STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE CERTIFIED QUESTIONS FROM THE 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 JEFFREY GULICK,

Plaintiffs,

v

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

Defendants.
_____/

Supreme Court No. 161492

USDC-WD: 1:20-cv-414

Filed Under AO 2019-6

BRIEF OF HOUSE DEMOCRATIC LEADER CHRISTINE GREIG AND THE HOUSE DEMOCRATIC CAUCUS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS

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QUESTIONS PRESENTED

Amici, House Democratic Leader Christine Greig and the Members of the House Democratic Caucus, file this brief to address the following questions, which the United States District Court for the Western District of Michigan certified to this Court:

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

   Amici answer: Yes.

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

   Amici answer: No.

INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Plaintiffs attempt to frame this matter as presenting the question whether the Governor may exercise authority under the Emergency Powers of the Governor Act for years into the future. That framing is evident from the section headings in their brief, as well as the bulk of their arguments throughout. See, *e.g.*, Pltf. Br. 17 ("The EPGA authorizes only limited orders for time-limited emergencies, and a years-long pandemic is not an 'emergency.'"); *id.* at 18 ("An 'emergency' for purposes of the EPGA is a set of exigent circumstances that calls for immediate action, not a years-long public health problem."); *id.* at 20 ("The Governor's declarations of 'emergency' contemplate that the state of emergency will last until the end of the epidemic, even if that takes years."); *id.* at 29 (arguing that the EPGA is unconstitutional without "a limitation on [its] applicability to long-term pandemics that pose years-long (and potentially permanent) public health policy implications").

Any argument about the Governor's power to address a "years-long" event is wildly premature, however. The first COVID-19 case was diagnosed in Michigan in March. It is now just a few months later. As the Director of the National Institute of Allergy and Infectious Diseases said last month, "[w]e are still knee-deep in the first wave" of the pandemic. Christina Maxouris & Amir Vega, *US is Still "Knee-Deep" in the First Wave of the Coronavirus Pandemic, Fauci Says*, CNN, July 7, 2020, https://perma.cc/2WH5-R494. Just this past week came reports that "[t]he coronavirus is spreading at dangerous levels across much of the United States, and public health experts are demanding a dramatic reset in the national response, one that recognizes that the crisis is intensifying and that current piecemeal strategies aren't working." Joel Achenbach, Rachel Weiner & Chelsea James, *Coronavirus Threat Rises Across U.S.: "We Just Have to Assume the Monster Is Everywhere,"* Wash. Post., Aug. 1, 2020, https://perma.cc/X4J2-8YVN. Of particular

[1] Pursuant to MCR 7.212(H)(3), *Amici* state that no counsel for a party authored this brief in whole or in part, nor did anyone, other than *Amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of the brief.

note for the State of Michigan, "the virus is again picking up dangerous speed in much of the Midwest." Julie Bosman, Manny Fernandez & Thomas Fuller, *After Plummeting, the Virus Soars Back in the Midwest*, N.Y. Times, Aug. 1, 2020, https://perma.cc/G7P2-2T5U. And the White House's coronavirus coordinator recently explained that interstate travel has ensured that the outbreak is "extraordinarily widespread" in all areas of the country. Benedict Carey, *Birx Says U.S. Epidemic is in a "New Phase,"* N.Y. Times, Aug. 2, 2020, https://perma.cc/HC4E-ERNY.

Whether the Governor has power under the EPGA to address a "years-long" event—and whether, if so, the statute is constitutional—is a purely hypothetical question at this point. This Court does not sit to decide such "abstract propositions." *Anway v Grand Rapids Ry Co*, 211 Mich 592, 605; 179 NW 350, 355 (1920). That is doubly true where the Court is asked to exercise its authority to answer a certified question under MCR 7.308(B)—authority that is purely discretionary, and that, as several justices have concluded in the past, might well exceed this Court's constitutional power. See, *e.g.*, *In re Certified Question from US Dist Court for Dist of New Jersey*, 489 Mich 870; 795 NW2d 815 (2011); *In re Certified Questions from US Court of Appeals for Sixth Circuit*, 472 Mich 1225; 696 NW2d 687 (2005). Particularly because the underlying action seeks relief that would violate the Eleventh Amendment to the U.S. Constitution, this Court should decline to answer the certified questions. The Court "should accept and answer certified questions from the federal courts sparingly and only when the Michigan legal issue is a debatable one and *pivotal to the federal case* that prompted the request for the certified question." *In re Certified Question from US Dist Court for W Michigan*, 493 Mich 70, 83–84; 825 NW2d 566, 573 (2012) (Young, C.J., dissenting) (emphasis added).

If the Court chooses to answer the questions, it should keep the actual factual context in mind. We are nowhere close to the "post-pandemic" phase to which Plaintiffs repeatedly refer. Pltf. Br. 9, 21, 34, 42. We are not even in a stable but chronic phase of the pandemic—what Plaintiffs describe as "no longer an emergency but a long-term public health challenge." *Id.* at 2. Rather, we remain in the midst of a rapidly evolving (and devolving) emergency situation. Responding to

such a situation is precisely the sort of "difficult and complex task" in a "constantly changing environment" in which this Court has previously held that the Legislature may delegate broad authority to the Governor. *State Conservation Dep't v. Seaman*, 396 Mich 299, 311; 240 NW2d 206, 211 (1976). And that is precisely what the Legislature did in enacting the EPGA.

The only questions squarely presented here are these: Whether the Governor's actions, in the midst of a crisis that is still emergent in every meaningful sense, are supported by the statutes the Legislature adopted to grant emergency powers to the executive branch; and whether those statutes are constitutional. Under the plain text of the Emergency Powers of the Governor Act, and under this Court's longstanding nondelegation jurisprudence, the answer to each of those questions is yes.

Plaintiffs claim to be defending the powers of the Legislature, against a Governor who has exercised her veto power to prevent "the Legislature's policy decisions" from becoming law. Br. 22. But the veto power is a part of the constitutional process. Const 1963, art 4, § 33. Under the Michigan Constitution, the only relevant "policy decisions" of the Legislature are the ones that can be found in the enacted laws of this State, notably the EPGA.

Amici are House Democratic Leader Christine Greig and the Members of the House Democratic Caucus. They submit this brief to vindicate the powers of the Legislature—by giving full effect to the text of the laws the Legislature has adopted to address emergencies like the present one, and by ensuring that the Legislature's power is not hamstrung in the future by an unduly restrictive nondelegation doctrine.

ARGUMENT

I. This Court Should Decline to Answer the Certified Questions

Under MCR 7.308, this Court has discretion whether to answer a certified question. This Court should exercise its discretion to decline to answer the questions here. The Eleventh Amendment bars the Plaintiffs from obtaining relief for their alleged state-law violations in

federal court. This Court's resolution of the certified questions, far from being "pivotal to the federal case," *In re Certified Question from US Dist Court for W Michigan*, 493 Mich at 83–84; 825 NW2d at 573 (Young, C.J., dissenting), will have no effect on its outcome.

In the underlying federal case, the Plaintiffs seek relief against the Defendant state officials for alleged violations of the United States Constitution and of state law in the promulgation and implementation of Governor Whitmer's emergency orders. The certified questions involve only the state law claims. On those claims, the Plaintiffs contend that the Governor's orders exceed the authority delegated to her by the Legislature. In the alternative, they contend that if the Governor did have statutory authority the relevant statutes violate the Michigan Constitution. The Plaintiffs seek declaratory and injunctive relief against the Defendants in their official capacities. See Federal Court Complaint at 1 (caption); *id.* at 36 (prayer for relief).

The federal courts lack jurisdiction over those state-law claims. Under the U.S. Supreme Court's landmark *Pennhurst* case, "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment." *Pennhurst State Sch & Hosp v Halderman*, 465 US 89, 121 (1984). A federal court lacks jurisdiction over such a claim even when the plaintiff seeks purely prospective relief. See *id.* at 106. The Sixth Circuit has repeatedly held that *Pennhurst* bars federal courts from hearing state-law claims against state officials in their official capacities, regardless of the relief sought. See, *e.g.*, *In re Ohio Execution Protocol Litig*, 709 Fed Appx 779, 782 (CA 6, 2017) (recognizing that "a federal court may issue prospective injunctive and declaratory relief compelling a state official to comply with federal law" but noting that the same principle "does not extend to prospective injunctive or declaratory relief based on alleged violations of state law"); *Ernst v Rising*, 427 F3d 351, 368 (CA 6, 2005) (*en banc*) (holding that "because the purposes of *Ex parte Young* do not apply to a lawsuit designed to bring a State into compliance with state law, the States' constitutional immunity from suit prohibits all state-law claims filed against a State in federal court, whether those claims are monetary or injunctive in

nature," and applying that principle to an official-capacity suit), cert denied, 547 US 1021 (2006). See also *World Gym, Inc v Baker*, 2020 WL 4274557, at *3 (D Mass, July 24, 2020) (holding that state-law challenges to Massachusetts governor's COVID emergency orders "are barred by the Eleventh Amendment").

Because the federal court lacks jurisdiction over the state-law claims under the Eleventh Amendment as interpreted in *Pennhurst*, the Plaintiffs could not succeed on those claims in the underlying litigation even if this Court were to answer the certified questions in their favor. To recognize this point is not, as Plaintiffs suggest, to "collaterally attack" on the federal district court's decision. Pltfs. Br. 45. That decision is currently on appeal to the Sixth Circuit, which has jurisdiction over interlocutory appeals raising Eleventh Amendment issues under *Puerto Rico Aqueduct & Sewer Auth v Metcalf & Eddy, Inc*, 506 US 139 (1993). In light of the Sixth Circuit's prior *Pennhurst* precedent, Defendants' appeal of that decision is highly likely to succeed. And any resolution of the certified questions would be purely advisory. This Court should not allow its discretionary certification power to be used for such an academic exercise.

II. The Emergency Powers of the Governor Act Authorizes the Governor's Executive Orders

In the state-court litigation challenging Governor Whitmer's executive orders, the Court of Claims held that those orders validly rest on the powers the Legislature granted in the Emergency Powers of the Governor Act of 1945 (EPGA), MCL 10.31 *et seq*. See *House of Representatives v Governor*, No. 20-000079-MZ (Ct Cl, May 21, 2020), Slip Op. 2, 10. That holding was correct.

A. The Plain Text of the EPGA Authorizes the Governor's Emergency Orders

This Court has explained that "[t]he touchstone of legislative intent is the statute's language." *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78, 84–85 (2008). If statutory text is "clear and unambiguous," this Court "enforce[s] the statute as written." *Id.* (internal quotation marks omitted). The text of the EPGA plainly authorizes Governor

Whitmer's orders—notably including her current Amended Safe Start Order, EO 2020-160, and all of the orders that the Plaintiffs claim to adversely affect them.

The Legislature specifically empowered the Governor to "proclaim a state of emergency" during "times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind." MCL 10.31(1). There can be no doubt that the COVID-19 pandemic, which even with aggressive mitigation measures has killed more than 6,400 people in the State and more than 157,000 people nationwide at last count, represents a "great public crisis"—or at least raises a "reasonable apprehension of immediate danger of a public emergency of that kind." The recent developments we discussed above highlight the continuing nature of that crisis. See pp. 1-2, *supra*.

But the Legislature did not stop by simply authorizing the Governor to "proclaim" the emergency. It went on to specify the broad powers that follow from such a proclamation: "After making the proclamation or declaration, the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1). And the Legislature gave a broad—but explicitly nonexclusive—list of examples of the types of "orders, rules, and regulations" that it empowered the Governor to issue. These include "providing for the control of traffic"; limiting or even prohibiting the "occupancy and use of buildings and ingress and egress of persons and vehicles"; "control of places of amusement and assembly and of persons on public streets and thoroughfares"; and imposing a "curfew." *Id.* The only power the Legislature *excluded* was "the seizure, taking, or confiscation of lawfully possessed firearms, ammunition, or other weapons." MCL 10.31(3). For good measure, the statute explicitly declared it "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.

The Legislature directed that the statute be "broadly construed to effectuate this purpose." *Id.*

Plaintiffs' principal argument is that "a years-long pandemic is not an 'emergency.'" Br. 17. Looking to dictionary definitions of the word "emergency," Plaintiffs contend that the statute should be read to apply only "to circumstances that are time-sensitive, rather than to long-term public health challenges." *Id.* at 18. There are four fundamental flaws with that argument.

First, there is nothing in the definitions offered by the Plaintiffs that offers any particular time limitation on an "emergency." If dangerous circumstances develop over time in ways that continue to "call[] for immediate action," they constitute an emergency under the Plaintiffs' own definition. Pltf. Br. 18 (internal quotation marks omitted).

Second, the statutory text is not limited to "emergenc[ies]" but, by its terms, extends to any "great public crisis." MCL 10.31(1). Standard definitions of "crisis" embrace any "time of intense difficulty, trouble, or danger: *the current economic crisis*." *E.g.*, New Oxford American Dictionary (3d ed 2010). A "crisis," so defined, can last for months or even years, as did the economic crisis caused by the Great Depression, or more recently the 2007-2008 Financial Crisis.

Third, the text itself declares that the Governor's power should be construed "broadly." MCL 10.32. Any effort to read the "crisis" language narrowly to limit it to a single point in time would fly in the face of the Legislature's express interpretive instruction.

But the fourth flaw in the Plaintiffs' argument is dispositive: Whatever may prove to be the case "years" from now, we are not yet in a chronic "long-term public health challenge[]." Rather, we remain in an acute state of crisis. The first wave of the pandemic continues to rage and change by the day, with a concomitant need for "time-sensitive" action to avoid life-threatening consequences.

The pandemic is neither stable nor under control. See pp. 1-2, *supra*. Continued outbreaks throughout the country, which are readily spread through interstate travel, ensure that we are still in a "period[]

of impending or actual public crisis or disaster." MCL 10.32. Cf. *Ass'n of Jewish Camp Operators v Cuomo*, 2020 WL 3766496, at *9 (NDNY, July 6, 2020) (finding "the recent dramatic rise in COVID-19 cases and deaths in several other states" to be "particularly worrisome," because it indicated that even though the rate of infection had "momentar[il]y" decreased in New York it could readily reverse course "if the conditions imposed by Defendant's executive orders are not sufficiently followed"); *Carmichael v Ige*, 2020 WL 3630738, at *7 (D Hawaii, July 2, 2020) (rejecting argument "that no [COVID-related] emergency exists here or throughout the United States" by noting that, as of July, "across the country, there is a resurgence in cases following the loosening of restrictions").

Contrary to Plaintiffs' suggestion (Br. 20-21), the prospect that hospitals would be overwhelmed by coronavirus patients is not the only emergent problem that has been caused by the pandemic. The continued uncontrolled spread of a deadly disease—one that appears to have debilitating effects on even many of those who survive[2]—is itself an exigent matter that requires swift action. And if the government cannot act quickly and decisively in response to the changing patterns in the pandemic, the state's economy will freeze up. See, *e.g.*, Peter R. Orszag, *Covid Fear Will Keep the World in a Slump*, Bloomberg Opinion, July 13, 2020, https://perma.cc/5AA4-RD2Q (describing academic studies demonstrating that it is fear of contracting COVID-19, and not governmental lockdown orders, that have led to economic contraction).

COVID-19 remains a rapidly evolving situation demanding an immediate government response—exactly the sort of situation Plaintiffs say the EPGA reaches. See also *Bayley's Campground Inc v Mills*, 2020 WL 2791797, at *12 (D Me, May 29, 2020) ("[T]he COVID-19 scenario is the kind of scenario for which emergency action would be expected."), reconsideration den 2020 WL 3037252 (D Me, June 5, 2020). Should the Governor continue to impose emergency orders after the virus is under

[2] See, *e.g.*, Jennifer Couzin-Frankel, *From 'Brain Fog' to Heart Damage, COVID-19's Lingering Problems Alarm Scientists*, Science, July 31, 2020, https://perma.cc/K42F-2FF3.

control, there will be time enough then to consider whether the EPGA supports those actions.[3]

Plaintiffs note that "the EPGA does not refer to 'epidemics' as an example of circumstances over which the EPGA gives the Governor emergency powers." Br. 19. But that is irrelevant. The statute gives only one specific example of the sort of emergency to which it empowers the Governor to respond—"rioting." MCL 10.31. Otherwise, it speaks in general terms: "great public crisis," "disaster," "catastrophe," and "similar public emergency." *Id.* A deadly pandemic plainly fits within each of those general terms. And the Court should not interpret them more narrowly than their broad language permits. See Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* § 9 (2012) ("[T]he presumed point of using general words is to produce general coverage—not to leave room for courts to recognize ad hoc exceptions."). That is doubly true in light of the Legislature's express instruction to interpret the statute "broadly" to "effectuate th[e] purpose" of "invest[ing] 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.

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[3] In light of the ongoing crisis, which has lasted for mere months, the cases cited by Plaintiffs rejecting "indefinite" emergency powers (Br. 22) are entirely inapposite. The Governor is not asserting an "open-ended or time unlimited" authority that "unreasonabl[y]" continues "after the termination of an emergency." *Hoitt v Vitek*, 497 F2d 598, 600 (CA 1, 1974). Nor is she "continu[ing] to rely indefinitely on an emergency which at this date is almost two years old." *Valiant Steel & Equip, Inc v Goldschmidt*, 499 F Supp 410, 413 (DDC, 1980). Much less has she asserted that an emergency situation has lasted for "nine years." *Co of Hudson v State of New Jersey Dept of Corr*, 2009 WL 1361546, at *1 (NJ Super Ct App Div, May 18, 2009). (For what it's worth, none of these cases involved the construction of the EPGA in any event, and only one—*County of Hudson*—even involved an analogous statute.)

B. Nothing in the In Pari Materia *Doctrine Justifies Engrafting the EMA's 28-Day Limit Onto the EPGA*

Plaintiffs argue that the Governor's emergency powers under the EPGA lapsed at the end of 28 days absent an extension granted by the Legislature. Br. 24-29. They recognize that the EPGA itself contains no 28-day limit. But they ask the Court to read into that statute the limitations that the Legislature placed on the Governor's authority under a *different* law—the Emergency Management Act (EMA), MCL § 30.401 *et seq.*

The EMA, adopted more than 30 years after the EPGA, layers additional and more detailed emergency authorities atop those that existed in the earlier statute. When the Legislature adopted the EMA, it imposed a 28-day limitation on the Governor's unilateral power under the new law. See MCL 30.403(3) ("After 28 days, the governor shall issue an executive order or proclamation declaring the state of disaster terminated, unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature."); MCL 30.403(4) (similar). But it specifically preserved all of the authority granted to the Governor under the EPGA. See MCL 30.417(d) (stating that the EMA "shall not be construed" to "[l]imit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of the Michigan Compiled Laws").

Despite the Legislature's clear instruction that the EMA did not in any way limit the Governor's power under the EPGA, Plaintiffs contend that Governor Whitmer's authority under the EPGA is bounded by the 28-day limitation in the EMA. Plaintiffs say that when the Governor issued an order terminating her original declaration of a state of emergency and disaster under the EMA (in recognition of the Legislature's failure to grant an extension), that order necessarily also terminated the state of emergency that she had declared under the EPGA. Because both the original EMA declaration and the original EPGA declaration responded to the same event—"the COVID-19

pandemic"—they assert that the two declarations must stand or fall together. Br. 25.

But that hardly follows. The Governor's termination of her original EMA disaster declaration did not reflect the conclusion that the emergency was over. It instead simply acceded to the Legislature's refusal to grant an extension *under that statute*. That is apparent from the plain text of EO 2020-66 (emphasis added):

> For the reasons set forth above, 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. Twenty-eight days, however, have elapsed since I declared states of emergency and disaster *under the Emergency Management Act* in Executive Order 2020-33. And while I have sought the legislature's agreement that these declared states of emergency and disaster should be extended, the legislature—despite the clear and ongoing danger to the state—has refused to extend them beyond today.

That executive order specifically terminated the emergency and disaster declarations under the EMA only, see *id.* (operative clauses), without withdrawing the prior emergency declaration under the EPGA. Indeed, on the very same day, the Governor issued EO 2020-67 (emphasis added), which reiterated that "[a] state of emergency remains declared across the State of Michigan *under the Emergency Powers of the Governor Act* of 1945." Contrary to Plaintiffs' suggestion, it is their argument on this point, not the Governor's, that is mere "word play." Pltf. Br. 25. [4]

[4] Plaintiffs' argument in this regard is also too clever by half. That argument suggests that the 28-day EMA limitation might *not* apply to the EPGA emergency if the Governor had originally issued two separate executive orders declaring emergencies—one under the EMA and one under the EPGA. But there is no reason why it should matter whether the declarations appeared in one order or two.

Plaintiffs also rely on the *in pari materia* and surplusage doctrines. Br. 26-29. They argue that the Court should read the EMA's 28-day limitation into the EPGA, which contains no such limitation. If the Court does not do so, Plaintiffs contend, the subsequently adopted EMA would be rendered "surplusage." Br. 28. There are three basic flaws in that argument.

First, Plaintiffs' argument flies in the face of the plain text of the EMA. Far from seeking to *limit* the Governor's pre-existing powers under the EPGA, the EMA's language explicitly *preserved* those powers. See MCL 30.417(d). The Legislature could not have been clearer that the EMA merely added to, and did not in any way narrow, the power it had granted the Governor three decades earlier when it adopted the EPGA.

Plaintiffs suggest that this language, at best, preserves only the Governor's authority to initially "proclaim" an emergency—but not her authority to issue further orders pursuant to that declaration. Br. 28. Their argument entirely ignores the "or exercise any other powers vested in him or her" language in MCL 30.417(d). That language makes clear that the EMA preserved not just the authority to "proclaim" an emergency but also all of the other powers attendant to such a proclamation under the EPGA.

Second, Plaintiffs' argument distorts the *in pari materia* and surplusage doctrines. This Court has made clear that the *in pari materia* doctrine is not a mechanism for "rewriting … unambiguous language." *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 73–74 & n26; 894 NW2d 535, 539–40 & n26 (2017). As this Court has explained, "[i]f a statute is unambiguous, a court should not apply preferential or 'dice-loading' rules of statutory interpretation." *People v Hall*, 499 Mich 446, 454; 884 NW2d 561, 565 (2016) (internal quotation marks omitted). See also *Summer v. Southfield Bd of Educ*, 324 MichApp 81, 93; 919 NW2d 641, 649 (2018), appeal denied, 503 Mich 953; 923 NW2d 256 (2019) ("*in pari materia* rule of statutory construction is not implicated" where "the language of the statute is unambiguous") (internal quotation marks omitted); *In re Indiana Michigan Power Co*, 297 MichApp 332, 344; 824 NW2d 246, 252–53

(2012) (observing that "the interpretive aid of the doctrine of *in pari materia* can only be utilized in a situation where the section of the statute under examination is itself ambiguous") (internal quotation marks omitted).

As we have shown, both the EPGA and the EMA are unambiguous. The EPGA unambiguously contains no 28-day limitation. And the EMA unambiguously preserves—without limitation—the powers granted to the Governor under the earlier statute. The *in pari materia* doctrine offers Plaintiffs no help.

The same goes for the surplusage doctrine. The canon against surplusage is merely an inferential means of uncovering legislative intent, one that does not apply where the text is clear. See *People v. Pinkney*, 501 Mich 259, 285 n.63; 912 NW2d 535, 548 n.63 (2018). Here, there is no need for inference, for the Legislature made its intent clear in the plain text of the EMA: The EMA merely adds to, and does not narrow, the authority the Legislature granted the Governor in the EPGA. Cf. *Apsey v. Mem'l Hosp*, 477 Mich 120, 131; 730 NW2d 695, 701 (2007) ("We question how the Legislature could have signaled more clearly its intent that the URAA should function as an alternative to MCL 600.2102 than by stating that the URAA 'provides an additional method of proving notarial acts.' The Legislature need not repeal every law in a given area before it enacts new laws that it intends to operate in addition to their preexisting counterparts.") (citation omitted).[5]

[5] Plaintiffs' reliance on the canon of constitutional avoidance (Br. 17) fails for the same reason. "The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means of choosing between them*." *Clark v. Martinez*, 543 US 371, 385 (2005) (emphasis in original). The EPGA's text is not susceptible of Plaintiffs' construction. In any event, as we show in the next section, there is no difficult constitutional question here.

Third, there is simply no surplusage here. As the Court of Claims held, "the EMA equips the Governor with more sophisticated tools and options at her disposal" than if she relied on the EPGA alone. *House of Representatives*, *supra*, slip op. 14. For example, it is only the EMA that authorizes the Governor to "enter into a reciprocal aid agreement or compact with another state, the federal government, or a neighboring state or province of a foreign country." MCL 30.404(3). And Governor Whitmer has stated that the portions of her orders granting immunity from civil liability to certain parties depend on the EMA. See MCL 30.411. Likewise, the provisions of the EMA that authorize expanded scope of practice for specified medical professionals during a declared state of disaster. MCL 30.411(5).

None of Plaintiffs' alleged injuries stem from orders or provisions that rest on the EMA alone. To the extent that the Governor seeks to invoke authorities that exist under the EMA but not the EPGA, she must use the procedures of the more recent statute. Even if, as here, the authorities granted by the two statutes overlap in many significant ways, that does not render the latter statute surplusage. See *Chevron U.S.A. Inc. v. Echazabal*, 536 US 73, 87 (2002) ("A provision can be useful even without congressional attention being indispensable."). There is no basis for reading the EMA's 28-day limitation into the EPGA.[6]

[6] The Oregon Supreme Court recently rejected a similar argument. The governor had issued COVID-related orders pursuant to her authority under a general emergency-powers law, which contained no time limitation. Plaintiffs argued that the orders should terminate after 28 days, the period set by the state statute specifically relating to public health emergencies. The court held that the Governor's authorities under the general emergency law were "not subject to the 28-day time limit." *Elkhorn Baptist Church v Brown*, 366 Or 506, 537; 466 P3d 30, 49 (2020).

III. The EPGA Does Not Violate the Separation of Powers

Plaintiffs argue that Governor Whitmer's emergency orders constitute lawmaking in violation of the constitutional separation of powers. As we have shown, however, those orders rested on the authority the Legislature itself granted in the Emergency Powers of the Governor Act. They can therefore violate the separation of powers only if the EPGA itself violates the constitutional nondelegation doctrine. See *Westervelt v Nat Res Comm'n*, 402 Mich 412, 430–31; 263 NW2d 564, 571–72 (1978). As the Court of Claims properly held, the statute fully satisfies the standards set forth in the cases applying that doctrine. *House of Representatives*, *supra*, slip op. 16-19. Governor Whitmer, by exercising the authority granted to her by the statute, is merely executing, not making, the laws. Accordingly, her orders are constitutional.

This Court has long made clear that the Executive Branch may carry out powers delegated by the Legislature, so long as the delegation is "limited by the imposition of 'defined legislative limits' or legislatively prescribed standards." *Westervelt*, 402 Mich at 430; 263 NW2d at 571. When the delegating legislation contains such standards, the Executive's action "is not in fact, 'law-making' and is therefore not an unconstitutional violation of the separation of powers." *Id.* at 431; 263 NW2d at 572.

In determining what limits are sufficient to guide a delegation, the Court has "recognized the fact that a flexible, adaptable rule regarding 'standards' is necessitated by the exigencies of modern day legislative and administrative government." *Id.* at 436; 263 NW2d at 574. It has thus held "that 'standards prescribed for guidance' need only be 'as reasonably precise as the subject-matter requires or permits.'" *Id.* at 435; 263 NW2d at 574 (quoting *Osius v City of St. Clair Shores*, 344 Mich 693, 698; 75 NW2d 25, 27 (1956)). In particular, "[t]he preciseness of the standard will vary with the complexity and/or the degree to which subject regulated will require constantly changing regulation." *Seaman*, 396 Mich at 309; 240 NW2d at 210. Where "it is impractical for the Legislature to provide specific regulations," it is fully constitutional for a statute to provide "that this function must be performed by the

designated administrative officials." *Id.* See also *id.* at 311; 240 NW2d at 211 (recognizing that broader delegation was appropriate where the government was faced with "a difficult and complex task" in a "constantly changing environment"). The Court has recognized that the Legislature can satisfy these standards in appropriate contexts by using "quite general language," *GF Redmond & Co v Michigan Sec Comm'n*, 222 Mich 1, 5; 192 NW 688, 689 (1923), or "paint[ing] 'with a rather broad stroke of the brush,'" *Westervelt*, 402 Mich at 448; 263 NW2d at 580, so long as it makes its policy judgments sufficiently clear.

The EPGA satisfies those standards. It does not give the Governor unfettered authority. Instead, it limits that power in key respects. First, the Governor may issue an emergency proclamation only in cases of a "great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind." MCL 10.31(1). That is a significant limitation, because it ensures that the emergency authorities exist only in response to truly extraordinary threats rather than as a tool of day-to-day governance in ordinary times. Second, once the Governor has issued an emergency proclamation, the statute limits the rules she can issue. They must be both "reasonable" and "necessary to protect life and property or to bring the emergency situation within the affected area under control." *Id.* Although the Governor will necessarily receive deference in making her determinations under this provision, it provides key substantive standards to guide her discretion and permit review.

Those standards may "paint[] 'with a rather broad stroke of the brush.'" Cf. *Westervelt*, 402 Mich at 448; 263 NW2d at 580. But they are "'as reasonably precise as the subject-matter requires or permits.'" *Id.* at 435; 263 NW2d at 574 (quoting *Osius*, 344 Mich at 698; 75 NW2d at 27. Responding to an emergency is perhaps the paradigm case of "a difficult and complex task" undertaken in a "constantly changing environment." Cf. *Seaman*, 396 Mich at 311; 240 NW2d at 211.

That is particularly true for COVID-19—"a global pandemic caused by a new and rapidly spreading virus, during which conditions change on a daily basis." *Elkhorn Baptist*, 366 Or at 510; 466 P3d at 35.

"COVID-19 is highly contagious and continues to spread, requiring public officials to constantly evaluate the best method by which to protect residents' safety against the economy and a myriad of other concerns." *Illinois Republican Party v Pritzker*, 2020 WL 3604106, at *7 (ND Ill, July 2, 2020). In "just a few short months," it "has killed tens of thousands of people worldwide and infected hundreds of thousands more." *Adams & Boyle, P.C. v. Slatery*, 956 F3d 913, 918 (6th Cir 2020). (Indeed, in the short time since the Sixth Circuit issued its opinion in *Adams & Boyle*, the United States death toll has passed the 150,000 mark.)

Responding to the pandemic "is a dynamic and fact-intensive matter." *South Bay United Pentecostal Church v Newsom*, 140 S Ct 1613, 1613 (2020) (Roberts, C.J., concurring). It requires assessment of (among other things) epidemiological, biological, and economic data from across the State, the Nation, and other parts of the world that are experiencing the same crisis. The information is ever-developing as the pandemic spreads, without effective control, throughout the country. See pp. 1-2, *supra*. An effective response thus requires officials to "actively shap[e] their response to changing facts on the ground." *South Bay United Pentecostal Church*, 140 S Ct at 1614. The stakes are the greatest ones imaginable: the preservation of life and health against needless deprivation, as well as ensuring that the economy of the State can continue in a safe and sustainable way. Immediate action—and immediate changes when the facts change—are necessary to protect these core interests during the crisis.

Even if the EPGA were limited to "great public cris[es]" caused by pandemics, it would be impossible to specify the standards governing the Executive Branch's emergency action more precisely. And given the range of potential emergencies beyond pandemics for which the State must be prepared—emergencies that might not be predicted or even predictable—it was entirely appropriate for the Legislature to craft the EPGA's delegation in the terms that it did.

Michigan's Legislature is hardly alone in having granted flexible authority to the Governor to respond to pandemics and similar emergencies. Across the Nation, state legislatures have adopted

statutes "broadly authorizing action where necessary to protect others from infection" in "the face of a novel infectious disease." Lawrence O. Gostin & Lindsay F. Wiley, *Public Health Law* 426 (3d ed. 2016). The Pennsylvania Supreme Court recently upheld, against a separation-of-powers challenge, orders promulgated by that state's governor in response to the COVID-19 pandemic. The court concluded that the authority to issue those orders was "inherent in the broad powers authorized by the General Assembly." *Friends of DeVito v. Wolf*, 227 A3d 872, 893 (Pa 2020), stay denied, 2020 WL 2177482 (US May 6, 2020). And the Oregon Supreme Court recently upheld COVID-related orders issued under a broad emergency statute that gave the governor "'the right to exercise, within the area designated in the proclamation, all police powers vested in the state by the Oregon Constitution in order to effectuate the purposes of this chapter.'" *Elkhorn Baptist*, 366 Or at 524; 466 P3d at 42 (quoting Or Rev Stat 401.168(1)). The same result is appropriate here.

The broad-but-not-unlimited power that the Legislature granted the Governor in the EPGA contrasts sharply with the powers at issue in the cases on which Plaintiffs rely. Plaintiffs place principal reliance on this Court's decision in *Blue Cross & Blue Shield of Michigan v. Milliken*, 422 Mich 1, 51; 367 NW2d 1, 27 (1985), and on the U.S. Supreme Court's decision in *Panama Refining Company v Ryan*, 293 US 388 (1935). Pltf. Br. 33. Each of these cases involved statutes that imposed literally no standards to guide the discretion of the executive branch. Neither is apposite here.

In *Blue Cross*, this Court invalidated part of an insurance reform law that authorized the Insurance Commissioner and an actuarial panel to approve or disapprove proposed risk factors. The Court explained that the statute provided the Insurance Commissioner and the actuaries with "*absolutely no standards*" to guide their decisions. *Id.* at 52; 367 NW2d at 27 (emphasis added). That characterization was entirely apt, as the Court's description of the relevant provisions makes clear:

> Second, the Insurance Commissioner must either "approve" or "disapprove" the factors proposed by the health care corporation,

> § 205(5). No guidelines are provided to direct the Insurance Commissioner's response.
>
> Third, if the risk factors are disapproved, a panel of three actuaries "shall determine a risk factor for each line of business," § 205(6). No further directions are set forth to guide the panel.

Id. at 52–53; 367 NW2d at 27–28 (footnote omitted). The Court explained that "the power delegated to the Insurance Commissioner is completely open-ended." *Id.* at 53; 367 NW2d at 28. The statute was "completely devoid of any indication why one factor should be preferred over another; no underlying policy has been articulated, nor has the Legislature detailed the criteria to be employed by the panel in making this determination." *Id.* at 55; 367 NW2d at 29.[7]

Panama Refining presented essentially the same situation. Section 9(c) of the National Industrial Recovery Act authorized the President to bar the interstate transport of hot oil, but it provided absolutely no standards to govern the President's decision:

> "The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State."

Panama Ref Co 293 US at 406 (quoting Section 9(c)). The Court concluded that the provision violated the nondelegation doctrine because "Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of

[7] *Osius*, 344 Mich at 700; 75 NW2d at 28, was also a case in which an administrative body had absolutely no standards to guide its exercise of discretion: "The zoning board of appeals is simply given authority to permit, and obviously to refuse to permit, the erection of gasoline stations after public hearings. But what standards prescribe the grant or refection of the permission? We find none."

circumstances and conditions in which the transportation is to be allowed or prohibited." *Panama Ref Co*, 293 US at 430.

The EPGA, by contrast, *does* both articulate an "underlying policy" and provide standards to guide the exercise of the power delegated to the Governor. The Governor's orders must be "reasonable" and within the realm of what could be considered "necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1). Once the "emergency situation" passes, and the orders are no longer a "reasonable" response to it, the Governor's statutory authority goes away. Plaintiffs' suggestion that the law could authorize emergency orders "for years to come" and "even after the pandemic has been resolved" (Br. 34) is not just premature; it is simply incorrect.

Considering the grammar and structure of the statutory text, it is apparent that "to protect life or property [etc.]" is an operative provision—a standard that governs the Executive Branch—and not merely a generic policy goal. The relevant language does not appear in a prefatory provision, or one stating general statutory purposes. Rather, it appears in the very sentence authorizing the Governor to issue "orders, rules, and regulations," and it specifically modifies that noun phrase. It thus provides the "'defined legislative limits' and 'ascertained conditions' (*i.e.*, 'standards')," *Westervelt*, 402 Mich at 431; 263 NW2d at 572 (quoting *People v Soule*, 238 Mich 130, 139; 213 NW 195, 197-98 (1927)), that restrict the Governor's discretion.[8]

[8] Unlike the Iowa statute invalidated i*n Lewis Consolidated School District of Cass County v Johnston*, 256 Iowa 236, 247; 127 NW2d 118, 125 (1964), the EPGA does not simply leave it to the executive to do as it wishes. See *id.* (interpreting the statute there to give "the superintendent, with the approval of the board, unlimited authority to do whatever he deems best in furthering the educational interests of the state"). Rather, it expressly requires that any regulations be "reasonable." And it keys the "necessary" requirement not to the

Plaintiffs state that they "have not found any case in which any statute—even an emergency-powers statute—has been saved from a non-delegation challenge by virtue of such amorphous statutory language" as appears in the EPGA. Br. 36. But far from being "amorphous," the terms "reasonable" and "necessary" are generally understood in the law to provide binding standards that guide and limit primary conduct. "Reasonable care," which frequently determines what steps individuals and entities must take to prevent harm to others on pain of monetary and even criminal sanction, is perhaps the most ubiquitous liability rule applied by courts throughout the State and Nation.

Arguing that the statutory language imposes no "real limitation on [the Governor's] authority," Plaintiffs point to several cases that have applied the rational basis test to reject federal constitutional challenges to Governor Whitmer's orders. Br. 37-38. But Plaintiffs mix apples and oranges. It is axiomatic that the rational basis test that applies to federal constitutional claims is uncommonly deferential. See, *e.g.*, *Kimel v Florida Bd of Regents*, 528 US 62, 85 (2000) (classification satisfies rational basis review even if it is based on a generalization that "is far from true" in all cases, "is probably not true" in most cases, and indeed "may not be true at all") (internal quotation marks omitted). The whole point of such a deferential test is to leave to state law questions regarding the reasonableness of state officials' action. See *Daniels v Williams*, 474 US 327, 333–36 (1986) (federal Constitution does not require state officials to exercise "reasonable" care, but state law may do so). The EPGA imposes just such a reasonableness requirement.

The terms "reasonable" and "necessary" in the EPGA compare favorably to the "quite general" terms that the Michigan courts have found in the past to impose sufficient limitations to satisfy the nondelegation doctrine. *G.F. Redmond & Co.*, 222 Mich at 5; 192 NW at 689. In *G.F. Redmond*, for example, the Supreme Court upheld a "Blue Sky" statute granting the Michigan Securities Commission power to

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Governor's unfettered judgment but to the protection of life and property and the bringing of the emergency under control. MCL 10.31(1).

suspend a business license if it found "good cause" for doing so. Although the delegation was phrased in broad terms, the Court concluded that "the term 'good cause' for revocation takes its sense from [the] policy" underlying the Blue Sky laws—to protect the public from fraud and sharp business practices. *Id.* at 5–6; 192 NW at 689.

Plaintiffs do not so much as cite this Court's decision *G.F. Redmond*. The delegation here is attended with much more specific limits than the one there. Given the complex and fast-moving actions that emergency response demands, there is even more justification for a broad delegation here.

Nor do Plaintiffs cite the many federal cases that have upheld statutory delegations based on far more "amorphous statutory language" than the EPGA's—even though Plaintiffs themselves note that "Michigan courts have … looked to federal precedent on questions of nondelegation and separation of powers." Br. 32. In *Yakus v United States*, 321 US 414, 426–27 (1944), the Supreme Court upheld a statute that delegated to the Price Administrator the power "to promulgate regulations fixing prices of commodities which '*in his judgment will be generally fair and equitable and will effectuate the purposes of this Act*' when, in his judgment, their prices 'have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act.'" *Id.* at 420 (emphasis added; quoting the statute). In *National Broadcasting Company v United States*, 319 US 190, 216–17 (1943), the Court upheld a statute that delegated to the Federal Communications Commission the power to regulate broadcasting "'as public convenience, interest, or necessity requires.'" *Id.* at 214 (quoting the statute).

Plaintiffs do not cite *Yakus* or *National Broadcasting*. They do cite the U.S. Supreme Court's decision in *Mistretta v United States*, 488 US 361 (1989). Br. 32. But they fail to mention two key aspects of that case: First, the Court *rejected* the delegation challenge in *Mistretta*, 488 US at 379. Second, the Court specifically reaffirmed the holdings in *Yakus* and *National Broadcasting*, which had held that statutory requirements to regulate in the "public interest" were sufficient to satisfy the nondelegation doctrine. *Mistretta*, 488 US at 378–79. Similarly, although Plaintiffs cite the U.S. Supreme Court's decision in

Whitman v American Trucking Associations, 531 US 457 (2001), they fail to note that the Court there upheld, against a nondelegation challenge, a statute that delegated to the executive the authority to set air quality standards at a level "'requisite to protect the public health' with 'an adequate margin of safety.'" *Id.* at 465 (quoting the statute); see *id.* at 473 (rejecting the nondelegation argument).

The limitations on the Governor's emergency authority under the EPGA compare favorably to the limitations found sufficient in each of these cases. The statute thus readily satisfies the nondelegation doctrine.

Even beyond the limits that appear in the EPGA itself, the Governor faces other constraints on the exercise of her authority under the statute. To the extent that her orders violate constitutional rights, the affected individuals may challenge them in court. See, *e.g.*, *Seaman*, 396 Mich at 313; 240 NW2d at 212 (noting that due process challenges are available to ensure that "authority, although properly delegated," is not "subject to abuse"). Moreover, the Governor is also constrained by the ultimate check—accountability at the polls through the normal political process. When the Legislature delegates authority to an official with a "high degree of proximity to the elective process," the ready availability of political checks provides "an additional, substantial factor assuring that the public is not left unprotected from uncontrolled, arbitrary power in the hands of remote administrative officials." *Westervelt*, 402 Mich at 449; 263 NW2d at 580. Of all state officials, the Governor is the one with the most salient "proximity to the elective process."

CONCLUSION

The Court should decline to answer the certified questions. If it chooses to answer them, it should affirm the legality of the Governor's emergency orders.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

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