outside the plain words of the statute." *In re Certified Question from US Court of Appeals for Sixth Circuit*, 468 Mich 109, 116 (2003) (cleaned up). In particular, courts "do not resort to legislative history to cloud a statutory text that is clear." *Id.* Lacking any ambiguity, the text of the EPGA, including its express directive to construe its terms broadly, controls.

Fifth, 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 the doctrine is most profitably applied to address statutes that do not refer to each other, so this canon is employed to make sense of their interaction. See, e.g., *People v Anderson,* ___ Mich App ___ (2019) (No. 343272), slip op at *3 (the doctrine applies "even if the statutes do not reference 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

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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 the midst of an emergency or disaster could be devastating. Better to, as the 1976 Legislature made clear with MCL 30.417(d), complement one authority with another.

The EMA provides for a more extensive structure of governmental action in response to an emergency, and a more detailed set of powers for the Governor to implement in that response. The EMA, however, expressly ensures that, underlying the mechanisms it provides for activating implementing state and local emergency response resources, there remains the EPGA and its foundational assurance that, in times of public emergency, the executive branch is empowered to exercise the police power of the State to do what is reasonable and necessary to protect life and bring the emergency under control. The law provides more than one tool in the Governor's toolbox, without any limitation against using them in tandem.

Sixth and finally, and for these same reasons, the Legislative Plaintiffs' attempt to engraft the EMA's 28-day limitation period onto the EPGA must fail. There is simply nothing in the text of either statute that supports or even suggests it. The Governor's proclamation only ceases "upon declaration *by the governor* that the emergency no longer exists." MCL 10.31(2) (emphasis added). And the

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Legislature, in enacting the EMA thirty years later, wisely chose to leave that characteristic of the EPGA intact. The wisdom of this legal landscape is apparent in the case of a pandemic that respects no boundaries while impacting individuals, regional health systems, and all aspects of life in severe and unpredictable ways.

III. The EPGA contains standards that guide the Governor's exercise of authority concomitant with the nature of broad, developing emergencies and therefore survives a non-delegation challenge.

The Legislative Plaintiffs claim that the EPGA violates the separation of powers because it lacks sufficient standards to guide the Governor's decision-making, in violation of the non-delegation doctrine. Ample caselaw disagrees.

A. The branches of government are not barred from working together, and sharing their authority is permitted so long as adequate guidance is given.

The Michigan Constitution provides for the separation of powers among the three branches of state government. In particular, the Constitution provides:

> 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. [Const 1963, art 3, § 1.]

But Michigan courts have never interpreted the separation of powers doctrine as meaning there can never be any overlapping of functions between branches. *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 752 (1982). Rather, an overlap or sharing of power is constitutionally permissible provided that "the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other." *Judicial Attorneys Ass'n v Mich*, 459 Mich 291, 297 (1998); see also *id.* ("It is simply

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impossible for a judge to do nothing but judge; a legislator to do nothing but legislate; a governor to do nothing but execute the laws.").

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), which the Legislative Plaintiffs claim the EPGA violates. While the legislative power—the power "to make, alter, and amend laws"—sits with the Legislature, *Harsha v City of Detroit*, 261 Mich 586, 590 (1933), both the U.S. Supreme Court and the Michigan Supreme Court "ha[ve] recognized that the separation of powers principle, and the nondelegation doctrine in particular, do not prevent Congress [or our Legislature] 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). Under this test, "legislation which contains a delegation of power to . . . [another branch] must contain either explicitly or by reference . . . standards prescribed for guidance . . . ." *Id.* at 437–438. Significantly, such standards must only be "as reasonably precise as the subject matter requires or permits." *Id.* at 438.

And the statute carries a presumption of constitutionality; it "must be construed in such a way as to 'render it valid, not invalid.' " *Id.*, citing *Argo Oil Corp v Atwood*, 274 Mich 47, 53 (1935). In Michigan, like the federal system, successful nondelegation claims are exceedingly rare. See *Taylor*, 468 Mich at 9

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("In the federal courts these improper delegation challenges to the power of federal regulatory agencies have been uniformly unsuccessful.")

This case presents no exception to the rule; the standards set forth in the EPGA are as "reasonably as precise as the subject matter requires or permits." *Westervelt*, 402 Mich at 439. 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, rules, and regulations as he or she considers *necessary* to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1). Accordingly, there are several limits on the Governor's authority. Her orders may come only upon a "public 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 situation . . . under control" in the "affected area." *Id.*

Michigan courts have consistently upheld similar language as sufficiently precise to avoid any nondelegation problem. In *G.F. Redmond & Co v Michigan Sec Comm'n*, 222 Mich 1, 7 (1923), this Court held that "the term 'good cause' for revocation of the license, relating, as it does, to the conduct of the business regulated by the policy declared in the statute, is sufficiently definite." See also *Smith v Behrendt*, 278 Mich 91, 97–98 (1936) (holding that allowing the executive to grant oversize loads for freeway travel in "special cases" was a limited and proper delegation of legislative authority). These examples suffice to reveal that the courts are hesitant to invalidate laws on the basis of an allegedly improper delegation

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where the Legislature provides even a modicum of direction to the executive branch. This level of trust—in the Legislature, to delegate as it sees fit, and in the executive, to follow those guidelines—justifies a strong deference from this Court to its coordinate branches.

The Legislative Plaintiffs rely on *Blue Cross & Blue Shield of Michigan v Milliken*, which 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.

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. *Westervelt*, 402 Mich at 439. The context of a developing "crisis, disaster, rioting, catastrophe, or similar public emergency," MCL 10.31(1), counsels granting substantial leeway to the decisionmaker. Public emergencies are not static events, nor do they unfold patiently or predictably. Response to such crises warrant—indeed require—nimbleness coupled with judgment to meet the needs of the moment. There is no specific one-size-fits-all response to a complex and ongoing emergency. This subject matter requires the broadest level of leeway permissible under the nondelegation doctrine. If "the management of natural resources is a difficult and complex task,"

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DNR v Seaman, 396 Mich 299, 311 (1976), surely the response to a rapidly developing and ever-changing public health crisis is even more so.

The EPGA provides the Governor substantial discretion, but limits her ability to act upon a finding of an emergency, and even then only to exercise her discretion to issue "reasonable" orders "necessary" to protect "life and property" and to bring the emergency "under control." MCL 10.31(1). These guideposts are more than sufficient, and do not contemplate legislative or judicial second-guessing.

B. The Legislature is not best equipped to address the exigencies of an emergency.

The Legislative Plaintiffs highlight the Legislature's "nature and design" as best situated to handle the ongoing public health crisis. (Pls Ct of Claims Br, p 44.) They offer the virtues of "consensus through rigorous parliamentary debate," and considerable "distillation and refinement," to make public policy choices. (*Id.*) As explained in painstaking detail by an amicus filing in the Court of Claims (Senate Democrats Caucus Br, pp 6–12), the road from an idea to a bill to an enactment is a long one, filled with procedural requirements—most notably, the constitutional requirement that each bill must sit, at a minimum, for *five days in each chamber* before it can be passed, Const 1963, art 4, § 26. Though valuable in the normal course of legislative deliberation, the response necessary to combat a fast-moving, contagious disease is agile and flexible (as well as temporary and reasonable)

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action, not Robert's Rules of Order.[21] 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 Court should honor that choice. Having extolled its virtues in making public policy choices, it is incumbent on the Legislature, not this Court, to make the changes it seeks. Bicameralism and presentment are the procedures that the Legislature designed to effectuate such choices, and if it thinks it is wise to take the reins in the middle of this crisis, it should exercise its legislative authority to do so.

IV. In the EMA, the Legislature *requires* the Governor declare a state of emergency and disaster if she finds certain conditions exist.

In addition to her authority under the EPGA, the Governor has an independent source of emergency-response authority in the EMA. In determining that the Governor acted outside of that statutory authority under the EMA when issuing Executive Order 2020-68, the Court of Claims made its only error on the merits. That error stems from an interpretation of the EMA's provision concerning the effect of the Legislature's decision not to extend the Governor's declarations of emergency and disaster. (5/22/20 Ct of Claims Op, pp 19–25.) Before review of that provision, however, an understanding of the scope of the EMA sets the background.

[21] In some emergency circumstances, even the constitutionally mandated quorum necessary to do business in the Legislature could pose logistical barriers. Const 1963, art 4, § 14.

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A. The EMA sets out a statutory game-plan for state and local emergency response, and it grants the Governor broad powers and duties to "cop[e] with dangers to the state or its people."

First enacted in 1976, the EMA sets forth several independent (though related) obligations regarding state and local responses to emergencies and disasters in the State. The Governor is not the only subject of the EMA—that act tasks county boards of commissioners, MCL 30.409, and directors in state government, MCL 30.408, among others, with emergency planning, including the designation of emergency management coordinators. See MCL 30.410. It grants those local coordinators the authority to declare a local state of emergency and permits them to, among other things, appropriate funds, provide emergency assistance to victims of a disaster, and enter into regional compacts with public and private entities to respond to the emergencies. MCL 30.410(1)(b).

Particular to 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 and serves as a baseline for the latitude given to her by the Legislature in times of crisis. To that end, she possesses the authority to "issues executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(2). The act grants the Governor, and only the Governor, the authority to amend or rescind those orders. *Id.*

This broad statement of authority is confirmed throughout the EMA. For example, MCL 30.414(3), makes clear that the EMA "shall not be construed to restrain the governor from exercising on his own initiative any of the powers set

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forth in this act." The act also emphasizes the breadth and strength it is intended to add to the Governor's preexisting emergency response authority, stating that it does not "[l]imit, modify, or abridge" the authority of the Governor to proclaim a state of emergency under the EPGA "or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of the state independent of, or in conjunction with, this act." MCL 30.417(d). As discussed above, the EPGA confers emergency authority on the Governor without mention of legislative involvement—a characteristic the EMA expressly preserved.

B. If the conditions warrant it, the Governor has a duty under the EMA to declare states of emergency and disaster which actuates certain emergency response mechanisms.

Consistent with this 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 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). Similarly, 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).

Upon that order or proclamation, the law grants the Governor authority to marshal both state and federal resources to adequately deal with the danger facing the State.[22] The executive order or proclamation also authorizes the Governor to

[22] See, e.g., MCL 30.404(1) (authorizing deployment of forces and distribution of supplies); MCL 30.404(2) (the Governor may seek and accept federal assistance); MCL 30.408(1) (demanding cooperation among the state agencies).

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exercise additional broad powers, including "[s]uspending a regulatory statute, order, or rule prescribing the procedures for conduct of state business" in certain circumstances, "commandeer[ing] . . . private property necessary to cope with the disaster or emergency," and "[c]ontrol[ling] ingress and egress to and from a stricken or threatened area," and "[d]irect[ing] all other actions which are necessary and appropriate under the circumstances." MCL 30.405(1)(a), (d), (g), (j).

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 emergency or disaster conditions exist. Per MCL 30.402(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." (Emphasis added.) Similarly, " 'state of emergency' means *an executive order or proclamation* that activates the emergency response and recovery aspects of the state, local, and interjurisdictional emergency

[23] The EMA defines both "disaster" and "emergency." Under MCL 30.402(e), " '[d]isaster' 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. . . ." "Emergency" is defined as "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(h).

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operations plans applicable to the counties or municipalities affected." MCL 30.402(p) (emphasis added).

In short, "state of emergency" and "state of disaster" are *species of executive orders* that activate certain response efforts and resources and may—indeed, must—be issued only when "emergency" or "disaster" conditions are found to exist. These statutory definitions are important to understand the interplay between the Governor's termination of her prior declarations and subsequent new declarations.

Importantly, "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 as such in an executive order or proclamation. MCL 30.403(3), (4). Under longstanding Michigan 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).[24] The Governor thus has a *duty* to declare a state of emergency or a state of disaster if she determines a disaster or emergency has occurred or will occur.

And just as she is required to *declare* a state of emergency if the real-world conditions merit it, she also has the duty to "terminate" a state of disaster or emergency, i.e., such executive orders, if the conditions cease or the Legislature refuses to extend those executive orders. MCL 30.403(3), (4).

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[24] See also *Sauder v Dist Bd of Sch Dist No 10, Royal Oak Tp, Oakland Co*, 271 Mich 413, 418 (1935) (when a statute uses "shall" and "the public are interested" that charge "is imperative"); *Southfield Tp v Main*, 357 Mich 59, 76 (1959) ("The use of the word 'shall' is mandatory and imperative and when used in a command to a public official.").

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C. Pursuant to the EMA's mandates, the Governor terminated her earlier declarations and issued new ones because there was an undisputed "disaster" and "emergency" in Michigan.

As April 30 approached and with it the expiration of the declared states of emergency and disaster under the EMA, see Executive Order 2020-33, the Legislature declined to extend those executive orders, despite the lack of dispute that that the conditions in our State remained dire. On April 30, then, in accordance 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. Executive Order 2020-66.

Then, since the conditions on the ground undisputedly remained dire—*just that day*, over 100 Michiganders died from the virus and over 1,100 were confirmed infected[25]—the Governor found "that an emergency [or disaster] has occurred or that the threat of an emergency [or disaster] exists," triggering her *duty* under the EMA to declare as such in an executive order or proclamation. MCL 30.403(3), (4); Executive Order 2020-68, Preamble.

In carrying out her statutory duty, the Governor acknowledged that the measures implemented pursuant to her authority under the EMA and the EPGA (like the Stay at Home order, among others) "have been effective, but the need for them—like the unprecedented crisis posed by this global pandemic—is far from over." *Id.* She emphasized the continued lack of treatment for the virus, the ease of

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[25] *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

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transmission, and the "lack [of] adequate means to fully test for it and trace its spread." *Id.* Ultimately, the Governor found that "the threat and danger posed to Michigan by the COVID-19 pandemic has by no means passed, and the disaster and emergency conditions it has created still very much exist." *Id.* Given her findings and the facts on the ground, the Governor was obligated to issue the declaration.

D. The construction of the Court of Claims and the Legislative Plaintiffs adds limitations on the Governor's authority that the Legislature did not impose.

The Court of Claims erroneously ruled that the Governor was barred from issuing Executive Order 2020-68. Because the Legislature did not extend the emergency and disaster declarations set to expire on April 30, the Governor terminated them, just as she was required to do. *Id.* But her duty to issue states of emergency and disaster plainly remained, and was not the subject of those terminated declarations. So, because of the duty to issue such declarations whenever the conditions warrant it—the law states that she "shall" do so—she immediately issued new orders declaring states of emergency and disaster. *Id.*

The Legislative Plaintiffs' position—that their refusal to extend requires not only termination of the executive orders, but bars the Governor from issuing distinct and subsequent executive orders—finds no mention in the text. (5/21/20 Ct of Claims Op at 23.) Rather, the Legislature seeks to engraft a *second* effect of their refusal to extend the Governor's executive orders: the negation of her duty to respond to emergencies under the EMA.

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To illuminate the legal error (and the real-world stakes) in an all-too-possible factual context, barring the Governor from declaring a state of emergency or disaster on the same subject matter of a prior, un-extended declaration would prohibit her from activating the EMA's emergency response resources to combat COVID-19, no matter how badly or urgently those resources are needed. *How long* would the Governor have to wait from the earlier termination before enough time had passed, if the Plaintiffs and the Court of Claims are correct that a minute is simply not long enough? How about a day? A week? Six months? No time period exists in the statute, and this Court should not add some extra-textual time-lapse before the Governor may fulfill her statutory duty to the State and its residents.

Nor is there any requirement in the statute, express or implied, that the Governor's duty to declare an emergency or disaster may spring back up, but only if the *conditions change*. (5/21/20 Ct of Claims Op at 23.) And in the absence of any statutory guidance, how is the Governor to know, or a court to review, whether the conditions have sufficiently changed? The EMA does not contemplate this, nor would it make any sense as a matter of emergency response; the decision to declare states of emergency and disaster is entrusted to the sound discretion of the Governor and is based, as it should be, on what the existing conditions require, not on whether they have changed in some undefined and uncertain way. Imposing such extra-textual rules about how and when a Governor can reactivate needed emergency response resources is both unwarranted and dangerous.

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Public health experts warn of a possible second wave of this pandemic. The existence of such unknowns and uncertainties about the future impact of the coronavirus (as with many emergencies or disasters) further supports reading the law as it is, not as the Legislative Plaintiffs would like it to be. The Legislature wrote the law; the Governor followed it. Only the Legislature may amend it.

The Governor is not granted her emergency authority without limit, as the Legislative Plaintiffs' seemingly warned below. Indeed, although the Governor "shall" declare an emergency or disaster "if he or she finds" that an emergency or disaster has occurred or threat of either exists, she is not empowered to declare either in the absence of the conditions precedent. MCL 30.403(3) and (4). These clear textual limitations should mute the siren-decibel lamentations of the Governor's purported "tyranny." (Pls Ct of Claims Br, p 41.)[26]

And while a Governor's factual finding of an emergency is entitled to great deference, it is not beyond judicial review. *Straus v Governor*, 459 Mich 526, 533 (1999), quoting *People ex rel Johnson v Coffey,* 237 Mich 591, 602 (1927) ("The Governor holds an exalted office. To him, and to him alone, a sovereign people has committed the power and the right to determine the facts in the proceeding before us. His decision of disputed question of fact is final. His finding of fact*, if it has*

[26] The Legislative Plaintiffs bludgeon the Governor's supposed creation of "new crimes" and for criminalizing violation of her executive orders. (Pls Ct of Claims Reply Br, pp 4, 23–24.) Yet, it is *the Legislature* that criminalized violation of a Governor's executive orders. MCL 30.405 (willfully disobeying or interfering with an order of the Governor is a misdemeanor); MCL 10.33 (violation of Governor's orders "shall be punishable as a misdemeanor" where so stated).

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evidence to support it, is conclusive on this court.") (emphasis added). If a party disputes the factual support for the Governor's findings supporting a declaration, it may attempt redress in the courts. But, again, the Legislative Plaintiffs have agreed that emergency and disaster conditions exist.

E. The Legislative Plaintiffs' responsive arguments do not fully account for the language of the act.

The Legislative Plaintiffs made several arguments below why the Governor's April 30, 2020 declaration of a state of emergency and state of disaster under the EMA are void. None have merit.

1. No piece of the EMA is invalidated or rendered nugatory.

The Court of Claims agreed with the Legislative Plaintiffs' contention that, under the Governor's reading, the concurrent-resolution procedure for extending states of emergency and disaster beyond 28 days in MCL 30.403(3) and (4) is rendered meaningless. (5/21/20 Ct of Claims Op and Order, p 24.) Not so.

First, the lack of legislative extension after 28 days *forces* the Governor to terminate those executive orders. That is no mere technicality. This mechanism is a tool to hold the Governor accountable if the conditions supporting a declaration are questionable, or completely lacking. Recall that the declaration "shall" include an explanation of the conditions causing the disaster or emergency and the area affected. MCL 30.403(3) and (4). Therefore, by refusing to extend a declared state of emergency or disaster, the Legislature can force the Governor to prove her

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insistence that an emergency or disaster has not abated, creating an interbranch dialogue on a matter of utmost public importance.[27]

But that is not the circumstance before the Court—the Legislative Plaintiffs have not denied that Michigan faces a dire public health threat, nor could it in good faith do so. Nonetheless, the Legislature withheld. The statute it drafted, though, does not allow that withholding to override the Governor's duty to declare states of disaster and emergency, and to cope with the dangers facing the State, when the conditions on the ground warrant it. And wisely so. In a wildfire, the firefighters holding the hose do not pack up if someone shuts off a ringing alarm. Instead, they fight the spread and respond to the conditions as they are.

The lack of legislative extension after 28 days also serves another purpose. It forces the Governor not only to show her work to the Legislature, but to explain to the People the grounds for any renewal of the declarations. This is because all emergency or disaster proclamations must be "disseminated promptly" to "bring its contents to the attention of the general public." *Id.* Thus, at least every 28 days, her justifications must be manifest to the whole State, to whom she answers.

Of course, this Court has recognized that it "is not to second-guess those policy decisions or to change the words of a statute in order to reach a different result." *People v Harris*, 499 Mich 332, 345 (2016). If the Legislative Plaintiffs now complain that the language they wrote grants them an insufficient measure of

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[27] Ultimately, as discussed above, this is a determination that, while subject to great deference, is within the courts' authority to review. See *Straus*, 459 Mich at 533; *Coffey*, 237 Mich at 602.

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control over the Governor's handling of an emergency or disaster, it is up to the Legislature, not this Court, to modify its statutes.

The Legislature had several options for writing its law differently. It could have set an expiration period on her *legal duty* to declare an emergency, rather than on the just the declaration. Or it could have *prohibited* the Governor from issuing a substantively similar declaration if the Legislature did not extend the earlier one. It could have constructed the definitions of "state of disaster" and "state of emergency" differently. But the 1976 Legislature wisely did not draft so inflexible and short-sighted a statute. Myriad unforeseen disasters and emergencies awaited future generations, so the Legislature's words *requiring* the Governor to issue a declaration where the real-world implications persist was a humble acknowledgement of our predictive limitations, and a trust in the one statewide office equipped to lead a coordinated response.

2. The Governor's construction does not yield absurd results.

Below, the Legislative Plaintiffs leaned on the concept of absurd results (Pls Ct of Claims Br, pp 21–23), arguing that the Governor issued contradictory orders by simultaneously terminating and declaring states of emergency and disaster. But this, again, shows a misunderstanding both of the Governor's declarations and of the language of the EMA. Even if the absurd results doctrine exists in Michigan, *Johnson v Recca*, 492 Mich 169, 193 (2012) (questioning that premise), it involves a high standard: "[a] result is only absurd if it is quite impossible that the Legislature could have intended the result," *id.* (cleaned up).

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Again, "state of emergency" and "state of disaster" are, by statutory definition, types of "executive orders." MCL 30.402(p) and (q). And as the Governor made abundantly clear in Executive Order 2020-66, the termination of her previously declared states of emergency and disaster was not driven by any belief that the emergency and disaster conditions requiring them had ceased to exist. Rather, per the EMA, she terminated those executive orders only because the Legislature refused to extend them. MCL 30.403(3) and (4). Accordingly, Executive Order 2020-66 complies stringently with the law. The Legislature wrote the rules; the Governor followed them.

3. If the Legislative Plaintiffs are right about the authority to effectively veto the Governor's declarations under the EMA, the Legislature retained an unconstitutional legislative veto under *Chadha* and *Blank*.

The Legislative Plaintiffs read the EMA's concurrent-resolution extension mechanism as a means for the Legislature to force the termination not only of certain orders, but of the Governor's substantive emergency response authority under the EMA. This reading not only goes beyond contradicting the EMA's plain text—it is unconstitutional. As discussed above, the Legislature may share its constitutional authority with 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 what amounts to a legislative veto. *Blank v Department of Corrections*, 462 Mich 103, 113 (2000). If the Legislative Plaintiffs are correct about their interpretation of the concurrent-resolution provision, then that body has not just kept a modicum of oversight, but a

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"right to approve or disapprove" the Governor's exercise of delegated authority—and to do so without itself abiding by constitutional requirements of bicameralism and presentment. *Id.* Such invasive oversight would violate our Constitution.

In *INS v Chadha*, 462 US 919 (1983), the U.S. Supreme Court evaluated whether the Constitution permitted Congress to delegate authority to the executive but permit one house of Congress to retain veto authority over the actions of the executive. The Court held that such a maneuver violated the principle of bicameralism and presentment. *Id.* at 959. Just as in *Chadha*, where there was "[d]isagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha," here, the Legislative Plaintiffs disagree with the Governor's decision to declare states of disaster and emergency in Michigan and to activate the response resources that accompany those declarations. *Id.* at 954. Such "determinations of policy" by legislative branches may be implemented "in only one way": bicameral passage and presentment to the President (or Governor). *Id.* at 954–955. "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." *Id.* at 955.

In *Blank*, this Court applied the framework in *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 Court framed the issue as follows: "[W]hether the Legislature, upon delegating [rulemaking authority to an executive-branch agency],

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may retain the right to approve or disapprove rules proposed by [the agency]." *Id.* at 113. The plurality opinion ultimately answered that question in the negative, finding that the Legislature's approval or disapproval of an executive-agency rule is "inherently legislative" and therefore "subject to the enactment and presentment requirements of the Michigan Constitution." *Id.* at 115–116.

The same conclusion holds for any determination by the Legislature that the Governor can no longer exercise the emergency powers the Legislature has vested in her through the EMA. Effectuating such an inherently legislative determination requires legislative action, and "[w]hen the Legislature engages in 'legislative action' it must do so by enacting legislation." *Id.* at 119. "[T]he Legislature cannot circumvent the enactment and presentment requirements [that must accompany legislative action] simply by labeling or characterizing its action as something other than 'legislation.' " *Id.* The Legislative Plaintiffs thus cannot complain that the EMA's concurrent-resolution procedure has not been given the effect they would like it to have, because that effect—a legislative veto of the Governor's delegated authority—would be unconstitutional.

The Court of Claims erred in concluding that "[t]he 28-day limit is not legislative oversight or a 'veto' of the Governor's emergency declaration; rather, it is a standard imposed on the authority so delegated." (5/21/20 Ct of Claims Op and Order, p 25.) But that conclusion is a consequence of the erroneous determination that the legislative extension provision does more work than the text provides. The Legislature's withholding only results in the termination of certain executive

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orders; it does not operate as a "stop" button on the duty the Legislature delegated to the Governor to respond to emergencies and disaster. The Legislature "must abide by its delegation of authority until that delegation is legislatively altered or revoked," *Chadha*, 462 US at 955, through the means set forth in the Constitution.

* * *

The Legislative Plaintiffs ask this Court to nullify the Governor's declarations and all of the executive orders derived from them, like the incrementally loosening Stay Home Order, among others. The emergency and disaster declarations issued by the Governor were executed after careful consideration of the unique nature of the threat facing Michigan and the advice of numerous individuals and entities with unique expertise. To judicially strip the Governor of her authority, contrary to her clear legal obligations, would not just upset the separation of powers, it would work grievous harm on the State and its citizens. If asking this Court to strike down its own statute as unconstitutional is not ironic enough, the Legislative Plaintiffs come to the judiciary seeking a shortcut to do something it already has the power to do—amend the challenged laws.

Because both emergency acts grant the Governor the authority she has exercised, and because she has stringently abided by the very terms the Legislature used in granting that power, this Court should hold that the Governor's executive orders were proper.

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CONCLUSION AND RELIEF REQUESTED

The Governor asks this Court to grant the bypass applications, determine that the Michigan House of Representatives and Michigan Senate do not have standing, and hold in the alternative on the merits—that the Governor's Executive Orders 2020-66, 2020-67, and 2020-68 are validly issued orders under the EPGA and EMA.

Respectfully submitted,

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EXHIBIT 4

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STATE OF MICHIGAN
IN THE SUPREME COURT

STEVE MARTINKO, an individual;
MICHAEL LACKOMAR, an individual,
WENDY LACKOMAR, an individual,
MARK GARMO, an individual; and
STEVE HUDENKO, an individual,

Plaintiffs-Appellants

v

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan; DANIEL EICHINGER, in his official capacity as Director of the Michigan Department of Natural Resources; and DANA NESSEL, in her official capacity as the Attorney General for the State of Michigan,

Defendants-Appellees.
_______________________________________/

Supreme Court No. 161333

Court of Appeals No. 353604

Court of Claims No. 20-000062-MM

DEFENDANTS-APPELLEES' BRIEF IN OPPOSITION TO PLAINTIFFS-APPELLANTS' EMERGENCY BYPASS APPLICATION FOR INTERLOCUTORY APPEAL AND MOTION FOR IMMEDIATE CONSIDERATION

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COUNTER-STATEMENT OF JURISDICTION

Defendants-Appellees Gretchen Whitmer, Daniel Eichinger, and Dana Nessel do not contest Plaintiffs-Appellants Steve Martinko, Michael Lackomar, Wendy Lackomar, Marck Garmo, and Steve Hudenko's (collectively, "Plaintiffs") statement of jurisdiction.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Plaintiffs have not demonstrated that they will suffer substantial harm if this Court does not grant their emergency interlocutory bypass application for interlocutory appeal, which they waited two weeks to file. Indeed, Plaintiffs have failed to state a claim for which relief may be granted and have not grappled with the mootness of several of their claims. Should this Court deny Plaintiffs' request for an emergency interlocutory bypass appeal?

   Appellants' answer: No.

   Appellees' answer: Yes.

   Trial court's answer: Did not answer.

2. The Court of Claims properly determined that Plaintiffs were unlikely to succeed on the merits of their constitutional and nondelegation claims. Long-standing statutory law and constitutional principles give the Governor the power to combat public health emergencies, and the public would be harmed by piecemeal or wholesale injunctions barring enforcement of the Governor's executive orders. Did the Court of Claims abuse its discretion in denying Plaintiffs' request for a preliminary injunction?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: Did not answer.

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INTRODUCTION

While Plaintiffs style their application as seeking emergency relief from this Court, Plaintiffs have made no showing that they will suffer "substantial harm" without immediate intervention. MCR 7.305(B)(4)(a). Indeed, their two-week delay in seeking this claimed emergency relief only confirms that such intervention is not warranted. The Court of Claims denied Plaintiffs' request for preliminary relief from important measures of the Governor's emergency response to the COVID-19 pandemic, measures that *no longer exist* in large part and are constitutionally proper in any event. There is no need for expedited consideration of these claims, especially where the Court of Appeals has not yet considered Plaintiffs' application for leave to appeal.

Plaintiffs claim that the orders abridge their constitutional rights, but the law is clear that "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson v Commonwealth of Massachusetts,* 197 US 11, 27 (1905). To that end, "[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community." *Id*. at 26.

This well-settled rule of law permits a state, in times of public health crises, to reasonably restrict the rights of individuals in order to secure the safety of the community. The scourge of COVID-19—a novel virus that quickly spread across the entire planet, infecting millions, and killing tens of thousands—presents such a

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crisis. In a series of executive orders, Governor Whitmer exercised her authority under Michigan law to put measures in place to suppress the spread of the virus and protect the public health.

Here, Plaintiffs attacked two of the most important, and successful, measures in protecting the public health – the restrictions on staying home and traveling. Providing Plaintiffs with their requested relief would endanger the public health and the progress that has been made toward a return to normalcy. Such judicial involvement would also infringe on the Governor's authority to act in a public health crisis and threaten the overarching plan to cope with the dangers of that crisis and protect the lives, health, and welfare of all Michiganders.

In its discretion, and in harmony with controlling law, the Court of Claims denied Plaintiffs' request.[1] The Court of Claims noted it was unable to pass judgment on the "wisdom" of the executive orders; instead, the Court was tasked with deciding whether the executive orders were consistent with long-standing caselaw regarding the Governor's responsibility to balance the health and safety of the population during a public-health emergency and the individual rights of its citizens. Under such circumstances, courts are not to strictly scrutinize government action, nor are they to engage in individualized assessments or search for more narrowly tailored prescriptions. In situations such as these, with the COVID-19 pandemic persisting across the planet and the State of Michigan, courts must

[1] See *Martinko v Whitmer*, opinion of the Court of Claims, issued April 29, 2020 (Docket No. 20-62-MM) (attached as Exhibit A).

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simply decide whether the government's action in response to such an emergency has a "real or substantial relation" to securing the public health and safety, "or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 US at 31.

The Court of Claims did just that. It properly held that the Plaintiffs were unlikely to succeed on the merits of their claims, recognizing the substantial leeway given to the Governor to respond to public health emergencies. The court also recognized the serious danger to the public at large presented by granting Plaintiffs their requested relief.

Now, two weeks after the Court of Claims denied their request for a preliminary injunction, and two weeks after the State filed a motion for summary disposition, Plaintiffs bring this interlocutory "emergency" bypass application for leave to appeal. Yet, Plaintiffs do not contest that most of their claims are moot. And they fail to identify any harm they would suffer if this Court does not grant them an interlocutory appeal. On the merits, Plaintiffs highlight mostly nonapplicable caselaw to tenuously support narrow, non-dispositive questions of law they believe the Court of Claims got wrong. In so doing, they ignore *Jacobson* and other cases outlining the proper legal standard for evaluating government action in a public health crisis. Indeed, nothing in this application requires this Court's immediate action.

Their application should be denied.

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The complaint offers a glaringly sparse discussion of the public health crisis that has consumed not just Michigan, but the entire planet. Those facts are important to demonstrate the undisputed conditions warranting the Governor's promulgation of the executive orders in question.

COVID-19 is similar to other coronaviruses (a large family of viruses that cause respiratory illnesses), but the strain is novel. There is no general or natural immunity built up in the population (meaning everyone is susceptible), no vaccine, and no known treatment to combat the virus itself (as opposed to treatment to mitigate its symptoms).

It is widely known and accepted that COVID-19 is highly contagious, spreading easily from person to person via "respiratory droplets."[2] Experts agree that being anywhere within six feet of an infected person puts you at a high risk of contracting the disease.[3] But even following that advice is not a sure-fire way to prevent infection. The respiratory droplets from an infected person can land on surfaces, and be transferred many hours later to the eyes, mouth, or nose of others who touch the surface. Moreover, since many of those infected experience only mild symptoms, a person could spread the disease before he even realizes he is sick.

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[2] World Health Organization, *Modes of transmission of virus causing COVID-19*, available at https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations. (Attached as Exhibit B).

[3] Centers for Disease Control, *Social Distancing, Quarantine, and Isolation*, available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html. (Attached as Exhibit C).

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Most alarmingly, a person with COVID-19 could be asymptomatic, yet still spread the disease.[4] Everyone is vulnerable either as a potential victim of this scourge or a carrier of it to a potential victim.

Because there is no way to immunize or treat for COVID-19, the Centers for Disease Control and Prevention have indicated the best way to prevent illness is to "avoid being exposed."[5] And as experience from prior pandemics such as smallpox and the 1918 Spanish Influenza indicates, early intervention to slow COVID-19's transmission is critical.

In keeping with this advice, governmental entities have stressed the critical import of "social distancing," the practice of avoiding public spaces and limiting movement.[6] The objective of social distancing is what has been termed "flattening the curve," that is, reducing the speed at which COVID-19 spreads. If the disease spreads too quickly, the limited resources of our healthcare system could easily become overwhelmed.[7]

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[4] (*Id.*)

[5] (*Id.*)

[6] (*Id.*)

[7] *See New York Times, Flattening the Coronavirus Curve* (March 27, 2020), available at https://www.nytimes.com/article/flatten-curve-coronavirus.html. (Attached as Exhibit D). Take Italy, for example, where the healthcare system was so overloaded in just three weeks of dealing with the virus that it could not treat all patients infected, essentially leaving some to die. Upon information and belief, Singapore eased early restriction and then saw a rise in cases – the dreaded specter of a "second wave" of this pandemic.

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The Governor responds to the emergency with bold, reasonable measures to protect the public.

On March 10, 2020, in response to the growing pandemic in Michigan, Governor Whitmer declared a state of emergency and invoked the emergency powers available to the Governor under Michigan law.[8] On March 13, 2020, Governor Whitmer issued Executive Order 2020-5, prohibiting assemblages of 250 or more people in a single shared space with limited exceptions, and ordering the closure of all K-12 school buildings.[9] Yet, even in the face of the social distancing recommendations and the six-foot rule of thumb, on Saturday, March 14, the public was out in droves.

On March 16, 2020, the Governor ordered various places of public accommodation, like restaurants, bars, and exercise facilities, to close their premises to the public.[10] And on March 17, 2020, the Governor issued an order rescinding 2020-5, changing the cap on assemblages to fifty persons in a single shared indoor space, and expanding the scope of exceptions from that cap.[11]

Subsequently, on March 23, 2020, again in response to the spreading pandemic in Michigan, Governor Whitmer issued Executive Order No. 2020-21, which essentially ordered all persons not performing essential or critical

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[8] E.O. No. 2020-4, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521576--,00.html. (Attached as Exhibit E).
[9] E.O. No. 2020-5, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521595--,00.html. (Attached as Exhibit F).
[10] E.O. No. 2020-9, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521789--,00.html. (Attached as Exhibit G) (Replaced by E.O. 2020-20).
[11] E.O. No. 2020-11, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521890--,00.html. (Attached as Exhibit H).

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infrastructure job functions to stay in their place of residence, other than to obtain groceries, care for loved ones, engage in outdoor activity consistent with social distancing, and other limited exceptions.[12] The order also prohibited, with limited exceptions, all public and private gatherings of any number of people that are not part of a single household.[13] That order was to continue through April 13, 2020; however, on April 9, 2020, the Governor issued Executive Order 2020-42, extending the Stay-home Order through April 30, 2020.[14]

Since the filing of the complaint, the Governor has issued additional executive orders that rescinded Executive Orders 2020-21 and 2020-42. On April 24, 2020, the Governor issued Executive Order 2020-59, which rescinded Executive Order 2020-42, but kept a general restriction that, subject to various exceptions, individuals stay in their place of residence.[15] On May 1, 2020, the Governor issued Executive Order 2020-70, which rescinded Executive Order 2020-59.[16] Executive Order 2020-70 kept the general "stay-at-home" restrictions but made additional

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[12] E.O. No. 2020-21, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html. (Attached as Exhibit I).

[13] (*Id.*)

[14] E.O. No. 2020-42, available at https://content.govdelivery.com/attachments/MIEOG/2020/04/09/file_attachments/1423850/EO%202020-42.pdf. (Attached as Exhibit J).

[15] E.O. No. 2020-59, available at https://www.michigan.gov/documents/whitmer/EO_2020-59_Signed_688350_7.pdf (Attached as Exhibit K).

[16] E.O. No. 2020-70, available at https://www.michigan.gov/documents/whitmer/EO_2020-70_Emerg_order_-MI_Safe_Start_689217_7.pdf (Attached as Exhibit L).

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exceptions to those in E.O. 2020-59. On May 7, 2020, the Governor issued Executive Order 2020-77, which rescinded Executive Order 2020-70, and made even further exceptions to those in E.O. 2020-70.[17] And on May 18, 2020, the Governor issued Executive Order 2020-92, which rescinded Executive Order 2020-77, made even further exceptions to those in E.O. 2020-77, and began implementing a regional approach to the reopening of activities in the State.[18]

The Governor's ongoing response continues to evolve and meet the changing conditions throughout the State.

About a month ago, Plaintiffs bring suit to challenge prior restrictions, and the Court of Claims denies preliminary injunctive relief.

On April 22, 2020, Plaintiffs filed the instant lawsuit against the Governor. Plaintiffs alleged that the social-distancing restrictions found in EO 2020-42 violated their constitutional rights, and that the Emergency Management Act represented an unlawful delegation of law-making authority from the Legislature to the Governor. (Compl, pp 8-15.) Along with their complaint, Plaintiffs filed a motion for an ex parte temporary restraining order, a show cause order, and a preliminary injunction.

Soon after the Governor filed her response to Plaintiffs' motion, the Court of Claims, Judge Murray presiding, issued an opinion denying Plaintiffs their

[17] E.O. No. 2020-77, available at https://content.govdelivery.com/attachments/MIEOG/2020/05/07/file_attachments/1446124/EO%202020-77.pdf (Attached as Exhibit M).

[18] E.O. No. 2020-92, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-529476--,00.html (Attached as Exhibit N).

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requested preliminary injunction. (Op and Ord, p 18.) The court noted that, other than the stay-at-home provision and ban on intrastate travel between vacation residences, the provisions of the EO's challenged by Plaintiffs were rescinded; thus, the court held those claims to be moot. (*Id.* at 3–4.)

The court then analyzed Plaintiffs' remaining claims, applying the factors to be considered in evaluating a request for a preliminary injunction. The court held that Plaintiffs were not likely to succeed on their constitutional claims because the Governor's executive orders had a "real or substantial relation" to the COVID-19 pandemic and were not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." (*Id.* at 11.) The court also held that Plaintiffs were unlikely to succeed on their nondelegation claim because the EMA "contain[s] specific procedures and certain criteria for the Governor to declare a state of disaster or emergency and . . . specific duties and powers when addressing any declared disaster or emergency." (*Id.* at 17.)

Finally, the court balanced the harms between the parties and commented on the public's interest in enjoining the Governor's executive orders. The court found that "issuing injunctive relief would not serve the public interest, despite the temporary harm to [P]laintiffs' constitutional rights" because the "difficulties of living under the executive orders" are temporary, while the result of contracting COVID-19 is potentially "all too permanent." (*Id.*) Because the court determined Plaintiffs were unlikely to succeed on the merits of their claims and the balancing of

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harms favored leaving the executive orders in place, the court denied Plaintiffs' request for a preliminary injunction.

Two days after the Court of Claims issued its opinion, the Governor filed a motion for summary disposition seeking dismissal of all of Plaintiffs' claims. Instead of responding to the Governor's motion for summary disposition, and two weeks after the Court of Claims issued its opinion, Plaintiffs filed an application for leave to appeal in the Court of Appeals and the instant "emergency" application for leave to appeal. Plaintiffs seek leave to appeal on an interlocutory basis as they appeal the Court of Claims' denial of their motion for a preliminary injunction, a non-final order or judgment.

The Governor now files this opposition and asks this Court to deny leave for Plaintiffs to file an interlocutory appeal for the reasons stated below.

STANDARD OF REVIEW

This Court reviews a trial court's grant or denial of a temporary injunction for abuse of discretion. See *Detroit Fire Fighters Assn, IAFF Local 344 v City of Detroit*, 482 Mich 18, 28 (2008). "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Maldonado v Ford Motor Co*, 476 Mich 372, 388 (2006), quoting *People v Babcock*, 469 Mich 247, 269 (2003). "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Babcock*, 469 Mich at 269.

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Relief is warranted only when "the trial court's decision falls outside the range of principled outcomes." *Detroit Fire Fighters Ass'n*, 482 Mich at 28.

ARGUMENT

I. Plaintiffs' interlocutory application for a bypass appeal should be denied.

MCR 7.205(B)(1) requires that an application for an interlocutory appeal "set[ ] forth facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal." Plaintiffs have not done so, failing to even allege how they would suffer substantial harm by waiting for final judgment in this case. This omission is for good reason – Plaintiffs have failed to state a claim for which relief may be granted.

Indeed, the Governor filed a motion for summary disposition two days after the Court of Claims issued its opinion denying Plaintiffs' request for a preliminary injunction. But instead of responding to the Governor's motion, Plaintiffs waited two weeks and filed this interlocutory, "emergency" application for bypass appeal. Given the strength and substance of the Court of Claims' opinion, dismissal is warranted, not extraordinary consideration by this Court. Seeking to avoid the inevitable, Plaintiffs come to this Court requesting "emergency" relief, and flatly asserting that they will suffer substantial harm in waiting for a final order from the Court of Claims. But Plaintiffs' two-week delay in seeking interlocutory review demonstrates that there is no emergency.

Just as significantly, Plaintiffs do not contest that most of the claims brought in their original complaint are now moot. In fact, many were moot by the time the

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Court of Claims rendered its opinion denying the preliminary injunctions (Op and Ord, p 3), a finding the Plaintiffs do not challenge.

The only claims that were not moot at the time the Court of Claims issued its decision were the generalized challenge to the stay-at-home order, the restriction on intrastate travel to vacation rentals and the limited restriction regarding access to public lands. (*Id.*) Plaintiffs have not demonstrated that they will suffer substantial harm absent interlocutory review for these claims. Their bypass application should be denied.

II. The Court of Claims did not abuse its discretion in denying Plaintiffs' request for a preliminary injunction.

Because Plaintiffs acted precipitously in seeking interlocutory review in this case, the only issue before this Court is whether the Court of Claims abused its discretion in denying Plaintiffs a preliminary injunction. A temporary or preliminary injunction is extraordinary relief and "should issue only in extraordinary circumstances." *Mich State Employees Ass'n v Dep't of Mental Health,* 421 Mich 152, 157, 158 (1984); see also *Mich Coalition of State Employee Unions, et al v Civil Service Comm,* 465 Mich 212, 226 n 11 (2001). The issuance of this extraordinary relief requires a court to engage in a four-factor analysis, determining whether:

> (1) the moving party made the required demonstration of irreparable harm,
>
> (2) the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party,
>
> (3) the moving party showed that it is likely to prevail on the merits, and

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(4) there will be harm to the public interest if an injunction is issued. [*Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 34 (2008).]

In its opinion, the Court of Claims properly determined that Plaintiffs were unlikely to succeed on the merits of their claims. The court also properly determined that granting Plaintiffs' injunction would harm the public more than Plaintiffs.[19] In the end, the court exercised its discretion and denied Plaintiffs' request for a preliminary injunction. That decision should be left undisturbed.

A. The Court of Claims did not abuse its discretion in holding that Plaintiffs were unlikely to succeed on the merits of their claims under *Jacobson v Commonwealth of Massachusetts*.

"In order to justify the extraordinary remedy of a preliminary injunction, the moving party *must* show a likelihood that it will succeed on the merits of the claim." *Northern Warehousing, Inc v Dep't of Ed*, 475 Mich 859, 859 (2006) (emphasis added). Relying on long-standing, unchallenged caselaw, the Court of Claims correctly held that Plaintiffs were unlikely to prove violations of their constitutional rights or an improper delegation of legislative power in the EMA.

1. The Supreme Court has held that States are granted wide latitude to enact temporary measures to safeguard extreme challenges to the public health.

The Court of Claims found that Plaintiffs were unlikely to succeed on the merits of their constitutional claims, a "reasonable and principled outcome" based on long-standing, unchallenged case law regarding the need for governmental action

[19] Because the Governor issued EO 2020-59 in an attempt to protect the public from the spread of COVID-19, the Court of Claims' opinion blends the two "harm factors" into one analysis.

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in the face of a public health crises even to the point of temporarily curtailing individual constitutional rights. *Maldonado*, 476 Mich at 388.

Faced with "great danger[ ]," state actors are permitted great latitude to secure the public health. *Jacobson*, 197 US at 29. And in this time of crisis, securing the public health requires temporary sacrifices by each of us: "Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others." *Id.* at 26.

In *Jacobson*, the U.S. Supreme Court considered a claim that the state's mandatory vaccination law, which applied to every person in Cambridge, Massachusetts, due to a growing smallpox epidemic, violated the plaintiff's Fourteenth Amendment right "to care for his own body and health in such way as to him seems best." *Id.* at 26. The Supreme Court upheld this sweeping, invasive measure as a proper exercise of the States' police power because of the exigencies and dangerousness of the public health crisis. It affirmed that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. As the Court stated,

> in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. [*Id.* at 29.]

Jacobson even highlighted the circumstance, without hesitation, in which seemingly healthy people were quarantined against their will aboard a ship on

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which others had cases of serious diseases. *Id.* at 29. The Court noted that such a drastic measure was reasonable "until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared." *Id.*

Recognizing the separation of powers, and the fitness of the judiciary to invade the authority of a co-equal branch, the Court refused to "usurp the functions of another branch of government" by second-guessing the executive's exercise of police power in such circumstances. *Id.* at 28.

Of course, constitutional rights do not disappear in the face of a public health crisis, but the analysis of the government's action changes. Review is "only" available if the challenged action "has *no real or substantial relation to those objects* [of securing public health and safety], or is, *beyond all question, a plain, palpable invasion of rights secured by the fundamental law*." *Id.* at 31 (emphasis added).

Jacobson's principle is no outlier. See, e.g., *Prince v Massachusetts*, 321 US 158, 166–67 (1944) ("The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."); *Compagnie Francaise de Navigation a Vapeur v La State Bd of Health*, 186 US 380, 393 (1902) (upholding Louisiana's right to quarantine even apparently healthy passengers aboard a vessel over a due process challenge).

And *Jacobson* not only remains good law, see, e.g., *Kansas v Hendricks*, 521 US 346, 356 (1997) (block quoting *Jacobson* in support of the proposition that "an individual's constitutionally protected interest in avoiding physical restraint may be

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overridden even in the civil context"), but courts across the country have recognized it as providing the proper frame for considering restrictions promulgated in response to the COVID-19 crisis that allegedly touch upon constitutional rights, including fundamental ones. *See, e.g., In re Abbott*, *In re Abbott*, opinion of the United States Court of Appeals for the Fifth Circuit, issued April 7, 2020 (Case No. 20-50264), p 8; 2020 WL 1685929. ("*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency.") (emphasis in original).

Notably, Plaintiffs' complaint and unsuccessful motion for preliminary injunction failed to meaningfully acknowledge *Jacobson*, or to discuss and analyze why it should not control here. That omission alone is fatal to Plaintiffs' claims. Nor is there a viable path for Plaintiffs around *Jacobson*'s well-settled rule of law. Plaintiffs cannot dispute the gravity of the pandemic in Michigan. It is a once-in-a-century kind of epidemiological public health crisis. In such times, the State has wide plenary authority to temporarily restrict activity that presents a diffuse but real threat to the public health. Under *Jacobson* and applicable principles of separation of powers, judicial deference to the Governor's authority responding to the crisis is paramount.

2. Applying *Jacobson* to the current public health crisis presented by COVID-19, the Court of Claims correctly held Plaintiffs are unlikely to succeed on the merits of their constitutional claims.

In its opinion, the Court of Claims relied on *Jacobson*—as well as several other cases—in holding that Plaintiffs were unlikely to succeed in their

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constitutional challenges to the Governor's executive orders. As so aptly stated by the Court of Claims:

> The role courts play under *Jacobson* and *Lansing Bd of Ed* is not to "second-guess the state's policy choices in crafting emergency public health measures," *In re Abbott*, 954 F3d at 784, but is instead to determine whether the state regulation has a "real or substantial relation to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" *Id*., quoting in part *Jacobson,* 197 US at 31. Part of this review includes looking to whether any exceptions apply for emergent situations, the duration of any rule, and whether the measures are pretextual. *Id*. at 785. [April 29, 2020 Opinion and Order Denying Plaintiffs' Motion for a Preliminary Injunction, p. 11].

The court correctly determined that Plaintiffs could not demonstrate that the Governor's executive orders lacked a "real or substantial relation" to the COVID-19 pandemic or that it was "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." Surely, the "stay home" provision has a real and substantial relation to the COVID-19 threat – a virus that spreads rapidly, jumps even from asymptomatic people, and lacks a vaccine or silver bullet treatment, especially in the context of scarce hospital beds and PPE. Moreover, the supposed constitutional invasion is not "plain" or "palpable" given the restrictions' temporary nature, and the several life-sustaining exceptions.

Likewise, the restrictions on travel have been critical to prevent the virus from spreading from one part of the state to another, and in particular, from more densely populated areas to less densely populated areas. As the virus ravaged southeastern Michigan, health systems were quickly at or above capacity. Medical supplies were dwindling, and beds in intensive care units were in short supply.

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There was a very real and imminent danger that hospitals could be completely overrun. Indeed, the TCF Center (formerly Cobo Center) – typically the home of auto shows and black-tie galas – was retrofitted as a makeshift field hospital in anticipation of local bed shortages.[20]

A similar outbreak of the virus in a rural area of the State would have dire consequences. Opportunities for medical care and treatment in less densely populated areas of the State are fewer. Rural areas have fewer medical specialists or resources like a fleet of ventilators that could be needed to absorb legions of severely ill patients. Access to testing is limited in remote areas of the State. These concerns warranted the imposition of temporary limitations on travel to cottages and other, second residences.

The rural areas of Michigan are particularly vulnerable to the threat of COVID-19. These also happened to be the areas of the State where many vacation rentals and public lands are located. The higher risk to these areas called for special protection. The restrictions on travel are directly aimed at preventing the spread of the disease from one part of the state to another, and in particular, from urban areas to rural areas.

In sum, the temporary restrictions in the Governor's orders have been necessary and appropriate, with a real and substantial relation to stopping the

[20] Detroit Free Press, *TCF Center transformation ahead of schedule, ready for patients April 8* (April 4, 2020), available at https://www.freep.com/story/news/local/michigan/2020/04/04/coronavirus-covid-19-tcf-center-field-hospital/2948726001/

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spread of the virus, and do not result, beyond question, in a plain, palpable invasion of Plaintiffs' rights. *Jacobson*, 197 US at 31. As properly stated by the Court of Claims:

> What the Court must do—and can only do—is determine whether the Governor's orders are consistent with the law. *Rock*, 216 Mich at 283. Under the applicable standards, they are. [April 29, 2020 Opinion and Order Denying Plaintiffs' Motion for a Preliminary Injunction, p 14].

Under the circumstances, and the rule of *Jacobson*, the court rightly determined that Plaintiffs' constitutional challenges to the Governor's executive orders were unlikely to succeed on the merits.[21]

3. Even absent *Jacobson*'s deferential and controlling standard, Plaintiffs' constitutional challenges to the Governor's prior Orders fail.

Plaintiffs' argument that the Court of Claims used the wrong standard in analyzing their claims is incorrect. (Pls' App, p 7.) Plaintiffs maintain that strict scrutiny review is the appropriate standard, but that argument ignores the very existence of *Jacobson* and the other cases cited by the Court of Claims establishing the level of judicial deference given to governmental action taken in response to a public health crisis. Nevertheless, should this Court disagree that *Jacobson* is dispositive, even under a more traditional analysis, Plaintiffs claims fail as a matter of fact and law.

[21] See also *People ex rel Hill v Lansing Bd of Ed*, 224 Mich 388, 390 (1923) (acknowledging "the right of the state, in the exercise of its police power and in the interest of the public health, to enact such laws, such rules and regulations, as will prevent the spread of [a] dread[ed] disease").

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a. Procedural Due Process

There are two types of due process: procedural and substantive. "The essentials of procedural due process are adequate notice, an opportunity to be heard, and a fair and impartial tribunal." *Hughes v Almena Twp*, 284 Mich App 50, 69 (2009). "Due process is a flexible concept, the essence of which requires fundamental fairness." *Al–Maliki v LaGrant*, 286 Mich App 483, 485 (2009)

Generally, three factors should be considered to determine what is required by procedural due process:

> First, the private interest that will be affected by the official action;
>
> second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
>
> finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." [*In re TK cases*, 306 Mich App 698, 706-707 (2014), quoting *In re Brock*, 442 Mich 101, 111 (1993), in turn quoting *Mathews v Eldridge*, 424 US 319, 332 (1976).]

Here, without any argument or citation to authority, Plaintiffs insist that they were entitled to the full panoply of procedural due process rights to challenge the executive orders prior to entry. Plaintiffs' entitlement to due process, however, cannot be determined in a static environment, since due process is a "flexible concept calling 'for such procedural protections as the particular situation demands.'" *Dobrezenski v Dobrezenski*, 208 Mich App 514, 515 (1995), quoting *Mathews*, 424 US at 334.

Under the circumstances presented here, namely the onset and rapid spread of COVID-19 and the urgent need to act quickly to protect the citizens of Michigan

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from sickness and death, the Governor was not in a position to provide for notice and an opportunity to be heard by Plaintiffs and every other person in the state prior to promulgating the executive orders. That would be akin to asking the fire department to adhere to the administrative procedures act before spraying a house engulfed in flames. The result would have been to delay life-saving actions by weeks, months, or even years. This would be an entirely untenable result given the duties and obligations placed on the Governor to abate the looming disaster.

Moreover, the stay-at-home order is a generally applicable order, so a hearing is not required at all. See *Neinast v Bd of Trustees of Columbus Metro Library*, 346 F3d 585, 596–97 (CA 6, 2003) ("Governmental determinations of a general nature that affect all equally do not give rise to a due process right to be heard."); see also *Hartman v Acton*, No. 2:20-CV-1952, 2020 WL 1932896, at *7 (SD Ohio Apr 21, 2020) (in the context of a TRO, rejecting a plaintiff business owner's procedural due process challenge to Ohio's COVID-19 related "Stay-at-home order" that "direct[ed] non-essential businesses to cease operating their physical locations").

As a result, Plaintiffs were not entitled to notice and an opportunity to be heard regarding the promulgation of the stay-at-home orders.

b. Substantive Due Process

The right to substantive due process is violated when legislation is unreasonable and clearly arbitrary, having no substantial relationship to the health, safety, morals, and general welfare of the public. *Bonner v City of Brighton,* 495 Mich 209, 223–232 (2014); see also *AFT Mich v Michigan*, 297 Mich App 597 (2012) (the right to substantive due process protects against the arbitrary

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deprivation of liberty or property interests). Here, however, there is nothing unreasonable or arbitrary about the Governor's stay-at-home orders. As previously discussed, given the characteristics of the virus, the Governor's actions are reasonably related to protecting the public from the spread of disease. "The fundamental nature of an individual's interest in liberty . . . may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society." *US v Salerno*, 481 US 739, 750–751 (1987). Now is such a time.

And while a right to intrastate travel under the Michigan Constitution was declared in *Musto v Redford Twp*, 137 Mich App 30, 34, n. 1 (1984), the executive orders do not ban all travel in the State of Michigan. Indeed, the orders allow for a substantial amount of travel for citizens engaged in various activities. Furthermore, the travel restrictions in the stay-at-home order are temporary, partially restricting intrastate travel for a few weeks. The exemptions from the general travel restriction represent a balance between reducing travel—and therefore human interactions and community spread of the virus throughout the State—and allowing citizens to engage in essential functions. Such a balance is necessary to maintain the efficacy of the fight against the virus because every time someone fills up their gas tank, they risk spreading the virus.[22] And given that

[22] The latest scientific data says that the virus can survive up to seventy-two (72) hours on plastic and stainless steel. The New England Journal of Medicine, *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1* (April 16, 2020), available at https://www.nejm.org/doi/10.1056/NEJMc2004973 (attached as Exhibit O).

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between 25% and 60% of people inflicted with coronavirus may not show any symptoms,[23] there simply is no way to perfectly tailor travel restrictions to individuals who are infected or have been in contact with people who are infected.

To be sure, the travel restrictions do not deny any citizen of this State "access" to certain areas or roadways. Instead, the restrictions temporarily limit certain traffic, allowing citizens to engage in intrastate travel to, among other things, go to work, get groceries and household and pet supplies, take care of elderly family members or their children, volunteer, exercise, and recreate.

Even under the most demanding constitutional scrutiny, which is inapplicable here, the restrictions are constitutional. Under a strict scrutiny analysis, the government may not infringe upon a fundamental liberty interest unless the infringement is narrowly tailored to serve a compelling state interest. *In re B & J*, 279 Mich App 12, 22 (2008). As to the State interest at the heart of the travel restrictions, it seeks to "protect the health, safety, and welfare of citizens in" Michigan in the face of a deadly pandemic, a compelling interest. For the reasons discussed above, the temporary travel restriction serves the compelling government interest through the means least restrictive under the circumstances. Thus, it does not violate the Plaintiffs' right to intrastate travel.

All told, even under a traditional analysis of Plaintiffs' due process claims, the restrictions imposed in the Governor's executive orders pass constitutional

[23] NBC News, *How many people have had coronavirus with no symptoms?* (April 20, 2020), available at https://www.nbcnews.com/health/health-news/how-many-people-have-had-coronavirus-no-symptoms-n1187681 (Attached as Exhibit P).

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muster, and Plaintiffs claims fail. Plaintiffs cannot demonstrate that the Court of Claims abused its discretion in relying upon and applying well-settled caselaw to its review of their claims.[24] *Northern Warehousing, Inc*, 475 Mich at 859.

4. The Court of Claims correctly held that Plaintiffs were unlikely to succeed on their nondelegation claim.

Similarly sound was the Court of Claims determination that Plaintiffs were unlikely to succeed on the merits of their claim that the Governor's authority to issue the executive orders under the Emergency Management Act (EMA) was compromised in light of separation of power principles. The Court of Claims rejected the Plaintiffs' nondelegation claim based on the plain text of the EMA and long-standing, unchallenged case law regarding the ability of the legislative branch to delegate power to the executive branch—an "outcome" that was most certainly "reasonable and principled" and does not warrant disruption or further review. *Maldonado*, 476 Mich at 388.

a. The Michigan Constitution provides for the coordinate branches to share authority.

The Michigan Constitution provides:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch

[24] Plaintiffs' arguments regarding civil commitment are of no moment. The executive orders do not commit individuals to confinement in their homes. The orders provide numerous exceptions for the exercise of essential functions. The orders also apply equally and indiscriminately to everyone. Furthermore, the emergency nature of the COVID-19 pandemic renders the cases Plaintiffs cite on this point materially differentiable. *Jacobson* is analogous to the COVID-19 pandemic, not cases regarding civil commitment and individualized quarantine assessments during periods of normalcy.

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> shall exercise powers properly belonging to another branch. Const 1963, art 3, §1.

However, Michigan courts have never interpreted this separation of powers doctrine to mean that there can never be any overlapping of functions between branches. *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 752 (1982). Rather, an overlap or sharing of power is constitutionally permissible provided that "the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other." *Judicial Attorneys Ass'n v Mich*, 459 Mich 291, 297 (1998).

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). And 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). Under this test, "legislation which contains a delegation of power to . . . [another branch] must contain either explicitly or by reference . . . "standards prescribed for guidance . . . ." *Id.* at 437–438, citing *Osius v City of St Clair Shores*, 344 Mich 693, 698 (1956). Significantly, such standards must be "as reasonably precise as the subject matter requires or permits." *Id.* at 438, citing *Osius*, 344 Mich at 698; see also *State Conservation Dep't v Seaman*, 396 Mich 299, 309 (1976) ("The preciseness of the standard will vary with the complexity and/or the degree to which subject regulated will require constantly changing regulation.").

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b. The Court of Claims properly turned away a challenge to the Legislature's detailed delegation of authority to the Governor in emergency circumstances in the EMA.

In its opinion, the Court of Claims correctly found that the EMA did not improperly delegate legislative power to the Governor because the EMA does not vest the Governor with "uncontrolled, arbitrary power," and the statute "contain[s] specific procedures and certain criteria for the Governor to declare a state of disaster or emergency and . . . specific duties and powers when addressing any declared disaster or emergency." (Op and Ord, p 17.)[25]

That ruling is borne out by the detailed language of the EMA. In addition to the Governor's "general authority" and "responsib[ility] for coping with dangers to this state or the people of this state presented by a disaster or emergency," MCL 30.405(1) & 30.403(1), 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." MCL 30.403(4) (emphasis added). Similarly, 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).

Upon that order or proclamation, the law grants the Governor authority to marshal both state and federal resources to adequately deal with the danger facing

[25] The Plaintiffs have not below, and do not here, challenge whether the Governor's action was properly within her authority under the EMA.

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the state.[26] That executive order or proclamation also authorizes the Governor to exercise additional powers, including but not limited to, "[s]uspending a regulatory statute, order, or rule prescribing the procedures for conduct of state business" in certain circumstances, "commandeer[ing] . . . private property necessary to cope with the disaster or emergency," and "[c]ontrol[ling] ingress and egress to and from a stricken or threatened area," and "[d]irect[ing] all other actions which are necessary and appropriate under the circumstances." MCL 30.405(1)(a), (d), (g), (j).

The Court of Claims did not abuse its discretion in determining that this detailed guidance to the Governor more than sufficiently guided the Governor's conduct. Given the lengthy list of "specific procedures and certain criteria" found in the EMA, it was not "outside the range of principled outcomes" for the court to conclude that Plaintiffs were unlikely to succeed on their nondelegation claims. *Detroit Fire Fighters Ass'n*, 482 Mich at 28. Indeed, its conclusion was consistent with the law in this State. See *Smith v Behrendt*, 278 Mich 91, 97–98 (1936) (holding that allowing the executive to grant oversize loads for freeway travel in "special cases" was a limited and proper delegation of legislative authority); see also

[26] See, e.g., 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 . . . ."); MCL 30.404(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."); MCL 30.408(1) ("Upon the declaration of a state of disaster or a state of emergency by the governor, each state agency shall cooperate to the fullest possible extent with the director in the performance of the services that it is suited to perform, and . . . in the prevention, mitigation, response to, or recovery from the disaster or emergency.")

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Klammer v Dep't of Transp, 141 Mich App 253, 262 (1985) (holding that the term "necessary" was a sufficiently precise standard for the retirement board to follow).

In sum, the Court of Claims got it right: the EMA provides sufficient guideposts for the Governor such that it does not improperly delegate unfettered legislative power to the executive branch. See *Westervelt*, 402 Mich at 437; *Seaman*, 396 Mich at 309; *Smith*, 278 Mich at 97–98; *Klammer*, 141 Mich App at 262. The court certainly did not stray beyond the "range of principled outcomes" in exercising its discretion to determine Plaintiffs were unlikely to succeed on the merits of their nondelegation claim. *Detroit Fire Fighters Ass'n*, 482 Mich at 28.

c. Plaintiffs added a claim that is not ripe for review as it was not presented to the Court of Claims below.

In its application for leave, Plaintiffs stray beyond the lower court record and offer an additional challenge to the Governor's authority that is not properly before this Court. Plaintiffs challenge the issuance of EO 2020-59 under the Emergency Powers of the Governor Act (EPGA)—for the first time in this case—and also argue that recent action by the Governor, which took place *after* the Court of Claims denied their request for a preliminary injunction, evidences a nondelegation issue. Those arguments and factual assertions were not considered by the Court of Claims and are irrelevant to review on appeal. Plaintiffs' complaint and motion for preliminary injunction never challenged EO 2020-59 under the EPGA, and the

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Court of Claims did not—*could not*—consider gubernatorial action that took place after it issued its opinion.[27]

B. The Court of Claims did not abuse its discretion in deciding the balancing of harms favored denying Plaintiffs' request for a preliminary injunction.

The Court of Claims held that its determination that Plaintiffs were not likely to succeed on the merits of their claims alone was dispositive of the request for a preliminary injunction. Nevertheless, the Court of Claims also addressed the harm factors. The Court of Claims held:

> Although the Court is painfully aware of the difficulties of living under the restrictions of these executive orders, those difficulties are temporary, while to those who contract the virus and cannot recover (and to their family members and friends), it is all too permanent. That is not to say that every new virus will require the action taken here, but given the authority of the Governor to do so in the face of these circumstances, the Court must conclude issuing injunctive relief would not serve the public interest, despite the temporary harm to plaintiffs' constitutional rights. [Ex A, p 17.]

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[27] A similar challenge under the nondelegation doctrine is advanced against the Emergency Powers of the Governor Act in another action currently pending in the Court of Claims. See *Michigan House of Representatives v Whitmer*, Ct of Claims Docket No 20-79-MZ. A decision on that issue is expected in short order.

Also, in In *Michigan United for Liberty v Whitmer*, Ct of Claims Docket No. 20-61-MZ, the Court determined that the plaintiff is unlikely to succeed on the merits of its claims because neither the Emergency Management Act, MCL 30.401 *et seq*, nor the Emergency Powers of the Governor Act, MCL 10.31 *et seq*, represent an impermissible delegation of legislative authority to the Governor. As noted by the Court, "[H]istorically, these types of challenges 'have been uniformly unsuccessful' across federal and state jurisprudence." *Taylor v Smithkline Beechap Corp*, 468 Mich 1, 8; 658 NW2d 127 (2003). *See Michigan United for Liberty v Whitmer*, opinion of the Court of Claims, issued May 19, 2020 (Docket No. 20-61-MZ) (attached as Exhibit Q).

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In their application for leave, Plaintiffs argue that the Court should not have disturbed the "status quo"—meaning life before social distancing and stay-at-home orders—by denying their request for an injunction. However, COVID-19 will not disappear with a court decision; indeed, the "status quo" Plaintiffs speak of does not exist at present. Instead, the court protected the operative status quo by denying Plaintiffs' request to enjoin the executive orders. The orders were put in place after careful consideration of the unique threat facing Michigan and the advice of numerous individuals and entities with unique expertise, to reduce the spread of COVID-19 and protect Michiganders.[28]

A piecemeal lifting of restrictions by the judiciary, without regard to the State's carefully considered, deliberate, ongoing plan to combat the crisis and transition back to normalcy, would increase the risk and potential harm to everyone. It was entirely in the court's discretion to determine the harm in upending the Governor's carefully laid out plan to combat COVID-19 was greater than the individual harm claimed by Plaintiffs, and, given the seriousness of the threat faced by the people of Michigan, that decision was undoubtedly "reasonable and principled." *Maldonado*, 476 Mich at 388.

CONCLUSION AND RELIEF REQUESTED

Plaintiffs sought extraordinary relief from the Court of Claims in the form of a preliminary injunction and now they seek extraordinary relief from this Court in

[28] See *Buck v Thomas Cooley Law School*, 272 Mich App 93, 98 n 4 (2006) (defining status quo as "the last actual, peaceable, noncontested status which preceded the pending controversy") (citation omitted)

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the form of an "emergency" bypass application for interlocutory appeal. Plaintiffs are not entitled to the relief they seek. The Court of Claims properly declined to enjoin the enforcement of the Governor's executive orders where Plaintiffs were unlikely to succeed on the merits of their claims, and where the risk and potential harm to the public caused by re-opening Michigan in one fell swoop would far outweigh any temporary harm to Plaintiffs.

Defendants-Appellees respectfully request that this Court deny Plaintiffs-Appellants' Emergency Bypass Application for Interlocutory Appeal.

Respectfully submitted,

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