UNITED STATES DISTRICT COURT
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,

v

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.

No. 1:20-cv-414

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

ATTORNEY GENERAL DANA NESSEL'S SUPPLEMENTAL BRIEFING ON CERTIFICATION

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ATTORNEY GENERAL DANA NESSEL'S SUPPLEMENTAL BRIEFING ON CERTIFICATION

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CONCISE STATEMENT OF ISSUE PRESENTED

1. Should this Court certify the following questions to the Michigan Supreme Court?

   a. Whether, under the Emergency Powers of the Governor Act, Mich. Comp. Laws § 10.31, *et seq*., or the Emergency Management Act, Mich. Comp. Laws § 30.401, *et seq*., Governor Whitmer has the authority to issue or renew any executive orders after April 30, 2020. [(Dkt. 23, Notice of Hr'g, PageID.1092.)]

   b. 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. [(*Id*.)]

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Doe v. Sundquist, 106 F.3d 702 (6th Cir. 1997)

Harrison v. NAACP, 360 U.S. 167 (1959)

Michigan House of Representative and Michigan Senate v. Whitmer, Mi. S. Ct. No. 161377, 6/4/2020 Order

Taylor v. First of Am. Bank-Wayne, 973 F.2d 1284 (6th Cir. 1992)

United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966)

INTRODUCTION

This Court has invited the parties to submit additional briefing regarding whether this Court should certify the following two issues to the Michigan Supreme Court:

1. Whether, under the Emergency Powers of the Governor Act, Mich. Comp. Laws § 10.31, *et seq*. [(EPGA)], or the Emergency Management Act, Mich. Comp. Laws § 30.401, *et seq*. [(EMA)], Governor Whitmer has the authority to issue or renew any executive orders after April 30, 2020. [(Dkt. 23, Notice of Hr'g, PageID.1092.)]

2. Whether the [EPGA] and/or the [EMA] violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution. [(*Id.*)]

Defendant Michigan Attorney General Dana Nessel's answer to the question of whether this Court should certify these issues is "no." While the Attorney General agrees with this Court that "the 'last word' on the meaning of state statutes requiring judicial interpretation belongs not to federal district courts, but to the state supreme court[,]" (Dkt. 23, Notice of Hr'g, PageID.1091 (quoting *Railroad Commission of Texas v. Pullman Co*., 312 U.S. 496, 499–00 (1941))), certification is neither necessary nor the most expedient process to undertake in this case.

The Attorney General's position is that: (1) the claims in this case are moot and should therefore be dismissed, (*see* Dkt. 27, Attorney General's Mot. to Dismiss, PageID.1395–97); (2) if this Court does not dismiss the claims as moot and intends to exercise supplemental jurisdiction over the state-law claims, it should hold this case in abeyance until the issues—which, notably, have already been raised and

decided in a lower state court—run their course (on a continued expedited basis) through the state appellate system, (*see* update below and Argument II in Attorney General's Mot. to Dismiss, Dkt. 27, PageID.1399); or (3) this Court could simply decline to exercise supplemental jurisdiction over the state-law claims, (*see* Dkt. 27, Attorney General's Mot. to Dismiss, PageID.1398–1400). None of these options requires certification from this Court.

ARGUMENT

I. Certification is unnecessary because the claims are moot.

As the Attorney General argued in her motion to dismiss (Dkt. 27, Attorney General's Mot. to Dismiss, PageID.1396), on May 21, 2020, the Governor issued a new Executive Order—Executive Order 2020-96—which rescinded Executive Order 2020-17 and Executive Order 2020-92 (which replaced Executive Order 2020-77) and imposed significantly lessened restrictions as compared to its predecessors. *See* E.O. 2020-96.[1] Then, on June 1, 2020, the Governor issued Executive Order 2020-110, which further lessens restrictions. *See* E.O. 2020-110. Thus, the challenged executive orders no longer have any legal force, and Plaintiffs' claims are moot. (*See* Dkt. 27, Attorney General's Mot. to Dismiss, PageID.1395–97.) It would be a waste of judicial resources to certify state-law issues on moot claims.

[1] All of the Governor's Executive Orders are available at: https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html.

II. Because these issues are making their way through Michigan's appellate courts and will ultimately reach the Michigan Supreme Court on an expedited basis, this Court should hold this case in abeyance.

The state-law issues that Plaintiffs raise in their Complaint have already been raised and decided in a lower state court. (*See Martinko v. Whitmer*, Court of Claims No. 20-000062-MM, April 29,2020 Opinion and Order Regarding Plaintiffs-Appellants' April 23, 2020 Motion for A Preliminary Injunction; *Michigan House of Representative and Michigan Senate v. Whitmer,* Court of Claims No. 20-000079-MZ, May 21, 2020 final opinion.) The *House & Senate* case in particular issue is making its way through the appellate courts, and raises issues concerning the Governor's authority under the EPGA, whether the EPGA is an illegal delegation or violates the separation-of-powers doctrine, and the Governor's authority under the EMA. (Ex. 1, *House & Senate*, Mich. Docket No. 151377, Bypass App., pp. 20–29, 34–36.)[2] And given the importance of the issues involved, these cases have consistently been given expedited consideration.

While, in *Martinko*, the Michigan Supreme Court recently denied the plaintiffs" bypass application because it was "not persuaded that the questions should be reviewed by the Court[,]" (6/4/20 *Martinko* Order;[3] 6/4/20), the Court when it denied the bypass application in *House & Senate* (a 4-3 decision) did not use

[2] The Attorney General notes that the *House & Senate* bypass application does raise an issue regarding the *House & Senate*'s standing to bring their claims in the first place. (Ex. 1, *House & Senate* Bypass App., pp. 14–17.) If that argument is successful, the Michigan Supreme Court would not reach the substantive issues.

[3] Available at: https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/RecentCourtOrders/19-20-Orders/161333%202020-06-04%20or.pdf

that language, instead stating that it was not persuaded that it should review the issues "*before consideration by the Court of Appeals*." (6/4/20 *House & Senate* Order[4] (emphasis added).)

Too, the Court's Order denying bypass in *House & Senate* underscores the Court's interest in reviewing the case—*after* review by the Court of Appeals. One of the concurrences explained: "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." (*Id.*, Bernstein, J., concurring). Another concurrence explained: "[O]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." *Id.* (Clement, J., concurring (emphasis added)).

Thus, the Court's Order in *House & Senate* signals that it wants the benefit of the full briefing and analysis that occurs as a case makes its way through normal appellate channels. Presumably, if a majority of the Michigan Supreme Court was

[4] Available at: https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/RecentCourtOrders/19-20-Orders/161333%202020-06-04%20or.pdf

unwilling to entertain the *House & Senate* bypass application (which it treated differently than the *Martinko* bypass application), it is just as unlikely to agree to certify the same questions from this Court—especially if it believes, as the Attorney General and Governor have argued, that the federal claims raised in this case are moot.

In the meantime, holding this case in abeyance would serve to "postpone the exercise of [this Court's] jurisdiction until the state court has had 'a reasonable opportunity to pass upon' the relevant questions of law," *Harrison v. NAACP*, 360 U.S. 167, 176–77 (1959), in much the same way that the *Pullman* abstention operated to postpone the exercise of the federal court's jurisdiction in *Harrison*. *Id*; *See also Pullman Co*., 312 U.S. at 499–500 (1941). Because the very issues that Plaintiffs raise in their Complaint and that this Court now flags as potential issues for certification are already making their way through Michigan's appellate courts, abeyance—rather than engaging in the certification process—is in the interest of judicial economy. Additionally, the state cases challenging the EPGA and the EMA has been expedited in every court. (*E.g.* 6/4/20 *House & Senate* Order (granting immediate consideration); *House & Senate*, Mich. Court of Claims Docket No. 20-000079-MZ;[5] 6/4/20 *Martinko* Order (granting immediate consideration); *Martinko*, Mich. Court of Claims Docket No. 20-000062-MM;[6] *Associate Builders &*

[5] Docket available at: https://webinquiry.courts.michigan.gov/WISearchResults/ViewPage1?commoncaseid=823894

[6] Docket available at: https://webinquiry.courts.michigan.gov/WISearchResults/ViewPage1?commoncaseid=823831

Contractors of Mich. v. Whitmer, Mich. Court of Claims Docket No. 20-000092-MZ;[7] *Mich. United for Liberty v. Whitmer*, Mich. Court of Claims Docket No. 20-00061-MZ;[8] *Mich. United for Liberty* Motion to Expedite Appeal, Mich. App. Docket No. 353643.[9]) Consequently, there is no reason to believe there would be an unreasonable delay in these issues coming before Michigan's highest court.

Finally, Local Rule 83.1 requires a number of steps prior to certification, including: (1) a written certification; (2) 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; (3) citation to authority authorizing the state court involved to resolve certified questions; and (4) a statement of facts to be transmitted to the Michigan Supreme Court by the parties as an appendix to the briefs. W.D. Mich. L.Civ.R. 83.1. Those steps could be avoided by holding this case in abeyance pending the conclusion of state-court proceedings in (at the very least) the *House & Senate* case. And since "the order of certification shall stay federal proceedings for a fixed time," *id.*, holding the case in abeyance achieves the same result.

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[7] Docket available at: https://webinquiry.courts.michigan.gov/WISearchResults/ViewPage1?commoncaseid=823961

[8] Docket available at: https://webinquiry.courts.michigan.gov/WISearchResults/ViewPage1?commoncaseid=823825

[9] Docket available at: https://courts.michigan.gov/opinions_orders/case_search/pages/default.aspx?SearchType=1&CaseNumber=353643&CourtType_CaseNumber=2

III. Alternatively, this Court should decline to exercise supplemental jurisdiction over the state-law claims.

As an alternative to holding this case in abeyance, this Court could simply decline to exercise supplemental jurisdiction over the state-law claims, as both Attorney General and the Governor argued in their motion to dismiss. (Dkt. 27, Attorney General's Mot. to Dismiss, PageID.1398–1400; Dkt. 24-2, Governor's Mot. to Dismiss, PageID.1119–24.)

Under 28 U.S.C. § 1367(c), the court can, in its discretion, decline to exercise supplemental jurisdiction over a claim in several circumstances: "(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." *See also United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966).

Here, all four factors are present, meaning this Court should decline to exercise supplemental jurisdiction: *First*, as discussed in Argument I above, all of the federal claims are moot and should therefore be dismissed, implicating the third factor under § 1367(c). *See Gibbs*, 383 U.S. at 726 ("[I]f the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."); *Taylor v. First of Am. Bank–Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1992) ("[W]hen 'all federal claims are eliminated before

trial, the balance of factors . . . will point toward declining to exercise jurisdiction.' " (quoting *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 n.7 (1988))).

Second, the state-law claims are novel, and concern the State's interest in the administration of its government, implicating the first factor under § 1367(c). *See Doe v. Sundquist*, 106 F.3d 702, 704, 707 (6th Cir. 1997) (dismissing the federal claim and declining to exercise supplemental jurisdiction over the state law claim since the issue was one of "peculiar relevance to the primary police functions of the state"); *Carver v. Nassau County Interim Finance Authority*, 730 F.3d 150, 154–55 (2d Cir. 2013) ("[W]here a pendent state claim turns on novel or unresolved questions of state law, especially where those questions concern the state's interest in the administration of its government, principles of federalism and comity may dictate that these questions be left for decision by the state courts." (quotations omitted)).

Third, the state-law issues in this case predominate over the federal claims, implicating the second factor under § 1368(c). That is, the predominant issues in this case concern the validity and scope of the Governor's statutory authority to act during an emergency or disaster. *See City of New Rochelle v. Town of Mamaroneck*, 111 F. Supp. 2d 353, 369–71 (S.D.N.Y. 2000) (declining to exercise supplemental jurisdiction where the predominate issues of the case were state-law issues of first impression, concerning the authority of the state to govern, delegate to other governmental entities, and enact laws, the resolution of which would "have wide-reaching impact on issues fundamental to governance" of the state).

And *fourth*, given the current COVID-19 crisis, as well as the fact that these issues are already before the state courts and working their way through the state-court system, the circumstances presented are exceptional, implicating the fourth factor under § 1367(c). *Donohue v. Mangano*, 886 F. Supp. 2d 126, 149 (E.D.N.Y. 2012) ("[T]he existence of the parallel, ongoing state court proceeding also provides a compelling reason for declining supplemental jurisdiction under 28 U.S.C. § 1367(c)(4)." (quotations omitted)).

Therefore, this Court should decline to exercise supplemental jurisdiction over Plaintiffs' state-law claims.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Defendant Attorney General Dana respectfully requests that this Honorable Court decline to certify issues to the Michigan Supreme Court.

Respectfully submitted,

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Dated: June 5, 2020

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2020, I electronically filed this Attorney General Dana Nessel's Supplemental Briefing on Certification with the Clerk of the Court using the ECF system which will send notification of such filing.

A courtesy copy of the aforementioned document was placed in the mail directed to:

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THE HONORABLE MAGISTRATE JUDGE PHILLIP J GREEN
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UNITED STATES DISTRICT COURT
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,

v

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.

No. 1:20-cv-414

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

EXHIBIT 1 TO ATTORNEY GENERAL DANA NESSEL'S SUPPLEMENTAL BRIEFING ON CERTIFICATION

Exhibit 1 - *House & Senate* bypass application

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

Supreme Court No.

Court of Appeals No. 353655
Court of Claims No. 20-000079-MZ

THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE, OR REGULATION OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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THE MICHIGAN LEGISLATURE'S
EMERGENCY BYPASS APPLICATION FOR LEAVE TO APPEAL
BEFORE DECISION BY THE COURT OF APPEALS

ORAL ARGUMENT REQUESTED

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ORDER APPEALED FROM AND RELIEF SOUGHT

On May 21, 2020, after the Michigan House of Representatives and Michigan Senate moved for declaratory judgment, the Court of Claims issued an opinion addressing the legality of certain executive orders issued by Governor Gretchen Whitmer in response to the COVID-19 pandemic. Those executive orders purportedly rested on two legislative acts: the Emergency Powers of the Governor Act of 1945 ("EPGA") and the Emergency Management Act of 1976 ("EMA"). See MCL 10.31–10.33; MCL 30.401–30.421. The court held that the Governor exceeded the authority granted to her in the EMA by declaring states of emergency and disaster in Executive Order 2020-68 over the Legislature's objection. But the court upheld the Governor's exercise of her authority under the EPGA in declaring a state of emergency in Executive Order 2020-67. Further, the court held that the EPGA's broad grant of gubernatorial lawmaking power did not offend the separation-of-powers doctrine. The Legislature filed a claim of appeal in the Court of Appeals on May 22, 2020.

The Legislature respectfully requests that this Court grant emergency-bypass review, reverse the decision of the Court of Claims in part, and hold (1) that the Governor exceeded her authority under the EPGA in declaring an indefinite statewide state of emergency in EO 2020-67; or (2) alternatively, that the EPGA violates the separation-of-powers doctrine in the 1963 Michigan Constitution because it upsets the balance of power that is central to the democratic process and does not provide sufficient standards to guide executive discretion. In either event, the Court should hold that the Governor's declaration of emergency in EO 2020-67 and the orders that rest upon the same are improper and invalid.

STATEMENT OF QUESTIONS PRESENTED

1. Should the Court grant bypass leave to appeal to determine whether the Emergency Powers of the Governor Act grants the governor the power to declare an indefinite statewide state of emergency premised on a pandemic over the Legislature's objection?

   The Legislature answers: "Yes."

   The Governor answers: "No."

   This Court should answer: "Yes."

2. Should the Court grant bypass leave to appeal to determine whether the Emergency Powers of the Governor Act is consistent with the separation-of-powers doctrine in the Michigan Constitution, where the act provides no functional standards to constrain the exercise of the broad lawmaking powers it delegates and results in the usurpation of the Legislature's role in formulating public policy?

   The Legislature answers: "Yes."

   The Governor answers: "No."

   This Court should answer: "Yes."

INTRODUCTION AND REASONS FOR GRANTING THE EMERGENCY BYPASS APPLICATION

This case concerns the power of a governor to exercise unconstrained lawmaking powers for an indefinite period throughout the state—all in the name of "emergency." In response to the COVID-19 pandemic, Defendant Governor Gretchen Whitmer has asserted vast executive-branch power to implement sweeping executive orders. She has premised these executive orders—orders that affect the otherwise lawful activities of every Michigander's day-to-day existence—on a series of separate executive orders declaring states of emergency and disaster. Governor Whitmer cited three supposed bases of authority to issue these declarations: Article 5, § 1, of Michigan's 1963 Constitution; the 1945 Emergency Powers of the Governor Act ("EPGA"), MCL 10.31–10.33; and the 1976 Emergency Management Act ("EMA"), MCL 30.401–10.421.

After the Legislature filed an action for declaratory judgment to deem the Governor's declarations invalid, the Governor abandoned any argument resting on any inherent authority found in Article 5, § 1. The Court of Claims then held that the Governor did not have authority to declare states of emergency or disaster premised on the EMA after April 30, 2020. Thus, the only remaining authority from which the Governor may draw to issue and sustain COVID-19-related declarations of emergency is the EPGA. That act, however, was only intended to address limited, localized emergencies, not the sort of statewide indefinite emergency that Governor Whitmer has sought to declare here. Even if it were not, the EPGA does not provide sufficiently definite standards or safeguards to render it constitutionally consistent

with the separation-of-powers doctrine. The EPGA, then, is of no use to the Governor. And lacking any genuine source of authority, the Governor's declarations—and the executive orders founded upon them—are all *ultra vires* acts that cannot be sustained.

If ever there were a case that warranted this Court's immediate involvement, then this would be it. The suit involves "a substantial question about the validity of [multiple] legislative act[s]." MCR 7.305(B)(1). It presents a serious question as to the constitutionality of the EPGA *and* a serious question as to the validity of the quasi-legislative acts that the Governor has unilaterally undertaken in the wake of COVID-19. These issues are undeniably of "significant public interest," in that they touch upon the daily lives of every person in Michigan (including those just passing through) and the republican form of government to which they are entitled. MCR 7.305(B)(2). The case involves a "subdivision" of the state on the one side (that is, the Legislature) and "an officer of the state … in [her] official capacity" (that is, the Governor) on the other. *Id.* The issue is one of "major significance to the state's jurisprudence," as it directly poses a central question of how the branches of government may exercise and balance their powers, particularly in a time of emergency. MCR 7.305(B)(3). 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).

The Legislature therefore respectfully asks the Court to order expedited merits briefing, schedule oral argument as soon as possible, and then issue a decision. It asks the Court to hold that the EPGA does not grant the Governor the broad powers that she claims it does. Alternatively, the Legislature asks the Court to hold that the EPGA is an unconstitutional delegation and usurpation of lawmaking power. The Governor's ongoing emergency orders are improper and invalid as a matter of state constitutional and statutory law. 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.

BACKGROUND

The Governor's Exercise of Broad Lawmaking Powers

As the Court of Claims recognized, the underlying facts of this case are undisputed.

On March 10, 2020, on the same day that the first two presumptive-positive cases of COVID-19 were announced in Michigan, Governor Whitmer declared a state of emergency throughout Michigan. See EO 2020-4; State of Michigan, *Michigan announces first presumptive positive cases of COVID-19* <https://bit.ly/2zVg2XH> (last accessed May 5, 2020). The Governor's declaration of emergency cited three

sources of authority: Article 5, § 1, of Michigan's 1963 Constitution, the EMA, and the EPGA. EO 2020-4. A few weeks later, on April 1, 2020, the Governor issued an Executive Order titled "Expanded emergency and disaster declaration." EO 2020-33. In rescinding and replacing the March 10 declaration, the new order declared an expanded "state of emergency *and a state of disaster* … across the State of Michigan." *Id.* (emphasis added). This new declaration rested on the same three supposed sources of authority.

The EMA required the Governor to "declar[e] the state of emergency [or disaster] terminated, unless a request by the governor for an extension of the state of emergency [or disaster] for a specific number of days is approved by resolution of both houses of the legislature." MCL 30.403(3), (4). After the Governor's initial declarations, the Legislature by resolution approved the Governor's requested "extension of the state of emergency and state of disaster" from the March 10, 2020 order and April 1, 2020 order, setting April 30, 2020 as its new expiration date. 2020 SCR 24. The "extension" resolution was required to extend the states of emergency and disaster, at an absolute minimum, by the EMA. MCL 30.403(3), (4).

On April 27, 2020**,** a few days before the as-extended state of emergency was to expire, the Governor announced that she would request that the Legislature further extend her declaration of state of emergency. Exhibit 3, April 27, 2020 Letter. But the Legislature and the Governor were unable to agree to terms, so the next day passed without the Legislature entering a resolution to further extend the state of emergency and state of disaster. Rather than continuing to let all public policy

decisions be implemented via ad hoc executive orders, the Legislature offered to extend the states of emergency and disaster so long as any future "stay-at-home" requirements be passed as bipartisan legislation through the democratic process. This reflected the Legislature's position: although the Governor is best equipped to swiftly respond to a pandemic's more immediate challenges, the Legislature is equipped to arrive at more durable, consensus-based solutions through a deliberative process. The Legislature would have still permitted the Governor to supplement with executive orders as needed. The Governor refused and even vetoed legislation to codify many of her executive orders.

Even though the Legislature determined not to extend the declared states of emergency and disaster and instead revert to the ordinary democratic process to handle the state's long-term pandemic response, the Governor decided to ignore that judgment and move ahead on her own. In particular, on April 30, 2020, less than five hours before the as-extended state of emergency and state of disaster were set to expire, the Governor issued a series of executive orders.

First, she issued EO 2020-66, terminating the state of emergency declared under the EMA in the April 1, 2020 order. See EO 2020-33. The order observed that the EMA called for her to terminate a declaration of a state of emergency or disaster after 28 days. See EO 2020-66. The Governor acknowledged that the statute bound her: "Twenty-eight days, however, have elapsed since I declared states of emergency and disaster under the Emergency Management Act in Executive Order 2020-33. And while I have sought the legislature's agreement that these declared states of

emergency and disaster should be extended, the legislature … has refused to extend them beyond today." *Id.*

Second, one minute later, the Governor issued another order: a declaration of state of emergency under the EPGA. See EO 2020-67. After citing the EPGA, the Governor ordered that "[a] state of emergency *remains* declared across the State of Michigan under the Emergency Powers of the Governor Act of 1945[.]" *Id.* (emphasis added). The Governor ordered that the declaration would continue through May 28, 2020, adding vaguely that she would "evaluate the continuing need for this order prior to its expiration." *Id.* EO 2020-67 rescinded the April 1 order and stated that all previous executive orders that had rested on that earlier order now rested on this order. *Id.*

Third, the Governor issued EO 2020-68, an executive order that—in direct contradiction to her termination order issued moments earlier—declared "states of emergency and disaster under the [EMA]." This order, like the preceding order, specified that it would continue through May 28, 2020, and laid out no conditions for termination beyond the Governor's evaluation of the "continuing need for this order" prior to that date. But unlike the EPGA order, which stated that a state of emergency *remains*, this third order played a semantics game: it was phrased to *declare* states of emergency and disaster *now*: "I now declare a state of emergency and a state disaster across the State of Michigan under the Emergency Management Act." *Id.* All prior orders resting on the April 1, 2020, declaration of emergency and disaster were said to then rest on this order. *Id.*

Using these declarations, the Governor has continued issuing broad orders at a rapid pace. Indeed, relying on the powers that she believed the EMA and EPGA declarations afforded her, the Governor has issued 98 COVID-19 executive orders—more than any other governor in the nation. See Council of State Governments, *COVID-19 Response for State Leaders* <https://web.csg.org/covid19/executive-orders/> (accessed May 22, 2020). The initial "stay-at-home" order has been modified six times, changing the scope of criminal and non-criminal activities in the state nearly every week. *See* EO 2020-96 (noting the extensions and modifications of the various state-at-home orders). As of May 22, 2020, there are 44 "live" COVID-19 executive orders. The Governor's current declaration of emergency and disaster is EO 2020-99, under which the Governor declared an emergency under the EPGA and, despite the Court of Claim's May 21 order, the EMA. In EO 2020-100, the Governor clarified the duration of 14 COVID-19 executive orders: EOs 2020-26, 28, 36, 39, 46, 52, 55, 58, 61–62, 64, 69, 76, and 96. In addition to those 16 orders, 28 other COVID-19 executive orders are still effective: EOs 2020-14, 22, 27, 38, 63, 65, 71–75, 78–83, 85–89, 93, 95, 97, and 101–103.

These orders—including the "stay at home" orders—touch upon all aspects of life in Michigan; they confine Michiganders to their homes, limiting a broad swathe of available services and goods, changing legal rights, criminalizing a variety of otherwise ordinary activity, closing schools, and more. In public statements, the Governor has shown no intent to end the declared states of emergency or disaster any time soon. See Riley Beggin & Mike Wilkinson, Bridge, *When Will Gov. Whitmer*

Reopen Michigan? It's Complicated. And A Bit Vague. <https://bit.ly/2LLrcRw> (May 17, 2020) (quoting Governor Whitmer as saying that reopening "depends on human nature, it depends on human activity").

The Court of Claims Decision

Faced with a governor who was determined to unilaterally exercise broad lawmaking powers across the entire state for an undefined period, the Legislature was compelled to file suit against her. On April 30, 2020, both the House and the Senate authorized the suit. The Legislature then filed a complaint and motion for declaratory judgment in the Court of Claims on May 6. On May 21, the Court of Claims decided on the Legislature's motion for immediate declaratory judgment.

After briefly discussing an abandoned procedural requirement, the court concluded that the Legislature had standing. The court found that "the issue presented in this case is whether the Governor's issuance of EO 2020-67 and/or EO 2020-68 had the effect of nullifying the Legislature's decision to decline to extend the states of emergency/disaster." See Exhibit 1, Court of Claims Op, p 7. The nullification of the Legislature's decision was akin to the "special injury" required to justify standing in prior cases, including the one legislator who was deemed to have standing in *Dodak v State Admin Bd*, 441 Mich 547, 560; 495 NW2d 539 (1993). *Id.* at 8. The court further observed that "guidance as to the issues presented in this case will avoid a multiplicity of litigation." *Id.* at 9.

The court next dispensed with the Governor's brief references to Article 5, § 1 of Michigan's 1963 Constitution, which vests the "executive power" in the Governor. Although referenced in the executive orders at issue, the Governor had largely

abandoned any reliance on this provision in the proceedings below. The court confirmed that the "executive power" only grants the Governor the power to administer or execute the laws, and she had no right to act in this instance without applicable enabling statutes. *Id.* at 9–10. Thus, the trial court was focused on the EPGA and EMA. *Id.* at 10.

The court then held that the EPGA authorized EO 2020-67 and the executive orders that relied upon it. The Court of Claims read the EPGA to "bestow[] broad authority on the Governor," including police power extending across the entire state. *Id.* at 10. The court further believed that, notwithstanding legislative history to the contrary, certain terms used in the act were "not terms that suggest local or regional-only authority," and it noted that the terms were to be "broadly construe[d]." *Id.* at 12, 15. The court agreed with the Legislature that the EPGA must be read together with the EMA. *Id.* at 14. But it found no problem in allowing the evidently limitless authority of the EPGA to be extended to the same subjects as the expressly limited authority of the EMA. *Id.* "[T]he Court can harmonize the two statutes," it said, "by recognizing 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.* The court did not say what those tools or options might be, nor did it provide any functional explanation of how the two laws interact.

The court found that this broad construction of the EPGA did not present any separation-of-powers concerns under the Michigan Constitution. The court considered whether the EPGA afforded sufficient standards to channel the

executive's exercise of delegated power. *Id.* at 16–17. The court believed this evaluation was shaped by the emergency circumstances of this case. *Id.* at 17 ("[T]he standard by which this Court must view the standards ascribed to the delegation at issue must be informed by the complexities inherent in an emergency situation."). With that more relaxed approach in mind, the court held that sufficient standards could be found in the EPGA because a declaration could only be issued during certain times or at the request of certain persons. *Id.* Further, once the declarations were issued, the Governor was empowered to take "reasonable" and "necessary" actions. *Id.* at 18. And the act contained "examples" of what a governor could or could not do after declaring a state of emergency. *Id.* at 18–19.

The court went on to hold, however, that the Governor's post-April-30 exercise of authority under the EMA was "ultra vires." *Id.* at 19. The Governor had taken the EMA's instructions "out of context." *Id.* at 23. Under the EMA, the Governor was obliged to terminate the declaration of emergency or disaster after 28 days absent a legislative extension, full stop. *Id.* at 23. The Governor's formalistic approach—which would allow her to declare, terminate, and then redeclare states of emergency and disaster repeatedly—would render that provision "meaningless." *Id.*; see also *id.* at 24 ("To adopt the Governor's interpretation of the statute would render nugatory the express 28-day limit and it would require the Court to ignore the plain statutory language. … [T]hat position conflicts with the plain statutory language."). What is more, the court rejected the Governor's attempt to extract from the EMA an "additional, independent source of authority" outside the context of a declaration of

emergency or disaster. *Id.* at 24. Lastly, the court disagreed with the Governor that the 28-day extension provision was an impermissible legislative veto. *Id.* at 25–26.

The Legislature filed a timely claim of appeal with the Court of Appeals on May 22, 2020. This application for leave followed.

STANDARD OF REVIEW

Whether to grant leave to appeal is within this Court's discretion. To obtain review by this Court, an appellant must show only that his case meets one or more of the criteria set forth in MCR 7.305(B).

Should this Court determine to grant leave to appeal, review will be *de novo*. See *Mich Dept of Transp v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008) ("Questions of constitutional interpretation and statutory interpretation are questions of law reviewed de novo by this Court."); *Petition of Cammarata*, 341 Mich 528, 540; 67 NW2d 677 (1954) (applying de novo standard of review to allegation that executive action was ultra vires).

ARGUMENT

I. The Court should grant leave to decide whether the Governor can use the EPGA to justify an indefinite, statewide state of emergency in light of COVID-19.

The Governor and the Court of Claims both embrace an interpretation of the EPGA that presents serious problems, particularly when read together with the EMA. This Court should grant leave to address those problems before more damage is done. The EPGA was meant for localized emergencies, not statewide ones.

A. The Governor's interpretation of the EPGA creates an irreconcilable conflict with the EMA.

"[S]tatutes that relate to the same subject or that share a common purpose" are *in pari materia* and "must be read together as one." *People v Hall*, 499 Mich 446, 459 n 37; 884 NW2d 561 (2016) (cleaned up). "The application of *in pari materia* is not necessarily conditioned on a finding of ambiguity." *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 73 n 26; 894 NW2d 535 (2017). Even "a statute that is unambiguous on its face can be rendered ambiguous by its interaction with and its relation to other statutes." *People v Valentin,* 457 Mich 1, 6; 577 NW2d 73, 75 (1998) (cleaned up); see also *Bd of Rd Comm'rs of Wayne Co v Lingeman*, 293 Mich 229, 236; 291 NW 879 (1940) ("Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it, which modifies the meaning of the words, and even the structure of the sentence." (citation and quotation marks omitted)). Fundamentally, a statute "cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum L Rev 527, 539 (1947). And here, the EPGA and EMA should be read *in pari materia.* They occupy the same realm of the law. The cover the same general topic: gubernatorial emergency powers. They have the same goal: immediate crisis control pending more durable legislative action.

If these statutes are properly read together, and the Governor's approach is embraced, then the EMA becomes a purposeless redundancy to EPGA. The Governor,

after all, insists that she can do most anything she wants under the EPGA that she could also do under the EMA. If the Governor were right, then all the statutory protections and safeguards found in the EMA—including, most notably, the 28-day automatic termination provision and the need for legislative approval—would be pointless. For why would a Governor acquiesce to the more rigid procedures of the EMA when she could have all she wanted through a brute-force application of the EPGA? Even the Court of Claims did not purport to answer that question; it could only suggest that the statutes could be "harmonize[d]" by "recognizing" that the "EMA equips the Governor with more sophisticated tools and options at her disposal." Exhibit 1, p 14. But what tools? What options? When it comes to the power to issue executive orders deriving from a declared state of emergency, the reader of the Court of Claims opinion is only left guessing as to why the EMA would have ever be implicated at all. And now that the EPGA has been so thoroughly enlivened by the Court of Claims, the EMA might well become dead letter when a governor is looking to exercise broad authority via executive authority.

Of course, a court's construction of a given statute should not operate like this, that is, it should not render a provision—let alone a whole separate statutory scheme—surplusage or nugatory. *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007) (citation omitted). A provision "is rendered nugatory when an interpretation fails to give it meaning or effect." *Id.* Courts have also said that interpretations must avoid rendering a portion of a statute "meaningless," *Herald Wholesale, Inc v Dept of Treasury*, 262 Mich App 688, 699; 687 NW2d 172 (2004);

People v Morey, 230 Mich App 152, 158; 583 NW2d 907 (1998), or "unnecessary," *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 399; 738 NW2d 664 (2007); *Gross v Gen Motors Corp*, 448 Mich 147, 159; 528 NW2d 707 (1995). However phrased, the Court must apply "any reasonable construction" before it accepts an interpretation that renders all or part of a statute "nugatory." *Ex parte Landaal*, 273 Mich 248, 252; 262 NW 897 (1935). The Court of Claims' order ignores that basic idea, stripping out the teeth from the EMA for the sake of building broader authority from the EPGA's vaguer text.

Even if the court was correct in applying both laws to statewide emergencies, the odd result of allowing an earlier, broader statute (the EPGA) to effectively neuter a later, more specific one (the EMA) is inconsistent with other fundamental canons of construction, too. For one, "[w]hen two statutes are *in pari materia* but conflict with one another on an issue, the more specific statute must control over the more general statute." *Donkers v Kovach*, 277 Mich App 366, 371; 745 NW2d 154 (2007). Yet the Court of Claims has done just the opposite: allowed what it interprets as the more general, abbreviated statute of the EGPA to remove the statutory guardrails found in the more specific and well-defined EMA. For example, regarding duration, the EMA provides a mechanism to decide the length of a state of emergency or disaster and a formal process to terminate the state of emergency or disaster, see MCL 30.403(3), (4), while the EPGA only refers vaguely to a "declaration by the governor that the emergency no longer exists" without providing guidance as to when or how that declaration is made, MCL 10.31(2). The EPGA, then, should be yielding

to the EMA, not the other way around. For another, in construing two evidently conflicting statutes *in pari materia*, the older statute must yield to the newer one. See *Metro Life Ins Co v Stoll*, 276 Mich 637, 641; 268 NW 763 (1936); *Parise v Detroit Entmt, LLC*, 295 Mich App 25, 28; 811 NW2d 98 (2011). The EPGA was passed in 1945 and the EMA in 1976; thus, the EMA provisions should control as the more recent expression of legislative intent. And as the Court of Claims recognized, an indefinite statewide declaration of emergency without legislative approval is not contemplated by the EMA.

The Court of Claims accepted the Governor's argument that these problems can be dismissed because of single fleeting provision in the EMA. That provision says that the EMA is not intended to "[l]imit, modify, or abridge the authority of the governor to *proclaim* a state of emergency pursuant to [the EPGA]." MCL 30.417(d) (emphasis added). Allowing the EMA to control as the more specific and recent statute, however, would only limit the Governor's ability to extend an emergency over the Legislature's objection, not her ability to proclaim a state of emergency at the onset under the EPGA. Even if it did, that problem is only caused by the lower court's supposed harmonizing of the EMA and EPGA in which both apply to the same kinds of statewide crises. If, however, the EMA and the EPGA were confined to distinct spheres, then there would be no modification, implicit or otherwise. The conflict would disappear.

And indeed, there is a way to keep each statute in its proper lane: by acknowledging that the EPGA is meant for specific, localized emergencies. Reading

the EPGA's conception of an "emergency" against the EMA's definition of the "emergency" highlights the former's local bent. The EPGA contemplates, for example, that the Governor will act in "emergency" instances like "rioting"—a decidedly local problem. MCL 10.31(1). The later-enacted EMA references "emergency," too, explaining that an emergency exists whenever the Governor decides "state assistance is needed to supplement local efforts." MCL 30.402(h). In other words, even in the EMA, a declared "emergency" is a local problem that becomes so severe the State must help. But the EMA goes further, providing for the further power to declare a state of *disaster*. A disaster is an occurrence of "widespread" damage, including, among other things, "epidemic[s]." MCL 30.402(e). Other examples of disasters confirm their wide geographical scope; they include "blight, drought, infestation," "hostile military action or paramilitary action, or similar occurrences resulting from terrorist activities." *Id.* Importantly, while the EPGA does briefly reference a "disaster," it does *not* empower the Governor to declare a "state of disaster." And when the EMA was originally passed, it gave the Governor the power to declare only disasters, leaving local emergencies to the EPGA. See 1976 PA 390. The Legislature expanded the scope of the EMA to include emergencies only to comply with the federal Emergency Planning and Community Right-To-Know Act—and even those amendments maintained a notably statewide focus. See Exhibit 4, Senate Fiscal Analysis, 1990 PA 50 (1990).

This deliberate distinction—wherein one statute has a "state of disaster" and the other does not—must be given meaning. See *Pike v N Michigan Univ*, 327 Mich

App 683, 696; 935 NW2d 86 (2019) ("[W]hen the Legislature uses different words, the words are generally intended to connote different meanings." (cleaned up)). On the other hand, "emergency," which appears in both places, should be defined consistently across the two acts. See *Paige v City of Sterling Hts*, 476 Mich 495, 520; 720 NW2d 219 (2006) (rejecting the notion that "absolutely identical phrases in our statutes … [can] have different meanings in different statutes"). The net effect is that "emergencies" (of the kind that can trigger the EPGA or the EMA) are local, while "disasters" (of the kind that can justify action *only* under the EMA) are statewide events. (Of course, "disasters" might involve or cause one or more "emergencies," but they still carry different meaning.)

Further, the EMA's administrative components contemplate emergencies more in the order of a statewide or widespread crisis—or problems at least requiring state-level resources. For example, it provides for federal aid, MCL 30.404(3), 30.405(1); includes detailed rules for compensation for property, MCL 30.406; establishes departments and department heads to oversee state administration, MCL 30.407–.408; provides for county representatives from each county, MCL 30.409; and many similar provisions. In contrast, the EPGA is barely a half-a-page of text—far more fitting for small, local management. It imagines only that the Governor will issue "orders, rules, and regulations" in an undefined way. MCL 10.31(1). The comparison is striking.

The import of all this is obvious: the Governor should not be permitted to generate statutory conflict by using the EPGA to impose a statewide, indefinite state of emergency.

B. Even aside from the conflict with the EMA that the Governor has created, the EPGA's text confirms that it is a locally focused statute.

The words of a statute should drive its interpretation. See *Hall*, 499 Mich at 453; *O'Leary v O'Leary*, 321 Mich App 647, 652; 909 NW2d 518 (2017). "[N]ontechnical words and phrases should be construed according to their plain meaning, taking into account the context in which the words are used." *S Dearborn Envtl Improvement Assn, Inc v Dept of Envtl Quality*, 502 Mich 349, 361; 917 NW2d 603 (2018) (cleaned up). In doing so, the Court "may consult dictionary definitions." *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Applying these principles to the EPGA confirms that the statute was intended to address only instances of local concern.

The statute starts by noting that the Governor may act during times of public emergency "within" the State. MCL 10.31(1). "Within" is a meaningful choice. "'Within' means 'on the inside or on the inner-side' or 'inside the bounds of a place or region.'" *State v Turner*, --- N.E.3d ----, No. CA2018-11-082, 2019 WL 4744944, at *4 (Ohio Ct App, September 30, 2019) (quoting *Webster's Third New International Dictionary* 758 (1993)). Thus, something defined as "within" relative to something else implies that the former is engulfed (and therefore smaller in size) than the latter. The Court of Claims assumed that "within" just marks the jurisdictional boundaries for the application of the statute. But it does not make sense to say that the state is

"within" the state. And had the Legislature meant for the legislation to apply to the state writ large, it would have said so, as it has done in other legislation. See, e.g., MCL 28.6 (requiring the commissioner of the Michigan State Police to "put into effect plans and means of cooperating with the local police and peace officers *throughout* the state" (emphasis added)).

Similarly, the statute reaffirms its local, geographic focus in repeatedly referring to an "area," "section," or "zone." The scope of the Governor's emergency declaration power under the EPGA is limited to "the *area* involved," and any orders she promulgates have to be calibrated to "the affected *area*." MCL 10.31(1) (emphasis added). She may take measures "to bring the emergency situation within the affected area under control." *Id.* The Governor's powers include controlling traffic "*within the area or any section of the area*" designated as the emergency area. *Id.* (emphasis added). And when the Governor controls the "ingress and egress of persons and vehicles" to and from properties, she does so within "designat[ed] … zones within the area." *Id.* (Contrast the EPGA's contemplation of gubernatorial power over a single "area" with the EMA, which expressly contemplates that the Governor's declaration under that act might reach "*areas*." MCL 30.403(3).)

These words—"area," "zone," and "section"—all establish that the Governor's power is intended to apply to some subpart of the state as a whole. For example, *Merriam-Webster's Online Dictionary* defines "area," in relevant part, as "a particular extent of space or one serving a special function," such as "a geographic region." Merriam-Webster's Online Dictionary, *Area* <https://bit.ly/3c17JYu> (accessed May

22, 2020). Similarly, *Webster's New World College Dictionary* defines "area" as "a part of a house, lot district, city, etc. having a specific use or character." Likewise, a "zone" contemplates "[a]n area that is different or is distinguished from surrounding areas." *Black's Law Dictionary* (11th ed. 2019), while a "section" is "a part of something" or "any of the more or less distinct parts into which something is or may be divided." *Forrester Lincoln Mercury, Inc v Ford Motor Co*, No. 1:11-cv-1136, 2012 WL 1642760, at *4 n 6 (MD Pa, May 10, 2012) (quoting dictionary definitions). None of these words, then, imply that the Governor's powers under the EPGA are intended to reach the entirety of the state. Yet the Court of Claims did not address them at all.

The EPGA's structure and language is consistent with other states that have applied their emergency statutes locally. See also, e.g., NY Exec Law 24 (statute borrowing EPGA's language but expressly noting that it creates a "local state of emergency"); La Stat 14:329.6 (statute borrowing EPGA's language but expressly noting that the state of emergency is declared as to "any part or all of the territorial limits of [a] local government").

The Court of Claims chose not to focus on all these textual provisions. Instead, the Court of Claims drew significant meaning from the statute's frequent reference to "public" emergencies and determined that the statute vested the entire "police power" in the Governor. The court's emphasis, one not even pressed by the Governor, is an unusual one. "Public" is used to emphasize the problem is one that reaches beyond an individual to affect a broader community. See, e.g., *Black's Law Dictionary* (11th ed 2019) (defining "private" to mean "[o]f, relating to, or involving an individual,

as opposed to the public or the government"). In other contexts, "public" is just used to refer to things that trigger the sovereign power of government; it is not a synonym for "statewide." See, e.g., *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 225; 507 NW2d 422 (1993) (noting the Open Meetings Act's definition of "public body" as one that "exercise[s] governmental or proprietary authority"); *Hays v City of Kalamazoo,* 316 Mich 443, 458; 25 NW2d 787 (1947) (finding a city's participation in the Michigan Municipal League served a "public" purpose because "the welfare of the city was thereby served"); *People v Freedland*, 308 Mich 449, 455; 14 NW2d 62 (1944) ("[A]n individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public[.]"). It is not helpful—and entirely circular—to say that the EPGA is triggered by instances in which the power of the government should become involved.

The Court of Claims also repeatedly focused on a statutory declaration of intent. Yet that provision says only that the statute was meant to give the Governor "sufficiently broad power of action" to "provide adequate control" during crisis periods. MCL 10.32. The "power of action" refers to what *acts* the Governor may perform. The Legislature and the Governor agree that those acts—that is, the tools that the Governor may employ—are broad. But the "power *of action*" says nothing about where those actions may be done. And the expansive power granted to the Governor is *more* reason to believe that the statute did not contemplate statewide action, not less—for it defies common sense to think that the Legislature would have closely cabined the statewide powers of the EMA while at the same time recognizing

even broader statewide powers within the EPGA. Aside from all that, a "rule of liberal construction does not override other rules if the application would defeat the evident meaning of the act." *Little Caesar Enterprises v Dept of Treasury*, 226 Mich App 624, 629; 575 NW2d 562 (1997). The Governor's interpretation would do just that, transforming an act meant for limited areas into one providing boundless power.

Thus, even when the EPGA's words are read without reference to the EMA, they signify that the EPGA is intended to address specific, local concerns—not matters covering every inch of the state.

C. The historical context shows that the EPGA was meant for local matters, too.

Context also matters. A crucial factor in determining the Legislature's original intent is the historical context in which the statute was passed and implemented. See *Dept of Envtl Quality v Worth Tp*, 491 Mich 227, 241; 814 NW2d 646 (2012) (holding that courts must read statutes "in conjunction with" the "historical context").

The context of the EPGA's enactment shows that the Act was designed for local issues. A *Lansing State Journal* article written on April 6, 1945 noted that the EPGA "result[ed] from the 1943 Detroit race riot" and would "give the governor wide powers to maintain law and order in times of public unrest and disaster." Exhibit 5, Article; see also Michael Van Beek, *Emergency Powers Under Michigan Law*, available at <https://bit.ly/2z3f8rC> (last accessed May 5, 2020) (explaining that the EPGA "was enacted in response to race riots in Detroit in 1943," a situation that had required troops and a curfew). It should come as no surprise then that provisions of the EPGA read like riot-control measures in a specific area within the state, under which the

Governor can establish curfews, control public streets, and limit the dissemination of alcohol and explosives. See MCL 10.31(1). In sum, the EPGA's historical context shows that it was passed to allow the Governor to address localized crises—specifically to preserve law and order in the face of civil unrest.

This "local riots" idea was the common understanding of the EPGA for decades and became part of the impetus for passage of the EMA. In the mid-1970s, for example, Governor Milliken expressed concern over the danger presented by high-water levels in the Great Lakes. In a special message to the Legislature on non-manmade disasters in 1973, he reiterated that the EPGA was "pertinent to civil disturbances" and concluded that "[u]nder existing law, the powers of the Governor to respond to disasters is unduly restricted and limited." See Exhibit 6, Milliken Special Message. Because the EPGA was insufficient to address a statewide, natural disaster, he asked "that the Legislature give the Governor plenary power to declare states of emergency both as to actual and impending disasters." *Id.* He repeated this same message in 1974 and 1975. The Legislature responded by passing the EMA. This legislative leadup confirms that the EMA is the device for broader emergencies, not the EPGA. Again: why would Governor Milliken have thought the EMA necessary if he already had everything he needed in the EPGA?

Court cases show the same. The only three court cases that even mention the EPGA all confirm this local understanding. Two discuss the EPGA in the context of local responses to localized emergencies—local curfews. See *Walsh v City of River Rouge*, 385 Mich 623; 189 NW2d 318 (1971); *People v Smith*, 87 Mich App 730; 276

NW2d 481 (1979). The last touches upon the EPGA's potential preemption of a local law designed to corral university students during "a drunken, raucous semi-annual event." *Leonardson v City of E Lansing*, 896 F2d 190, 192 (CA 6, 1990). Obviously, none of these concern widespread statewide disasters, let alone pandemics.

Past Governors understood the limited nature of the EPGA as well. To the Legislature's knowledge, no prior Governor has used the EPGA in at least 30 years (as far back as electronic records are available) for any emergency, let alone statewide emergencies. Before the present administration, the Legislature is not aware of a single use of the EPGA to manage a statewide crisis. In fact, when the Michigan Department of Community Health conducted an assessment in cooperation with the Centers for Disease Control and Prevention of all laws that might be relevant in responding to a pandemic, the EPGA barely warranted a mention (particularly as compared to the EMA). See Exhibit 7, *Social Distancing Law Project: Assessment of Legal Authorities* (2007). The EPGA was referenced only in noting the Governor's power to impose a curfew. *Id.* at 16. This Governor, however, has nevertheless invoked the EPGA almost 100 times in the last few months.

The Court of Claims' endorsement of the Governor's novel approach to the EPGA is inconsistent with the context in which this statute was first implemented and has since operated. It should not be credited.

D. The Legislature's construction of the EPGA avoids constitutional concerns.

Lastly, the Court should find that the EPGA is limited to local matters because to do otherwise would raise constitutional concerns. "[A]s between two possible

interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [the Court's] plain duty is to adopt that which will save the act." *Hunter v Hunter*, 484 Mich 247, 264 n 32; 771 NW2d 694 (2009). Yet ignoring the EPGA's geographic limitations is constitutionally fraught. As explained below, the Court of Claims' interpretation of the EPGA creates an impermissible delegation of powers; it delegates too much raw power with too few standards for the Governor's exercise of power—and no meaningful temporal limitation at that. The Court should therefore accept the Legislature's argument, which preserves the EPGA's constitutionality. "A statute may be constitutional although it lacks [express] provisions which meet constitutional requirements, if it has terms not excluding such requirements." *Council of Organizations & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 584; 566 NW2d 208, 221 (1997) (cleaned up).

II. The Court should grant leave to decide whether the EPGA's supposed delegation of broad lawmaking powers offends the separation of powers.

The Court could determine that the EPGA did not grant the Governor the power to declare a statewide state of emergency and stop there. But even if the Governor acted within her statutory authority, her ongoing declarations (and the attendant executive orders) face another problem: separation of powers. In effectively exercising standardless lawmaking authority to formulate public policy rather than the democratic process, the Governor has usurped the Legislature's power.

A. The lawmaking power rests exclusively with the Legislature.

"[T]he legislature makes, the executive executes, and the judiciary construes the law." *Wayman v Southard*, 23 US 1, 46; 6 L Ed 253 (1825). These are not civics-

class platitudes, but the foundation of our constitutional system. Michigan's 1963 Constitution adheres to these same separation-of-powers principles. See *Westervelt v Nat'l Resources Comm'n*, 402 Mich 412, 427–429; 263 NW2d 564 (1978) (repeating the same principles). In fact, every Michigan Constitution since our first in 1835 has included a provision making the separation of powers explicit. In Michigan's 1963 Constitution, that provision is Article 3, § 2: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

This separation exists because, "[w]hen the legislative and executive powers are united in the same person or body[,] . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." *Soap and Detergent Ass'n v Nat Resources Comm'n*, 415 Mich 728, 751; 330 NW2d 346 (1982), quoting *The Federalist* No. 47 (Madison); see also *Musselman v Governor*, 200 Mich App 656, 665; 505 NW2d 288 (1993) (quote Justice Cooley's exposition of the separation of powers). "By separating the powers of government, the framers of the Michigan Constitution sought to disperse governmental power and thereby to limit its exercise." *Fieger v Cox*, 274 Mich App 449, 464; 734 NW2d 602 (2007) (cleaned up). Thus, "if there is any ambiguity, the doubt should be resolved in favor of the traditional separation of governmental powers." *Civil Serv Comm'n of Michigan v Auditor Gen*, 302 Mich 673, 683; 5 NW2d 536 (1942).

As part of this scheme, the lawmaking power is vested exclusively in the Legislature. Article 4, § 1, of Michigan's 1963 Constitution says that *all* legislative power is vested in the Legislature. "The legislative power, under the Constitution of a state, is as broad, comprehensive, absolute, and unlimited as that of the Parliament of England, subject only to the" US and Michigan constitutions. *Young v City of Ann Arbor*, 267 Mich 241, 243; 255 NW 579 (1934). Even more specifically, Article 4, § 51, explicitly gives the lawmaking power *to protect public health* to the Legislature: "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."

Michigan's courts have accordingly held time and again that when public policy decisions are required, the Legislature is the branch best equipped to make them. *Henry v Dow Chem Co*, 473 Mich 63, 91 n 22; 701 NW2d 684 (2005) (stating that public policy must be set by "the Legislature—the branch of government best able to balance the relevant interests in light of the policy considerations at stake"); *People v Mineau*, 194 Mich App 244, 248; 486 NW2d 72 (1992) (stating "public policy issues are best addressed by the Legislature"). Indeed, the more complex the policy problem, the more appropriate that the Legislature decide it. See *N Ottawa Cmty Hosp v Kieft*, 457 Mich 394, 408 n 14; 578 NW2d 267 (1998) ("The public policy issues surrounding these circumstances are complex, and we think that such issues are best taken up by the Legislature[.]"); *Van v Zahorik*, 227 Mich App 90, 98; 575 NW2d 566 (1997), aff'd

460 Mich 320; 597 NW2d 15 (1999) (citing the need to "defer[] to the Legislature in matters involving complex social and policy ramifications" (cleaned up)).

In contrast with Article 4's articulation of the Legislature's law-making power and processes, Article 5—which applies to the executive branch—says nothing about the lawmaking power, excepting two narrow sections on the veto power and reorganization of departments that are not relevant here. See Const 1963, art 5, § 1 (explaining that the *executive* power rests with the Governor).

B. The Governor is unilaterally making laws.

The Governor's ongoing COVID-19-related orders have strayed far into the realm of legislative power. In contrast with executive power—the authority to *execute* laws—"legislative power is the authority, under the Constitution, *to make laws*, and to alter and repeal them." 1 Cooley, Constitutional Limitations (2d ed), pp 89–90. A law is any "regime that orders human activities and relations through systematic application of the force of politically organized society." *Black's Law Dictionary* (11th ed. 2019). There can be no reasonable debate that these executive orders do exactly that.

The Governor's flagship order, the stay-at-home order, EO 2020-96, provides just one example of how these executive orders have strayed far into the realm of lawmaking. The order commands all Michigan residents "to stay at home or at their place of residence," subject to certain exceptions, and prohibits most gatherings. ¶ 3. Michiganders may leave home to get groceries, or to engage in outdoor recreational activities, exempted employment, care for others, or gather in groups with 10 or fewer people. *Id.* ¶ 8. But these exceptions have exceptions, too. For example, a citizen

can get necessary groceries, but if she needs "non-necessary supplies" she can only get them curbside. *Id.* ¶ 8(a)(7)–(8). Besides a few categories, "travel is prohibited, including all travel to vacation rentals." *Id.* ¶ 8(b)–(c). Michigan's businesses are affected, too. Citizens who run businesses that the Governor has declared non-essential, must, among other things, suspend all non-basic operations that require people to leave home. *Id.* ¶ 5. There is, again, an exception for those "who perform resumed activities," *id.* ¶ 5(c); and resumed activities include 18 different categories, but there are many additional exceptions that depend on which "region" the worker is in and what the date is. All "short-term vacation property" rentals are prohibited. *Id.* ¶ 13. Violating the order is punishable as a misdemeanor. *Id.* ¶ 20.

To be sure, this is not just about one order. The Governor has issued 98 COVID-19-related executive orders—more than any other governor. These orders are not only numerous, but the most expansive in scope. EO 2020-54 prohibits entering a building to evict someone. EO 2020-17 suspended all "non-essential medical and dental procedures." EO 2020-58 purports to extend the statute of limitations, and EO 2020-38 to revise and suspend certain FOIA mandates. And EO 2020-70 restricted the ability of the faithful to congregate and freely exercise their religion. Five signatures, by one person, unilaterally overrode the legislatively-enacted laws, and imposed new laws, for whether Michigan's property owners may regain control of their property, how Michigan's doctors may practice medicine, which patients may seek what treatments, when Michigan defendants are relieved of lawsuits that the Legislature had declared stale, how long Michigan's citizens can be

made to wait for public documents, and how people choose to worship their creator. And these are just a few of the orders. The overwhelming majority of the Governor's orders are in this same vein.

The Governor's executive orders improperly exercise lawmaking power. They reorder the way Michigan's citizens work, the way we shop, the way we realize our rights, the way we interact with our neighbors, the way we travel, the way we spend our leisure, and how we may see our family. Michigan residents are at this moment foregoing Governor-declared non-essential functions of civilization to "follow the law." And Michigan's businesses are refusing otherwise lawful transactions with willing patrons because the Governor has declared those transactions criminal. In fact, the threat of criminal enforcement looms over many otherwise unexceptional activities because the Governor says her orders are the law. This restructuring of the livelihoods and social interactions of Michigan's citizens is incontrovertibly lawmaking.

C. The separation of powers is not diminished by crisis.

"The Constitution … is concerned with means as well as ends. The Government has broad powers, but the means it uses to achieve its ends must be consistent with the letter and spirit of the constitution." *Horne v Dept of Agric*, 576 US 350; 135 S Ct 2419; 192 L Ed 2d 388 (2015). "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." *Id.* "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon

power granted or reserved." *Home Bldg & L Ass'n v Blaisdell,* 290 US 398, 425; 54 S Ct 231; 78 L Ed 413 (1934).

This Court, and many other state supreme courts, have said the same. See *People ex rel Twitchell v Blodgett*, 13 Mich 127, 139 (1865); see also, e.g., *Fed Land Bank of Wichita v Story*, 1988 OK 52; 756 P2d 588, 593 (1988); *State ex rel Dept of Dev v State Bldg Com'n*, 139 Wis 2d 1, 9; 406 NW2d 728 (1987); *Matheson v Ferry*, 641 P2d 674, 690 (Utah, 1982); *Worthington v Fauver*, 88 NJ 183, 207; 440 A2d 1128 (1982); *Opinion to the Governor*, 75 RI 54, 60; 63 A2d 724 (1949). Indeed, when state courts consider the "executive powers exercised by state officials during emergencies," their decisions "consistently reinforce[] the understanding that there are no inherent executive powers under state constitutions, only delegated powers that must be managed by previously adopted statutes." Rossi, *State Executive Lawmaking in Crisis*, 56 Duke L J 237, 252 (2006).

Nor can the Governor usurp the lawmaking power merely because she disagrees with the Legislature's response to the COVID-19 crisis. The separation of powers must be respected, even when one branch's "power is usurped or abused" by another. Even then, another branch may not "attempt[] to correct the wrong by asserting a superior authority over that which by the constitution is its equal." *Musselman*, 200 Mich App at 665; see also, e.g., *Maryville Baptist Church, Inc v Beshear*, No 20-5427, 957 F3d 610, ___, at *7 (CA 6, May 2, 2020) ("[W]ith or without a pandemic, no one wants to ignore state law in creating or enforcing these [executive] orders."); *Wisconsin Legislature v Palm*, No. 2020AP765-OA, 2020 WL 2465677, at

*22 (Wis, May 13, 2020) ("Fear never overrides the Constitution. Not even in times of public emergencies, not even in a pandemic.").

Many of these ideas were captured in Justice Jackson's famous concurrence in *Youngstown Sheet & Tube Co v Sawyer,* 343 US 579; 72 S Ct 863; 96 L Ed 1153 (1952). There, Justice Jackson noted that the Executive Branch had functionally asked "for a resulting power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law." *Id.* at 646. Though many thought that finding such power for the executive "would be wise," that "is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies." *Id.* at 649–650. Nevertheless, Justice Jackson explained, "emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them." *Id.* at 652. He concluded: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." *Id.* at 655. So too here.

Because the separation of powers is a cornerstone of our form of government, and because it is *the* foundational structural protection against the abuse of our liberties, the courts must resist all temptations to sacrifice it for expediency. "The hydraulic pressure inherent within each of the separate Branches to exceed the outer

limits of its power, even to accomplish desirable objectives, must be resisted." *Immigration and Naturalization Serv v Chadha*, 462 US 919, 951; 103 S Ct 2764; 77 L Ed 2d 317 (1983).

D. The EPGA's supposed delegation of power cannot save the Governor's COVID-19 executive orders.

Michigan's foremost constitutional law expert, Justice Cooley, considered it a "settled maxim[] in constitutional law" that "the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority." 1 Cooley, Constitutional Limitations (2d ed), p 116 ("Where the sovereign power of the State has located the authority, there it must remain[.]"). The Legislature may not "relieve itself of the responsibility" to make laws, nor may it "substitute the judgment, wisdom, and patriotism of any other body" for its own. *Id.* at 116–117. At most, "the Legislature, within limits defined in the law, may confer authority on an administrative officer or board to make rules as to details, to find facts, and to exercise some discretion, in the administration of a statute." *Ranke v Michigan Corp & Sec Comm*, 317 Mich 304, 309; 26 NW2d 898 (1947). These acts of execution are far different from lawmaking.

The EPGA, as interpreted by the Governor and affirmed by the Court of Claims, is functionally an open-ended grant of legislative power. The EPGA states that, after the Governor declares an emergency, she "may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31. As outlined above, the Governor believes this language entitles her to

make rules touching the most intimate parts of Michiganders' lives. Judging from the orders she has issued, the Governor has not felt constrained by the examples of statutory power reflected in the actual statutory text. She has even rendered many ordinary activities of daily life criminal. But the power to "declare what shall constitute a crime, and how it shall be punished, is an exercise of the sovereign power of a state, and is inherent in the legislative department of the government. Unless authorized by the constitution, this power cannot be delegated by the legislature to any other body or agency." *People v Hanrahan*, 75 Mich 611, 619; 42 NW 1124 (1889); see also *Fahey v Mallonee*, 332 US 245, 249; 67 S Ct 1552; 91 L Ed 2030 (1947) (noting that in two prior cases where the US Supreme Court struck down statutes as violations of the non-delegation doctrine, both "dealt with delegation of a power to make federal crimes of acts that never had been such before and to devise novel rules of law in a field in which there had been no settled law or custom").

The Governor construes the EPGA to mean that she can rule by executive fiat on any public policy issue remotely touched or affected by the COVID-19 pandemic. For example, her statute-of-limitations executive order is not aimed at controlling the COVID-19 pandemic itself—it is aimed at controlling the legal ramifications. Many of her COVID-19 executive orders aim to control the secondary social effects of the pandemic, not the pandemic itself. Some, in an exercise of power two or three degrees divorced from the pandemic, seek to regulate the effects of the executive orders themselves. See, e.g., EO 2020-63 (suspending the expiration of personal protective orders because "proceedings designed to protect vulnerable individuals" have in

"some cases" become "exceedingly difficult" in part because of the Governor's own control measures). If the EPGA can be interpreted to give the Governor power to control literally any aspect of our social structure that is affected by the pandemic, with no deadline for the end of that exercise of raw power, it provides her substantively limitless legislative power. With a little creativity, this approach would effectively transfer the entire legislative power of the State (if not more) to the Governor during an emergency. No statute can transfer that amount of raw legislative power to another branch. Cf. *Michigan State Hwy Comm v Vanderkloot*, 43 Mich App 56, 62; 204 NW2d 22 (1972) ("[A] statute which in effect reposes an absolute, unregulated, and undefined discretion in an administrative agency … pass[es] beyond the legitimate bounds of delegation of legislative power."). If the Governor believes the EPGA did, she is wrong, and her actions unconstitutional. And if the Court of Claims were correct that the EPGA delegates such unlimited authority, the EPGA would be unconstitutional.

Even assuming that this *amount* of power is delegable, the EPGA contains insufficient standards to guide its use. To avoid an unconstitutional delegation of legislative power, a statute "must contain language, expressive of the legislative will, that defines the area within which an agency is to exercise its power and authority." *Westervelt*, 402 Mich at 439. "[A] complete lack of standards is constitutionally impermissible." *Oshtemo Charter Tp v Kalamazoo Co Rd Com'n*, 302 Mich App 574, 592; 841 NW2d 135 (2013). Importantly, standards exist on a spectrum—what is appropriate in one case will not be appropriate in another. "[D]elegation must be

made not on the basis of the scope of the power alone, but on the basis of its scope plus the specificity of the standards governing its exercise. When the scope increases to immense proportions … the standards must be correspondingly more precise." *Synar v United States*, 626 F Supp 1374, 1386 (DDC, 1986); accord *Osius v City of St Clair Shores,* 344 Mich 693, 698; 75 NW2d 25, 27 (1956) (explaining that "the standards prescribed for guidance [must be] as reasonably precise as the subject-matter requires or permits"). To put it simply: greater delegation requires greater standards. And standards are especially important when delegating to the Governor; delegating to a chief executive "pose[s] the most difficult threat to separation of powers, and therefore require the strictest standards," because a chief executive "is less closely scrutinized by [the Legislature] than are agencies." Kaden, *Judicial Review of Executive Action in Domestic Affairs*, 80 Colum L Rev 1535, 1545 (1980). The Court should therefore exercise a heightened level of scrutiny and skepticism.

To decide whether a statute contains sufficient standards, the Court applies a three-step analysis. First, the statute "must be read as a whole; the provision in question should not be isolated but must be construed with reference to the entire act." *State Conservation Dept v Seaman*, 396 Mich 299, 309; 240 NW2d 206 (1976). Second, the standard must be "as reasonably precise as the subject matter requires or permits." *Id.* (cleaned up). And third, "if possible[,] the statute must be construed in such a way as to render it valid, not invalid, as conferring administrative, not legislative power and as vesting discretionary, not arbitrary, authority." *Id.* (cleaned up).

The EPGA, at least as the Court of Claims has interpreted it, fails each part of the relevant test.

First, taking the statute as a whole, there is little guidance for the Governor to be found in the EPGA. The statute is exceptionally short. It is comprised of three sections, only one of which is substantive. That substantive section says that "[d]uring times of great public crisis . . . the governor may proclaim a state of emergency." MCL 10.31(1). After so declaring, the governor "may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." *Id.* Although the section gives examples of such orders, it says the governor's powers are not limited to those orders. *Id.* There is no temporal limitation. It set out just one thing that the Governor cannot do: seize guns. *Id.* In sum, the EPGA's standard consists solely of two words: "reasonable" and "necessary." And the statute itself (at least as read by the Court of Claims) suggests that this passing pair of words is not intended to provide any functional limit on the governor's judgment, because the provision laying out the "construction of the act" emphasizes that the governor must be given "sufficiently broad power" to do what she reach some unspecified level of "adequate control over persons and conditions." MCL 10.32.

Second, in the Court of Claims' apparent view, the subject matter of the EPGA includes any possible public-policy area affected by COVID-19. Again, given the inherent nature of a contagious disease, this spin on the EPGA allows orders on practically every imaginable topic. Thus, as the Court of Claims has applied it here,

the Legislature shifted to the executive branch vast lawmaking power over every corner of the economy and social life with only the guiding words "reasonable" and "necessary." "Reasonableness" is already the lowest standard of acceptable governmental action; actions that fail to meet that standard—in other words, arbitrary and capricious conduct—are always unlawful. And importantly, the "necessary" referenced in MCL 10.31 isn't even the formulaic "necessary to implement this act." Rather, it is "necessary to protect life and property" or bring the crisis "under control"—a far broader mandate, which, as interpreted by the Governor, includes actions unrelated to the crisis at hand. The words grant pure discretion, unguided by any other standard. See, e.g., *Yant v City of Grand Island*, 279 Neb 935, 945; 784 NW2d 101 (2010) ("[R]easonable limitations and standards may not rest on indefinite, obscure, or vague generalities[.]"); *Lewis Consol Sch Dist of Cass Co v Johnston*, 256 Iowa 236, 247; 127 NW2d 118 (1964) ("Is it sufficient that an administrative officer, or body, be given power to do whatever is thought necessary to carry out their purposes and to enforce the laws, without other guide than that they must keep within the law? We think something more is required.").

The Court of Claims believed that a provision referring to the need "to protect life and property or to bring the emergency situation within the affected area under control" provides additional standards. The ruling confuses the statute's *goals* with its *standards*. The goal of the EPGA is to protect life and property and to manage unforeseen crises. Even that goal is rather ambiguous. But more to the point, *how* the Governor achieves that goal is signing "reasonable," "necessary" executive orders.

In short, these other phrases are *not* the standards, but objectives. The only *standards* guiding how the Governor achieves that objective are that her orders be "reasonable" and "necessary." See *Palm,* 2020 WL 2465677, at *8 (holding that claimed delegation of lawmaking authority during existence of authority was improper given lack of procedural safeguards and standards accompanying the delegation); cf. *United States v Amirnazmi*, 645 F3d 564, 577 (CA 3, 2011) (holding that emergency statute was not improper delegation of authority only because it "struck a careful balance between affording the President a degree of authority to address the exigencies of national emergencies and restraining his ability to perpetuate emergency situations indefinitely by creating more opportunities for congressional input").

Similarly, the Court of Claims appeared to deem an expressly *non-exhaustive* list of *examples* of appropriate actions under the EPGA as a silent constraint on the Governor's abilities under the act. A list that says powers are "not limited to" those listed cannot constitute a "limit." See, e.g., *State v Thompson*, 92 Ohio St 3d 584, 588; 752 NE2d 276 (2001) (explaining that "[t]he phrase 'including, but not limited to' 'indicates that what follows is a nonexhaustive list of examples,' such that a decisionmaker looking at a list of such factors may nevertheless consider whatever he deems relevant). Likewise, the Court of Claims found it important that the statute defined some moments when the Governor's authority was said to be triggered under the act. But those times are determined at the discretion of the Governor. And that

aside, defining when powers are triggered does very little to provide guidance in how to *exercise* those powers.

The Governor also rested her claimed authority on a permutation of the "emergencies justify laxity" approach. She has repeatedly said that EPGA's subject matter—unforeseen crises—requires flexibility, such that the "reasonable" and "necessary" standards are as specific as they can be. The Court of Claims seemed to bite at this notion. Yet it sounds much like the argument from necessity that Justice Jackson so persuasively refuted in *Youngstown*. And it is a double-edged sword: as the breadth of her powers grow, so does the need for proportionally strong standards. If the EPGA really gives her such broad powers in the event of unforeseen crises, there must be better standards than "reasonable" and "necessary." "Necessary" may be good enough when the question is whether an employee's term of employment may be extended past a mandatory retirement age. See *Klammer v Dept of Transp*, 141 Mich App 253, 261–262; 367 NW2d 78 (1985) (explicitly limiting its holding regarding "necessary" to "the context of th[e] case"). But that is a far different determination than exercising minute-by-minute regulation of basic actions by all Michiganders with the bite of criminal sanctions lurking in the background. See *United States v Robel*, 389 US 258, 275; 88 S Ct 419; 19 L Ed 2d 508 (1967) (Brennan, J., concurring) ("The area of permissible indefiniteness [in delegation standards] narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights[.]"). Similarly, the Court of Claims was mistaken in finding authority in a Michigan no-fault insurance statute allowing for the recovery of "reasonable" medical

charges. See MCL 500.3107(1)(a). That statute does not in any way concern a limit on the exercise of delegated authority, and a jury's determination of "reasonableness" is far different from an executive's exercise of constitutionally un-cabined authority.

In the end, this case is much like *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 55; 367 NW2d 1 (1985), in which this Court applied the *Seaman* factors and concluded that a statute was an impermissible delegation. There, the Court confronted a statute establishing a panel of three actuaries to resolve risk-factor disputes. The Court held the statute violated *Seaman*'s test where it simply provided the Insurance Commissioner with the discretion to "approve" or "disapprove" risk factors proposed by health care corporations. *Id.* at 53–54. Importantly, *Blue Cross* struck down the provision even though the statute had a clearly and specifically articulated public policy *goal* to guide execution of the act: "to . . . secure for all of the people of this state who apply for a certificate, the opportunity for access to health care services at a fair and reasonable price." MCL 550.1102(2). Like the statute in *Blue Cross*, the EPGA, under the Court of Claims' interpretation, includes statutory goals but vests the Governor with nearly discretion-less power to meet those goals. See also *Oshtemo Charter Tp*, 302 Mich App at 592 (expressing "extreme[] skeptic[ism]" towards a statute that "contain[ed] neither factors for the [decisionmaker] to consider … nor guiding standards").

The Court of Claims thought this case was closer to *Blank v Dept of Corr*, 462 Mich 103, 124; 611 NW2d 530 (2000), but *Blank* is fundamentally different. There, this Court considered whether the Department of Correction's ("DOC") enabling act

was an "unconstitutionally broad delegation of legislative power." The Court held that the statute's "many" limitations on the DOC's authority were "sufficient guidelines and restrictions." *Id.* at 125–126. These guidelines included, among many others, abiding by the Administrative Procedures Act ("APA"); promulgating "rules only for the effective control and management of DOC"; prohibiting rules that applied to smaller municipal jails; taking "necessary or expedient" action to properly administer the act; and forbidding rules on firearms and name changes. *Id.* at 126. The delegation was therefore "sufficiently limited to pass constitutional muster." *Id.*

The DOC's enabling statute's standards included significant limitations; in contrast, the EPGA's include two perfunctory words. *Blank* also required adherence to the APA; the EPGA does not. *Blank* further included specific substantive limitations; as interpreted by the Court of Claims, the EPGA does not. And *Blank*'s use of the "necessary or expedient" language was related to actions implementing the act, not a category so broad as "protecting life and property." In short, the power the Governor claims under the EPGA is much greater than the power delegated to the DOC, but it is controlled by a fraction of the standards. The Court of Claims, however, took only one of the *Blank* standards ("necessary and expedient"), held it up in isolation, and declared the "necessary" and "reasonable" language at issue here was therefore good enough on its own.

Third, and finally, the Legislature has already offered the Court a construction of the EPGA that could save it from invalidation. That construction would, however, invalidate the Governor's particular *use* of the EPGA in this instance. That is

unavoidable. Because, as the Governor interprets it, the EPGA includes no real, substantive standards governing her exercise of an unparalleled delegation of authority, the Court should find that her interpretation, and that of the Court of Claims, is unconstitutional. If the Governor's reading of the statute is wrong, then her acts are without authority. If she is right, then the act itself must fall.

CONCLUSION

"[I]t may easily happen that specific [legal] provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding." *Twitchell*, 13 Mich at 139. The EPGA does not give the Governor the power that she insists it does. Even if it did, it would be an impermissible, standard-free delegation of the Legislature's lawmaking power. In either event, the Governor's declaration of a state of emergency—and all the executive orders that derive from it—cannot stand. For all these reasons, then, the Legislature respectfully asks that this Court grant the Legislature's emergency bypass application for leave to appeal and reverse that part of the Court of Claims' decision sustaining the Governor's actions under the EPGA.

Respectfully submitted,

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Dated: May 22, 2020

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

Supreme Court No.

Court of Appeals No.
Court of Claims No. 20-000079-MZ

THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE, OR REGULATION OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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INDEX OF EXHIBITS

Exhibit	Description
1	May 21, 2020 Order of Court of Claims
2	May 15, 2020 Transcript of Hearing Before Court of Claims
3	Governor's April 27, 2020 Letter
4	Senate Fiscal Analysis, 1990 PA 50 (1990)
5	April 6, 1945 *Lansing State Journal* Article
6	Milliken Special Message
7	Social Distancing Law Project: Assessment of Legal Authorities (2007)