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-00414

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_____/

Exhibit N

STATE OF MICHIGAN
COURT OF CLAIMS

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Plaintiffs,

v

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

Defendant.

No. 20-000079-MZ

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GRETCHEN WHITMER'S MAY 12, 2020 CORRECTED RESPONSE TO PLAINTIFFS' MOTION FOR IMMEDIATE DECLARATORY JUDGMENT

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INTRODUCTION

The Legislative Plaintiffs come to this Court seeking only to build a constitutional crisis atop a public health crisis in Michigan. There is no dispute about the persistence of the latter. Unfortunately, the scourge of COVID-19 is nowhere near its end. The novel coronavirus that causes COVID-19 has rapidly spread across the planet, infecting millions, and killing hundreds of thousands. In response, jurisdictions the world over have had to impose aggressive measures to stem the viral tide that has overwhelmed healthcare systems. Schools have been shuttered, gatherings postponed, and business operations curtailed.

Here at home, Michigan is one of the states hardest hit by the pandemic. As of May 1, 2020, at least 42,356 were confirmed infected and 3,866 had died, all in less than eight weeks; today the numbers continue to increase. Governor Gretchen Whitmer declared states of emergency and disaster in response to the pandemic. Consistent with her duties to protect the health and welfare of the State and its citizens and respond to emergencies in the state, the Governor put measures in place to suppress the spread of the virus, incrementally loosening restrictions as the public health permits. Because of these efforts, the disease's spread has been slowed and countless lives have been saved. But the crisis is far from over, and the virus remains ever-present—highly contagious, still untreatable, and potentially poised for resurgence.

The current Michigan Legislature denies none of this. Yet the Legislative Plaintiffs now prefer to dictate the State's emergency response through legislative action. Past Legislatures, however, have thought better of putting a slow and

fractious multi-member body in charge of responding to public health emergencies that demand a rapid, coordinated, and nimble response. Through two laws—the Emergency Powers of the Governor Act (EPGA) and the Emergency Management Act (EMA)—those Legislatures vested such authority in the executive branch, just as legislatures have done across the country.

The Legislative Plaintiffs, of course, remain free to amend these laws, even over the Governor's objection, if they are dissatisfied with the authority they vest in the Governor or the Governor's exercise of that authority. But they have not done so. Instead, the Legislative Plaintiffs now asks this Court to referee this political disagreement and do their legislative work for them. They cannot, however, use the courts in this manner, and they lack standing to bring this suit. The Legislative Plaintiffs have failed to show a sufficient injury to an institutional interest, and their action against the Governor raises separation of powers concerns. Moreover, nothing in the declaratory relief they seek is necessary to guide their future conduct and preserve their legal rights—they only seek to affect the *Governor's* rights.

They fare no better on the merits of their challenges to the Governor's exercise of her emergency authority, as both the EPGA and the EMA authorize the Governor's actions in proclaiming and responding to the states of disaster and emergency. Under the EPGA, the Legislature plainly granted the Governor authority to proclaim an emergency and reasonably guided her discretion in doing so. And while Legislative Plaintiffs attempt to engraft limitations on this authority and cast doubt on its constitutionality, settled caselaw and the EPGA's plainly

stated text make short work of those arguments. The Governor's declaration and reaffirmation of an emergency under the EPGA remains undisturbed.

Independently, the EMA contains both a general authority of the Governor to "cope with dangers to this state or the people of this state" and additional authority that is activated upon the Governor's declaration of a state of emergency or disaster. If the states of emergency or disaster—which are defined by the act as "executive order[s]"—are not extended by the Legislature after 28 days, the Governor must terminate those executive orders. While the Legislative Plaintiffs contend that the Governor ignored this limitation, she in fact adhered closely to it—she timely terminated earlier declarations and issued new ones, consistent with her obligation to do so when disaster or emergency conditions afflict our State.

The Legislative Plaintiffs frame the Governor's actions—particularly her new declarations—as unprecedented. But that flips the conversation on its head. The pandemic that Michigan is facing is unprecedented, as is the Legislative Plaintiffs' refusal to ratify the declarations the Governor lawfully issued in response to this ongoing and deadly crisis. That refusal may be their right under the EMA, but the Governor's responsibility to cope with the dangers presented by this pandemic, and to issue declarations activating necessary resources and powers to do so, is her duty. But even if this Court were to find that the Governor exceeded her authority under the EMA, that leaves her declaration under the EPGA undisturbed. Because the Governor's declarations work as a belt and suspenders, even if the belt is removed, the suspenders remain.

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

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

While long on gripes about the Governor's actions, the Legislative Plaintiffs' brief offers a glaringly sparse discussion of the actual and undisputed public health crisis that has consumed not just Michigan, but the entire planet. Those facts—not political squabbles—are what matter here, as they demonstrate not only the circumstances under which the Governor acted, but also the reasons why those actions were necessary and warranted, both to protect the public health and safety of the State and to discharge her duties as Governor under the laws the Legislature has enacted.

COVID-19 infects the globe.

SARS-CoV-2 is similar to other coronaviruses (a large family of viruses that cause respiratory illnesses), but the strain is "novel," *i.e.*, never-before-seen. This

means that there is no general or natural immunity built up in the population (meaning everyone is susceptible), no vaccine, and no known treatment to combat the virus itself (as opposed to treatment to mitigate its symptoms).

It is widely known and accepted that the virus is highly contagious, spreading easily from person to person via "respiratory droplets."[1] Experts agree that being anywhere within six feet of an infected person puts you at a high risk of contracting the disease, called COVID-19.[2] But even following that advice is not a sure-fire way to prevent infection. The respiratory droplets from an infected person can land on surfaces, and be transferred many hours later to the eyes, mouth, or nose of others who touch the surface. Moreover, since many of those infected experience only mild symptoms, a person could spread the disease before he even realizes he is sick. Most alarmingly, a person with COVID-19 could be asymptomatic, yet still spread the disease.[3] Everyone is vulnerable either as a potential victim of this scourge or a carrier of it to a potential victim.

Because there is no way to immunize or treat for COVID-19, the Centers for Disease Control and Prevention have indicated the best way to prevent illness is to

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

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

[3] (*Id.*)

"avoid being exposed."[4] And as experience from prior pandemics such as smallpox and the 1918 Spanish Influenza have indicated, early intervention to slow transmission is critical.

In keeping with this advice, governmental entities have stressed the critical import of "social distancing," the practice of avoiding public spaces and limiting movement.[5] The objective of social distancing is what has been termed "flattening the curve," that is, reducing the speed at which COVID-19 spreads. If the disease spreads too quickly, the limited resources of our healthcare system could easily become overwhelmed.[6]

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

On March 10, 2020, in response to the growing pandemic in Michigan, Governor Whitmer declared a state of emergency and invoked the emergency powers available to the Governor under Michigan law—pursuant to her authority under the Emergency Powers of Governor Act (EPGA), the Emergency Management Act (EMA), and her constitutional authority under Article V, Section 1.[7]

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[4] (*Id.*)

[5] (*Id.*)

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

[7] EO No. 2020-4, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521576--,00.html. (Attached as Exhibit D).

On March 13, 2020, Governor Whitmer issued an executive order prohibiting assemblages of 250 or more people in a single shared space with limited exceptions, and ordering the closure of all K-12 school buildings.[8] Yet, even in the face of the social distancing recommendations and the six-foot rule of thumb, on Saturday, March 14, the public was out in droves. On March 16, 2020, the Governor ordered various places of public accommodation, like restaurants, bars, and exercise facilities, to close their premises to the public.[9]

Subsequently, on March 23, 2020, again in response to the spreading pandemic in Michigan, Governor Whitmer issued an executive order which essentially ordered all persons not performing essential or critical infrastructure job functions to stay in their place of residence, other than to obtain groceries, care for loved ones, engage in outdoor activity consistent with social distancing, and other limited exceptions.[10] Several other orders intended to address the pandemic in

[8] EO No. 2020-5, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521595--,00.html. (Attached as Exhibit E).
[9] EO No. 2020-9, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521789--,00.html. (Replaced by EO 2020-20). (Attached as Exhibit F).
[10] EO No. 2020-21, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html. (Attached as Exhibit G). That order was to continue through April 13, 2020; however, on April 9, 2020, the Governor issued Executive Order 2020-42, extending the Stay-home Order through April 30, 2020 at midnight. EO No. 2020-42, available at https://content.govdelivery.com/attachments/MIEOG/2020/04/09/file_attachments/1423850/EO%202020-42.pdf. (Attached as Exhibit H).

Michigan were issued pursuant to her authority under the EPGA, EMA, and the Constitution.[11]

On April 1, the Governor issued Executive Order 2020-33, which expanded upon the prior declaration of a state of emergency and, consistent with the virus's aggressive and destructive spread, declared states of emergency and disaster across the State of Michigan. Under the EMA (though not the EPGA), the declarations must be terminated after 28 days absent resolution by both houses of the Legislature. MCL 30.403(3), (4). On April 7, the Michigan House and Senate approved an extension of the Governor's declaration until April 30, 2020.[12]

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

Prior to April 30, the Governor again asked the Legislature to extend the states of disaster and emergency under the EMA pursuant to MCL 30.403(3) and (4), but the Legislature did not do so. Notably, neither in public statements nor in its pleading to this Court have the Legislative Plaintiffs expressed disagreement that the conditions persist that warrant declarations of emergency and disaster.[13]

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

[12] 2020 SCR 24. (Attached as Exhibit I).

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

On April 30, 2020, then, the Governor issued three executive orders. First, in Executive Order 2020-66 (Exhibit J), the Governor terminated the states of emergency and disaster declared under the EMA as required by MCL 30.403(3) and (4). The Executive Order acknowledged and quoted the statutory language of MCL 30.401—including its requirement that "the governor shall issue an executive order or proclamation declaring the state of [disaster/emergency] terminated, unless a request by the governor for an extension of the state of [disaster/emergency] for a specific number of days is approved by resolution of both houses of the legislature." EO 2020-66. Although noting that "the threat and danger posed to Michigan by the COVID-19 pandemic has by no means passed, and the disaster and emergency conditions it has created very much exist," the Governor recognized that the Legislature—"despite the clear and ongoing emergency and disaster conditions afflicting our state—has refused to extend [the states of emergency and disaster] beyond today." *Id.* Accordingly, she was required by the EMA's plain language to issue an order "terminat[ing]" the states of emergency and disaster. *Id.*

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

After terminating the prior declarations, the Governor again declared a state of emergency and a state of disaster under the EMA. Executive Order 2020-68 (Exhibit K). She also explained the basis for this new declaration. Although the measures issued pursuant to her emergency authority had been effective, "the need for them—like the unprecedented crisis posed by this global pandemic—is far from over." *Id.* COVID-19, she said,

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

The Governor further found, "[t]he health, economic, and social harms of the COVID-19 pandemic thus remain widespread and severe, and they continue to constitute a statewide emergency and disaster." *Id.* Accordingly, the Governor stated: "I now declare a state of emergency and a state of disaster across the State of Michigan under the Emergency Management Act." *Id.* Finally, the Governor ordered that "[a]ll previous orders that rested on Executive Order 2020-33 now rest on this order." *Id.*

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

In the third Executive Order, the Governor reaffirmed the state of emergency under the EPGA, ordering that "[a] state of emergency remains declared across the State of Michigan under the Emergency Powers of the Governor Act of 1945." Executive Order 2020-67 (Exhibit L). And like in 2020-68, she ordered "Executive Order 2020-33 is rescinded and replaced. All previous orders that rested on Executive Order 2020-33 now rest on this order." *Id.*

The Legislative Plaintiffs bring suit.

Membership of the House and Senate (the Legislative Plaintiffs) bring suit, seeking an expedited declaratory judgment that the Governor's authority to act under the EMA ended April 30, 2020; the EPGA does not provide authority for the Governor's COVID-19 executive orders; the Governor has no lawmaking power

under Const 1963, art 5, § 1; and the Governor's ongoing COVID-19 executive orders violate the separation of powers. (Compl, Request for Relief.) The Governor now responds.

ARGUMENT

I. The Legislative Plaintiffs lack standing.

Dissatisfied by the Governor's issuance of Executive Orders 2020-67 and 2020-68, the Legislative Plaintiffs have a clear, unique, and powerful remedy at law: they can change the law, even over the Governor's objection. Instead, they have chosen to sue the Governor, asking this Court to do their work for them. This, they cannot do: they lack standing under the law to use the courts in that way.[14] On this basis alone, the request for a declaratory judgment should be denied.

"'Standing is the legal term used to denote the existence of a party's interest in the outcome of the litigation; an interest that will assure sincere and vigorous advocacy.'" *League of Women Voters of Michigan v Secretary of State*, ___ Mich App

[14] Furthermore, the Legislative Plaintiffs have even failed to meet the requirements that their own laws impose on all who may seek relief from this Court. Namely, they failed to verify their complaint "before an officer authorized to administer oaths." MCL 600.6431(1). As a condition precedent for bringing a claim against the state, *Fairley v Dep't of Corrections*, 497 Mich 290, 297 (2015), this requirement renders the complaint legally lacking. Here, the Legislative Plaintiffs sue Governor Whitmer in her official capacity. And since " 'a suit against a state official in his or her official capacity is . . . no different from a suit against the State itself,' " *Mays v Snyder*, 323 Mich App 1, 88–89 (2018), quoting *Will v Mich Dep't of State Police*, 491 US 58, 66 (1989), their claim is one "against the state" that is subject to the verification requirements of MCL 600.6431(1). Lacking proper verification, the Complaint is inadequate as a matter of law. The Legislative Plaintiffs' failure to cure this dispositive defect would mean any action of this Court other than dismissing the complaint would be void ab initio. *Fox v Board of Regents of the University of Michigan*, 375 Mich 238, 242–243 (1965).

___, ___ (2020) (Docket Nos. 350938, 351073), slip op at *6 (Exhibit M), quoting *Allstate Ins Co v Hayes*, 442 Mich 56, 68 (1993) (citations omitted). When standing is at issue, "the question is whether the person whose standing is challenged is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable." *Id.*, slip op at *6–7 (cleaned up). "[A] litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Id.*, slip op at *7, citing *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372 (2010).

"A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *League of Women Voters of Michigan*, ___ Mich App at ___; slip op at *7, quoting *Fieger v Comm'r of Ins*, 174 Mich App 467, 471 (1988). Where a cause of action has not been provided by law, a plaintiff must have "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large." *Id.*, slip op at *7, quoting *Lansing Schools Ed Ass'n*, 487 Mich at 372. Thus, relevant here, a litigant has standing if the litigant has a special right that will be detrimentally affected in a manner distinct from the citizenry at large, or has met the requirements of MCR 2.605. *Id.*

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

In *House Speaker* (*Dodak) v State Administrative Board*, 441 Mich 547 (1993), several individual members of the House and Senate sued challenging interdepartmental transfers by the State Administrative Board. *Id*. at 550–554. The Supreme Court observed that standing ensures that "a party's interest in the outcome of litigation that will ensure sincere and vigorous advocacy." *Id*. at 554. But evidence that a party will engage in full and vigorous advocacy, by itself, is insufficient. Instead, standing requires a demonstration that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large. *Id*. at 554. In *Dodak*, the plaintiffs claimed "standing on the basis of their status as legislators" and alleged that the transfers "reduced their effectiveness as legislators and nullified the effect of their votes." *Id*. at 555.

Citing federal precedent, the *Dodak* Court stated that "[u]nder limited circumstances, the standing of legislators to challenge allegedly unlawful executive actions has been recognized." *Id*. at 555 (citation omitted). But a legislator bears a "heavy burden" to establish standing, especially where a dispute "may interfere with the separation of powers between the branches of government." *Id*. (citation omitted). "For these reasons, plaintiffs who sue as legislators must assert more than 'a generalized grievance that the law is not being followed.' Instead, they must establish that *they have been deprived of a 'personal and legally cognizable interest peculiar to [them].*'" *Id*. at 556 (emphasis added).

Here, the plaintiffs are nominally the legislative bodies, but the *Dodak* analysis is relevant to both individual legislators and to the body as a whole. As with an individual legislator, to establish standing, a legislative body must allege that it has been deprived of a cognizable interest peculiar to the body. *Tennessee General Assembly v US Dep't of State*, 931 F3d 499, 507 (CA 6, 2019), citing *Ariz State Legislature v Ariz Independent Redistricting Comm*, 135 S Ct 2652, 2664 (2015).

But just as "a generalized grievance that the law is not being followed" is not a sufficient injury to confer standing on an individual legislator, *Dodak*, 441 Mich at 556, neither is it a sufficient "institutional injury" to support standing as a legislative body. See, e.g, *Virginia House of Delegates v Bethune-Hill*, 139 S Ct 1945, 1953 (2019) (discussing legislative standing to defend constitutionality of statutes).

These principles were reaffirmed in *League of Women Voters*, where the Legislature brought an action against the Secretary of State. Slip op at *4. The suit sought a declaration that 2018 PA 608 was constitutional and a valid exercise of the Legislature's authority. *Id.* The Legislature further sought an injunction compelling the Secretary to implement and enforce the Act in question. *Id.*

At the outset, the trial court determined that the Legislature had no standing to sue because it had not demonstrated a particularized injury. *Id.*, slip op at *4. The Court, applying *Dodak,* ultimately affirmed, stating:

> the Legislature is suing to reverse actions by the Secretary, a member of the Executive Branch. The Legislature is thus plainly challenging the actions of members of the Executive Branch. *Dodak* stands for the proposition that courts should not confer standing in matters that have the real possibility of infringing upon the separation of powers. [*Id.*, slip op at *8.]

The situation at hand is analogous.

Here, the Legislative Plaintiffs are suing to reverse the actions of the Governor and are plainly challenging executive action. Undoubtedly, their success in this case would infringe upon the separation of powers by invalidating her implementation of the law and her exercise of the powers vested in her by law. Indeed, that is explicitly the relief that the Legislative Plaintiffs seek. Under *League of Women Voters* and *Dodak*, they cannot obtain that relief in a judicial forum.

The Legislative Plaintiffs claim that the Governor's actions violate the EPGA and the EMA. But even if that were true (it is not), such an alleged injury is not personal or unique to them. Those allegations amount to a contention that the law as contained in the EPGA and EMA is not being followed, which is insufficient to confer standing on the Legislative Plaintiffs. As the court noted in *League of Women Voters*, "once the votes of legislators have been counted and the statute enacted, their special interest as lawmakers has ceased." ___ Mich App at ___; slip op at *7.

The Legislative Plaintiffs fare no better by attempting to cast their claims as Michigan constitutional violations. Whether they frame the Governor's action as allegedly unlawful or unconstitutional, they lack standing to challenge the actions

for the same reasons. In either instance, the alleged injury or deprivation is no different than that accruing to the ordinary citizen. As stated by the Court of Appeals in *League of Women Voters*:

> To accept the Legislature's argument that it has standing here would open the door for the Legislature to seek a declaratory judgment whenever the constitutionality of a statute was challenged. [___ Mich App at ___; slip op at *9.]

In short, the Legislative Plaintiffs simply have not demonstrated a special interest in challenging the executive orders of the Governor that differs in any way from the general interest of the citizenry at large. Where the Legislature has not shown a sufficient injury to an institutional interest, and where its action against the Governor raises separation of powers concerns, it has not "overcome [its] heavy burden" to establish standing. *Dodak*, 441 Mich at 555.

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

Nor can the Legislative Plaintiffs sidestep this result by framing their claims as requests for declaratory relief; *League of Women Voters* makes that clear. MCR 2.605 states that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." An "actual controversy" under MCR 2.605(A)(1) exists when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve that plaintiff's legal rights. *League of Women Voters of Michigan*, ___ Mich App at ___, slip op at *7, citing *UAW v Cent Michigan Univ Trustees*, 295 Mich App 486, 495 (2012). Where no such actual controversy exists, a plaintiff does

not have standing to bring a declaratory action. *Id.*, slip op at *4, citing *City of South Haven v Van Buren Cty Bd of Comm'rs*, 478 Mich 518 (2007).

A case of actual controversy is a "condition precedent to invocation of declaratory relief." *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 55 (2000). "In the absence of an actual controversy, the trial court lacks subject-matter jurisdiction to enter a declaratory judgment." *Lansing Sch Educ Ass'n v Lansing Bd of Educ (On Remand),* 293 Mich App 506, 515 (2011).

"In general, 'actual controversy' exists where a declaratory judgment or decree is *necessary to guide a plaintiff's future conduct in order to preserve his legal rights*." *Pontiac Police & Fire Retiree Prefunded Grp Health & Ins Tr Bd of Trustees v Pontiac No 2*, 309 Mich App 611, 624 (2015), quoting *Shavers v Attorney General*, 402 Mich 554, 588 (1978) (emphasis added). See also *Associated Builders & Contractors v Dep't of Consumer & Indus Servs Director*, 472 Mich 117, 126 (2005), overruled in part on other grounds, 487 Mich at 371 n 18.

Here, the gravamen of the Legislative Plaintiffs' complaint is that they passed laws that are not being followed by the Governor, and that the Governor's actions violate the Michigan Constitution. But if that were enough to create an actual controversy, the Legislature would have standing to bring a lawsuit against any government entity that, in the Legislature's eyes, has allegedly violated the Constitution or failed to enforce or comply with a statute. That outcome would be both an abuse of the court system and an improper curtailing of the legislative and political processes.

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

> Given the definition of "actual controversy" for purposes of MCR 2.605, we are not convinced that the Legislature has demonstrated standing to pursue a declaratory action here. No declaratory judgment is necessary to guide the Legislature's future conduct in order to preserve its legal rights. The Legislature's authority to enact laws is separate and distinct from this Court's role in determining whether any law passes constitutional muster. These "rights" and obligations of the two separate branches of government will remain the same, no matter what the outcome in this matter, such that the preservation of the Legislature's legal rights is not at issue. [*League of Women Voters*, ___ Mich App at ___, slip op at *7.]

The Legislative Plaintiffs contend that they have a special right that is affected in a manner different from the citizenry at large in their right to enact legislation – but this is more spin than reality. Any such contention is belied by the allegations of the complaint, where the Legislative Plaintiffs acknowledge that they have continued significant legislative activities throughout the COVID-19 crisis notwithstanding the Governor's executive orders. In fact, the complaint specifically alleges that the Legislature has passed more than 100 bills on COVID-19 related issues. (Compl, ¶ 43). There is nothing in the Governor's actions that interferes

with the Legislature's ability to legislate. The Legislative Plaintiffs' claim for declaratory relief fails because there is no threat to their power to enact legislation.

Courts are wisely reluctant to hear disputes that may interfere with the separation of powers between the branches of government. "It would be imprudent and violative of the doctrine of separation of powers to confer standing upon a legislator simply for failing in the political process." *Dodak*, 441 Mich at 544–545. That is exactly the situation in this case.

"[A] proper understanding of the doctrine of separation of powers suggests that the personal desires of legislative and executive officers to exercise their authority are not within the 'zone of interests' protected by the provisions of the Constitution and laws conferring such authority. Only the interests of particular individuals who would be aided by the exercise of that authority—and have been harmed by its unlawful deprivation—come within that zone, since the authority was conferred for the benefit not of the governors but of the governed." *Dodak*, 441 Mich at 544 n 17, quoting *Moore v United States House of Representatives*, 733 F.2d 946, 960 (CA DC, 1984). This is particularly applicable here, given that once the votes of the legislators have been counted and the statutes enacted, "their special interest as lawmakers has ceased." *League of Women Voters*, ___ Mich App at ___, slip op at *9.

The Legislative Plaintiffs have not established an actual controversy under MCR 2.605, and they therefore lack standing to bring this lawsuit.

II. The Governor has the independent authority and duty under both the EPGA and the EMA to declare states of emergency and disaster, and to issue orders to protect the health and safety of the State and its people.

Even if the Legislative Plaintiffs could seek their requested relief from this Court, they have not shown any entitlement to it. The Legislative Plaintiffs end the Introduction to their brief with a quote from the Supreme Court, stating, "[e]mergency does not create power." *Home Bldg & L Ass'n v Blaisdell,* 290 US 398, 425 (1934). True enough. But reading the very next paragraph clarifies the Supreme Court's point: "While emergency does not create power, emergency may furnish the occasion for the exercise of power." *Id.* at 426. Through two distinct acts, stated in plain and certain terms, the Legislature has granted the Governor broad but focused authority to respond to emergencies that affect the State and its people. The Governor's challenged actions—declaring states of disaster and emergency during a worldwide public health crisis—are required by the very statutes the Legislature drafted.

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

Faced with "great danger[ ]," state actors are permitted great latitude to secure the public health. *Jacobson v Commonwealth of Massachusetts,* 197 US 11, 29 (1905). In *Jacobson*, the Supreme Court considered a claim that the Massachusetts' mandatory vaccination law, which applied to every person in Cambridge due to a growing smallpox epidemic, violated the defendant's Fourteenth Amendment right "to care for his own body and health in such way as to him seems best." 197 US at 26. The Supreme Court upheld this sweeping, invasive measure

as a proper exercise of the States' police power because of the exigencies and dangerousness of the public health crisis. It affirmed that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. As the Court stated,

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

In holding that the Massachusetts law was constitutional, the Court refused to "usurp the functions of another branch of government" by second-guessing the executive's exercise of police power in such circumstances. *Id.* at 28.

As *Jacobson* well illustrates, the police power has long been recognized as a fundamental and central means by which States can respond in an appropriate and effective fashion to changing political, economic, and social circumstances, and thus to maintain their vitality and order. See also, e.g., *Mugler v Kansas*, 123 US 623, 666 (1887). And as *Jacobson* further confirms, the effective exercise of that power is especially necessary when a State faces an imminent threat to its public health and safety.

B. Consistent with the proper exercise of police power, the Legislature passed laws granting the Governor emergency authority.

The Governor possesses the executive power. Const 1963, art V, § 1. And through the EPGA and the EMA, the Legislature has ensured that the Governor has the necessary tools to deal with emergencies and disasters in this State. During this crisis (and always), the Legislature retains its lawmaking role; indeed, dozens

of bills have been introduced regarding COVID-19 issues. (Pls Br, pp 10–11.) But rather than exercising that lawmaking authority to amend the statutes at issue in this case, it asks this Court to misconstrue them.

The EPGA and the EMA independently provide the Governor with the authority—indeed, the responsibility—to respond to emergency conditions in our State. The earlier-enacted EPGA is best thought of as an entrustment of the State's police power to the Governor in designated public emergencies. The subsequent EMA is a detailed statutory rubric to activate and guide the State and local response efforts and resources in emergency and disaster circumstances.

And let us not forget that the Legislature has full constitutional authority to amend the EPGA and EMA as it sees fit, by veto override if necessary.[15] If asking this Court to strike down one of its own statutes as unconstitutional is not ironic enough, Legislative Plaintiffs come to this Court seeking a shortcut to do what has not been done—amendment of the very laws challenged. Because both emergency acts grant the Governor the authority she has exercised, and because she has stringently abided by the very terms the Legislature used in granting that power, this Court should deny the relief sought.

[15] The Michigan Constitution provides that "[n]o bill shall become law without the concurrence of a majority of the members elected to and serving in each house." Const 1963, art 4, § 26. In addition, "[e]very bill passed by the legislature shall be presented to the governor before it becomes law. . . ." Const 1963, art 4, § 33. In the event of a Governor's veto, the Legislature may override it by a two-thirds vote in each house, *id.*

C. The EPGA grants the Governor broad, but not unlimited authority during a "great public crisis" and "public emergency."

The first, independent source of authority relied on by the Governor to proclaim and respond to a state of emergency is the Emergency Powers of Governor Act (EPGA). See Executive Order 2020-67. The "clear and unambiguous language" of the EPGA makes clear the Legislature's intent in enacting it, and fully authorizes the actions Governor Whitmer has taken in response to the COVID-19 pandemic. *Aroma Wines & Equip, Inc v Columbian Distribution Services, Inc*, 497 Mich 337, 345–346 (2015).

1. The Governor properly declared a state of emergency under the EPGA.

The EPGA, enacted in 1945, provides the Governor with broad and important powers "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state." MCL 10.31(1). The Governor "may proclaim a state of emergency" during these times, or upon "reasonable apprehension of immediate danger" of such an emergency "when public safety is imperiled." *Id.*

Upon the proclamation of a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." *Id.* Any "orders, rules, and regulations promulgated . . . are effective from the date and in the manner prescribed in the orders, rules, and regulations." MCL 10.31(2). And they "may be amended, modified, or rescinded . . .

by the governor" and "shall cease to be in effect upon declaration by the governor that the emergency no longer exists." *Id*. As a whole, the EPGA "invest[s] the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster," and must "be broadly construed to effectuate this purpose." MCL 10.32.

This is undoubtedly a "time[ ] of great public crisis," "disaster," or "similar public emergency," and "public safety is imperiled." MCL 10.31(1). The world over has been ravaged by the COVID-19 crisis, with serious, often fatal, consequences for many due to the virus's easy and rapid transmission, even by those individuals who lack symptoms, and the current lack of adequate treatment, let alone a vaccine. States of emergency exist across our country too, with stringent orders to effectuate social distancing, which is currently the best method to slow the spread of the virus. Since its origin in China, it has traveled to nearly every country on Earth, killing over a quarter million people. Unfortunately, it has hit Michigan particularly hard—if Michigan were a country, it would hover in the top 10 in the world for number of individuals killed. Indeed, in April, it killed more Michiganders than heart disease and cancer combined.[16] As of filing, over 4,300 people have died. And the State (and the nation) "still lack[s] adequate means to fully test for it and trace

[16] Michigan Department of Community Health, Number of Deaths by Select Causes of Death by Month. Available at https://www.mdch.state.mi.us/osr/Provisional/MontlyDxCounts.asp (Attached as Exhibit N).

its spread," EO 2020-67, virtually ensuring an undercount of the number infected and killed, and severely hampering the State's ability to reduce the prohibitions.

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

2. The Legislative Plaintiffs' narrow construction of the EPGA is not borne out by the statute's plain language, and the heavy reliance on the alleged history of the act is misplaced.

In an attempt to avoid the unfavorable result that flows from the EPGA's plain and straightforward text, the Legislative Plaintiffs strain to narrowly read their own statute, suggesting that the EPGA is limited to quelling riots and other uprisings of local concern. (Pls Br, pp 27–38.) But this narrow construction is unwarranted.

First, such a limited reading is directly contrary to the Legislature's own (duly enacted) direction, which mandates that the act be "broadly construed to effectuate [its] purpose." MCL 10.32. And the "purpose" itself was plainly declared:

> It is hereby declared to be the legislative intent to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. [MCL 10.32.]

But the Legislature's direction—in its law, not its brief—to broadly interpret its words need not even be summoned because a reasonable construction of the plain language yields this broad authority.

Second, the Legislative Plaintiffs proffer *a geographical limitation*—an interpretation of the statute that limits a declaration's reach to only local subsets of the State. (Pls Br, p 29.) ("These words—'area,' 'zone,' and 'section'—all establish that the Governor's power is intended to reach some subpart of the state as a whole.") This is simply an attempt to recast the intended, and plainly stated, flexibility of the EPGA as a limitation. The EPGA simply provides that, when declaring an emergency, the Governor must "designate the area involved." MCL 10.31(1). The EPGA then provides an illustrative, and expressly nonexhaustive, list of "orders, rules, and regulations" that the Legislature suggested may be appropriate in response to an emergency—which occasionally includes reference to "zones" or "section[s]," but just as often does not. *Id.* All of this simply and wisely recognizes that public emergencies, and necessary responses thereto, may come in many different shapes and sizes, depending on the nature of the threat to public safety. And none of it suggests that the Governor, when faced with a statewide threat to public safety, cannot declare a state of emergency commensurate with that threat. Here, the "area" designated by the Governor is the entire State—and rightfully so, given the nature of the threat posed to this state (not to mention the entire country, and indeed the world) by this highly contagious, often fatal, and still untreatable virus. See MCL 10.31(1) (permitting a declaration during a "public

emergency" or "reasonable apprehension of immediate danger of a public emergency").

Mackinac Island, one of our State's crown jewels, well illustrates the statewide nature of this threat, and the corresponding need for a statewide emergency response under the EPGA. Mackinac Island typically "opens" for the season about this time of year. Although there are currently no known cases of COVID-19 on the Island, should the protective measures issued pursuant to the emergency declaration cease, a deluge of visitors from Michigan and countries across the globe may converge as they inevitably do, year after year. That is a recipe for another hot spot—a grander version of a March 6 pancake breakfast in Detroit that spread the virus and decimated the Detroit Police Department.[17] And unlike in metro Detroit, where there are large health systems equipped to respond, a public health crisis in the Straits of Mackinac would present a qualitatively different challenge to contain and counteract.

Simply put, given the nature of this virus and the current limitations on our ability to test for, trace, and contain it, there is unquestionably a "reasonable apprehension of immediate danger of a public emergency" currently present in every portion of this State. MCL 10.31(1). The State is the "area involved," and

[17] *Coronavirus Devastates Detroit Police, From the Chief on Down, NY Times,* April 21, 2020, available at https://www.nytimes.com/2020/04/20/us/coronavirus-detroit-police.html. (Attached as Exhibit O).

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

Similarly misguided is the suggestion that a statewide declaration is contrary to the EPGA because it contemplates that the Governor may act during times of public emergency "within" the State. But even adopting the Legislative Plaintiffs' definition of "within"—"'Within' means 'on the inside or on the inner-side' or 'inside the bounds of a place or region'" (Pls Br, p 27, ultimately quoting *Webster's Third New International Dictionary* 758 (1993))—the designated area here meets that definition. The entirety of the state is "inside the bounds" of the State's borders. And again, this narrow and strained interpretation elides the plain statutory purpose, MCL 10.32, and should be discarded.

Third, like squeezing water from a stone, the Legislative Plaintiffs wish to engraft yet another limitation on the EPGA—let us call it the "rioting" limitation—in order to shrink the EPGA's authority to reach only local emergencies of a very specific sort. (Pls Br, pp 30–31.) This, too, fails. Again, the EPGA concerns "times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state." MCL 10.31. The trusty canon of construction ejusdem generis is appropriate here, which applies "where a general term follows a series of specific terms," requiring "the general term [to be] interpreted to include only things of the same kind, class, character, or nature as those specifically enumerated." *Neal v Wilkes*, 470 Mich 661, 669 (2004) (cleaned up). With "public emergency" as the general term, the "similar" specific terms must inform the general term's scope.

The ample breadth of "public emergency" is confirmed by the distinct specific terms. While the Legislative Plaintiffs' chosen specific term—rioting—is certainly covered, it sits adjacent "great public crisis," which is quite general (and perfectly applicable), as are "disaster" and "catastrophe."

The broad terms used by the Legislature, in conjunction with the liberal-construction requirement in MCL 10.32, confirm that the Governor's declaration and response measures under the EPGA are appropriate.

Fourth, the Legislative Plaintiffs spend pages stitching together their own narrative of the history and motivations behind the enactments of the EPGA and the EMA. (Pls Br, pp 2–6, 34–37.) Plaintiffs, of course, have told the story that helps their case, but its accuracy or completeness is fundamentally beside the point. The Legislature made its intentions in enacting the EPGA and EMA perfectly clear in the language of the statutes themselves, and Plaintiffs cannot rewrite those intentions to meet their own immediate desires. "Because the statute is clear, there is no ambiguity that would permit or justify looking outside the plain words of the statute." *In re Certified Question from US Court of Appeals for Sixth Circuit*, 468 Mich 109, 116 (2003) (cleaned up). In particular, courts "do not resort to legislative history to cloud a statutory text that is clear." *Id.* See also *Luttrell v Dept of Corr*, 421 Mich 93, 103 (1984) ("*Where ambiguity exists* in a statute, a court may refer to the history of the legislation in order to determine the underlying intent of Legislature.") (emphasis added); *Aroma Wines & Equip, Inc*, 497 Mich at 355 n 49 (where a statute is "unambiguous . . . the examination of legislative history *of any*

form is not proper.") (cleaned up; emphasis added). Lacking any ambiguity, the text of the EPGA, including its express directive to construe its terms broadly, controls.

Fifth, contrary to the Legislative Plaintiffs' argument, the doctrine of *in pari materia* is inapplicable, and in any event using it here would support the Governor's construction. This canon of construction, which can assist in reading laws on the same subject harmoniously, is not applicable to statutes that are unambiguous and do not present a "patent conflict." See *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 74 n 26 (2017). Lacking ambiguity or conflict, it is of no assistance.

And any reliance of on the doctrine of in pari materia would only confirm that the EPGA is not limited to merely emergencies of a local nature. (Contra Pls Br, pp 30–32.) The doctrine regarding reading two statutes that address the same subject together (literally meaning "equal matter") is most profitably applied to address two statutes that do not reference each other, so that this canon is employed to make sense of their interaction. See, e.g., *People v Anderson,* ___ Mich App ___, ___ (2019) (Docket No. 343272), slip op at *3 (the doctrine applies "even if the statutes do not reference one another and were enacted on different dates"). But there is no mystery here.

The second-in-time statute—the EMA—expressly explains that it does not "[l]imit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant [the EPGA]." MCL 30.417(d). Thus, the statutes themselves tell us that they each are—and must be read as—independent and supplementary grants of authority to the Governor.

Moreover, just as the EPGA plainly accommodates emergencies statewide in scope, so too is the EMA filled with references to the authority for addressing local states of emergencies. It defines a "local state of emergency," MCL 30.402(j), grants local officials with the authority to declare such a state of emergency, MCL 30.410(1)(b), and provides guidance where a local emergency extends "beyond the control of the county," MCL 30.414(1). Any claim that the EMA is only designed to address statewide emergencies, and the EPGA only local ones, is belied by the statutes' plain terms. It also leads to the unfounded and insensible conclusion that, prior to the passage of the EMA in 1976, the law contemplated no means for the State to respond to a statewide emergency. The idea that the Governor would have had to issue 83 local emergency orders is not well taken, and is wholly unsupported by the text or express purpose of the EPGA.

Rather, the statutes perform distinct functions, providing the Governor different tools to address an emergency. As discussed at greater length below, the EMA provides for a more extensive structure of governmental action in response to an emergency, and a more detailed set of powers for the Governor to implement in that response. The EMA, however, expressly ensures that, underlying the mechanisms it provides for activating and implementing state and local emergency response resources, there remains the EPGA and its foundational assurance that, in times of public emergency, the executive branch shall be empowered to exercise the police power of the State to do what is reasonable and necessary to protect life and bring the emergency under control. The law provides more than one tool in the

Governor's toolbox, without any limitation against using them in tandem in a global pandemic.

Finally, and for these same reasons, the Legislative Plaintiffs' attempt to engraft the EMA's 28-day limitation period onto the EPGA must fail. There is simply nothing in the text of either statute that supports or even suggests it. Instead, the Legislature, in enacting the EPGA, wisely linked the end of the Governor's "reasonable" emergency authority with the end of the emergency. The Governor's proclamation only ceases "upon declaration *by the governor* that the emergency no longer exists." MCL 10.31(2) (emphasis added). And the Legislature, in enacting the EMA thirty years later, wisely chose to leave that characteristic of the EPGA intact. The wisdom of this legal landscape is apparent in the case of a pandemic that respects no boundaries of time or space while impacting individuals, regional health systems, and all aspects of life in severe and unpredictable ways.

In Executive Order 2020-67, the Governor reaffirmed that the state of emergency under EPGA—which has been in effect since the virus first showed itself in Michigan, and as it has rapidly claimed thousands of lives across the State—"remains declared." (Paragraph 1.) Thus, the EPGA state of emergency remains in place. And with that state of emergency in place, the Governor's authorities under the EPGA, and the orders she has issued pursuant to those authorities to "protect life" and "bring [this pandemic] under control," continue. MCL 10.31(1).

D. In the EMA, the Legislature granted the Governor broad, general powers to cope with emergency conditions; the act also *requires* the Governor declare a state of emergency and disaster if she finds certain circumstances are present.

In addition to her authority under the EPGA, the Governor has an independent source of emergency-response authority in the EMA. Importantly, not only does the EMA grant the Governor certain powers upon a declaration of a state of disaster or emergency, see MCL 30.403(3), (4), that act provides for another, general source of authority to "issue executive orders, proclamations, and directives having the force and effect of law," MCL 30.403(2), and the Governor is obligated do so in accordance with her "responsib[ility] for coping with dangers to this state or the people of this state . . . ." MCL 30.403(1).

Thus, the EMA grants the Governor emergency authority independent of any declaration. But the Governor has also declared states of emergency and disaster, which further support her substantive executive actions.

1. The EMA grants a broad, general authority to the Governor to "cop[e] with dangers to the state or its people."

First enacted in 1976, the EMA sets forth several independent (though related) obligations, coordinating state and local responses to emergencies and disasters in the State. The Governor is not the only subject of the EMA—that act tasks county boards of commissioners, MCL 30.409, and directors in state government, MCL 30.408, among others, with emergency planning, including the designation of emergency management coordinators. See MCL 30.410. As noted, it grants those local coordinators the authority to declare a local state of emergency

and permits them to, among other things, appropriate funds, provide emergency assistance to victims of a disaster, and enter into regional compacts with public and private entities to respond to the emergencies. MCL 30.410(1)(b).

The EMA also expressly grants "disaster relief forces"—including state and local governments, and "private and volunteer" personnel, MCL 30.402(f)—the legal rights and immunities enjoyed by state employees in carrying out their response duties. MCL 30.411(1).

Particular to the Governor, the EMA grants her the important responsibility to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency." MCL 30.403(1). This broad charge places the Governor at the forefront of emergency and disaster responsiveness and serves as a baseline for the latitude given to the Governor by the Legislature in times of crisis. To that end, the Governor possesses the authority to "issues executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(2). The act grants the Governor, and only the Governor, the authority to amend or rescind those orders. *Id.*

Significantly, this section is not tied to a declaration of a state of emergency and disaster, discussed more fully below. Accordingly, by the EMA's plain language, the Governor has this authority and obligation under the act, regardless of whether there has been any expression of legislative approval of a continued state of emergency or disaster. This is further reflected by § 5(1) of the Act, MCL 30.405(1), which provides that the additional powers of the Governor that flow from

a declaration of a state of emergency or disaster are "[i]n addition to the *general authority* granted to the governor by th[e] act." (Emphasis added.)

This distinct, general authority is confirmed throughout the EMA. For example, MCL 30.414(3), makes clear that the EMA "shall not be construed to restrain the governor from exercising *on his own initiative* any of the powers set forth in this act." (Emphasis added). The act also emphasizes the breadth and strength it is intended to add to the Governor's preexisting emergency response authority, stating that it does not "[l]imit, modify, or abridge" the authority of the Governor to proclaim a state of emergency under the EPGA "or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of the state independent of, or in conjunction with, this act." MCL 30.417(d). As discussed above, the EPGA confers emergency authority on the Governor without any legislative invasion—a characteristic the EMA expressly preserved.

2. The EMA also grants the Governor, upon an emergency or disaster proclamation, distinct authorizations.

In Executive Order 2020-66, the Governor terminated the states of emergency and disaster declared under the EMA in Executive Order 2020-33 that were set to expire at midnight on April 30. Then, that same day, the Governor issued a new declaration of states of emergency and disaster under the EMA. Executive Order 2020-68 is the focus of the Legislative Plaintiffs' ire, but the Governor's issuance of it was not only permitted but *compelled* by the EMA.

Separately, and in addition to the Governor's "general authority" and "responsib[ility] for coping with dangers to this state or the people of this state presented by a disaster or emergency," MCL 30.405(1) & 30.403(1), the Governor "*shall*, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists." MCL 30.403(4) (emphasis added). Similarly, she "*shall*, by executive order or proclamation, declare a state of disaster if he or she finds a disaster has occurred or the threat of a disaster exists." MCL 30.403(3) (emphasis added).[18]

Upon that order or proclamation, the law grants the Governor authority to marshal both state and federal resources to adequately deal with the danger facing the state.[19] That executive order or proclamation also authorizes the Governor to exercise additional broad powers, including but not limited to, "[s]uspending a

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[18] The EMA defines both "disaster" and "emergency." Under MCL 30.402(e), " '[d]isaster' means an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause. . . ." "Emergency" is defined as "any occasion or instance in which the governor determines state assistance is needed to supplement local efforts and capabilities to save lives, protect property and the public health and safety, or to lessen or avert the threat of a catastrophe in any part of the state." MCL 30.402(h).

[19] See, e.g., MCL 30.404(1) ("An executive order or proclamation of a state of disaster or a state of emergency shall serve to authorize the deployment and use of any forces to which the plan or plans apply and the use or distribution of supplies, equipment, materials, or facilities assembled or stockpiled . . . ."); MCL 30.404(2) ("Upon declaring a state of disaster or a state of emergency, the governor may seek and accept assistance, either financial or otherwise, from the federal government, pursuant to federal law or regulation."); MCL 30.408(1) ("Upon the declaration of a state of disaster or a state of emergency by the governor, each state agency shall cooperate to the fullest possible extent with the director in the performance of the services that it is suited to perform, and . . . in the prevention, mitigation, response to, or recovery from the disaster or emergency.").

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

Notably, the EMA independently defines "state of disaster" and "state of emergency" independently from "disaster" and "emergency." While "disaster" and "emergency" refer to certain conditions that the Governor may find to exist in the State, "state of emergency" and "state of disaster"—both of which were declared in 2020-68—are defined as types of executive order or proclamations that the Governor must issue upon finding emergency or disaster conditions exist. Per MCL 30.402(p), "'state of disaster' means *an executive order or proclamation* that activates the disaster response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected." (Emphasis added.) Similarly, "'state of emergency' means *an executive order or proclamation* that activates the emergency response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected." MCL 30.402(p) (emphasis added). In other words, "state of emergency" and "state of disaster" are *species of executive orders* that activate certain response efforts and resources, and may be issued only upon a particular finding.

In short, "if [the Governor] finds that an emergency [or disaster] has occurred or that the threat of an emergency [or disaster] exists," the Governor "*shall*" declare as such in an executive order or proclamation. MCL 30.403(3), (4). Under longstanding Michigan precedent, "the word 'shall' is ordinarily construed in its imperative sense, excluding the idea of discretion." *State Bd of Ed v Houghton Lake Cmty Sch*, 430 Mich 658, 670 (1988). See also *Sauder v Dist Bd of Sch Dist No 10, Royal Oak Tp, Oakland Co*, 271 Mich 413, 418 (1935) (when a statute uses "shall" and "the public are interested" that charge "is imperative"); *Southfield Tp v Main*, 357 Mich 59, 76 (1959) ("The use of the word 'shall' is mandatory and imperative and when used in a command to a public official.").

The Governor thus has a *duty* to declare a state of emergency or a state of disaster if she determines a disaster or emergency has occurred or will occur. While the emergency or disaster declarations (which are, again, simply types of executive order) may expire after 28 days, it is "imperative" that she issue an emergency or disaster declaration if the conditions supporting them exist.[20] This legal dynamic is reality-based, for it mirrors the undeniable fact that emergency circumstances can and do rise and fall over time, particularly in the case of a global pandemic.

Importantly, the Governor is not granted her emergency authority without limit, as the Legislative Plaintiffs' seemingly warn. Indeed, although the Governor "shall" declare an emergency or disaster "if he or she finds" that an emergency or

[20] Nor does her independent responsibility to "cope" with emergency circumstances, MCL 30.403(1)somehow evaporate after 28 days, as it is not contingent on any declaration.

disaster has occurred or threat of either exists, she is not empowered to declare either in the absence of the conditions precedent. MCL 30.403(3) and (4); see also MCL 10.31(1) (permitting the Governor to proclaim a state of emergency in the event of a "public emergency within the state" or "reasonable apprehension" of such an emergency, when "public safety is imperiled"). These provisions establish clear textual limitations on the Governor's authority, limitations that should silence the siren-decibel lamentations of the Governor's purported "tyranny." (Pls Br, p 41.)

And while a Governor's factual finding of an emergency is entitled to great deference, it is not beyond judicial review. *Straus v Governor*, 459 Mich 526, 533 (1999), quoting *People ex rel Johnson v Coffey,* 237 Mich 591, 602 (1927) ("The Governor holds an exalted office. To him, and to him alone, a sovereign people has committed the power and the right to determine the facts in the proceeding before us. His decision of disputed question of fact is final. His finding of fact*, if it has evidence to support it*, is conclusive on this court. It would be unbecoming in us to impugn his motives, and unseemly and unlawful to invade his discretion.") (emphasis added). Should a party choose to quibble with the factual support for the Governor's findings, it may attempt redress in the courts. But, again, the Legislative Plaintiffs' have expressed no disagreement with her considered finding that emergency and disaster conditions exist.

3. Consistent with the EMA, the Governor terminated the original states of disaster and emergency; her subsequent disaster and emergency proclamations are required by law.

The Governor followed MCL 30.403(3) and (4), the provisions which provide for the expiration of the state of disaster or state of emergency; the provisions under which the Legislative Plaintiffs' suggest they have been shut out. Those provisions each provide for three conditions for the end of a state of disaster or emergency—that is, the "termination" of those types of executive orders. MCL 30.402(p), (q). First, if "the governor finds that the threat or danger has passed," the state of disaster or emergency does not "continue." MCL 30.403(3), (4). This has not occurred. Second, if the "disaster has been dealt with to the extent that disaster conditions no longer exist," the state of disaster or emergency does not "continue." MCL 30.403(3), (4). Again, this has not occurred.

What *did* happen was that the executive orders were initially extended under the third option beyond 28 days—the Governor requested an extension and the Legislature approved that extension "for a specific number of days" by resolution until April 30. MCL 30.403(3), (4).

As April 30 approached, the Governor against sought an extension, which the Legislature refused, requiring that the Governor "issue an executive order or proclamation declaring the state of disaster [and emergency] terminated." MCL 30.403(3), (4). As a consequence, the Governor did as the statute required and "terminated" the states of emergency and disaster declared under the EMA by

Executive Order 2020-33. Executive Order 2020-66. Thus, MCL 30.403(3) and (4) were effectuated.

4. Because statewide disaster and emergency conditions continue to exist, the Governor is duty bound to activate the State's response, as she did with Executive Order 2020-68.

Then, the Governor likewise did as she was required under the EMA to do through Executive Order 2020-68: issue an executive order declaring states of emergency and disaster under the EMA because she found "that an emergency [or disaster] has occurred or that the threat of an emergency [or disaster] exists," triggering her duty to declare as such in an executive order or proclamation. MCL 30.403(3), (4); Executive Order 2020-68, Preamble. The Governor acknowledged that the measures issued pursuant to her authority under the EMA and the EPGA (like the Stay at Home order, among others), "have been effective, but the need for them—like the unprecedented crisis posed by this global pandemic—is far from over." Executive Order 2020-68, Preamble. While acknowledging the economic and social hardships that Michiganders currently face in light of the novel virus and the measures taken to beat it back, she emphasized the continued lack of treatment for the virus, the ease of transmission, and the "lack [of] adequate means to fully test for it and trace its spread." Executive Order 2020-68, Preamble. Ultimately, the Governor found that "the threat and danger posed to Michigan by the COVID-19 pandemic has by no means passed, and the disaster and emergency conditions it has created still very much exist." Executive Order 2020-68, Preamble. Thus, given

her findings and the facts on the ground, the Governor was obligated to issue Executive Order 2020-68.

Nothing in the EMA provides that, once an executive order declaring a state of emergency or disaster expires, the Governor is powerless to act on behalf of the State's health and welfare. Quite the opposite. If she finds a disaster or emergency has occurred or is threatening to occur, MCL 30.402(e), (h), then she "*shall*" issue orders declaring states of disaster or emergency. MCL 30.403(3), (4); *State Bd of Ed*, 430 Mich at 670 ("shall" indicates an "imperative"). With Executive Order 2020-68, that is precisely what she did.

Any other reading would unduly fail to account for disasters or emergencies that simply have not ceased upon expiration of an earlier declaration. For example, at some point, the Governor's states of emergency and disaster will expire because the conditions will not at that time be present to support their continuance.[21] But what if the same virus rears its head again say, six months later? Is the Governor unable to declare a state of emergency or disaster because the earlier proclamations had expired on the very same subject? This would contravene not only the letter of the EMA but also its purpose in granting the Governor the latitude to respond to disasters and emergencies, and would permit the dead hand of the past to

[21] Consistent with the EMA, and contrary to Legislative Plaintiffs' suggestion otherwise, Executive Order 2020-68 specifies "the conditions permitting the termination of the state of disaster" and "of emergency," MCL 30.403(3) & (4): when a "stable [economic] recovery [from this pandemic] is underway, the economic and fiscal harms from this pandemic have been contained, and the threats posed by COVID-19 to life and the public health, safety, and welfare of this state have been neutralized." EO 2020-68, Preamble.

jeopardize the health and safety of Michiganders, all without a plain requirement in the statutory language.

5. The Legislative Plaintiffs' responsive arguments fail to account for the language of the act.

The Legislative Plaintiffs make several arguments why this Court should declare the Governor's new declaration of a state of emergency and state of disaster under the EMA void. None have merit.

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

The Legislative Plaintiffs lean on the concept of absurd results (Pls Br, pp 21–23), arguing that the Governor issued contradictory orders by simultaneously terminating and declaring states of emergency and disaster. But this, again, shows a misunderstanding both of the Governor's declarations and of the language of the EMA. Even if the absurd results doctrine exists in Michigan, *Johnson v Recca*, 492 Mich 169, 193 (2012) (questioning that premise), it involves a high standard: "[a] result is only absurd if it is quite impossible that the Legislature could have intended the result," *id.* (cleaned up). Again, "state of emergency" and "state of disaster" are, by statutory definition, types of "executive orders." MCL 30.402(p) and (q). And as the Governor made abundantly clear in Executive Order 2020-66, the termination of her previously declared states of emergency and disaster was not driven by any belief that the emergency and disaster conditions requiring them had ceased to exist. Rather, per the EMA, she terminated those executive orders only because the Legislature refused to ratify her declaration. MCL 30.403(3) and (4).

Accordingly, Executive Order 2020-66 complies stringently with the law. The Legislature wrote the rules; the Governor followed them.

The ongoing existence of a "disaster" and an "emergency" in this State, see MCL 30.402(e), (h), is uncontested, yet the Governor was required by the EMA to terminate the "state of disaster" executive order and "state of emergency" executive order, which she did. It is the persistence of the underlying disaster and emergency that requires her, under the plain terms of the EMA, to declare those states again—just as she has.

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

The Legislative Plaintiffs' contend that, under the Governor's reading, the concurrent-resolution procedure for extending states of emergency and disaster beyond 28 days in MCL 30.403(3) and (4) is rendered meaningless. Not so. A court's construction of a statute should avoid rendering a provision surplusage or nugatory. *Apsey v Mem Hosp*, 477 Mich 120, 127 (2007). One plain purpose of this procedure is to give the Legislature a mechanism to hold the Governor accountable if the conditions supporting a declaration are questionable, or completely lacking. To that end, MCL 30.403(3) and (4) provide that the declaration "shall" include an explanation of the conditions causing the disaster or emergency and the area affected. By refusing to extend a declared state of emergency or disaster, the

Legislature can force the Governor to prove her insistence that an emergency or disaster has not abated, creating an interbranch dialogue.[22]

But that is not the circumstance before the Court—the Legislature has not denied that Michigan continues to face a dire public health threat, nor could it in good faith do so. Nonetheless, the Legislature withheld. The statute it drafted, though, maintains the Governor's duty to declare states of disaster and emergency, and to cope with the dangers facing the State, in spite of that withholding. In a wildfire, the firefighters holding the hose do not end their efforts if someone shuts off a ringing alarm. Instead, they fight the spread and respond to the conditions as they are, and not as others would like them to be.

The 28-day time period serves another purpose. It forces the Governor not only to show its work to the Legislature, but to explain to the People the grounds for any extension of the declarations. The proclamation must be "disseminated promptly" to "bring its contents to the attention of the general public." *Id.* Thus, her justifications must be manifest to the whole State, to whom she answers.

The Legislature might have included a provision that *prohibited* the Governor from issuing a substantively similar declaration if the Legislature did not extend the earlier one. But the 1976 Legislature wisely did not draft so inflexible and short-sighted a statute. Myriad unforeseen disasters and emergencies awaited future generations, so the Legislature's words *requiring* the Governor to issue a

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

declaration where the real-world implications persist was a humble acknowledgement of our predictive limitations, and a solemn trust in the one statewide office equipped to lead a coordinated response.

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

To read the EMA's concurrent-resolution extension mechanism as the Legislative Plaintiffs do—a means for the Legislature to force the termination not only of certain orders, but of the Governor's substantive emergency response authority under the EMA writ large—would go beyond contradicting the EMA's plain text; it would be unconstitutional. As discussed more fully below, the Legislature may share its constitutional authority with the Governor provided it prescribes standards for guidance that are reasonably precise in light of the subject matter of the delegation. But once the Legislature does so, it may not retain what amounts to a legislative veto. If the Legislative Plaintiffs are correct about their interpretation of the concurrent-resolution provision, then that body has not just kept a modicum of oversight, but a "right to approve or disapprove" the Governor's exercise of delegated authority—and to do so without itself abiding by constitutional requirements of bicameralism and presentment. *Blank v Department of Corrections*, 462 Mich 103, 113 (2000). Such invasive oversight would violate our Constitution.

In *INS v Chadha*, 462 US 919 (1983), the Supreme Court evaluated whether the Constitution permitted Congress to delegate authority to the executive but

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

In *Blank*, the Michigan Supreme Court applied the framework in *Chadha* in considering the constitutionality of a 1977 amendment to the Administrative Procedures Act ("APA"), which required an administrative agency to "obtain the approval of a joint committee of the Legislature or the Legislature itself before enacting new administrative rules." *Blank*, 462 Mich at 108 (opinion of Kelly, J.). The Court framed the issue as follows: "[W]hether the Legislature, upon delegating [rulemaking authority to an executive-branch agency], may retain the right to approve or disapprove rules proposed by [the agency]." *Id.* at 113. In a plurality opinion, the Court ultimately answered that question in the negative, finding that the Legislature's approval or disapproval of an executive-agency rule is "inherently

legislative" and therefore "subject to the enactment and presentment requirements of the Michigan Constitution." *Id.* at 115–116.

The same conclusion holds for any determination by the Legislature that the Governor can no longer exercise the emergency powers the Legislature has vested in her through the EMA. Effectuating such an inherently legislative determination requires legislative action, and "[w]hen the Legislature engages in 'legislative action' it must do so by enacting legislation." *Id.* at 119. "[T]he Legislature cannot circumvent the enactment and presentment requirements [that must accompany legislative action] simply by labeling or characterizing its action as something other than 'legislation.'" *Id.*; see also *id.* at 118 n 8 ("[T]he fact that the Legislature can delegate legislative power to others who are not bound by the enactment and presentment requirements does not mean that it can delegate the same power to itself and, in the process, escape from the constraints under which it must operate.") (cleaned up).

The Legislative Plaintiffs thus cannot complain that the EMA's concurrent-resolution procedure has not been given the effect they would like it to have, because that effect—a legislative veto of the Governor's delegated authority—would be unconstitutional. The Legislature plainly granted broad emergency authority to the Governor; it "must abide by its delegation of authority until that delegation is legislatively altered or revoked," *Chadha*, 462 US at 955, through the proper channels set forth in our Constitution.

III. The EPGA contains standards to guide the Governor's exercise of authority concomitant with the nature of broad, developing emergencies and therefore are not susceptible to non-delegation challenges.

The Legislative Plaintiffs argue that the 1945 law, the EPGA, violates the separation of powers because it lacks sufficient standards to guide the Governor's decision-making, rendering it a violation of the non-delegation doctrine. Ample caselaw disagrees.

If the Legislature wishes to amend its own statutes, its rush to this Court is as unusual as it is unnecessary. The Legislature has the constitutional tools it needs within its own branch—legislative action through bicameralism and presentment. Instead we are here, with the Legislative Plaintiffs asking this Court to declare unconstitutional *their own duly enacted law*. With this staging in the background, the Legislative Plaintiffs' protestations about the Governor's supposed violation of the separation-of-powers ring hollow.

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

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

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch. Const 1963, art 3, §1.

But Michigan courts have never interpreted the separation of powers doctrine as meaning there can never be any overlapping of functions between branches. *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 752 (1982). Rather,

an overlap or sharing of power is constitutionally permissible provided that "the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other." *Judicial Attorneys Ass'n v Mich*, 459 Mich 291, 297 (1998); see also *id.* ("It is simply impossible for a judge to do nothing but judge; a legislator to do nothing but legislate; a governor to do nothing but execute the laws.").

The separation of powers doctrine "ha[s] led to the constitutional discipline that is described as the nondelegation doctrine," *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8 (2003), which the Legislative Plaintiffs claim the EPGA violates. While, in general, the legislative power—the power "to make, alter, and amend laws"—remains with the Legislature, *Harsha v City of Detroit*, 261 Mich 586, 590 (1933), both the United States Supreme Court and the Michigan Supreme Court "ha[ve] recognized that the separation of powers principle, and the nondelegation doctrine in particular, do not prevent Congress [or our Legislature] from obtaining the assistance of the coordinate Branches." *Taylor*, 468 Mich at 8, quoting *Mistretta v United States*, 488 US 361, 371 (1989).

The Michigan doctrine of non-delegation has been expressed in terms of a "standards test." *Westervelt v Natural Resources Comm*, 402 Mich 412, 437 (1978). Under this test, "legislation which contains a delegation of power to . . . [another branch] must contain either explicitly or by reference . . . standards prescribed for guidance . . . ." *Id.* at 437–438, citing *Osius v City of St Clair Shores*, 344 Mich 693, 698 (1956). Significantly, such standards must only be "as reasonably precise as the

subject matter requires or permits." *Id.* at 438, citing *Osius*, 344 Mich at 698; see also *State Conservation Dep't v Seaman*, 396 Mich 299, 309 (1976) ("The preciseness of the standard will vary with the complexity and/or the degree to which subject regulated will require constantly changing regulation.").

And the statute carries a presumption of constitutionality; it "must be construed in such a way as to 'render it valid, not invalid.' " *Id.*, citing *Argo Oil Corp v Atwood*, 274 Mich 47, 53 (1935).

The standards set forth in the EPGA are as "reasonably as precise as the subject matter requires or permits." *Westervelt*, 402 Mich at 439. The Legislature did not grant the Governor a blank check. The EPGA provides the Governor the authority, after declaring a state of emergency, to "promulgate *reasonable* orders, rules, and regulations as he or she considers *necessary* to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1). Accordingly, there are several limits on the Governor's authority. Her orders may come only after upon a "public emergency" and the orders must not only be reasonable *and* necessary; they must be directed at protection of "life and property" or "bring[ing] the emergency situation . . . under control" in the "affected area." *Id.*

Michigan courts have consistently upheld similar language as sufficiently precise to avoid any nondelegation problem. In *Klammer v Department of Transportation*, 141 Mich App 253, 262 (1985), the Court of Appeals considered the that the word "necessary" was a sufficiently precise standard for the retirement

board in the context of considering the length of time a certain state worker could continue after reaching the mandatory retirement age. See also *G.F. Redmond & Co v Michigan Sec Comm'n*, 222 Mich 1, 7 (1923) ("[T]he term 'good cause' for revocation of the license, relating, as it does, to the conduct of the business regulated by the policy declared in the statute, is sufficiently definite . . . ."); *Smith v Behrendt*, 278 Mich 91, 97–98 (1936) (holding that allowing the executive to grant oversize loads for freeway travel in "special cases" was a limited and proper delegation of legislative authority). These examples suffice to reveal that the courts are hesitant to invalidate laws on the basis of an allegedly improper delegation where the Legislature provides even a modicum of direction to the executive branch. This level of trust—in the Legislature, to delegate as it sees fit, and in the executive, to follow those guidelines—signifies a strong deference from this Court to its coordinate branches.

The Legislative Plaintiffs rely on *Blue Cross & Blue Shield of Michigan v Milliken*, which determined that "the power delegated to the Insurance Commissioner" regarding approval of actuarial risk factors "is completely open ended." 422 Mich 1, 53 (1985). And for good reason—the commissioner's authority was not guided at all. Instead, the commissioner was granted complete authority to " 'approve' or 'disapprove' the proposed risk factors; the basis of the evaluation is not addressed." *Id.* *Blue Cross* is a poor comparison.

And of course, the standards imposed on the Governor's authority under the EPGA are not read in a vacuum—the "subject matter" of the delegation guides how

strictly or narrowly drawn the standards must be. *Westervelt*, 402 Mich at 439. The context of a developing "crisis, disaster, rioting, catastrophe, or similar public emergency," MCL 10.31(1), counsels granting substantial leeway to the decisionmaker. Public emergencies are not static events, nor do they unfold patiently or predictably. Response to such crises warrant—indeed require—nimbleness coupled with judgment to meet the needs of the moment. There is no specific one-size-fits-all response to a complex and ongoing emergency. This subject matter requires the broadest level of leeway permissible under the nondelegation doctrine. If "the management of natural resources is a difficult and complex task," *Seaman*, 396 Mich at 311, surely the response to rapidly developing and ever-changing public health crisis is even more so.

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

B. Michigan is one of many States that has largely entrusted emergency authority to the executive branch.

While it may be true that, with the EPGA, the Legislature did not attempt to set forth an elaborate scheme of detailed provisions designed to cover every conceivable type of situation that might arise in an emergency in granular detail, it was for good reason. The law has long demonstrated an understanding that

emergency situations require prompt, decisive action that is not the subject of advance prediction. See, e.g., *Ex parte McGee*, 185 P 14, 16 (Kan, 1919) (in the wake of the influenza pandemic of 1918 accepting the "necessity for legislation" conferring broad authority on state health officials "to prevent the spread and dissemination of diseases dangerous to the public health"); *State v Rackowski*, 86 A 606, 607–608 (Conn, 1913) (calling such response as "a chief end of government"); *Kirk v Wyman*, 65 SE 387, 389 (SC, 1909) (the state must "act with promptness[] when the public health is endangered"); *Blue v Beach*, 56 NE 89, 92 (Ind, 1900) (the state has "an imperative obligation" "to take all necessary steps" to safeguard public health.)

Michigan's scheme is in good company. Myriad States have similar regimes granting the executive broad authority to take reasonable and temporary measures during a public emergency. See, e.g., Ky Rev Stat Ann § 39A.100(1)(j) (granting the governor broad powers "to perform and exercise other functions, powers, and duties deemed necessary to promote and secure the safety and protection of the civilian population"); Miss Code Ann § 33-15-11(c)(4) (the governor may "perform and exercise such other functions, powers and duties as may be necessary to promote and secure the safety and protection of the civilian population in coping with a disaster or emergency"); Haw Rev Stat § 127A-13(3); 14(c) (granting the Hawaii governor—who "shall be the sole judge of the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency"—broad powers to combat emergencies including suspending laws that "impede[] or tend[] to impede

or be detrimental to the expeditious and efficient execution of, or to conflict with, emergency functions"); 20 Ill Comp Stat 3305/7 (giving the Illinois Governor the power to "utilize all available resources of the State government as reasonably necessary to cope with the disaster"). Unsurprisingly, many if not all States have looked to those and similar delegations in response to the COVID-19 pandemic.[23]

The need for flexibility and decisiveness in public health crises is reflected in the "standards test," which requires standards of guidance to only be "as reasonably precise as the subject matter requires or permits." *Westervelt*, 402 Mich at 437–438, citing *Osius*, 344 Mich at 698. Here, the Legislature spoke as precisely as a state of emergency requires and, in its wisdom, left to the Governor the important task of developing the appropriate response.

The Legislative Plaintiffs proffer the Legislature's "nature and design" as best situated to handle the ongoing public health crisis. (Pls Br, p 44.) It offers the virtues of "consensus through rigorous parliamentary debate," and considerable "distillation and refinement," to make public policy choices. (*Id.*) The response necessary to combat a fast-moving, contagious disease is agile and flexible (as well as temporary and reasonable) action, not Robert's Rules of Order.

As the authorities above illustrate, legislatures across the country acknowledge that they are not the institution best equipped to make and enforce

[23] See Kaiser Family Foundation, *State Data and Policy Actions to Address Coronavirus*, available at https://www.kff.org/health-costs/issue-brief/state-data-and-policy-actions-to-address-coronavirus/

quick judgments on evolving information.[24] The Legislature knows that to meet the moment, proper delegation to the executive is the wisest course, which is why it granted the authorities it did to the Governor in the EPGA and the EMA.

This Court should honor that choice rather than allow itself to be co-opted to do the Legislative Plaintiffs' bidding. Having extolled its virtues in making public policy choices (Pls Br, p 44), it is incumbent on the Legislature, not this Court, to make the changes it seeks. Bicameralism and presentment are the constitutional procedures that the Legislature is best equipped to effectuate, and if it thinks it is wise to take the reins in the middle of this crisis, it should exercise its legislative authority accomplish it.

The Legislative Plaintiffs have not done so. Instead, they sought to extract the authority duly entrusted by law with the Governor by refusing to acknowledge—contrary to undisputed science and data—the emergency and disaster conditions afflicting this State. Having lost that political gamble, they are doubling down on this lawsuit. But this is more than a political bluff for a dissatisfied coequal branch of government holding a losing hand under applicable law. It is a power grab cloaked in the fineries of unfounded legal reasoning begging for judicial imprimatur. As gatekeeper and interpreter of Michigan's laws, the judiciary must appropriately respond and avoid the fray. Hence the common meaning and understanding of judicious.

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

* * *

The Legislative Plaintiffs' requested relief would not only sow confusion, it would unduly undermine each of the Governor's substantive executive orders (like the Stay at Home Order, among others) that are properly rooted in her authority under the EPGA and the EMA, endangering the public. The emergency and disaster declarations issued by the Governor were executed after careful consideration of the unique nature of the threat facing Michigan and the advice of numerous individuals and entities with unique expertise. To judicially strip the Governor of her authority, contrary to her clear legal duties, would not just upset the separation of powers. It would work grievous harm on the State and its citizens. The end of the beginning of the ongoing pandemic is not the end of the Governor's authority to protect the health and safety of everyone in Michigan.

CONCLUSION AND RELIEF REQUESTED

The Governor respectfully requests this Court deny Plaintiffs' motion. The Governor further requests this Court render judgment in her favor, MCR 2.116(I)(1), (2), and grant any other appropriate relief.

Respectfully submitted,

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