**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

IN RE CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION,
_____/

Supreme Court No.161492

USDC-WD: 1:20-cv-414

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

Plaintiffs,

v.

GOVERNOR OF MICHIGAN, MICHIGAN ATTORNEY GENERAL, and MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES DIRECTOR,

Defendants.

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

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**AMICUS BRIEF OF THE**
**MICHIGAN HOUSE OF REPRESENTATIVES**
**AND THE MICHIGAN SENATE**

## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

**Cases**

**Statutes**

**Other Authorities**



**Constitutional Provisions**

## STATEMENT OF INTEREST

The Michigan House of Representatives and the Michigan Senate together comprise the sole lawmaking body for the State of Michigan. Const 1963, art 4, § 1. Among other things, the Michigan Constitution charges the Legislature with "pass[ing] suitable laws for the protection and promotion of the public health." Const 1963, art 4, § 51. This proceeding raises issues of vital importance to that exclusive power to legislate. And no party is more interested in these issues than Michigan's first branch of government, the Legislature, which has asserted many of the same challenges to the Governor's unilateral exercise of statewide, indefinite lawmaking power in its own suit. In inviting the Legislature to submit a brief here, the Court recognized the Legislature's substantial interest.

## INTRODUCTION

This case ultimately reduces to a straightforward question: whether this governor, *and any governor to come*, can exercise broad, statewide, and indefinite policy-making powers—over the Legislature's objection—whenever the governor, and the governor alone, determines that an emergency exists. Governor Gretchen Whitmer insists that the Emergency Powers of the Governor Act ("EPGA") and Emergency Management Act ("EMA") give her that all-encompassing power. In so arguing, the Governor stretches statutory text to its breaking point, upends constitutional structures, and uses a legitimate crisis to justify illegitimate assertions of power.

To uphold our constitutional allocation of power, the Court should hold that neither the EPGA nor the EMA grant the Governor the broad powers that she is currently exercising. Were it otherwise—if a statutory delegation of emergency authority permitted the Governor to regulate the health, safety, and welfare of Michigan's citizens, with statewide effect, unilaterally, immediately, and indefinitely—then that delegation of authority would be an unconstitutional delegation and usurpation of lawmaking power.

This Court should return the balance of power to the division allocated in the Michigan constitution. Only the Legislature can make laws. Those who designed Michigan's constitutional system purposefully favored consensus-based policy making over unilateral executive action. The system equips the Governor to act swiftly and the Legislature to act deliberately in times of crisis; to be effective, the State's response to this crisis must be both swift *and* deliberate. And yet, for almost six months, the Governor has insisted that the present is no time for deliberation, and the inconvenience of the legislative process justifies a go-it-alone approach. But remember, for example, that two-thirds of both houses, in addition to the Governor, must agree before legislation can take immediate effect. This increased level of cooperation through deliberation in times of emergency is not a bug, it is a feature—one that the constitutional framers fully intended. This Court should restore that intention. The Court should answer the certified questions and inform the U.S. District Court for the Western District of Michigan that the Governor had no power to enter her post-April 30 declarations of disaster and emergency.

## SUMMARY OF THE ARGUMENT

The Governor's actions in unilaterally imposing an indefinite, statewide state of emergency and disaster cannot stand.

The Governor has fundamentally rearranged the political structures enshrined in the 1963 Michigan Constitution, warping the incentives that were baked into it. The Constitution sets up many hoops for legislation to jump through before it becomes law—even in emergencies, which the Constitution foresaw. The Constitution requires inter- and intra-branch compromise and consensus in normal times; it requires heightened cooperation in times of crisis. But with the executive now empowered with primary policy-making authority, legislators from the Governor's party have no incentive to work with legislators of the other side. Nor does the Governor have incentive to compromise with the legislative majority. The constitutional mandate that crisis-time laws have strong bipartisan support is then replaced with rule-by-one.

This reshuffling of authority has already undermined the Legislature's ability to address the COVID-19 pandemic. Even so, the Legislature has, a few times, overcome this rearrangement and passed meaningful COVID-19 legislation—though never on an issue the Governor has decided is exclusively hers and always with a less desirable result than the Legislature could reach absent the threat of executive fiat. These bright spots show that once the Governor's actions are declared unlawful and the normal political structure is restored, the Legislature can effectively govern alongside the Governor. It can, and it should.

Neither the EMA nor EPGA supports the expansive delegation of emergency powers the Governor advocates. As Plaintiffs *and* the Attorney General have explained, any authority the Governor could exercise under the EMA expired on April 30, when the Legislature chose not to extend the states of emergency and disaster. Meanwhile, the previously all-but-dormant EPGA does not license the Governor to declare indefinitely a statewide state of emergency. The EPGA's language describing the geographical scope of the emergency and the Governor's permissible response show that the EPGA's authority applies only to localized, not statewide, crises. The EPGA's historical context—it was passed to allow an effective state response to civil unrest—confirms this localized-crisis reading. If the EPGA meant what the Governor says, and if it were co-extensive with the EMA, then the entire (later) EMA was an exercise in lawmaking futility. As the Governor applies these acts, there was no reason for the Legislature to pass the EMA, no reason for the Governor to sign it, and apparently, no way *for anyone* to enforce it. That view of the EPGA and EMA violates core rules of statutory interpretation. One is the maxim that lawmakers know the law when they pass new law. Another is that that every word in every law is presumed to have meaning. Rather than run roughshod over fundamental precepts like these, the Court should interpret the passage of the EMA as specific, purposeful lawmaking that governs the Governor's emergency authorities, not as mere performance art.

If problems of statutory authority are not enough, the Governor's interpretation of the EPGA faces another significant hurdle: it violates the separation

of powers. In Michigan, the constitution gives all lawmaking power to the Legislature, which cannot delegate that power. Yet the Governor's COVID-19 executive orders incontrovertibly make law. And contrary to the Governor's repeated intimations, emergency does not create power, and constitutional structure may not be sacrificed for efficiency and seeming necessity. The Legislature could never constitutionally delegate the amount and kind of power the Governor thinks it did. Even if such power were delegable, the EPGA lacks the standards required to guide that power. As a delegation's scope increases, the strength of the guiding standards must increase commensurately. In the Governor's view, the EPGA gives her the largest conceivable delegation of power. The statute places no constraints on the Governor's initial decision to declare a state of emergency, and according to the Governor, the only standards it imposes on her actions are that they must be "reasonable" and "necessary" to protect life and property or bring the crisis under control. That standardless half-page of text is insufficient to guide the vast delegation the Governor has found within the EPGA. The Court should avoid this constitutional thicket and interpret the EPGA consistent with its text and history.

The Governor's post-April 30 declarations of emergency and disaster were *ultra vires* acts that cannot stand. The Court should answer the federal district court's questions accordingly.

## ARGUMENT

### I. The Governor's interpretation of her authority fundamentally alters the 1963 Michigan Constitution's political incentive structures, under which the legislature legislates, even in an emergency.

The Governor's approach to exercising emergency powers has substantially damaged the carefully calibrated levers of government that the Michigan Constitution creates. By insisting on unilateral control, the Governor has offended "the Constitution's separation of powers doctrine, its legislative processes, and the specific limitations it places upon the individual branches of government." *Taxpayers of Mich Against Casinos v State*, 471 Mich 306, 410 n 66; 685 NW2d 221 (2004) (Markman, J., concurring in part and dissenting in part).

#### A. The Michigan Constitution assigns the Legislature to regulate health, safety, and welfare of Michigan's citizens and equips it as the proper forum to determine the State's long-term response to a crisis.

Above all, the drafters of the Michigan Constitutions emphasized individual liberties of Michigan's citizens, intentionally making it difficult for those in power to infringe the freedoms of the people. Both the law-making power *and* the responsibility to protect citizens' health, safety, and welfare primarily rests not with the executive branch, but with the Legislature—the peoples' elected representatives. Const 1963, art 4, § 51 ("The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health."). Article 4's myriad requirements and duties—and, indeed, the Legislature's very nature—make legislating difficult, both because it is "time consuming," *City of*

*Gaylord v Beckett*, 378 Mich 273, 322; 144 NW2d 460 (1966), and requires a "step-by-step, deliberate[,] and deliberative process." *INS v Chadha*, 462 US 919, 959; 103 S Ct 2764; 77 L Ed 2d 317 (1983).

The crafting of public policy is *supposed* to be difficult. Legislation is not, as a rule, supposed to morph from nascent thought to binding law at the snap of the government's fingers. Thought and time are key ingredients. The Legislature must take time to fully consider policy ramifications, and people must have notice of pending changes. For example, the Legislature can only do business when it has a quorum. Const 1963, art 4, § 14 Legislation must be introduced as a bill. *Id.* § 22. A bill may not "embrace more than one object," and its fundamental character may not be changed by amendment. *Id.* § 24. Bills must sit in each house five days and be read three times before final passage. *Id.* § 26. Every vote on every piece of legislation in committee must be recorded and the journals made "available for public inspection." See *id.* § 17, § 18. Every final-passage vote must be recorded in the journal. *Id.* § 18. The Legislature cannot use a local or special act if a general act will do; if a local or special act is necessary, it requires a two-thirds vote. *Id.* § 29. As does a legislative override of a governor's veto. *Id.* § 33. All laws must be published no longer than 60 days after session ends, *id.* § 35, and by default cannot go into effect earlier than 90 days after session, *id.* § 27.

Of course, the drafters of the 1963 Michigan Constitution were no strangers to emergencies; even so, they saw value in deliberation. They had lived through the Great Depression and World War II, and many through the First World War as well.

They, like the Founding Fathers, "knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies." *Youngstown Sheet & Tube Co v Sawyer,* 343 US 579, 650; 72 S Ct 863; 96 L Ed 1153 (1952) (Jackson, J., concurring). Despite that first-hand knowledge, they prized legislative consensus over unilteral control.

Indeed, in times of crisis, the Constitution incentivizes *more* cooperation within and with the Legislature, not unilateral action by the Governor. Michigan's framers, like the national framers, "made no express provision for exercise of extraordinary [executive] authority because of a crisis." *Id.* To the contrary, even in times of crisis, the same fundamental power and incentive structures remain in place: legislation for the health, safety, and welfare of Michigan remains the duty of the Legislature. And the Constitution permits the Legislature to act with haste, but only on actions on which two-thirds of its members agree. Const 1963, art 4, § 27.

Several constitutional safety valves allow certain wheels of government to turn more easily during a crisis, but crucially, not in different directions. The center of governance in an emergency remains the Legislature. For example, if "the seat of government becomes dangerous from any cause," the "governor may convene the legislature at some other place." Const 1963, art 5, § 16. Even in those types of emergencies, "[n]either house shall, without the consent of the other, adjourn for more than two intervening calendar days." Const 1963, art 4, § 21. The governor may also, on "extraordinary occasions," convene the Legislature for a special session. Const

1963, art 5, § 15. On those occasions, the Legislature may pass a bill only on subjects "expressly stated in the governor's proclamation or submitted by special message." Const 1963, art 4, § 28. In a section titled, "Continuity of government in emergencies," the 1963 Michigan Constitution commands the Legislature to provide for "continuity of state and local governmental operations in periods of emergency." Const 1963, art 4, § 39. To this end, the Legislature "may provide by law for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices." *Id.* Even so, "elections shall always be called as soon as possible to fill any vacancies in elective offices temporarily occupied by operation of any legislation enacted pursuant to the provisions of this section." *Id.* Thus, in times of crisis, the Constitution expressly provides that the Legislature will continue to meet regularly and continue to pass legislation that governs the public health, safety, and welfare of Michigan's diverse citizenry.

The Constitution also permits legislation with speed, but increased speed concomitantly requires heightened *cooperation*. Ordinarily, the Legislature can pass laws for the governor's signature by majority vote, and the effect of those laws is delayed until 90 days after a legislative session ends (and at least 30 days after publication of the law). The Legislature can override this delay and pass legislation with immediate effect, but only by vote of two thirds of both houses. See *id.* § 27. In short, where legislation is required to go into immediate effect to protect the health,

safety, and welfare of Michigan's citizens in the short or long term, the Constitution's incentive system requires a super-majority of elected representatives to hammer out bipartisan agreements.

The executive branch's briefing repeatedly intimates that these choices are wrong—that during an emergency the executive branch must, for the good of the state, take over the policymaking role, replacing legislation with executive orders that must in turn be imposed in an instant. But courts in Michigan and across the country have recognized that during emergencies—and specifically epidemics—legislation should continue to come from the Legislature. The "Legislature has the ability to protect the public health, welfare, and safety through legislation" combatting "incurable epidemics" as they are happening. *People v Jensen*, 231 Mich App 439, 454, n 6; 586 NW2d 748 (1998); see also *Fruge v Bd of Trustees of La State Employees' Ret Sys*, 6 So 3d 124, 131 (La, 2008) (contemplating that the Legislature will meet and pass legislation during an epidemic); *Clean v State*, 130 Wash 2d 782, 832; 928 P2d 1054 (1996) (holding that the Legislature had a duty and role to legislate especially during an "epidemic of vast proportions," quoting *State ex rel Kennedy v Reeves*, 22 Wash 2d 677, 681; 157 P2d 721 (1945)); *Advisory Op to the Gov*, 88 So 2d 131, 132 (Fla 1956) (noting that, under Florida's constitutional structure, the Legislature should take "needed legislative action to meet public emergencies"); *Foster v Graves*, 168 Ark 1033; 275 SW 653, 655 (1925) (holding that emergencies such as "widespread epidemics" may "requir[e] the instant convening of the Legislature" to address the epidemic via legislation).

And the public record shows that the Legislature is ready and willing to act here. Since the Governor first declared an emergency on March 10, 2020, the Legislature has done tremendous legislative work. It has, for example, introduced over 700 bills and 100 resolutions. Over the same time, it passed about 240 bills and adopted 60 resolutions. It has also enrolled over 90 bills. And nearly all of those enrolled bills have become laws on topics including criminal law, criminal procedure, probate law, civil procedure, telecommunications, insurance law, contract law, municipal law, tax law, primary and higher education, watercraft, municipal bonds, public parks, financial institutions, liquor law, property law, the courts, unemployment benefits, environmental law, traffic laws, licensing, economic development, state identification cards, election law, mental health services, health law, Medicaid, vehicle registration, law enforcement, agriculture, infrastructure, and labor law. See 2020 Michigan Public Acts Table https://bit.ly/2XTvgFE (last accessed August 12, 2020). These legislative acts are based on dozens of committee meetings and hours and hours of testimony and debate.

Much of this legislative work specifically addresses the COVID-19 pandemic and its ripple effects. For example, just a few days ago, the Legislature passed the signature bipartisan "Return to Learn" education bill package, providing for the safe return of students to school this fall. In late July, the Legislature passed HB 5265, SB 145, and SB 373—three bills that address a $2.2 billion budget hole caused by COVID-19. These bills passed nearly unanimously with only a handful of nay votes out of hundreds of votes cast. The Legislature also appropriated and distributed $880

million from the Coronavirus Relief Fund via SB 690 without a single "nay" vote. The Legislature's appropriations committees approved both spending reductions proposed by the Governor in EO 2020-155 as well as several ad hoc transfer requests by the Governor. And finally, in mid-March, the Legislature appropriated, and the Governor signed, a $150 million funding package to support current and future COVID-19 public health efforts. See HB 4729; SB 151. This included additional funding for COVID-19 health care capacity, preparedness and response activities, and a reserve fund for future needs.

Not only can the Legislature reach substantive consensus, it can still do so quickly. On April 7, for example, Senate Majority Leader Shirkey introduced Senate Concurrent Resolution 24 to extend the state of emergency under the EMA. That same day, both the Senate and House of Representatives adopted SCR 24, extending the state of emergency 23 days to April 30. The Legislature can also call a special session via a joint letter and 18-hour notice (or, in some circumstances, sooner). It has done so multiple times during the pandemic, convening a special session on April 24 for both chambers, on August 15 for the Senate, and on August 17 for the House. The Legislature also has COVID-19-related bills sitting in both chambers, which could immediately be passed and sent to the other chamber, thus halving the constitutional five-day waiting requirements. Const 1963, art 4, § 26.

In short, the Legislature's deliberative role was and is central to our State's system of governance—and remains so even in the midst of challenge as unprecedent as COVID-19.

### B. The EMA & EPGA must be read to complement the constitutional incentive structure, not to undermine it.

The Legislature offers the proper reading of the EMA and EPGA. That reading is described below; no doubt Legislature will have more to say on that subject if it or the Governor brings the Legislature's own challenge to the Governor's flawed interpretations of those statutes to this Court. See *House of Representatives, et al. v Governor*, 943 NW2d 365, reconsideration denied, 944 NW2d 706 (Mich, 2020). But for now, it's enough to say that the Governor's view is not consistent with the constitutional incentive structure and separation of powers.

In reviewing these statutes, the Court should take careful account of these incentive structures. *Perrin v Kitzhaber*, 191 Or App 439, 446; 83 P3d 368 (2004) (recognizing the effect of its interpretation and the constitution on "incentive[s] to resolve political disagreements in the appropriate forum: the legislature"); *Marine Forests Soc'y v Cal Coastal Com*, 36 Cal 4th 1, 62; 113 P3d 1062 (2005) (Baxter, J., concurring) (noting that a court should be aware of the "political incentives" when interpreting statutes). It cannot close its eyes to other-branch actions that "fundamentally alter[] the constitutional structure of th[e] state." *In re Advisory Op to the Gov*, 732 A2d 55, 71 (RI 1999); accord *NLRB v Noel Canning*, 573 US 513, 573; 134 S Ct 2550; 189 L Ed 2d 538 (2014). Honoring the incentive structure that the framers baked into the 1963 Michigan Constitution, this Court should interpret the EPGA and EMA to "give both political parties an incentive to compromise." *Winters v Ill State Bd of Elections*, 197 F Supp 2d 1110, 1114 (ND Ill, 2001), aff'd, 535 US 967, 122 S Ct 1433 (2002).

The EMA, for example, as explained below, allows the Governor to immediately act statewide in the case of an emergency, but not permanently. The permanent statewide response is the Legislature's job. So, the EMA's 28-day period gives the Legislature time to gather, brainstorm, draft legislation, hold committee meetings, and line up votes to obtain the super-majority needed for immediate effect. It also gives the Legislature and the Governor time to work together on solutions and determine the extent to which emergency executive authority is necessary to respond to a crisis. And in requiring a jointly passed resolution for an emergency to be extended, the EMA, just like the Michigan Constitution, forces legislative agreement—and not just standard political agreement, but the sort of *additional* bipartisan cooperation the Michigan Constitution requires in cases of emergencies. Consensus and time still respected in the exercise of awesome, statewide power.

The EPGA, in allowing the Governor to assist locally, respects the requirements of Const 1963, art 4, § 29. Section 29 prohibits the Legislature from passing a local or special act if a general act will suffice. The EPGA is a *general act* the Governor *implements locally*. It does *not* delegate the same powers the EMA does; it does not, for example, allow the Governor to suspend and amend statutes. Instead, it allows the Governor to swiftly direct state resources to help local officials with immediate crisis control—the kind of thing the Constitution envisioned would be done by the executive branch, not the Legislature. Immediacy can be favored over consensus in that act because of its limited reach; the entire system of governance is not upended, but only a local problem is resolved.

Of course, if the Governor did not interpret her authority to be both independent and unbounded in the case of an emergency, then she, too, would have an incentive to work with the Legislature to pass laws that a super-majority of elected legislators agree are best for Michigan. Michigan's emergency powers laws sufficiently empower state government to offer a unified response to crises without using them to supplant the Legislature's role. The EMA and EPGA should be construed in this way to complement the constitution's structure.

### C. The executive's interpretation upends the constitutional incentives, and it has already disrupted the legislative process.

The constitutional framers recognized that that bipartisanship and consensus are critical precisely when the State is facing a tremendous challenge. The executive branch's view of the EMA and EPGA sacrifices compromise and consensus on the altar of efficiency. The Legislature asks this Court to restore the political balance the constitutional framers struck—and with it, the incentives for legislative and executive cooperation in times of emergency.

The executive branch's interpretation of the EMA and EPGA allows the Governor to easily alter the rules that govern Michigan citizens—something the framers intended only the Legislature would do, and even then only with great consensus and accountability. No longer are public health and economic issues across the entire state being controlled by the people's direct representatives. No longer is the threat of criminal sanctions a tool of the Legislature. The Governor now wields them at her total discretion. And, of course, the Governor's formation and promulgation of policy does not require agreement of two-thirds of elected legislators

to take immediate effect. In fact, it does not require any interbranch cooperation whatsoever. Policy decisions that have both short-term and long-term consequences on Michigan's diverse citizenry are being unilaterally made by a single official who is, by constitutional design, ill-equipped to process the needs and concerns of the thousands of stakeholders and communities across the state. And those decisions can (and do) change at any time and at a moment's notice.

The executive's interpretation of the EPGA has the Legislature delegating its constitutional duty to regulate public health, safety, and welfare to the Governor, while simultaneously dropping all of Article 4's lawmaking protections. It takes the power to decide "reasonable and necessary" long-term health and safety measures that must go into immediate effect away from a two-thirds majority of both houses and gives that vast power to a single person—the then-Governor—with no meaningful checks or balances. Gone is the heightened need for compromise and bipartisanship the constitutional drafters called for in times of emergency; and in its place, the rule-by-one structure that the drafters imposed so many protections seeking to avoid.

The executive branch's interpretation of the EMA and EPGA also has deceptively subtle but significant effects on the Legislature's internal incentives. With the governor wresting the power to implement any policy his or her party seeks unilaterally, legislators who are members of that party have no incentive to cooperate toward the constitutionally required legislative consensus. Why bother compromising, deliberating, or striking deals with a super-majority when the

governor can make policy dreams come true in mere seconds with the stroke of a pen? Indeed, accepting the executive branch's view of the EMA and EPGA means that, in this and future emergencies, members of the then-governor's party are better off *not* engaging in meaningful discussions and debate with fellow legislators. Put another way, whereas the 1963 Michigan Constitution requires bipartisan cooperation in times of emergency—the legislators working together to solve a puzzle—the executive branch's interpretation *encourages* some members to take their puzzle pieces, go home, and await the governor's solo solution. Better to let a single, ideologically aligned official craft and maximize shared policy preferences via executive orders than risk compromising in a bipartisan bill. This dangerously upends political incentives.

These are not abstract fears; these sorts of distortions are already affecting the Legislature. For example, when the Legislature tried a few months ago to codify several of the Governor's executive orders via SB 858, legislative members of the Governor's party refused to vote for the bill—despite fully and publicly supporting the bill's substance. This refusal meant that although SB 858 passed, it did not get the two-thirds vote necessary for immediate effect. In a victory for circular reasoning, the Governor then vetoed SB 858 because it would not take immediate effect and would "constrain [her] ability," preserving her executive orders as the sole actions addressing those COVID-19-related issues. Senate Journal 39, May 7, 2020, p 655 https://bit.ly/3fV2hrp. And just last week the Governor vetoed SB 899, which would have codified the same type of long-term immunity to healthcare workers and

facilities during an emergency or disaster declaration that the Governor previously requested and subsequently provided by executive order. The Governor felt that doing so by legislation encroached on her own extensions of immunity, so she vetoed it. Veto Letter, August 10, 2020 https://bit.ly/3fVX1n4 (mocking the bill as "an attempt to mop up one consequence" of the Legislature's decision not to extend the Governor's emergency powers).

These disruptions to the political balance matter: state supreme courts consistently "recognize the political realities of the legislative branch"—especially to better understand statutory interplay with the constitutional structure. *Gannon v State*, 304 Kan 490, 517; 372 P3d 1181 (2016); see also *King v Lindberg*, 63 Ill 2d 159, 162; 345 NE2d 474 (1976) ("[W]e cannot overlook the practical political reality . . . ."); *State ex rel Inv Corp of S Fla v Harrison*, 247 So 2d 713, 717 (Fla 1971) (using "logic and political reality" to understand the interplay of a constitutional provision and statute); *Op of the Justices*, 121 NH 552, 556, 431 A2d 783 (1981) (noting that the "drafters of [New Hampshire's] constitution recognized [ ] political realit[ies]"); *Or Educ Ass'n v Phillips*, 302 Or 87, 108; 727 P2d 602 (1986) (Linde, J., concurring) (opposing an interpretation that "subordinates political reality to a verbal fiction"). The United States Supreme Court and other federal courts do, too. See *US Term Limits, Inc v Thornton*, 514 US 779, 842; 115 S Ct 1842; 131 L Ed 2d 881 (1995) (Kennedy, J., concurring) (using the "political reality" of our government to understand our constitution); *Nixon v Adm'r of Gen Servs*, 433 US 425, 483–484; 97 S Ct 2777; 53 L Ed 2d 867 (1977) ("We, of course, are not blind to appellant's plea

that we recognize the social and political realities of 1974."); *Wal-Mart Stores, Inc v Knickrehm*, 101 F Supp 2d 749, 761 (E.D. Ark 2000) ("The court understands that political realities cannot be ignored."); *Kean v Clark*, 56 F Supp 2d 719, 726 n 9 (S.D. Miss. 1999) (recognizing that some "justiciable political issue involv[e] the intersection of constitutional rights and political realities").

Nor is it a response to argue, as the Governor has, that the Governor may do what is necessary and reasonable for public health under the EPGA. The Michigan Constitution explicitly gives the role of protecting public health to the *Legislature*. And as should be plain enough by now, it allows the Legislature to act with immediate effect in times of emergency, but *only* when a super-majority agree. Const 1963, art 4, § 27. At a time when the constitution calls for legislative cooperation, the EPGA cannot be interpreted to have delegated away the legislature's role in its entirety, and with it all constitutional protections that govern lawmaking.

The disruption of the constitutional incentive structure also rebuts the oft-repeated argument that this Legislature can return incentive structures to the constitutional norm by amending or repealing the EPGA. Putting aside that the Governor's interpretation of the law and not the law itself is the problem, this argument blinks reality. The Governor seems to recognize that the broken incentive system she has created in turn prevents some legislators from voting even for legislation *they agree* is reasonable and necessary—leaving the Governor to enact the same by executive order. But the Governor ignores that the same broken incentive system prevents amendment of the law she says gives her those powers—especially

with enough votes to go into immediate effect and to override the Governor's certain veto. The reality is, if the EPGA is interpreted as broadly as the Governor claims, repeal or amendment is possible only with a legislative super-majority that is *not* the governor's party.

Our constitutional system simply does not envision a substantial number of legislators being statutorily disincentivized from participating in the legislative process, thus making a two-thirds vote effectively impossible. The executive branch's implementation of the EMA and EPGA has broken our constitutional incentive system—the very thing the Governor is telling the Legislature it must use to fix the problem. It is like breaking a tool-and-dye machine and then telling the machine operator that if she needs any parts to fix it, she'll have to make them with her broken machine.

Fundamentally, it has been the function of the courts since *Marbury v. Madison* to rectify improper exercises of executive power. See *Marbury v Madison*, 5 US 137, 177; 2 L Ed 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). No Michigan court has agreed that it must stand silent whenever the Legislature might have a remedy of its own. See *Makowski v Governor*, 495 Mich 465, 475; 852 NW2d 61 (2014) ("[The distribution of power between the Legislature and the Governor . . . creates a legal question that this Court must answer."). After all, why should the Legislature be forced to resort to self-help, without the aid of courts, merely because one person has chosen to wield a given statute in a wholly improper way? See *State of Ohio v US Dep't of the Interior*, 880

F2d 432, 458; 279 US App DC 109 (1989) (effectively refusing to penalize a legislature for its failure to "amend an already-clear statutory command"). It seems especially grotesque to insist on that course when the possible legislative "remedy" is entirely illusory. *Marbury*, 5 US at 176 ("To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?").

The executive branch's interpretation of the EPGA and EMA have upset the political incentives baked into the 1963 Michigan Constitution. Without them, the system simply does not work as intended. The Court should return state government's levers to their proper places.

## II. Neither the EMA nor EPGA gives the governor the power to disrupt the constitutional balance of power, even in times of emergency.

The Governor, finding no constitutional authority to legislate the health, safety, and welfare of Michigan citizens in times of emergency, advances two statutory provisions as the source of her power. Neither gives her the power she purports to wield.

### A. As the Plaintiffs and Attorney General correctly argue, the Governor's authority under the EMA expired on April 30, 2020.

The Legislature has little to add to the Plaintiffs' and Attorney General's explanation that any authority the Governor may have had under the EMA expired on April 30, 2020, when the Legislature chose not to extend the state of emergency or disaster under the EMA. Pl's Br, pp 17–22; Attorney General's ("AG's") Br, pp 37–40. The Governor's contrary view ignores the plain text of the act and renders the

Legislature's responsibility under the act a nullity. Pl's Br, p 14; AG's Br, pp 39–40 ("Allowing the Governor to repeatedly rescind and immediately replace the declared states of disaster and emergency would risk shortchanging [the legislative] intent and rendering the Legislature's involvement in the extension process mere surplusage."). The Governor's argument that the Legislature's refusal to extend an emergency or disaster is a legislative "veto" is flatly wrong. Pl's Br, pp 14–17; AG's Br, p 38 n 41. No more needs to be said on that.

### B. The Governor cannot use the EPGA to justify an indefinite, statewide state of emergency.

All parties agree that the EPGA and the EMA cover the same subject matter: gubernatorial emergency powers. Under fundamental principles of statutory construction, therefore, the two statutes must be harmonized and read so that every word is given meaning. The executive branch's position—that the statutes independently authorize every COVID-19 executive order issued—renders every word of the 1976 EMA's 12 pages surplusage. The Court should instead read the two statutes as having separate purposes: the EPGA is to assist with localized emergencies, while the EMA allows executive response to statewide disasters.

#### 1. The executive branch's interpretation creates an irreconcilable conflict between the EPGA and the EMA.

The Governor says her lack of authority under the EMA is no concern because she possesses the *same* authority under a statute passed thirty years earlier. Respectfully, she does not, and that's not how lawmaking works.

The rules of statutory interpretation require the Court to apply "*any* reasonable construction" before it accepts an interpretation that renders all or part of any statute "nugatory." *Ex parte Landaal*, 273 Mich 248, 252; 262 NW 897 (1935) (emphasis added). Not even one word can be sacrificed. *People v Cannon*, 481 Mich 152, 158; 749 NW2d 257 (2008).

Contrary to this fundamental rule, the executive branch's interpretation renders the *entire* EMA—its 1976 passage, every word in it, and every exercise of authority under it—a purposeless redundancy of the EPGA. *See Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007) ("Whenever possible, every word of a statute should be given meaning. And no word should be treated as surplusage or made nugatory.") (citation omitted). Interpretations must avoid rendering a portion of a statute "meaningless," *Herald Wholesale, Inc v Dep't of Treasury*, 262 Mich App 688, 699; 687 NW2d 172 (2004), or "unnecessary," *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 399; 738 NW2d 664 (2007).

If the EPGA's few paragraphs could swallow the EMA's disaster-response provisions whole, then Governor Milliken and the 1976 Legislature engaged in a meaningless and empty exercise in calling for the EMA, passing it, and signing it into law. The Legislature often passes later statutes to broaden more primitive statutory schemes, but it makes no sense for it to pass a later statute that is total surplusage from the moment it passes. If the Governor really could do anything under the EPGA that she can under the EMA, then the EMA statute—including its substantive and temporal safeguards—are pointless. Why would the Legislature pass and the

Governor sign the EMA, if the acts it authorizes were already permitted under the EPGA? And why would *any* Governor accept the more rigid procedures of the EMA when she could have all that authority (and more) through a brute-force application of the EPGA?

The executive branch has no answer to these questions, and, indeed, has *never* provided a plausible way to read the EPGA as broadly as it does while maintaining the integrity of both statutes. Even when expressly called on to do so before the Court of Appeals and the Court of Claims, the Governor simply could not.

Statutes relating "to the same subject" or sharing "a common purpose" are *in pari materia* and "must be read together as one." *People v Hall*, 499 Mich 446, 459 n 37; 884 NW2d 561 (2016) (cleaned up). Even a facially unambiguous statute can be made "ambiguous by its interaction with and its relation to other statutes." *People v Valentin,* 457 Mich 1, 6; 577 NW2d 73 (1998) (cleaned up). Here, the EPGA and EMA occupy the same realm of the law. They cover the same general topic: gubernatorial emergency powers. And they advance the same underlying concept: immediate executive crisis control pending more durable legislative action. The Governor cannot contend that they govern different subjects, having cited both as authority for her COVID-related actions.

But fundamental canons of construction prevent the Governor's reading that the statutes provide identical powers. Under fundamental principles, for example, an earlier, broader statute (like the EPGA) cannot render a later, more specific one (like the EMA) an empty shell. When two statutes govern the same subject and are

in conflict, "the more specific statute must control over the more general statute." *Donkers v Kovach*, 277 Mich App 366, 371; 745 NW2d 154 (2007). And the older statute must yield to the newer. *Metro Life Ins Co v Stoll*,276 Mich 637, 641; 268 NW 763 (1936); *Parise v Detroit Entmt, LLC*, 295 Mich App 25, 28; 811 NW2d 98 (2011). Yet the executive branch's interpretation allows the older, more general, 1945 EGPA to remove the statutory guardrails found in the newer, more specific 1976 EMA. E.g., MCL 30.403(3), (4), and MCL 10.31(2) (conflicting directions for terminating a declaration of emergency). That gets the matter exactly backwards: if the two statutes conflict, the EPGA must yield to the EMA, not the other way around.

Reading the EPGA's conception of "emergency" against the EMA's definition of "emergency" highlights the former's local and narrow powers, as compared to the latter's statewide and broader (but time limited) grant of authority. For example, the EPGA contemplates that the Governor will act in "emergency" instances like "rioting"—a local problem. MCL 10.31(1). And the EMA explains that an emergency exists whenever the Governor decides "state assistance" must "supplement local efforts." MCL 30.402(h). So, even in the EMA, an "emergency" is a *local* problem that is nevertheless so severe it requires State help. But the EMA goes further, giving the power to declare a state of *disaster*. A disaster involves "widespread" damage, including, among other things, "epidemic[s]." MCL 30.402(e). Other examples confirm a disaster's wide geographical scope: "blight, drought, infestation," "hostile military action or paramilitary action, or similar occurrences resulting from terrorist activities." *Id.* Importantly, while the EPGA does mention "disaster," it does *not* use

it as a term of art or to empower the Governor to declare a "state of disaster." See *Pike v N Mich Univ*, 327 Mich App 683, 696; 935 NW2d 86 (2019) (holding that, in statutes, different words are "are generally intended to connote different meanings." (cleaned up)). An epidemic is nowhere to be found in the EPGA, either.

The EMA's administrative components contemplate problems requiring state-wide resources. See, e.g., MCL 30.404(3), 30.405(1) (providing for federal aid); MCL 30.406 (providing rules for compensation for property); MCL 30.407–.408 (setting up departments and department heads to oversee state administration); MCL 30.409 (providing for county representatives from each county). The EMA enumerates specific things the governor may do, most all of which have a broad reach. See MCL 30.405. And a declaration under the EMA must describe "the nature of the disaster, the area or areas threatened, the conditions causing the disaster, and the conditions permitting the termination of the state of disaster." MCL 30.403(3), (4).

In contrast, the EPGA contains a brief statement of authority with some loose examples, all spanning a few terse paragraphs. MCL 10.31(1). The specific examples of power it offers are all directed to local issues (particularly civil unrest), including the power to control traffic, implement curfews, control "ingress," control "places of amusement and assembly," and regulate alcohol and explosive sales. *Id.* Rules guiding declarations of emergency and disaster are slimmer, and there are no structural checks other than the governor's self-determination of emergency. *Id.*

The executive branch's interpretation improperly allows the Governor to use the EPGA to capture the statewide powers in the EMA while leaving that statute's

limitations on those powers behind. The Legislature put tight limits on the EMA—including the 28-day automatic termination provision—because it can be used statewide. One cannot assume, as the executive branch does, that the EPGA, a statute with the vaguest of terms and slenderest of protections, affords a governor unchecked power over all aspects of Michiganders' lives. "[T]he Legislature does not, one might say, hide elephants in mouseholes[.]" *People v Arnold*, 502 Mich 438, 480 n 18; 918 NW2d 164 (2018) (cleaned up); accord *Food & Drug Admin v Brown & Williamson Tobacco Corp*, 529 US 120, 160; 120 S Ct 1291; 146 L Ed 2d 121 (2000).

The executive branch cannot be permitted to create statutory conflict by using the EPGA to impose an indefinite, statewide state of emergency. And contrary to the executive branch's assertions, "[t]he application of *in pari materia* is not necessarily conditioned on a finding of ambiguity" in any statute. *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 73 n 26; 894 NW2d 535 (2017). That the EMA and EPGA refer to one another is *more* reason to read them together, not less. *People v Kern*, 288 Mich App 513, 519–520; 794 NW2d 362 (2010).

MCL 30.417(d) does not change this. MCL 30.417(d) says the EMA does not "[l]imit, modify, or abridge the authority of the governor to *proclaim* a state of emergency pursuant to [the EPGA]" (emphasis added). First, this provision itself recognizes that the EPGA is *separate*, and whatever it is, it is *not* what the legislature passed in the 1976 EMA statute. Second, allowing the EMA to control as the more specific and recent statute does not limit the Governor's ability to *proclaim* a state of emergency—only her ability to *extend* it over the Legislature's objection. Third, if the

EMA and the EPGA are confined to their appropriate spheres, then there would be no modification, implicit or otherwise. A "limit" or "abridge[ment]" only arises if the EPGA can infringe on the EMA's turf, as the Governor maintains it does. But the Legislature is not arguing that EMA acts as some implied repeal of the EPGA. The Legislature's reading of the EPGA merely acknowledges its already-existent scope—the scope that the 1976 Legislature and Governor found insufficient to address the emergency and disaster response baked into the EMA. Considering the EMA's related scope does not "abridge" the EPGA in any way.

A few examples help highlight the relationship between the EPGA and EMA. The first of the only two ever pre-COVID-19 declarations under the EPGA came in the summer of 1967. When race riots erupted in Detroit, Governor Romney immediately invoked the EPGA to quell the riots. See Riots, Civil and Criminal Disorders 1235–1236 (US Government Printing Office, 1967). He issued a proclamation declaring "that a public crisis, emergency, rioting, and civil disturbances exist within the City of Detroit, Michigan, within the City of Highland Park, Michigan, and within the City of Hamtramck, Michigan, in the County of Wayne." July 23, 1967 Proclamation. The second and last time, pre-COVID-19, the EPGA was used was over 20 years later. On New Year's Day in 1985, an ice storm blanketed several southern-Michigan counties. Detroit Free Press, *Ice Storm to Blame*, January 3, 1985, at A1. With hundreds of thousands out of power in several specific counties, Governor Blanchard acted under the EMA, but also declared an emergency under the EPGA. Michigan Hazard Analysis, https://bit.ly/3hfalVd, p 326

(April 2019). This was the last time, pre-COVID-19, the EPGA was used. By comparison, the EMA is used to address statewide emergencies. For example, when Great Lakes water levels were rising statewide in the 1970s, Governor Milliken needed the EMA to address it. When just last year extreme cold afflicted every corner of the state, Governor Whitmer dealt with it using the EMA. Imagine instead of local rioting that the police hear of a terrorist attack planned on an as-yet unknown public place somewhere in the state. If the Governor wanted to take defensive measures throughout every part of the state, she could do so only under the EMA. And similarly, when combatting a global pandemic, the EMA is the proper tool. All this is to say that the two statutes serve complementary roles with attendant limits, yet the Governor has sought to muddle those roles into one unrestrained act of executive rule.

**2. The EPGA's text confirms that it is a locally focused statute, not intended for long-term, worldwide events like COVID-19.**

A statute's text drives its interpretation. See *Hall*, 499 Mich at 453. The EPGA's text confirms it is intended to address localized crises, not statewide pandemics. The EPGA allows a governor to act "within" the State. MCL 10.31(1). "'Within' means 'on the inside or on the inner-side' or 'inside the bounds of a place or region.'" *State v Turner*, 145 NE3d 985, 992 (Ohio Ct App, 2019) (quoting *Webster's Third New International Dictionary* 758 (1993)). Thus, something defined as "within" relative to something else implies that the former is engulfed (and therefore smaller in size) than the latter. It is illogical to say that the state is "within" the state. If the

Legislature intended the EPGA to apply to the entire state, it would have said so, as it has elsewhere. See, e.g., MCL 28.6.

The EPGA reaffirms its local, geographic focus by repeatedly referring to an "area," "section," or "zone." MCL 10.31(1). *Merriam-Webster's Online Dictionary*, *Area* https://bit.ly/3c17JYu (accessed August 12, 2020), defines "area," in part, as "a particular extent of space" such as "a geographic region." *Webster's New World College Dictionary* similarly defines "area" as "a part of a house, lot district, city, etc. having a specific use or character." "Zone" contemplates "[a]n area that is different or is distinguished from surrounding areas," *Black's Law Dictionary* (11th ed. 2019), while a "section" is "a part of something" or "any of the more or less distinct parts into which something is . . . divided," *Forrester Lincoln Mercury, Inc v Ford Motor Co*, No. 1:11-cv-1136, 2012 WL 1642760, at *4 n 6 (MD Pa, May 10, 2012) (quoting definitions). These words imply that the EPGA's emergency powers do *not* reach the whole state.

Indeed, contrast the EPGA's then-existing idea of gubernatorial power over an "area" with the EMA's grant of emergency powers over not just an "area" but also "*areas*." MCL 30.403(3). If the 1976 Legislature believed the EPGA reached the whole state, why would it add the "or areas" surplusage? This understanding of EPGA's language accords with similar laws in other states that used more pointed language to emphasize these laws' local purposes. See, e.g., NY Exec Law 24 (mirroring EPGA's language and noting it creates a "local state of emergency"); La

Stat 14:329.6 (mirroring EPGA's language and noting that a state of emergency is declared as to "any part or all of the territorial limits of [a] local government").

The executive branch makes much of MCL 10.32, which says the EPGA gives the Governor "sufficiently broad power of action" to "provide adequate control" during crisis periods. This focus is misplaced. "[P]ower of action" refers to what *acts* the Governor may take—not *where* they may be taken. That the 1976 Legislature would closely cabin the EMA's statewide powers while simultaneously recognizing far broader statewide powers already existed under the EPGA is absurd. But aside from all that, a "rule of liberal construction does not override other rules if the application would defeat the evident meaning of the act." *Little Caesar Enters v Dep't of Treasury*, 226 Mich App 624, 629; 575 NW2d 562 (1997). The executive's interpretation does just that, transforming an act meant for limited areas and limited authority into one providing boundless power.

Thus, the EPGA's words signify that statute is intended to address specific, local concerns and the need to obtain "control" over a geographic region—not matters covering every inch of the state and all aspects of Michiganders' lives.

**3. The historical context also shows that the EPGA was meant for local matters.**

The Court must also consider a statute's historical context. See *Dep't of Envtl Quality v Worth Tp*, 491 Mich 227, 241; 814 NW2d 646 (2012). Here, the EPGA's context shows it was designed for local issues. A 1945 *Lansing State Journal* article for example, noted that it "result[ed] from the 1943 Detroit race riot" and would "give the governor wide powers to maintain law and order in times of public unrest and

disaster." Docket No. 161377, Legislature's Emergency Bypass App, Exhibit 5; see also Michael Van Beek, *Emergency Powers Under Michigan Law*, available at https://bit.ly/2z3f8rC (last accessed August 12, 2020) (same). It is thus no surprise that EPGA sections read as riot-control measures.

This "local riots" response concept was the common understanding of the EPGA for decades and became part of the impetus for passing the EMA. In the mid-1970s, Governor Milliken, worried about the danger of rising water levels in the Great Lakes, sent a special message to the Legislature on non-manmade disasters. He confirmed the EPGA was "pertinent to civil disturbances" and concluded that "[u]nder existing law, the powers of the Governor to respond to disasters is unduly restricted and limited." Docket No. 161377, Legislature's Emergency Bypass App, Exhibit 6. Because the EPGA did not address statewide, natural disasters, he asked that the Legislature give him "plenary power to declare states of emergency both as to actual and impending disasters." *Id.* The Legislature—evidently agreeing with him—passed the EMA to *give* him that power, subject to certain checks. See *Walsh v City of River Rouge*, 385 Mich 623, 632–633; 189 NW2d 318 (1971) (considering gubernatorial statements, including Governor Milliken's, to construe the EPGA).

Past governors similarly understood the limited nature of the EPGA. To the Legislature's knowledge, not one used the EPGA in at least 30 years for any emergency—and *never* for statewide emergencies. In fact, when the executive branch, in cooperation with the federal CDC, assessed all Michigan laws that might be relevant in responding to a pandemic, the EMA was cited as the primary source of

authority and the EPGA was barely mentioned—and only with regard to curfews. Docket No. 161377, Legislature's Emergency Bypass App, p 26, Exhibit 7. Governor Whitmer has nevertheless invoked the EPGA well over 100 times in the last few months. And while the executive branch believes past governors' practice does not matter, it is wrong. Under this Governor's interpretation, vast reserves of power lay waiting in the EPGA, untapped until now; in passing the EMA, the 1976 Legislature wrote *more* law to give the executive *less* power.

The scant three cases that mention the EPGA confirm this local understanding. Two discuss the EPGA in the context of local responses to localized emergencies—local curfews. *Walsh*, 385 Mich at 623; *People v Smith*, 87 Mich App 730; 276 NW2d 481 (1979). The last discusses the EPGA governing on "a drunken, raucous semi-annual event." *Leonardson v City of E Lansing*, 896 F2d 190, 192 (CA 6, 1990). Historical context backs the Legislature, and the Governor does not dispute it.

## III. Ignoring the EPGA's geographic and scope-of-authority limitations creates an impermissible delegation of lawmaking powers.

Ignoring the statutory limitations on the EPGA would create a constitutional crisis and violate the separation of powers. Under the doctrine of constitutional avoidance, the Court should adopt the Legislature's reasonable reading of the EPGA. See *Hunter v Hunter*, 484 Mich 247, 264 n 32; 771 NW2d 694 (2009).

### A. The lawmaking power rests exclusively with the Legislature.

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

class platitudes but the bedrock of our constitutional system. Michigan's 1963 Constitution adheres to these same principles. See *Westervelt v Nat'l Resources Comm'n*, 402 Mich 412, 427–429; 263 NW2d 564 (1978). Every Michigan Constitution since our first in 1835 has made this separation of powers explicit. E.g., Const 1963, art 3, § 2. This separation exists because, "[w]hen the legislative and executive powers are united in the same person or body[,] . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." *Soap and Detergent Ass'n v Nat Resources Comm'n*, 415 Mich 728, 751; 330 NW2d 346 (1982), quoting *The Federalist* No. 47 (Madison). Any doubt must "be resolved in favor of the traditional separation of [ ] powers." *Civil Serv Comm'n of Mich v Auditor Gen*, 302 Mich 673, 683; 5 NW2d 536 (1942).

As part of this system, the Constitution vests *all* lawmaking power *exclusively* in the Legislature. Const 1963, art 4, § 1; *Young v City of Ann Arbor*, 267 Mich 241, 243; 255 NW 579 (1934) (holding that the Legislature's power is "as broad, comprehensive, absolute, and unlimited as that of the Parliament of England, subject only to" the federal and state constitutions). Even more specifically, the Legislature explicitly has the lawmaking power to protect "public health." Const 1963, art 4, § 51. Michigan's courts have accordingly held time and again that when difficult public policy decisions are required, the Legislature is the branch best equipped to make them. See, e.g., *Henry v Dow Chem Co*, 473 Mich 63, 91 n 22; 701 NW2d 684 (2005).

Article 5, on the other hand, which applies to the executive branch, says nothing about the lawmaking power, excepting two narrow sections on the veto power and reorganization of departments not relevant here. See Const 1963, art 5, § 1.

Even so, the executive branch continues to act as if those separation-of-powers lines may be blurred. But the cases it cites in support are insufficient. For example, *Judicial Attorneys Ass'n v Mich*, 459 Mich 291, 297; 586 NW2d 894 (1998), was only about the judiciary's inherent power to exercise *executive-like* authority to control and administer its own internal operations. *Id.* at 297–298. Each branch's smooth functioning "necessarily includes some ancillary inherent capacity" to complete "housekeeping chores" usually done by other branches. *Id.* (cleaned up). And while the Legislature may "obtain[] the assistance of coordinate branches" to, for example, implement a law, it "cannot delegate its power to make a law." *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 9 n 7; 658 NW2d 127 (2003) (cleaned up).

**B. The Governor is unilaterally making laws.**

A law is defined as any "regime that orders human activities and relations through systematic application of the force of politically organized society." *Black's Law Dictionary* (11th ed. 2019). The Governor's COVID-19 executive orders make law.

At issue here is not just an impermissible extension of an emergency and disaster declaration. The Governor has used these declarations as the basis of over 150 COVID-19-related executive orders, some of the most expansive scope. See, e.g., EO 2020-54 (prohibiting evictions); EO 2020-17 (suspending "non-essential medical

and dental procedures"); EO 2020-58 (extending the statute of limitations); EO 2020-38 (revising and suspending FOIA mandates); and EO 2020-70 (restricting church attendance). But most troublingly, the Governor asserts she has the power to indefinitely confine all Michiganders to their homes under threat of criminal prosecution. See, e.g., EO 2020-96. These actions, which restructure livelihoods and social interactions, are lawmaking.

"[I]t would frustrate the 'system of government ordained by the Constitution' if [the Legislature] could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Gundy v United States*, ____US____; 139 S Ct 2116, 2133; 204 L Ed 2d 522 (2019) (Gorsuch, J., dissenting) (quoting *Marshall Field & Co v Clark*, 143 US 649, 692; 12 S Ct 495; 36 L Ed 294 (1892)). The EPGA as the executive branch interprets it does just that. Cf. *Indus Union Dep't, AFL-CIO v Am Petroleum Inst*, 448 US 607, 687; 100 S Ct 2844; 65 L Ed 2d 1010 (1980) (Rehnquist, J., concurring in the judgment) ("If we are ever to reshoulder the burden of ensuring that Congress itself make the critical policy decisions, these are surely the cases in which to do it.").

### C. Crisis does not diminish the separation of powers.

"The Constitution … is concerned with means as well as ends." *Horne v Dep't of Agric*, 576 US 350; 135 S Ct 2419, 2428; 192 L Ed 2d 388 (2015). A strong desire to help the general welfare cannot "warrant achieving the desire by a shorter cut than the constitutional way." *Id.* (cleaned up). "Emergency does not create power,"

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

This Court has said the same. See *People ex rel Twitchell v Blodgett*, 13 Mich 127, 139 (1865). So have other courts. See, e.g., *Maryville Baptist Church, Inc v Beshear*, No 20-5427, 957 F3d 610, ___, at *7 (CA 6, May 2, 2020) ("[W]ith or without a pandemic, no one wants to ignore state law in creating or enforcing these [executive] orders."); *Wisconsin Legislature v Palm*, ___ NW3d ___, No. 2020AP765-OA, 2020 WL 2465677, at *22 (Wis, May 13, 2020) ("Fear never overrides the Constitution. Not even in times of public emergencies, not even in a pandemic.").

Justice Jackson captured many of these ideas in his concurrence in *Youngstown,* 343 US at 579. He noted that the executive had asked for "power to deal with" "an emergency according to the necessities of the case." *Id.* at 646. Some thought finding such power "would be wise," but it "is something the forefathers omitted. They knew what emergencies were [and] knew the pressures they engender for authoritative action." *Id.* at 649–650. "With all its defects, delays and inconveniences," he concluded, "men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." *Id.* at 655.

Some emergencies require immediate and unilateral executive action, but not COVID-19—at least not any longer. Health professionals agree it will drag on for months or years; it has already been affecting Michiganders for almost half of this year. Thus, unilateral control is counterproductive and dysfunctional, especially

when the Legislature has already shown it can act fast when it must. This is not the type of case presenting a need for instantaneous action in response to a flashpoint event. See *Palm*, 2020 WL 2465677, at *9 ("[I]f a forest fire breaks out, there is no time for debate. Action is needed. . . . But in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely.").

The Governor herself recently seemed to acknowledge the truths. When the President issued executive orders a few weeks ago to address the pandemic, the Governor criticized his "refus[al] to work together with Congress on a bipartisan recovery package" and urged him "to do the right thing, stop playing political games, and work with Congress on a recovery package that will help us fight this virus." See Governor Whitmer Statement, <https://bit.ly/3aL7CAr> (August 9, 2020). If the Governor believes the time for necessary and unilateral executive action has passed at the federal level and that a comprehensive legislative response is now more appropriate, then surely the same must be said of her own state's response.

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

The Legislature can, at most, "confer authority on an" executive branch officer "to make rules as to details, to find facts, and to exercise some discretion" to "administ[er] . . . a statute." *Ranke v Mich Corp & Sec Comm*, 317 Mich 304, 309; 26 NW2d 898 (1947). But the EPGA, as interpreted by the executive branch, is an open-ended grant of legislative power. Truth is, it "ha[s] few, if any, real restrictions on the Governor's authority or even standards to guide that authority." *MDHHS v*

*Manke*, unpublished order of the Court of Appeals, entered May 28, 2020 (Docket No. 353607) (Swartzle, J., concurring in part and dissenting in part).

The EPGA says that 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." MCL 10.31. The Governor believes this entitles her to make new policies touching the most intimate parts of Michiganders' lives, including making many ordinary activities of daily life criminal. But the power to "declare what shall constitute a crime, and how it shall be punished, . . . is inherent in the legislative department of the government. Unless authorized by the constitution, this power cannot be delegated by the legislature to any other body or agency." *People v Hanrahan*, 75 Mich 611, 619; 42 NW 1124 (1889).

What's more, the Governor believes that the power delegated by EPGA allows her to make laws in a way that the Legislature constitutionally cannot. For example, to ensure public accountability and transparency, a single legislative bill cannot "embrace more than one object"—i.e., amend more than one law at once. Const 1963, art 4, § 24. But the Governor has used single executive orders to amend or suspend multiple laws at once. A bill that amends another law must be "in the possession of each house for at least five days" before final passage. Const 1963, art 4, § 26. But citing the EPGA, the Governor has issued executive orders amending and suspending laws in seconds. These are just two such examples; Article 4 contains many others. Because the 1963 Michigan Constitution prohibits the Legislature from suspending

or amending multiple laws at once and in mere seconds, among other things, it was impossible for the Legislature to delegate that power to the Governor. And these impermissible acts have follow-on effects, such as the abrogation of notice-and-comment requirements under Michigan's Administrative Procedures Act.

But, even if this amount and kind of power were delegable, the EPGA contains insufficient standards to guide its use. To avoid impermissible delegation, a statute "must contain language . . . that defines the area within which an agency is to exercise its power and authority." *Westervelt*, 402 Mich at 439. "[A] complete lack of standards is constitutionally impermissible." *Oshtemo Charter Tp v Kalamazoo Co Rd Com'n*, 302 Mich App 574, 592; 841 NW2d 135 (2013). Standards exist on a spectrum—what is appropriate in one case will not be appropriate in another. "When the scope" of a delegation reaches "immense proportions . . . the standards must be correspondingly more precise." *Synar v United States*, 626 F Supp 1374, 1386 (DDC, 1986); accord *Osius v City of St Clair Shores,* 344 Mich 693, 698; 75 NW2d 25 (1956) (explaining that "standards" must be "as reasonably precise as the subject-matter *requires* or permits" (emphasis added)). In short, greater delegation requires greater standards. And this Court has recognized that the use of EPGA powers "involves the suspension of constitutional liberties of the people. It, in effect, suspends normal civil government." *Walsh*, 385 Mich 623 at 639. The Court has equated it with the "war powers of the federal government," including "martial law." *Id.* Thus, this delegation is decidedly one of "immense proportions." *Synar*, 626 F Supp at 1386.

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

Applying the test, the EPGA, as the executive branch interprets it, is an improper delegation. *First*, taking the EPGA as a whole, it gives the Governor no functional guidance. It is exceptionally short. It has just three sections, only one of which is substantive. That one section allows a declaration of emergency "[d]uring times of great public crisis." MCL 10.31(1). And the governor may issue any "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.* There is no temporal limitation. The only thing the Governor cannot do is seize guns. *Id.* In sum, the EPGA's standards consist solely of two words: "reasonable" and "necessary."

*Second*, as interpreted by the executive branch, the EPGA allows orders on every possible public-policy area affected by COVID-19. This means the Legislature has, though the EPGA, shifted to the executive branch vast lawmaking power over every corner of the economy and social life with just the words "reasonable" and

"necessary." Reasonableness is already the lowest standard of lawful governmental action; unreasonable conduct—i.e., arbitrary and capricious conduct—violates substantive due process and is per se unlawful. And "necessary" means "necessary to protect life and property" or bring the crisis "under control"—a sweeping mandate, which, as interpreted by the Governor, includes actions unrelated to the crisis at hand. See, e.g., *Yant v City of Grand Island*, 279 Neb 935, 945; 784 NW2d 101 (2010) ("[R]easonable limitations and standards may not rest on indefinite, obscure, or vague generalities[.]"); *Lewis Consol Sch Dist of Cass Co v Johnston*, 256 Iowa 236, 247; 127 NW2d 118 (1964) (explaining that "something more is required" than telling an executive to "do whatever is thought necessary to carry out their purposes").

There are no additional standards in the phrase "to protect life and property or to bring the emergency situation within the affected area under control," either. It is hard to imagine what kind of order that so-called limitation would prohibit. The phrase identifies the EPGA's *goals*; it does not impose *standards*. The EPGA's goal is to protect life and property and manage unforeseen crises. The *way* the Governor achieves that goal is signing "reasonable" and "necessary" executive orders. *Palm,* 2020 WL 2465677, at *8 (holding delegation of lawmaking authority improper given lack of procedural safeguards and standards accompanying it). The EPGA's nonexhaustive list of example actions a governor may take is equally unlimiting. See, e.g., *State v Thompson*, 92 Ohio St 3d 584, 588; 752 NE2d 276 (2001) (explaining that "[t]he phrase 'including, but not limited to' indicates that what follows is a

nonexhaustive list of examples," so that a decisionmaker looking at the list may consider whatever she chooses).

Further, as delegated powers grow so does the need for proportionally strong standards. If the EPGA really gives the Governor the broad powers that she claims, then those powers must be guided by more fulsome standards than "reasonable" and "necessary." "Necessary" may be good enough if the issue is whether an employee's term of employment may be extended past mandatory retirement age. See *Klammer v Dep't of Transp*, 141 Mich App 253, 261–262; 367 NW2d 78 (1985) (explicitly limiting its holding about "necessary" to "the context of th[e] case"). But that is far different than regulating day-to-day actions of all Michiganders with the bite of criminal sanctions. In *Whitman v Am Trucking Assoc*, for example, the United States Supreme Court held that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." 531 US 457, 475; 121 S Ct 903; 149 L Ed 2d 1 (2001) (citations omitted). While Congress would not have to "provide any direction" to the EPA regarding the definition of a "country [grain] elevator," "it must provide *substantial guidance* on setting air standards that affect the entire national economy." *Id.* (emphasis added). The EPGA's delegation, as the Governor has described it elsewhere, lies at the latter end of the spectrum; it consists of the "broadest level" of power to functionally control Michigan's entire economy. Gov's Br, p 43.

The standards governing the executive's discretion are as flaccid as those governing the panel of actuaries created by the Nonprofit Health Care Corporation

Reform Act, which was held in *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 55; 367 NW2d 1 (1985), to violate the delegation rule. This Court held that part of the statute violated *Seaman*'s test where it simply provided the Insurance Commissioner with the discretion to "approve" or "disapprove" risk factors proposed by health care corporations, and, if he disapproved them, a panel of three actuaries were to determine a risk factor for each line of business, with no further standards. *Id.* at 53–54. This was despite the clearly and specifically articulated public policy *goal* to secure reasonably priced healthcare for all Michiganders. See MCL 550.1102(2). Like that statute, which vested unfettered power in the actuaries to determine risk factors to help control costs, the EPGA, under the executive branch's interpretation, vests the Governor with nearly unconstrained power to meet the EPGA's goals. This will not do. See also *Milford v People's Cmty Hosp Auth*, 380 Mich 49, 61–62; 155 NW2d 835 (1968) (finding a "best interest" standard impermissible); *Hoyt Bros v City of Grand Rapids*, 260 Mich 447, 451; 245 NW 509 (1932) (finding a "worthy" standard impermissible); *Oshtemo Charter Tp*, 302 Mich App at 592 (expressing "extreme[] skeptic[ism]" towards a statute without either "factors for the [decisionmaker] to consider . . . []or guiding standards").

*Blank v Dep't of Corr*, 462 Mich 103, 124; 611 NW2d 530 (2000), relied upon by the Governor, is inapposite. The Court there held that the Department of Corrections enabling act's "many" limitations on the DOC's authority were "sufficient guidelines and restrictions." *Id.* at 125–126. These included, among many others, abiding by

the Administrative Procedures Act ("APA"); promulgating "rules only for the effective control and management of DOC"; prohibiting rules that applied to municipal jails; taking "necessary or expedient" action to properly administer the act; and forbidding rules on firearms and name changes. *Id.* at 126. In contrast to these significant limitations, the EPGA includes (at most) two perfunctory words. And it does not require adherence to the APA and its oversight mechanisms. In short, the EPGA's power is much greater than the power at issue in *Blank*, but it is controlled by a fraction of the standards.

*Third*, and finally, the proper construction of the EPGA saves it from invalidation, but it invalidates the particular *use* of the EPGA here. The executive's interpretation of the EPGA includes no real, substantive standards guiding the exercise of an unparalleled delegation of power, and therefore the Court should find the Governor's actions taken under it unconstitutional.

If the Governor's reading of the statute is wrong, then her acts are without authority. If she is right, then the statute itself must fall.

## CONCLUSION

For all these reasons, the Court should rule that the Governor does not have authority under the EMA or the EPGA to continue to issue emergency orders related to the COVID-19 pandemic over the Legislature's objection.

Respectfully submitted,

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