STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

Supreme Court No.

Court of Appeals No. 353655

Court of Claims No. 20-000079-MZ

**Filed under AO 2019-6**

**This appeal involves a ruling that governmental action is invalid.**

# THE MICHIGAN LEGISLATURE'S APPLICATION FOR LEAVE TO APPEAL FROM THE MICHIGAN COURT OF APPEALS

**— Oral Argument Requested —**

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## ORDER APPEALED FROM AND RELIEF SOUGHT

The Michigan House of Representatives and Michigan Senate filed a complaint in the Court of Claims challenging the Governor's declarations of emergency and disaster as to COVID-19. Finding that the Legislature had standing, the court held that the Governor had exceeded the authority granted to her in the Emergency Management Act of 1976 ("EMA") by declaring extended states of emergency and disaster in Executive Order 2020-68 over the Legislature's objection. Yet the court upheld the Governor's exercise of authority under the Emergency Powers of the Governor Act of 1945 ("EPGA") in declaring a state of emergency in Executive Order 2020-67. The court also held that the EPGA's broad grant of gubernatorial lawmaking power did not offend the separation-of-powers doctrine.

In a 2-1 decision, the Court of Appeals affirmed in part. The court held that "the Governor's declaration of a state of emergency, her extension of the state of emergency, and her issuance of related executive orders fell within the scope of [her] authority under the EPGA." The court refused to decide whether the Governor's actions violated the EMA, declaring that issue moot. Judge Jonathan Tukel dissented; he found that neither law granted the Governor the powers she currently wields. He also concluded that the EPGA would be an unconstitutional abrogation of the separation of powers if construed in the manner that the Governor construes it.

The Legislature now asks this Court to grant review, reverse the decision of the Court of Appeals, and hold (1) that the Governor exceeded her authority under the EMA and EPGA; or (2) alternatively, that (a) the Governor exceeded her authority under the EMA and (b) the Governor's interpretation of the EPGA violates the separation-of-powers doctrine in the Michigan Constitution.

In either event, the Court should hold that the Governor's COVID-19-related declarations of emergency and disaster, and the orders that rest on the same, are improper and invalid.

## STATEMENT OF THE QUESTIONS INVOLVED

*First Question*

Has the Governor exceeded her authority under the Emergency Powers of the Governor Act ("EPGA") by declaring an indefinite state of emergency and exercising plenary authority during a statewide pandemic?

| | |
|---|---|
| The Michigan Legislature answers: | Yes. |
| The Governor answers: | No. |
| The Court of Claims answered: | No. |
| The Court of Appeals answered: | No. |

*Second Question*

If the Governor's construction of the EPGA is correct, does the Act offend the separation of powers because it impairs the Legislature's lawmaking prerogative and fails to provide sufficient standards to guide executive discretion?

| | |
|---|---|
| The Michigan Legislature answers: | Yes. |
| The Governor answers: | No. |
| The Court of Claims answered: | No. |
| The Court of Appeals answered: | No. |

*Third Question*

Did the Governor exceed her authority under the Emergency Management Act by extending the declared states of emergency and disaster beyond April 30, 2020, when the legislatively extended period for the declaration had run and the Legislature declined to extend it further?

| | |
|---|---|
| The Michigan Legislature answers: | Yes. |
| The Governor answers: | No. |
| The Court of Claims answered: | Yes. |

The Court of Appeals did not answer.

## INTRODUCTION AND REASONS FOR GRANTING THE APPLICATION

At a time like this, it might be tempting to construe an emergency-powers statute in the broadest possible way—even beyond what its words will bear. And it might be tempting to overlook a few constitutional problems, so long as the emergency is said to require it. Yes, it might be tempting indeed to just close our eyes to the law for a while until this unprecedented challenge is over.

But our system of law and governance depends on our resolve to resist the temptation and not allow the end to justify the means.

One-hundred-and-fifty-five years ago, this Court said it best: "[I]t may easily happen that specific [constitutional] provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding." *People ex rel Twitchell v Blodgett*, 13 Mich 127, 139 (1865). The reason is simple: if we break the system in service of a desired end, we might well find ourselves with bigger problems than the immediate emergency at hand.

We see that happening here. Only one law at issue, the Emergency Management Act ("EMA"), allows the Governor to address a statewide epidemic. But the EMA also requires legislative agreement to extend a state of disaster. To avoid that mandate, Governor Gretchen Whitmer has distorted and misapplied both the EMA and the Emergency Powers of the Governor Act ("EPGA") in ways the law cannot sustain. Her approach renders the EMA a dead letter while imbuing governors with effectively unlimited, statewide power. She offends the separation of powers by commandeering a lawmaking process designed around consensus and deliberation and replacing it with rule-by-one and lawmaking through webpage FAQs. And she has derided the Legislature for challenging her claimed right to unilaterally extend a state of emergency despite the Legislature's *express* right and refusal to do so.

Circumstances like these undeniably present issues of "significant public interest" and legal principles "of major significance to the state's jurisprudence." MCR 7.305(B)(2), (3). The Court should address them.

This suit has nothing to do with the Governor's motives, the wisdom of her decisions, or the seriousness of the challenge that Michigan faces. This suit has everything to do with the balance of power that our constitution requires and that our statutes preserve. This Court should restore that balance by granting this application, reversing the Court of Appeals, and holding that the Governor's unilateral extension of emergency and disaster declarations cannot stand.

## STATEMENT OF FACTS

### I. Michigan's Constitutional Framework

In Michigan, "[t]he powers of government are divided into three branches: legislative, executive and judicial." Const 1963, art 3, § 2. "[T]he legislative power of the State of Michigan is vested in a senate and a house of representatives." Const 1963, art 4, § 1. "[T]he executive power is vested in the governor." Const 1963, art 5, § 1. "No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." *Id.*

### II. The Governor's Exercise of Broad Lawmaking Powers

On March 10, 2020, Governor Whitmer announced the first two positive COVID-19 cases in Michigan and declared a statewide emergency. See EO 2020-4; State of Michigan, *Michigan announces first presumptive positive cases of COVID-19* <https://bit.ly/2zVg2XH> (last accessed August 27, 2020). The Governor cited three supposed sources of authority to make her declaration: Article 5, § 1, of Michigan's 1963 Constitution, the EMA, and the EPGA. EO 2020-4. A few weeks later, on April 1, 2020, the Governor issued an Executive Order titled "Expanded emergency and disaster declaration." EO 2020-33. The new order rescinded and replaced the March 10 declaration and declared an expanded "state of emergency and a state of disaster … across the State of Michigan." It listed the same authorities.

The EMA requires the Governor to "declar[e] the state of emergency [or disaster] terminated [within 28 days], unless a request by the governor for an extension of the state of emergency [or disaster] for a specific number of days is approved by resolution of both houses of the

legislature." MCL 30.403(3), (4). The Governor requested, and the Legislature approved by resolution, an "extension of the state of emergency and state of disaster" from the March 10, 2020 and April 1, 2020 orders, setting April 30, 2020 as the declarations' new expiration date. SCR 24.

On April 27, 2020, the Governor asked the Legislature to extend her declared state of emergency again. See Exhibit 1. But the Legislature and the Governor were unable to agree to terms. The Legislature determined that consensus-driven policies and constituent concerns, as well as the need for more durable solutions, required a return to the ordinary democratic process. It thus declined to prolong the Governor's unilateral authority under the states of emergency and disaster.

The Governor responded by moving ahead on her own. On April 30, 2020, just hours before the as-extended states of emergency and disaster were set to expire, the Governor issued a series of executive orders.

She first issued EO 2020-66, which terminated her April 1, 2020 declaration of a state of emergency and disaster. She acknowledged the EMA required her to do so.

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

The Governor's third order that evening, EO 2020-68, purported to declare new states of emergency and disaster under the EMA. This order also stated that it would continue through May 28, 2020, with no conditions for termination beyond the Governor's evaluation of the "continuing need for this order." But unlike the EPGA order, which said that a state of emergency *remains*, this order *declared* states of emergency and disaster *now*: "I now declare a state of emergency and a state of disaster across the State of Michigan under the Emergency

Management Act." *Id.* All prior orders resting on the April 1, 2020, declaration were said to rest on this order. *Id.*

Using these declarations, the Governor continues to issue broad orders at a rapid pace. Over about five months, the Governor has issued 164 COVID-19 executive orders—far more than any other governor in the nation. See Council of State Governments, *COVID-19 Response for State Leaders* <https://bit.ly/3f7RVUY> (last accessed August 27, 2020). She has modified the initial "stay-at-home" order nine times. See EO 2020-160 (modifying the order and listing nine prior orders). As of August 28, there were 52 "live" COVID-19 executive orders. See EOs 2020-22, 26, 27, 46, 52, 55, 63, 64, 65, 66, 73, 76, 78, 87, 88, 89, 100, 101, 102, 104, 106, 107, 112, 118, 122, 128, 134, 135, 137, 138, 142, 144, 150, 151, 152, 153, 154, 156, 157, 158, 159, 160, 161, 162, 164, 165, 166, 167, 168, 169, 170, and 172. The Governor has also repeatedly redeclared states of emergency and disaster. In the current declaration (issued on August 7), the Governor again declared an emergency under both the EPGA and the EMA. See EO 2020-165.

These orders have touched upon all aspects of life in Michigan; they confined Michiganders to their homes, limited available services and goods, changed legal rights, criminalized otherwise ordinary activities, closed schools, and more. In public statements, the Governor has shown no intent to end the declared states of emergency or disaster any time soon. See EO 2020-99 ("Until … the economic and fiscal harms from this pandemic have been contained, and the threats posed by COVID-19 to life and the public health, safety, and welfare of this state have been neutralized, statewide disaster and emergency conditions will exist.").

## III. The Court of Claims Decision

The Legislature was faced with a governor determined to disrupt the balance of power by unilaterally exercising broad lawmaking powers across the entire state for an undefined period. Thus, the House and the Senate voted to authorize this suit. The Legislature then filed a complaint and motion for declaratory judgment in the Court of Claims.

The Court of Claims held that the Governor's post-April 30 exercise of authority under the EMA was "ultra vires." See Exhibit 2, Court of

Claims Order, p 19. In insisting that she has the power to extend declarations of emergency or disaster indefinitely despite express statutory time limits, the Governor twisted the EMA's instructions "out of context." *Id.* at 23. Under the EMA, the Governor had to terminate the declaration of emergency or disaster after 28 days absent a legislative extension, full stop. *Id.* at 23.

But the court then held that the EPGA authorized EO 2020-67 and the executive orders that relied on it. In doing so, the Court did not acknowledge that the Governor's EPGA interpretation renders the EMA—and, more specifically, its legislative-extension provision—meaningless. The Court also held that the loose standards found in the EPGA were enough to save it from separation-of-powers problems.

## IV. The Court of Appeals Decision

The Legislature timely appealed, and the Governor timely cross-appealed. All parties also filed bypass applications for leave to appeal with this Court, which the Court narrowly denied (and later declined to reconsider).

In a split decision on August 21, the Court of Appeals "affirm[ed] on the issues necessary to resolve this appeal." See Exhibit 3, Court of Appeals Opinion ("Majority"), p 2. In short, the Court of Appeals found that the EPGA granted the Governor all the powers she claims. *Id.* at 10-13. In response to the Legislature's argument that such a construction renders the EMA meaningless by allowing the EPGA to swallow all of its purposes, powers, and functions, the court determined that it was "not at liberty to question or ignore the Legislature's informed, intentional decision when enacting the EMA to leave the broad language of the EPGA untouched, fully intact, and operational." *Id.* at 15. The court held that this construction of the EPGA presented no separation-of-powers concerns. *Id.* at 18. It refused to examine the Governor's powers under the EMA, believing that its EGPA ruling mooted that issue. *Id.* at 19–20.

Judge Tukel dissented in relevant part.

Like the Legislature, Judge Tukel concluded that the EPGA and the EMA were to be read together to preserve distinct roles for each. Judge Tukel would have held:

> [T]he inclusion of the word "epidemic" in the definition of disaster under the EMA means that the Legislature did not understand any of the EPGA's triggering events to include an epidemic; if the EPGA applied to an epidemic, there would have been no reason to include it in the EMA definition, as it would be a redundancy, contrary to how we construe statutes, because the governor can impose all of the same relief under the EPGA as may be imposed under the EMA.

See Exhibit 4, Judge Tukel Opinion ("Dissent"), p 9. Judge Tukel deemed the Governor's argument that the Legislature intended the statutes to be "belt and suspenders" "frivolous" because it assumes that the Legislature intentionally enacts surplusage. *Id.* at 9-10.

Judge Tukel also rejected any notion that that his construction of the statute offends MCL 30.417(d), which says the EPGA was not to "limit, modify, or abridge" the Governor's right to proclaim an emergency. For one thing, that statute speaks to the Governor's power to *proclaim* an emergency, but the question here is "[w]hether the governor also has the additional power to have any such declared emergency continue, without any limitations or input from anyone else, so long as the governor sees fit to do so[.]" *Id.* at 12. Further, reading the EMA together with the EPGA did not offend MCL 30.417(d)'s instruction that the EMA not "[l]imit, modify, or abridge" the Governor's powers under other statutes, because what limited the EPGA was "straight-forward application of standard rules of construction[.]" *Id.* at 13. Finally, the majority's reading of the EPGA rendered the EMA's 28-day limit on declared states of emergency or disaster meaningless, as "[t]he governor could [by using the EPGA] circumvent the 28-day limit on executive action by the governor which the Legislature had just gone to the trouble of enacting [in the EMA]." *Id.* at 15.

Judge Tukel also concluded that the majority's construction of the EPGA is unconstitutional. "As the majority interprets the governor's authority to issue the orders, they involve the whole power of the

Legislature, as there are no subject matters which are outside their potential scope." *Id.* at 19. This wholesale shift of power from one branch to another "is … precisely the evil which the separation of powers doctrine was intended to preclude." *Id.* The "spare statutory standards of the EPGA" are not enough to fix the problem, he explained, as they offered "few objective, outside controls or standards at all[.]" *Id.* at 20. The 28-day limit on emergencies found in the EMA saved it from constitutional problems, but the majority opinion stripped that control away by holding that the EPGA fully authorized the Governor's actions. *Id.* at 20-21.

## SUMMARY OF THE ARGUMENT

The Court of Appeals erred in holding that the Governor has the power to implement an indefinite, statewide emergency in response to an epidemic under the EPGA. Reading the EPGA so broadly renders the EMA meaningless. To give the EMA effect, the EPGA should be appropriately confined to local emergencies—or, at the very least, circumstances other than epidemics. And if the Governor's broad reading of the act is right, then the EPGA is an unconstitutional delegation of lawmaking power.

The Court of Appeals incorrectly found the EMA question "moot." Only the EMA addresses statewide epidemics, and it provides the Legislature with the exclusive right to decline to extend a state of emergency. But "what good is a [] right without a remedy?" *Mays v Governor*, --- NW2d ----, No. 157335-7, 2020 WL 4360845, at *29 (Mich, July 29, 2020) (McCormack, J., concurring). As the Court of Claims held, the Governor violated the EMA in trying to use "on-again, off-again" emergency and disaster declarations to get around the Legislature's choice to *not* extend them. The Governor's tactic ignores the plain text of the statute. The Governor's after-the-fact attempt to paint the extension process as unconstitutional fails, too.

## LEGAL STANDARD

This appeal involves questions of statutory and constitutional interpretation, which the Court reviews de novo. See *Mich Dep't of Transp v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008).

## ARGUMENT

### I. The Governor cannot use the EPGA to declare an indefinite, statewide state of emergency premised on an epidemic.

As the dissent recognized, the majority's reading of the EPGA violates core principles of statutory construction. The Court should give every word in a statute meaning, and when two statutes cover the same subject—as the EPGA and EMA do—the Court should harmonize them. Still, the Governor has never once interpreted the EPGA in a way that would not swallow the EMA whole. The Court of Claims did not wrestle with this problem; it spoke of the EMA having more "tools," but never explained why those tools meant the Governor's reading of the EPGA was the right one. And though the Court of Appeals tacitly recognized that the Governor's EPGA construction rendered the EMA an afterthought, it then declared itself unable to do anything about it. The result is that every word of the 1976 EMA's 12 pages of text is now surplusage.

This Court should set things right. The Legislature offered a reading that reconciles the two statutes: the EPGA is for localized issues, while only the EMA can reach as widely as a statewide epidemic. Whether this Court adopts that construction or another limited reading—like that offered by Plaintiffs in the related *Certified Questions* action—this Court cannot embrace the sweeping construction upon which the Governor relies. And because only that sort of overbroad construction could justify her repeated declarations, the Governor's declarations of emergency and disaster cannot stand.

#### A. In adopting the Governor's interpretation of the EPGA, the Court of Appeals has reduced the EMA to nothing.

The Court of Appeals improperly held that the Governor could invoke the EPGA to issue an indefinite, statewide declaration of emergency because of COVID-19. That broad reading of the EPGA sounds the death knell for the EMA.

### 1. The Governor's reading of the EPGA renders the EMA just an empty shell.

A court should not interpret one statute to erase another in every practical way. *See Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007). A statutory provision "is rendered nugatory when an interpretation fails to give it meaning or effect." *Id.* And courts must avoid interpretations that render even 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; 738 NW2d 664 (2007). The United States Supreme Court, too, has said that statutes should be consistent across the code books. See *Bilski v Kappos*, 561 US 593, 608; 130 S Ct 3218; 177 L Ed 2d 792 (2010). However phrased, the Court should apply "any reasonable construction" before it accepts an interpretation that renders all or part of a statute "nugatory." *Ex parte Landaal*, 273 Mich 248, 252; 262 NW 897 (1935). Not even one word can be sacrificed. See *People v Cannon*, 481 Mich 152, 158; 749 NW2d 257 (2008) ("[N]o word [in a statute] should be treated as surplusage or made nugatory.").

When two statutes "relate to the same subject or … share a common purpose," they 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 statute that is unambiguous on its face can be rendered ambiguous by its interaction with and its relation to other statutes." *People v Valentin,* 457 Mich 1, 6; 577 NW2d 73, 75 (1998) (cleaned up). "The application of *in pari materia* is not necessarily conditioned on a finding of ambiguity" in either statute. *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 73 n 26; 894 NW2d 535 (2017).

Here, the EPGA and EMA must be read together. They occupy the same realm of the law. They cover the same general topic: gubernatorial emergency powers. They have the same goal: immediate crisis control pending more durable legislative action. And indeed, the Governor's position (and the effect of the Court of Appeals' ruling) is that they independently authorize the same executive orders (even though the EMA does so for only 28 days, as extended). The majority in the Court of Appeals construed this to waive the Legislature's argument that the acts apply to different emergencies and disasters. But the Legislature's

whole point is that the two statutes—although applying to the same general context—must apply to *different* circumstances for either to have meaning. Perhaps the Court of Appeals would have preferred more discussion of "epidemics" in particular, but that is no waiver. *See Yee v City of Escondido, Cal.*, 503 U.S. 519, 534-35 (1992) (explaining that when a claim is properly presented, parties are not limited to "precise arguments they made below"). And even if it were, this Court must interpret statutes correctly. *See League of Women Voters* v Secy of State, No 353654, 2020 WL 3980216, at *3 (2020). The majority in the Court of Appeals, however, declined even to examine the EMA, as its all-encompassing reading of the EPGA rendered the operation of the EMA a moot point.

The Court of Appeals' decision does far more than injure a word or two in an isolated provision—the holding renders the entire EMA a purposeless redundancy to the EPGA. The Governor can do everything under the EPGA that she could do for the first 28 days under the EMA. If the Court of Appeals is right, then the 1976 lawmaking exercise, along with all the EMA's tools, protections, and safeguards, are pointless. That includes the 28-day automatic termination provision and the need for legislative approval.

But why would any governor accept the more rigid procedures of the EMA when unlimited powers are available in the EPGA? The Court of Appeals could not answer that question. All it could offer is that "[p]erhaps the Legislature desired an executive-legislative partnership in confronting a public emergency but also wished to avoid a political impasse and inaction in the face of an emergency should the partnership fail." Majority, p 16. Yet the EMA's 28-day provision contemplates that sometimes the executive may wish to continue an emergency declaration while the Legislature does not. It provides a clear resolution in that situation: the emergency declaration terminates. The court abdicated its responsibility to reconcile these statutes by declaring itself "not at liberty to question or ignore" what it saw as a contrary legislative intention in the EMA. *Id.* at 15. The practical effect is undeniable. By not even analyzing the Governor's emergency powers under the EMA, the court rendered all of the 1976 EMA total surplusage.

Despite being repeatedly pressed for one, the Governor has *never* provided a plausible way to read the EPGA. The Governor has noted that the two statutes refer to one another—but that is *more* reason to read them together, not less. *People v Kern*, 288 Mich App 513, 519–520; 794 NW2d 362 (2010) ("When one statute explicitly refers to provisions of another statute, those provisions are applicable and binding as though they had been incorporated and reenacted in the statute under consideration."). Otherwise, she has said (without further explanation) that the EMA provides "a more detailed set of powers." But according to the Governor's reading, "more detailed" powers do not equal "distinct" powers. That much is plain from the Governor's present insistence that the Court of Claims' EMA decision changes nothing about her authority and from the Court of Appeals' declaration that the proper construction of the EMA is now "moot."

The Governor's argument, and the result of the Court of Appeals' ruling—that the earlier, more general statute (the EPGA) renders the later, more specific one (the EMA) an empty shell—violates two other fundamental canons of construction. When two related statutes conflict with one another, "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, see *Parise v Detroit Entmt, LLC*, 295 Mich App 25, 28; 811 NW2d 98 (2011). Yet the Court of Appeals has done the opposite: allowed what it interprets as the older, more general, abbreviated EGPA to remove the statutory guardrails enacted in the more recent, more specific, and well-defined EMA. For example, the EMA provides a specific mechanism to decide the length of a state of emergency or disaster and a formal process to terminate the same. See MCL 30.403(3), (4). In contrast, the EPGA only refers vaguely to a "declaration by the governor that the emergency no longer exists" without explaining when or how the governor must make that declaration. MCL 10.31(2).

The EPGA, then, must yield to the EMA, not the other way around. All the more so because only the EMA addresses epidemics. And as the Court of Claims recognized, the EMA does not allow an indefinite statewide emergency without legislative approval.

### 2. The Legislature's interpretation does not "limit, modify, or abridge" any valid power under the EPGA.

The Court of Appeals seems to have accepted the Governor's argument that these problems can all be dismissed because of a single provision in the EMA. That provision says that the EMA is not intended to "[l]imit, modify, or abridge the authority of the governor to *proclaim* a state of emergency pursuant to [the EPGA] … or exercise any other powers vested in him or her…." MCL 30.417(d) (emphasis added); Dissent at 12 (noting that 30.417(d) is "the critical statutory provision" as "the only textual basis which could arguably show a reasonable reading of Legislative intent in derogation of the normal canons of construction."). That section does not save the Governor's interpretation.

Although this Court has not analyzed what it means to "limit, modify, or abridge" a statute, it has engaged with similar terms: "alter" and "abrogate." See *Protect Our Jobs v Board of State Canvassers*, 492 Mich 763; 822 NW2d 534 (2012). In determining whether a constitutional provision had to be reprinted on an initiative petition, the Court held that one provision "altered" another provision if it added to, deleted from, or changed "the actual text of an existing provision." *Id.* at 782. Likewise, the Court held that a provision "abrogated" another provision if it "would essentially eviscerate an existing provision." *Id.* at 783.

The Legislature's construction does not rewrite any "actual text," and the Governor's powers to respond to more localized issues leaves important powers intact—hardly evisceration. At most, the Legislature's construction uses what the EMA says to inform its understanding of what the EPGA always was. That is a far cry from suggesting that one statute directly rewrites another. See Dissent, p 13 ("[I]t is not the EMA which in any way limits the application of the EPGA to epidemics, but rather the standard rules of construction, which embody assumptions about how legislatures work, which control that interpretation."). Thus, MCL 30.417(d) does not command courts to shut their eyes to anything that the EMA says when reading it along with the EPGA.

The same conclusion follows from the ordinary meanings of Section 30.417(d)'s terms. To "modify" means to effect a "change" or "alteration." Black's Law Dictionary, *Modification* (9th ed. 2009). "Limit" means to "restrict" or "restrain." *Id.* And "abridge" means "reduce or diminish." *Id.* The EMA does not "modify," "limit," or "abridge" the governor's ability to declare an emergency under the EPGA at the outset; the EPGA's text, and the governor's emergency-proclamation power under that statute, remains just as it was in 1945. But the EPGA likewise remains subject to its originally understood scope, which required the Legislature to pass the EMA in the first place.

The Court of Appeals' conclusion—that is, that MCL 30.417(d) prevents a court from reconciling the statutes—is problematic in many other ways. *First*, the Legislature's interpretation does not implicate MCL 30.417(d). The EMA does not "limit, modify, or abridge" the Governor's ability to *proclaim* a state of emergency, but only her ability to *extend* a declaration of emergency over the Legislature's objection. See Dissent, p 12 ("Simply put, the first part of § 17(d) has no application to this case."). *Second*, the court's conclusion is circular. The EMA would only "limit, modify, or abridge" the EPGA if the two statutes were construed to confer entirely overlapping powers—something fundamental principles of statutory construction prohibits. See *id.* at 14 ("This construction not only does not run afoul of § 17(d), it is compelled by it—a court cannot 'limit,' or 'modify,' or 'abridge,' an authority of the Governor which the Governor never possessed in the first instance."). *Third*, the court's conclusion effectively mandates a total abandonment of the EMA, as any construction of the EMA other than its total erasure could be said to "limit, modify, or abridge" the all-encompassing construction of the EPGA the Governor presses. Courts should not interpret a statutory clause meant to preserve the scope of a separate statute (the EPGA) to nullify the scope of the enacted statute (the EMA). *Fourth*, the court's conclusion *insists* on statutory conflict, while the law insists on the opposite. See *Dodak v State Admin Bd*, 441 Mich 547, 568–569; 495 NW2d 539, 549 (1993) ("The legal presumption is that the legislature did not intend to keep really contradictory enactments in the statute books[.]").

### B. The EPGA's text shows that it was not intended for long-term, worldwide pandemics like COVID-19.

The EPGA can and must be interpreted differently than the Governor suggests. The words of a statute drive its interpretation. See *Hall*, 499 Mich at 453; *O'Leary v O'Leary*, 321 Mich App 647, 652; 909 NW2d 518 (2017). The EPGA's words confirm that it was not intended to give every Governor unfettered authority, statewide, for an unlimited time during an epidemic, or any time he or she perceives any "emergency."

To begin, the one-page EPGA does not mention epidemics and is instead laden with local-focused words. The statute starts by noting that the Governor may act during times of public emergency "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*, 2019-Ohio-3950, ¶ 19; 145 NE3d 985, 992 (Ohio 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.

The statute reaffirms its local, geographic focus in repeatedly referring to an "area," "section," or "zone." See MCL 10.31(1) (referring to the "area involved," "the affected area," "designat[ed] … zones," and actions "within the area or any section of the area"). These words establish that (as the 1976 legislature understood) the Governor's power under the EPGA is intended to apply to some subpart of the state as a whole. For example, *Merriam-Webster's Online Dictionary* defines "area," in relevant part, as "a particular extent of space or one serving a special function," such as "a geographic region." Merriam-Webster's Online Dictionary, *Area* <https://bit.ly/3c17JYu> (last accessed August 27, 2020). Likewise, a "zone" contemplates "[a]n area that is different or is distinguished from surrounding areas," *Black's Law Dictionary* (11th ed. 2019), while a "section" is "a part of something" or "any of the more or less distinct parts into which something is or may be divided," *Forrester Lincoln Mercury, Inc v Ford Motor Co*, No. 1:11-cv-1136, 2012 WL 1642760, at *4 n 6 (MD Pa, May 10, 2012) (quoting dictionary definitions). These words imply that the Governor's powers under the EPGA do *not* reach the whole state.

Contrast the EPGA's then-existing contemplation of gubernatorial power over a single "area" with the 1976 legislature's grant of emergency powers in the EMA to declare emergencies not only that affect an "area" but also "*areas*." MCL 30.403(3). If the 1976 legislature, reading the EPGA when writing the EMA, believed the former already reached the whole state, why would it have added the "or areas" surplusage?

Reading the EPGA's conception of an "emergency" against the EMA's definition of "emergency" further highlights the former's local and narrow powers. The EPGA contemplates, for example, that the Governor will act in "emergency" instances like "rioting"—a local problem. MCL 10.31(1). The later-enacted EMA references "emergency," too, explaining that an emergency exists whenever the Governor decides "state assistance is needed to supplement local efforts." MCL 30.402(h). In other words, even in the EMA, a declared "emergency" is a local problem that becomes so severe the state must help.

But in enacting the EMA, the Legislature provided the added power to declare a state of *disaster*. A disaster is an occurrence of "widespread" damage, including, among other things, an "epidemic." MCL 30.402(e). Other examples of disasters confirm their wide geographical scope; they include "blight, drought, infestation," "hostile military action or paramilitary action, or similar occurrences resulting from terrorist activities." *Id.* Contrast that with the EPGA, which says nothing about epidemics:

> Thus, applying the rules of construction in a straightforward manner, it is readily apparent that the inclusion of the word "epidemic" in the definition of disaster under the EMA means that the Legislature did not understand any of the EPGA's triggering events to include an epidemic; if the EPGA applied to an epidemic, there would have been no reason to include it in the EMA definition, as it would be a redundancy, contrary to how we construe statutes, because the governor can impose all of the same relief under the EPGA as may be imposed under the EMA.

Dissent, p 9.

The Court of Appeals pushed these words aside, focusing instead on the EPGA's list of emergency *types* that might justify a declaration of emergency. See Majority, p 10–11. The court found meaning in the statute's statement that a governor can declare an emergency in times of "great" public crisis. *Id.* at 11. That word is appropriately read to limit the statute's reach, not to extend the statute's reach beyond its example declarations of emergencies to encompass state-wide disasters. A tornado that rips through a Michigan community might, for instance, be called both "great" (in that it kills and terrorizes with such force that it's remembered decades later) *and* local (in that it only crosses a few miles). See Miller, *Remembering the Kalamazoo tornado 40 years after it struck May 13, 1980*, MLive.com <https://bit.ly/34Dm10n> (May 11, 2020).

The Court of Appeals also noted a statutory declaration of intent. Majority, p 12–13. Yet that provision says only that the Legislature meant for the statute to give the Governor "sufficiently broad power of action" to "provide adequate control" during crisis periods. MCL 10.32. The "power of action" refers to what *acts* the Governor may perform; it says nothing about *when* or *where* the Governor may take those actions. Aside from all that, a "rule of liberal construction does not override other rules if the application would defeat the evident meaning of the act." *Little Caesar Enterprises v Dep't of Treasury*, 226 Mich App 624, 629; 575 NW2d 562 (1997). The Governor's interpretation does just that. It transforms an act that had always been understood as having a narrower scope—as the very passage of the 1976 EMA shows—into one providing apparently boundless power.

### C. The EPGA's structure betrays the suggestion that it is a secret reserve of vast, statewide power.

Structure matters, too, as the Court should consider a statute's "structure and … physical and logical relation of its many parts." *TOMRA of N Am, Inc v Dep't of Treasury*, --- N.W.2d ----, No. 158333, 2020 WL 3261606, at *6 (Mich, June 16, 2020). The EPGA's structure, especially when contrasted with the EMA's, favors the Legislature's position. The Court of Appeals' ruling improperly allows the Governor

to use the EPGA to exercise the statewide powers conferred by the EMA while leaving the EMA's limitations on those powers behind.

The EMA's administrative components contemplate problems requiring state-level resources. The Act even lists specific things that the governor may do, most of which have a broad reach. See MCL 30.405. Only the EMA includes the power to suspend statutes, shift funds, commandeer private property, provide housing, or force evacuation. See, e.g., MCL 30.404(3), 30.405(1); MCL 30.406; MCL 30.407–.408; MCL 30.409. But limitations in the EMA check that power, including a 28-day automatic termination absent legislative action. See, e.g., MCL 30.403(3), (4). There are also specific requirements for how a governor must enter executive orders, how other state entities must cross-approve certain actions, how lower-level executive officials must comply with certain limits on their authority, and more. See, e.g., MCL 30.403(3), (4); 30.404(3); 30.407(3). The EMA even imposes specific requirements on what a governor must write into a declaration of emergency or disaster. The declaration 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). The Legislature put stringent limits on the EMA—including the 28-day automatic termination provision—because a governor can use it at the statewide level.

In contrast, the EPGA contains a brief statement of authority with loose examples, all spanning a few terse paragraphs—fitting for smaller, local management. MCL 10.31(1). A declaration under the EPGA need only "proclaim" an emergency and "designate the area involved." *Id.* 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.* There are no structural checks other than the governor's self-determination of emergency—something that would only makes sense if the Legislature intended the law to provide powers so localized in scope that they required no counterbalance.

In short, while the EMA is a comprehensive legislative scheme, the EPGA is not. One cannot assume, as the Court of Appeals held, that a

terse statute with the vaguest of terms can afford 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). The Court of Appeals' ruling reads the EPGA to empower any Governor to define how Michigan's entire population lives, works, plays, worships, and learns for as long as that Governor feels an "emergency" exists. But even if delegation were permissible, the Legislature "could not have intended to delegate … decision[s] of such economic and political significance to [the executive branch] in so cryptic a fashion." *Food & Drug Admin v Brown & Williamson Tobacco Corp*, 529 US 120, 160; 120 S Ct 1291; 146 L Ed 2d 121 (2000).

### D. The EPGA's historical context also shows that it was never meant for times like this.

The Court should also consider the historical context in which the statute was passed and implemented. See *Dep't of Envt'l Quality v Worth Tp*, 491 Mich 227, 241; 814 NW2d 646 (2012) (holding that courts must read statutes "in conjunction with" the "historical context").

When the Legislature enacted the EPGA, it did not design the act for global epidemics. A 1945 *Lansing State Journal* article for example, noted that the EPGA "result[ed] from the 1943 Detroit race riot" and would "give the governor wide powers to maintain law and order in times of public unrest and disaster." Exhibit 5; see also Beek, *Emergency Powers Under Michigan Law*, available at <https://bit.ly/2z3f8rC> (last accessed August 27, 2020) (explaining that the EPGA "was enacted in response to race riots in Detroit in 1943," a situation that had required troops and a curfew); *Governor Kelly's Riot Act*, Detroit Tribune (June 2, 1945), p 6 (describing the EPGA as "a new Riot Act" meant to equip the governor to respond to "racial or industrial disturbance"). The bill was "sponsored by the state police." *Riot Bill Passes Senate*, The Herald-Press (April 18, 1945), p 5. It should come as no surprise then that provisions of the EPGA read like riot-control measures. See MCL 10.31(1).

This "local riots" 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 presented by high-water levels in the Great Lakes. In a special message to the Legislature on non-manmade disasters in 1973, he reiterated that the EPGA was "pertinent to civil disturbances" and concluded that "[u]nder existing law, the powers of the Governor to respond to disasters is unduly restricted and limited." See Exhibit 6. Because the EPGA could not address a statewide, natural disaster, he asked "that the Legislature give the Governor plenary power to declare states of emergency both as to actual and impending disasters." *Id.* He repeated this same message in 1974 and 1975. After Governor Milliken's speeches and messages, the Legislature—agreeing with him that the EPGA did not provide the executive "plenary power" for every potential emergency and disaster—passed the EMA to *give* the governor that power, subject to certain checks. See also *Walsh v City of River Rouge*, 385 Mich 623, 632–633; 189 NW2d 318 (1971) (considering gubernatorial statements, including statements from Governor Milliken, in construing the EPGA's reach).

Other past governors understood the limited nature of the EPGA. To the Legislature's knowledge, no other governor has used the EPGA in at least 30 years (as far back as electronic records are available) for any emergency, let alone statewide emergencies. The Legislature is unaware of a single use of the EPGA, before the present administration, to manage a statewide crisis. Indeed, the Legislature can only find two pre-COVID-19 uses for the act all. 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). And 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). These were local events.

The EPGA has not been thought of as a response tool for epidemics before. When the Michigan Department of Community Health conducted an assessment in cooperation with the Centers for Disease

Control and Prevention of all laws that might be relevant in responding to a pandemic, the EPGA barely warranted a mention (particularly as compared to the EMA). See Exhibit 7. The report referenced the EPGA only in noting the Governor's power to impose a curfew. *Id.* at 16. Yet this Governor has still invoked the EPGA over 100 times during this epidemic.

The Court of Appeals held, and the Governor still insists, that the whole exercise of passing the EMA was unnecessary. Prior lawmakers and executives are said to have been were wrong about the need for the EMA. Under this view, 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. That makes no sense.

The only three cases that even mention the EPGA confirm this local understanding. Two discuss the EPGA in the context of local responses to localized emergencies—local curfews. See *Walsh*, 385 Mich at 623; *People v Smith*, 87 Mich App 730; 276 NW2d 481 (1979). The last touches upon the EPGA's potential preemption of a local law designed to corral college students during "a drunken, raucous semi-annual event." *Leonardson v City of E Lansing*, 896 F2d 190, 192 (CA 6, 1990). None of these concern widespread statewide disasters, let alone epidemics.

### E. The Governor's interpretation of the EPGA alters the power dynamics and incentive structures intentionally built into the Michigan Constitution.

The Michigan Constitution creates carefully calibrated levers of government. In reviewing how the EPGA and EMA are meant to operate, 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).

By insisting on unilateral executive and legislative 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). Both the law-making power *and* the responsibility to protect citizens' health, safety, and welfare rests not with the executive branch, but with the Legislature—the peoples' elected representatives. See 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. The Legislature must take time to consider policy ramifications, and people must have notice of pending changes. That remains true even during emergencies. Michigan's framers, 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). They still prized legislative consensus over unilateral control.

Michigan's framers, like the national framers, "made no express provision for exercise of extraordinary [executive] authority because of a crisis." *Youngstown Sheet & Tube,* 343 US at 650. To the contrary, in times of crisis, the Constitution 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. See Const 1963, art 4, § 21, 39; Const 1963, art 5, §§ 15, 16.

Indeed, in times of crisis, the Constitution pushes for *more* cooperation within the Legislature and between the Legislature and the Governor, not unilateral action by the Governor. For example, the Legislature ordinarily can pass laws for the governor's signature by majority vote, and the Constitution delays the effect of those laws until 90 days after a legislative session ends. The Legislature can override this delay and pass legislation with immediate effect, but only by vote of two-thirds of both houses. See Const 1963, art 4, § 27. So, where legislation needs 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.

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 by legislation).

Despite all this, the Governor interprets the EPGA to allow her to easily and instantaneously alter the rules that govern Michigan citizens. 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 at all.

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 a moment's notice.

The Governor's interpretation of the EMA and EPGA also has subtle but significant effects on the Legislature's internal incentives. With the Governor asserting the power to implement unilaterally any policy her party seeks, legislators who are members of that party have no incentive to cooperate to reach legislative consensus. Why bother compromising, deliberating, or striking deals when a 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, while 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 official craft and maximize shared policy preferences through executive orders than risk compromising in a bipartisan bill. This reshuffling upends political

incentives. See *House of Representatives v Governor*, unpublished order of the Supreme Court, entered June 4, 2020 (Docket No. 161377) (Viviano, J., dissenting), p 14 (explaining that, without her present emergency powers, "the Governor would have an incentive—the one our founders built into our system of government—to work with Legislature to develop bills that she found acceptable and would be willing to sign into law").

These disruptions to the political balance matter: state supreme courts "recognize the political realities of the legislative branch" when seeking to understand how statutes 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]"). 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."); *Kean v Clark*, 56 F Supp 2d 719, 726 n 9 (S.D. Miss. 1999) (recognizing that some "justiciable political issue[s] involv[e] the intersection of constitutional rights and political realities").

It is no response to argue, as the Governor does, that the Governor may do what is necessary and reasonable for public health under the EPGA. The Michigan Constitution gives the role of protecting public health to the *Legislature*. And as should be plain enough by now, the Constitution 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 an emergency entirety, and with it all constitutional protections that govern emergency lawmaking.

The disruption of the constitutional incentive structure also rebuts the oft-repeated argument that this Legislature can return to the constitutional norm by amending or repealing the EPGA. Putting aside that the Governor's interpretation of the EPGA, not the EPGA itself, is the problem, this argument blinks reality. The Governor seems to recognize that the broken incentive system she has created prevents some legislators from voting even for legislation *they believe is reasonable and necessary*, leaving her 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 the two-thirds necessary to take immediate effect and override the Governor's certain veto.

Our constitutional system does not envision an entire caucus 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 will have to make them with her broken machine.

* * * *

In the end, the Governor's interpretation of the EPGA goes against the statutory text and structure, legislative context, and constitutional constructs. It erases every bit of the EMA from the code books, save the one provision (MCL 30.417(d)) that the Governor and the Court of Appeals rely on to insist the erasure is required. This construction of the EPGA cannot stand.

## II. The Court of Appeals' construction of the EPGA creates an unconstitutional delegation of lawmaking power.

If, as the Court of Appeals held and the Governor argues, the EPGA grants the Governor the power to indefinitely extend statewide states of emergency and disaster during an epidemic without rendering the EMA a nullity, then the statute faces a larger constitutional problem: separation of powers. Under the doctrine of constitutional avoidance, the Court should adopt the Legislature's reasonable reading of the EPGA to bypass that problem altogether. See *Hunter v Hunter*, 484 Mich 247, 264 n 32; 771 NW2d 694 (2009) ("[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [the Court's] plain duty is to adopt that which will save the act."). But if it doesn't, then the EPGA must fall as an unconstitutional and impermissible delegation of powers.

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

"[T]he legislature makes, the executive executes, and the judiciary construes the law." *Wayman v Southard*, 23 US 1, 46; 6 L Ed 253 (1825). These are not civics-class platitudes, but the foundation of Michigan's constitutional system. See *Westervelt v Nat'l Resources Comm'n*, 402 Mich 412, 427–429; 263 NW2d 564 (1978). In fact, every Michigan Constitution since our first in 1835 has included a provision making the separation of powers explicit—most recently Article 3, § 2, in Michigan's 1963 Constitution.

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

governmental powers." *Civil Serv Comm'n of Michigan v Auditor Gen*, 302 Mich 673, 683; 5 NW2d 536 (1942).

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

Unlike Article 4, Article 5—which applies to the executive branch—says nothing about the lawmaking power, excepting two narrow sections on the veto power and reorganization of departments not relevant here. See Const 1963, art 5, § 1 (explaining that the *executive* power rests with the Governor).

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

The Governor's ongoing COVID-19-related orders have strayed far into the realm of legislative power. A law is any "regime that orders human activities and relations through systematic application of the force of politically organized society." *Black's Law Dictionary* (11th ed. 2019).

To be sure, what is at issue is not just an impermissible extension of an emergency and disaster declaration. The Governor has used these declarations to justify 164 expansive COVID-19-related executive orders. EO 2020-17 suspended all "non-essential medical and dental procedures." EO 2020-58 purports to extend the statute of limitations, and EO 2020-38 to revise and suspend certain FOIA mandates. EO 2020-70 restricted the ability of the faithful to congregate and freely exercise their religion. And these are just some of the Governor's orders—many others are in the same vein. Most troubling, perhaps, the

Governor claims the authority to indefinitely confine all Michiganders to their homes or otherwise limit their movements under threat of criminal prosecution. See, e.g., EO 2020-96. This restructuring of the livelihoods and social interactions of Michigan's citizens is lawmaking.

"The legislature cannot delegate its power to make a law[.]" *Consumers Power Co v Pub Serv Comm'n*, 460 Mich 148 n 9; 596 NW2d 126 (1999) (cleaned up). And "it 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 (Gorsuch, J., dissenting). The EPGA, at least as the Governor and Court of Appeals interpret it, does just that. The Court should invalidate the Governor's spin on the EPGA on that basis alone. 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. The Government has broad powers, but the means it uses to achieve its ends must be consistent with the letter and spirit of the constitution." *Horne v Dep't of Agric*, 576 US 350; 135 S Ct 2419, 2428; 192 L Ed 2d 388 (2015). "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." *Id.* (cleaned up). "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved." *Home Bldg & L Ass'n v Blaisdell,* 290 US 398, 425; 54 S Ct 231; 78 L Ed 413 (1934).

This Court has said the same. See *Twitchell*, 13 Mich at 139. So have other courts. See, e.g., *Maryville Baptist Church, Inc v Beshear*, 957 F3d 610, 614 (CA 6, 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*, 391 Wis 2d 497, 556; 942 NW3d

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

The Governor nevertheless believes that emergencies—even those she defines to last for years—are only for the executive to handle. In extended, long-term situations like COVID-19, unilateral control is counterproductive, dysfunctional, and unconstitutional. See *Palm*, 391 Wis 2d at 525 ("[I]f a forest fire breaks out, there is no time for debate. Action is needed. The Governor could declare an emergency and respond accordingly. But in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely.").

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

Even assuming the Legislature could delegate this amount of power, the EPGA contains insufficient standards to guide its use. To avoid an unconstitutional delegation of legislative power, a statute "must contain language, expressive of the legislative will, that defines the area within which an agency is to exercise its power and authority." *Westervelt*, 402 Mich at 439. "[A] complete lack of standards is constitutionally impermissible." *Oshtemo Charter Tp v Kalamazoo Co Rd Com'n*, 302 Mich App 574, 592; 841 NW2d 135 (2013). Standards exist on a

spectrum—what is appropriate in one case will not be appropriate in another.

The majority in the Court of Appeals struggled to understand how the EPGA could be constitutional if construed to apply to localized emergencies, but unconstitutional if extended to statewide emergencies. Under the constitution, the difference in scope is everything. "[D]elegation must be made not on the basis of the scope of the power alone, but on the basis of its scope plus the specificity of the standards governing its exercise. When the scope increases to immense proportions … the standards must be correspondingly more precise." *Synar v United States*, 626 F Supp 1374, 1386 (DDC, 1986); accord *Osius v City of St Clair Shores,* 344 Mich 693, 698; 75 NW2d 25 (1956) (explaining that "the standards prescribed for guidance [must be] as reasonably precise as the subject-matter *requires* or permits" (emphasis added)). Greater delegation requires greater standards. And standards are especially important when delegating to the Governor; delegating to a chief executive "pose[s] the most difficult threat to separation of powers, and therefore require the strictest standards," because a chief executive "is less closely scrutinized by [the Legislature] than are agencies." Kaden, *Judicial Review of Executive Action in Domestic Affairs*, 80 Colum L Rev 1535, 1545 (1980).

The EPGA, as interpreted by the Governor and affirmed by the Court of Appeals, is an open-ended grant of legislative power. 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 at 639. The Court has equated it with the "war powers of the federal government," including "martial law." *Id.* Thus, this delegation is one of "immense proportions." *Synar*, 626 F Supp at 1386. Even so, "the EPGA appears to have few, if any, real restrictions on the Governor's authority or even standards to guide that authority." Exhibit 8, *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).

Courts use a three-step standards analysis to determine whether purported delegations like these pass constitutional muster. 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 Court of Appeals and the Governor have interpreted it, constitutes an improper delegation.

*First*, taking the statute as a whole, the EPGA gives the Governor no functional guidance. The statute is exceptionally short. It consists of three sections, only one of which is substantive. That substantive section says that "[d]uring times of great public crisis … the governor may proclaim a state of emergency." MCL 10.31(1). After so declaring, the governor "may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." *Id.* Although the section gives examples of such orders, it says the governor's powers are not limited to those orders. *Id.* There is no temporal limitation. In sum, the EPGA's standards consist solely of two words: "reasonable" and "necessary." The statute itself (as the Court of Appeals read it) suggests that this passing pair of words ("reasonable" and "necessary") was not intended to provide any useful limit on the governor's judgment. The provision laying out the "construction of the act" emphasizes that the governor should be given "sufficiently broad power" to do what she must to reach some unspecified level of "adequate control over persons and conditions." MCL 10.32. And again, the Constitution delegates the duty to pass "reasonable" and "necessary" laws to protect the entire state's citizenry to the Legislature. *Id.*, § 1. And before such a statewide law can go into immediate effect, two-thirds of both legislative houses must agree on it being both reasonable and necessary. *Id.*, § 27. The Governor's interpretation would have the Legislature delegate all its authority to legislate during an emergency *and more*—something it cannot do.

*Second*, in the Court of Appeals' view, the subject matter of the EPGA includes any possible public-policy area affected by COVID-19. Again,

given the inherent nature of a contagious disease, and the Governor's position that her emergency powers last even through the pandemic's economic fallout, this spin on the EPGA allows orders on practically every imaginable topic, indefinitely. Thus, as the Court of Appeals has applied it here, the Legislature shifted to the executive branch vast lawmaking power over every corner of the economy and social life with only the guiding words "reasonable" and "necessary."

"Reasonableness" is already the lowest standard of acceptable governmental action; actions that fail to meet that standard—in other words, arbitrary and capricious conduct—are always unlawful. And importantly, the "necessary" referenced in MCL 10.31 isn't even the formulaic "necessary to implement this act." Rather, it is "necessary to protect life and property" or bring the crisis "under control"—clauses the Governor has interpreted as a far broader mandate. If the words mean what the Governor says, they grant pure discretion, unguided by any other standard. See, e.g., *Yant v City of Grand Island*, 279 Neb 935, 945; 784 NW2d 101 (2010) ("[R]easonable limitations and standards may not rest on indefinite, obscure, or vague generalities[.]"); *Lewis Consol Sch Dist of Cass Co v Johnston*, 256 Iowa 236, 247; 127 NW2d 118 (1964) (explaining that "something more is required" than telling an executive to "do whatever is thought necessary to carry out their purposes").

The Court of Appeals believed that a provision referring to the need "to protect life and property or to bring the emergency situation within the affected area under control" provides sufficient standards. It is hard to imagine what kind of order that so-called limitation would prohibit, especially where the emergency can be defined as broadly as the Governor does—that is, co-extensive with the full police power. But beyond that, the ruling confuses the statute's *goals* with its *standards*. The goal of the EPGA is to protect life and property and to manage unforeseen crises. Even that goal is ambiguous. But more to the point, *how* the Governor achieves that goal is signing "reasonable," "necessary" executive orders. In short, these other phrases are *not* the standards, but objectives. The only *standards* guiding how the Governor achieves that objective are that her orders be "reasonable" and "necessary." See *Palm,* 391 Wis 2d at 522 (holding that claimed delegation of lawmaking

authority during existence of authority was improper given lack of procedural safeguards and standards accompanying the delegation).

Similarly, the Court of Appeals appeared to treat a *non-exhaustive* list of *examples* of appropriate actions under the EPGA as a silent constraint on the Governor's abilities under the act. But a list that says powers are "not limited to" those listed cannot constitute a firm "limit." See, e.g., *State v Thompson*, 92 Ohio St 3d 584, 588; 752 NE2d 276 (2001) (explaining that "[t]he phrase 'including, but not limited to' indicates that what follows is a nonexhaustive list of examples," so a decisionmaker may still consider whatever she wishes). The Governor believes the statute entitles her to make new statewide policies touching the most intimate parts of Michiganders' lives, subject to no notice-and-comment period, and with no temporal, geographic, or other limitations on scope or authority. Judging from the orders she has issued, the Governor has not felt constrained by the examples of power reflected in the statutory text.

As the EPGA has been interpreted by the Governor and Court of Appeals, none of these supposed "limits"—the "reasonable" and "necessary" language, the examples list, or protecting "life and property"—restrict the Governor's *determination to declare or continue a state of emergency*. MCL 10.31(1). But it is the extended declarations that the Legislature's suit challenges. Based on the breadth of the Governor's EOs that now rest on an extended-emergency declaration under the EPGA, the supposed limits in that statute provide no practical limit at all.

The Court of Appeals also found it important that the statute defined some moments that trigger the Governor's authority under the act. But the Governor determines those times at her discretion—and a discretionary limitation on *when* powers can be first triggered provides no practical limit on *how* or for *how long* they can be executed. There is effectively no limit at all.

The Governor and the Court of Appeals both insist that emergencies require broad powers. But as the breadth of a governor's powers grow, so does the need for proportionally strong standards. If the EPGA gives her such broad powers in the event of unforeseen crises, then there must

be better standards than "reasonable" and "necessary." "Necessary" may be good enough when the question is whether an employee's term of employment may be extended past a mandatory retirement age. See *Klammer v 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 a far different determination than exercising minute-by-minute regulation of basic actions by all Michiganders with the bite of criminal sanctions. See *United States v Robel*, 389 US 258, 275; 88 S Ct 419; 19 L Ed 2d 508 (1967) (Brennan, J., concurring) ("The area of permissible indefiniteness [in delegation standards] narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights[.]"). In *Whitman v Am Trucking Associations*, for example, the 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 the legislature 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 of power, at least as the Governor and Court of Appeals have construed it, is just the sort of broad delegation that requires more direction. The reading has allowed the Governor to functionally control Michigan's "entire [state] economy." *Id.* at 475. The court therefore missed the mark when it said the "complexity of the subject matter" requires less stringent standards. Majority, p 18. That would mean a minor delegation involving simple subject matter requires *more* stringent standards than a major delegation of indefinite power, simply because the latter subject matter is more complicated. That cannot be so.

This case is an unprecedented one, as no prior case has addressed a statute with such sweeping powers matched with such minimal standards. Yes, there are cases that condemn the kinds of meek standards reflected in the Governor's rendering of the EPGA. See, e.g, *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 55; 367 NW2d 1 (1985) (finding that a statute giving the Insurance Commissioner with

the discretion to "approve" or "disapprove" risk factors proposed by health care corporations violated the delegation rule, even though the statute included certain policy goals); *Milford v People's Cmty Hosp Auth*, 380 Mich 49, 61–62; 155 NW2d 835 (1968) (finding that a public hospital's bylaws lacked sufficient standards for revoking privileges when the executive committee was only charged with acting in "the best interest of the hospital and its patients"); *Hoyt Bros v City of Grand Rapids*, 260 Mich 447, 451; 245 NW 509 (1932) (holding that a nonprofit-licensing statute allowing for "worthy" charities allowed for too "great [a] variety of qualifications"). But even those cases do not capture the constitutional affront that this case presents, as none of them involve such extensive powers asserted by the chief executive over such broad subject matter, all in the name of "emergency." And the Governor's use of the EPGA is not mere rulemaking, which might be said—even in the most extreme cases—to be an exercise in filling in the gaps. Rather, the Governor's power involves the authority to write new law from whole cloth *and* upend existing law at her discretion. Those unparalleled powers demand meaningful legislative standards to guide them.

This situation is also different because it implicates criminal penalties. In fact, using COVID-19 executive orders, the Governor has made many ordinary activities of daily life criminal. But the power to "declare what shall constitute a crime, and how it shall be punished, is an exercise of the sovereign power of a state, and is inherent in the legislative department of the government. Unless authorized by the constitution, this power cannot be delegated by the legislature to any other body or agency." *People v Hanrahan*, 75 Mich 611, 619; 42 NW 1124 (1889). The power to define a crime, then, requires more fulsome standards. They are absent from the EPGA.

*Third*, and finally, the Legislature has already offered the Court a construction of the EPGA that could save it from invalidation. That construction would, however, invalidate the Governor's particular *use* of the EPGA here. That is unavoidable. Because, as the Governor interprets it, the EPGA includes no real, substantive standards governing her exercise of an unparalleled delegation of authority, the Court should find that her interpretation, and that of the Court of Appeals, is unconstitutional.

If the Governor's reading of the statute is wrong, then her acts are without authority. If she is right, then the act itself must fall. This Court should reverse the Court of Appeals' holding that the EPGA authorizes the Governor's continued exercise of emergency powers.

## III. After April 30, 2020, the Governor did not possess authority under the EMA to declare a state of emergency or disaster.

The only other authority the Governor could retreat to for her post-April 30 statewide declarations of emergency and disaster concerning COVID-19 is the EMA. But as the Court of Claims correctly held, the EMA prohibits those actions.

The EMA allows the Governor to declare a statewide state of disaster or emergency for up to 28 days. "After 28 days," she must "issue an executive order or proclamation declaring the state of disaster [or emergency] terminated, unless" the legislature approves "by resolution of both houses" her request "for an extension of the state" of emergency or disaster. MCL 30.403(3)–(4). The Governor purported to fulfill the EMA's termination requirement here by ending the states of emergency and disaster on April 30, only to redeclare states of emergency and disaster—based on the same underlying facts—*one minute* later. The Court of Claims correctly held that the Governor's formalistic and disingenuous interpretation of the EMA is wrong.

### A. The Governor's orders conflict with the EMA's plain text.

The Court's "primary goal when interpreting statutes is to discern the intent of the Legislature. To do so, [the Court] focus[es] on the best indicator of that intent, the language of the statute itself." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205–206; 815 NW2d 412 (2012). The Court should read "provisions of statutes reasonably and in context" and "subsections of cohesive statutory provisions together." *Detroit Pub Sch v Conn,* 308 Mich App 234, 248; 863 NW2d 373 (2014).

The EMA's plain language confirms that the Governor's April 30 declaration of states of emergency and disaster—and the executive

orders that derive from that declaration—were unlawful. The language mandates that a given state of emergency will end after 28 days unless the Legislature jointly resolves otherwise. The Legislature used the word "terminated," a word used to connote the absolute end of the matter—not a temporary pause, a point of reassessment, or a time for potential revival. *See Black's Law Dictionary* (11th ed 2019) (defining "terminate" to mean: "[t]o put an end to; to bring to an end … [t]o end; to conclude."); see also, e.g., *State ex rel Flynt v Dinkelacker*, 156 Ohio App 3d 595, 600; 807 NE2d 967 (2004) ("Terminated means done, finished, over, kaput."); *Conecuh-Monroe Cmty Action Agency v Bowen*, 852 F2d 581, 588 (1988) ("[C]ommon usage suggests that the word ["terminate"] means a complete cut-off[.]"); *Jones Motors v Workmen's Comp Appeal Bd*, 51 Pa Cmwlth 210, 213; 414 A2d 157 (1980) ("We have no doubt that the word 'termination' connotes finality. … 'Termination' signifies a conclusion or cessation, and its meaning is not interchangeable with 'suspend.'").

The EMA does not describe a process for the Governor to reinstate a state of emergency or disaster and continue to operate without the Legislature. To the contrary, after the 28 days have run, and absent a legislatively approved extension, the EMA does not contemplate any role for the *Governor* to act in emergencies, other than the mandatory ministerial issuance of an executive order terminating the declaration. In other words, as the Court of Claims put it, the statute contemplates that the Governor will either terminate the declaration or extend it with legislative approval. "There is no third option for the Governor to continue the state of emergency and/or disaster on her own[.]" Court of Claims Order, p 24.

The Governor has offered just one textual hook for her view that perfunctory and repeated declarations and terminations suffice: the statute's reference to statement that she "shall" issue declarations of emergency or disaster. As the Court of Claims said, "the Governor takes these directives out of context." *Id.* at 23. The plain reading is that the Governor discharges her duty by declaring a state of emergency or disaster once after conditions arise justifying one. That is the only way to reconcile the EMA's other "shall" provision, which says the Governor "shall" terminate a declaration after 28 days.

### B. The Governor's formalistic interpretation would produce absurd results.

Courts "are required to interpret statutes in their *entirety* in the most reasonable manner possible." *Duffy v Michigan Dep't of Nat Res*, 490 Mich 198, 215 n 7; 805 NW2d 399 (2011) (emphasis in original). Thus, courts should use "common sense" when interpreting a statute. *Diallo v LaRochelle*, 310 Mich App 411, 418; 871 NW2d 724 (2015); accord *Marquis v Hartford Acc & Indem*, 444 Mich 638, 644; 513 NW2d 799 (1994). They should avoid "absurd results." *People v Pinkney*, 501 Mich 259, 266; 912 NW2d 535 (2018) (cleaned up).

The Governor interprets the EMA to produce absurd results. The Governor has issued contradictory orders that declared that a state of emergency existed and that a state of emergency did not exist within a minute. Given forecasts that COVID-19 could create issues into 2021 and beyond, this bob-and-weave could go on for months or even years. See, e.g., Livengood, *Pfizer preparing to manufacture COVID-19 vaccine in Kalamazoo*, Crain's Detroit <https://bit.ly/2YB49QP> (May 5, 2020) (quoting the Governor: "We can't resume normal life until we have a vaccine.").

Courts reject this kind of behavior. See, e.g., *Gill v NY State Racing & Wagering Bd*, 11 Misc 3d 1068(A); 816 NYS2d 695 (NY Sup Ct, 2006) (finding that regulatory board improperly used emergency rulemaking process to circumvent time limits on duration of emergency rules by "let[ting] the rule lapse as if the emergency disappeared for 24 hours and then [reinstating the rule as if the emergency had] magically reappeared 24 hours later"); *Boston Gas Co v Fed Energy Regulatory Comm'n*, 575 F2d 975, 978 (CA 1, 1978) (refusing to interpret a statute to create an "endless cycle" of petitions and rehearings).

If the Governor's termination order is to be given effect, as the law says it must, then several impractical consequences arise. Suspended statutes would come back into force, only to disappear a moment later. Reallocated resources would be sent to their original positions, only to be reassigned again seconds after. And private property that was commandeered by executive order would return to the rightful owners, only to be passed back into the hands of the state for a second time in

an instant. See MCL 30.407 (describing the powers of the Governor incident to an emergency or disaster declaration). Here again, these inevitable consequences create inefficiencies and chaos amid already challenging circumstances, undermining the purpose of the statute.

Ultimately, "[l]aw reaches past formalism." *Lee v Weisman*, 505 US 577, 595; 112 S Ct 2649; 120 L Ed 2d 467 (1992). The Governor's on-again-off-again declaration approach is "formalistic in the extreme." *Id.* The Court should reject it.

### C. The Governor's interpretation of the EMA renders the Legislature's fundamental role a nullity.

The Governor's interpretation also distorts the EMA and renders the Legislature's responsibility mere surplusage and nugatory. The EMA provides the Legislature a limited but critical role: the Legislature is the *only* party that the EMA empowers to extend a declared state of emergency or disaster. If the Governor could rescind her declaration and restate it a minute later, as she did, then the Legislature's role becomes meaningless. If the Legislature's refusal to extend a declaration has no practical effect, then it was unnecessary to include the resolution provision in the EMA, and the Governor's own invocation of that provision was a sham. Indeed, the Governor has never explained the supposed effect of the Legislature's refusal to extend. Her answer of "none" cannot suffice.

The Governor posited that the 28-day mark only offers her a chance to "show her work" and engage in an "interbranch dialogue." Nothing in the text implies that the 28-day provision is just a time to talk. If that were the case, the Legislature could have met that objective through a simple reporting requirement. And why would this mechanism for discussion be needed, when the Legislature already has tools to compel that kind of "dialogue"? See MCL 4.101, 4.541 (allowing the Legislature to authorize committees to subpoena governmental officials and records). Anyway, the Governor always must "show her work," as the EMA requires her to terminate the states of emergency or disaster the moment the "threat or danger has passed." MCL 30.403(3), (4).

If the Governor can circumvent the legislative-approval clause with two strokes of a pen, then the whole exercise of approval is pointless.

### D. The Governor's interpretation of the EMA defeats a central purpose of the statute: to allocate power among the branches.

Recall that the Court aims for a "reasonable construction in consideration of the purpose of the statute and the object sought to be accomplished." *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). Although a statute's purpose can often be found on its face, it can also be found in interpretive tools like the House Legislative Analysis. See *Bell v FJ Boutell Driveaway Co*, 141 Mich App 802, 810; 369 NW2d 231 (1985).

Here, the Legislature intended the 28-day period to allow swift but temporary unilateral action from the Governor to address urgent disasters or emergencies. The law gives the Legislature 28 days to prepare to assume its own role, to determine whether to grant a request for an extension from the Governor, and to otherwise address the crisis. See House Legislative Analysis, HB 5496 <https://bit.ly/3b8XMXM> (May 5, 2002) (explaining that the 28-day unilateral action period "recognizes that sometimes the legislature may not be in session during the time when a state of emergency or disaster needs extending"). In other words, the statute intends for the Legislature to take the reins once feasible. The Legislature may extend the declaration if it wishes; otherwise, the Governor's ability to exercise the EMA's emergency powers ends. See *id.* (noting concerns about "abuses of executive power" through the EMA and noting the views of some that 60 days would be "a considerable length of time for the state government to be able to exercise emergency powers").

If a crisis lasts for a longer period, then the Legislature, as the state's deliberative and consensus-driven body, is best equipped to address it. If the Governor feels the Legislature is not making the right choices, she is free to do what she may always do: use the "bully pulpit," her veto pen, and her office's influence to seek the results she wants. The need for a two-thirds bipartisan majority to give a law immediate effect also ensures that citizens' voices are being heard through their

representatives, and that each is accountable to her constituents. In sum, the Legislature determines when it is ready to act.

### E. The EMA's resolution provision is constitutionally sound.

Left with no plausible argument that she has complied with the EMA's temporal limit, the Governor argued below that the EMA's whole resolution mechanism is unconstitutional. As the Court of Claims recognized, the Governor is mistaken.

Under Michigan's 1963 Constitution, legislation creates law, and "[a]ll legislation shall be by bill." Const 1963, art 4, § 22. A resolution under MCL 30.403(3), (4) is *not* legislation. MCL 30.403(3), (4) contains an automatic sunset provision for *every* declaration of disaster or emergency. The statute dooms them to terminate within 28 days; only a resolution saves them. This provision does *not* require or allow the Legislature to approve or disapprove any of the Governor's specific executive orders. Compare with MCL 10.85(2) (permitting the Legislature to disapprove executive orders, directives, and proclamations used to address an energy emergency under State Energy Emergency Act). Rather, it requires the Legislature to decide whether a state of disaster or emergency—and the resulting emergency powers of the Governor—will extend beyond the natural statutory sunset.

*Taxpayers of Mich Against Casinos v State*, 471 Mich 306, 318; 685 NW2d 221 (2004) ("TOMAC"), confirms that this resolution process is not "legislation." There, Governor Engler signed several compacts with Michigan Indian tribes that became operative once he endorsed them and the Legislature "concurre[d] in that endorsement by resolution." *Id.* at 316. The plaintiffs argued that adopting the compacts was an act of legislation that only a bill could effect. *Id.* at 317. The Supreme Court disagreed. First, legislation is best defined as unilateral regulation, which a compact is not. *Id.* at 324. Second, the resolution would "not apply to the citizens of the state of Michigan as a whole." *Id.* Crucially, "[l]egislation looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." *Id.* (cleaned up). But the compacts did not set out rules for anyone over whom the state had legislative power. *Id.* Finally,

endorsing the compacts did not create more state obligations. *Id.* at 326. Thus, the resolution was not legislation.

The extension here meets *TOMAC*'s test for "non-legislation." Because a resolution extending a declaration of a state of emergency or disaster exercises no "[c]ontrol over something by rule or restriction," it is not a regulation. *Black's Law Dictionary* (11th ed. 2019) (definition of "regulation"). And while an extension of a declaration may indirectly affect Michigan citizens by allowing the Governor to act under the EMA longer, the extension itself (as in *TOMAC*) does not *directly* do so. Nor does it directly affect the rights of citizens. Nor is an extension a "new rule" or forward-looking change to existing conditions for citizens. As in *TOMAC* the Legislature is expressing its concurrence with a determination already made by the Governor, not adding new obligations to the state.

The Governor cannot rely on *Blank v Dep't of Corr*, 462 Mich 103, 124; 611 NW2d 530 (2000). There, the Legislature blocked certain Department of Corrections rules, which directly stopped the DOC director from completing his statutory duty of implementing the DOC's Act. *Id.* at 116. Here, on the other hand, any effect will be indirect; the *statute*—not the lack of a resolution—stops any declared and un-extended state of emergency or disaster. Second, the legislative process in *Blank* supplanted other legislative methods of reaching the same result. *Id.* at 117. But here, a resolution is the *only* method the Legislature uses to extend an emergency declaration. Finally, refusing to approve the Department's rules "involve[d] policy determinations," as the Legislature took testimony, received comments, heard from stakeholders, and decided how to implement the statute. *Id.* at 115–116 (discussing monitoring, overseeing, or vetoing specific acts of implementation). Here, the Legislature's choice not to extend a declaration of emergency is neither a policy decision nor an attempt to implement the EMA itself. See *In re Certified Question*, 432 Mich 438, 455–456; 443 NW2d 112 (1989) (defining "policy").

The Legislature may use resolutions to express its non-legislative "assent." *TOMAC*, 471 Mich at 328 n 9, 329; accord *Becker v Detroit Sav Bank*, 269 Mich 432, 435; 257 NW 853 (1934) ("[R]esolutions are often used to express the legislative will in cases not requiring a general

law."). The resolution mechanism is therefore a constitutionally appropriate method of assenting to an extension of a declaration of emergency or disaster.

In sum, the EMA's resolution process is constitutional. Even if it were not, the Governor would still need to explain how the resolution provision is severable from the rest of the act, allowing the rest of the Governor's powers under the EMA to "reasonably" continue. See *Mich State AFL-CIO v Mich Employment Relations Comm'n*, 212 Mich App 472, 501; 538 NW2d 433 (1995). Likewise, the Governor would need to explain why her declarations would somehow live on past 28 days just because the *extension* process is constitutionally invalid. She has done neither.

## CONCLUSION AND RELIEF REQUESTED

The Governor has overstepped her authority. The Court should grant the application and hold that neither the EPGA nor the EMA grants the Governor the broad powers she claims. Alternatively, the Court should hold that the Governor exceeded the authority granted in the EMA and that her use of the EPGA is an unconstitutional usurpation of lawmaking power.

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Dated: August 28, 2020

## CERTIFICATE OF COMPLIANCE

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