NO. 100992-5

SUPREME COURT OF THE STATE OF WASHINGTON

GENE GONZALES; SUSAN GONZALES; HORWATH FAMILY, TWO, LLC; and WASHINGTON LANDLORD ASSOCIATION,

Petitioners,

v.

GOVERNOR JAY INSLEE and STATE OF WASHINGTON,

Respondents.

RESPONDENTS' ANSWER TO BRIEF OF AMICUS CURIAE CITIZEN ACTION DEFENSE FUND

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I. INTRODUCTION

"The COVID-19 pandemic is a disaster unlike any the citizens of Washington have seen before." *In re Recall of Inslee* (*Inslee I*), 199 Wn.2d 416, 434, 508 P.3d 635 (2022). Over 15,300 Washingtonians have died from COVID-19 and over 79,700 have been hospitalized.[1]

Facing this unprecedented crisis, Governor Inslee declared a state of emergency so he could take steps to protect public health and avoid mass casualties. This included issuing Proclamation 20-19 (the Moratorium) pursuant to RCW 43.06.220(1)(h), which prohibited certain activities related to evictions. The Moratorium's effect was to temporarily delay some, but not all, residential evictions. The Moratorium's purpose was to reduce risks to life and health by keeping people in homes at a time the pandemic required them to stay there.

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[1] Wash. Dep't of Health, *COVID-19 Data Dashboard*, https://doh.wa.gov/emergencies/covid-19/data-dashboard (last visited Feb. 1, 2023).

The Moratorium fell well within the Governor's emergency powers. This is confirmed by the plain text of RCW 43.06.220(1)(h), authorizing the Governor to prohibit "[s]uch other activities as he or she reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace"; the Legislature's changes to the emergency powers statutes that confirm the Governor's broad emergency powers; and this Court's repeated recognition that the breadth of the emergency powers statutes, including RCW 43.06.220(1)(h), shows a clear intent by the Legislature to give broad police power to the Governor to act in times of emergency.

Citizen Action Defense Fund's (CADF) arguments that the Court should narrow the emergency powers statute is untethered to the statute's plain text and manifest purpose: To give the Governor wide latitude to act in the face of disasters and public disorders, which obviously includes the gravest public health emergency in over a century. The Governor validly exercised his emergency powers here, and CADF's requests to

narrow the Governor's emergency powers would be better addressed to the Legislature.

II. ARGUMENT

A. The Governor Has Broad Authority to Act in Times of Emergency

Chapter 43.06 RCW clearly and unambiguously gives the Governor the authority to declare an emergency in response to COVID-19 and to prohibit activities that he reasonably believes are necessary to preserve public life and health. Here, these activities included certain residential evictions and treatment of unpaid rent prohibited by Proclamation 20-19, as amended. The plain text of RCW 43.06.220(1)(h), the Legislature's statement of intent and legislative history in amending the emergency powers statute, and this Court's precedent recognizing the Governor's broad powers all compel the conclusion that the Governor was authorized to issue Proclamation 20-19.

1. Governor Inslee acted within his delegated authority in issuing Proclamation 20-19

"The executive branch has historically led Washington's response to emergencies." *Colvin v. Inslee*, 195 Wn.2d 879, 895, 476 P.3d 953 (2020). The Legislature delegated to the Governor the authority to exercise emergency powers in the event of a "public disorder, disaster, energy emergency, or riot[.]" RCW 43.06.010(12). Once an emergency has been declared, the Governor "unlocks 'the powers granted the governor during a state of emergency.'" *Colvin*, Wn.2d at 895 (quoting RCW 43.06.010(12)). Such powers include the "broad discretionary authority to issue emergency proclamations restricting 'activities [the governor] reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace' during declared emergencies." *Inslee I*, 199 Wn.2d at 426 (quoting RCW 43.06.220(1)(h)); *see also In re Recall of Inslee* (*Inslee II*), __ P.3d __, No. 101117-2, 2023 WL 308217, at *7 (Wash. Jan. 19, 2023).

Here, the Governor proclaimed a state of emergency with respect to COVID-19, *see* Procl. 20-05—an action plainly justified under the statute as this Court and others have decided. *See, e.g.*, *Inslee I*, 199 Wn.2d at 433 ("disaster" under RCW 43.06.010(12) included the COVID-19 pandemic); *Slidewaters LLC v. Wash. State Dep't of Lab. & Indus.*, 4 F.4th 747, 755 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 779 (2022) ("[T]he governor had the lawful authority under [RCW] 43.06.010(12) to issue Proclamation 20-05 [declaring state of emergency], as the pandemic is both a 'public disorder' and a 'disaster' affecting 'life [and] health' in Washington.").[2]

During the declared emergency, the Governor unlocked the power to issue orders prohibiting "[s]uch other activities" he "reasonably believe[d]" should be prohibited "to help preserve and maintain life, health, property or the public peace." RCW 43.06.220(1)(h). Governor Inslee appropriately issued

[2] The Governor terminated the state of emergency under Proclamation 20-05 on October 31, 2022. *See* Procl. 20-05.1.

Proclamation 20-19 relying on that "broad discretionary authority." *Inslee I*, 199 Wn.2d at 426; *see* Procl. 20-19.6 at 5 (citing RCW 43.06.220(1)(h)). The issuance of such an order is "'by statute committed to the sole discretion of the Governor.'" *Colvin*, 195 Wn.2d at 895 (citation omitted).

In interpreting a statute, the Court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the Court must give effect to that plain meaning as an expression of legislative intent. *State v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002). Here, as the Court of Appeals rightfully held, the plain language of RCW 43.06.220(1)(h) is capacious and unambiguous. *Gonzales v. Inslee*, 21 Wn. App. 2d 110, 128, 504 P.3d 890 (2022). The term "activities" is broad, and certainly encompasses the actions Proclamation 20-19 prohibited with respect to certain residential evictions and the treatment of unpaid rent.

Given the pandemic's economic dislocations and the public health risks posed by thousands of displaced tenants, the Governor "reasonably believe[d]" that temporarily prohibiting certain residential evictions would "help preserve and maintain life, health, property or the public peace." RCW 43.06.220(1)(h). As one federal court explained in upholding the Moratorium, not only did the Moratorium "soften[] the economic blow" caused by the pandemic "by providing stable housing for those who would otherwise be evicted because of the pandemic," but it also "avoid[ed] the transmission of the disease by reducing housing instability and the heightened risk of disease transmission." *El Papel LLC v. Inslee*, No. 2:20-cv-01323-RAJ-JRC, 2020 WL 8024348, at *9, *10 (W.D. Wash. Dec. 2, 2020); *see also Jevons v. Inslee*, 561 F. Supp. 3d 1082, 1099 (E.D. Wash. 2021) (recognizing the Moratorium's purposes to prevent transmission of COVID-19 and address the economic fallout from the gravest public health crisis in a century).

With as many as 789,000 Washingtonians at risk of eviction, the Moratorium provided a lifeline to those facing unprecedented hardships. CP 975. By keeping renters in their homes—and out of homeless shelters, doubled up with family or friends, and other congregate settings—the Moratorium prevented up to 59,008 more eviction-attributable COVID-19 cases, 5,623 more hospitalizations, and 621 more deaths. CP 1356; *see also* King County Bar Association Housing Justice Project Amicus Br. at 16–19 (discussing studies showing how eviction moratoria slowed COVID-19 transmissions, prevented increases in homelessness, alleviated overburdened healthcare systems, protected vulnerable communities already disproportionately harmed by the pandemic and evictions).

RCW 43.06.220(1)(h) plainly authorized the Governor to issue Proclamation 20-19, as amended.

2. The Legislature has confirmed the breadth of the Governor's emergency powers

Statutory construction begins, and often ends, with the words of a statute and any related statutes. *See Wash. State Ass'n*

of Counties v. State, 199 Wn.2d 1, 11, 502 P.3d 825 (2022). CADF skips the plain text analysis and jumps to misreading the historical context of RCW 43.06.220, and subsequent changes to it made by the Legislature, to contend that the Governor misused his authority. *See* CADF Br. at 14–18.

CADF's argument that the Legislature enacted the emergency powers statute to give the Governor powers to address riots and civil unrest—not pandemics—ignores that the emergency powers statute gave broad powers to the Governor from the outset. It authorized the Governor to prohibit a wide swath of activity from assembly on public streets to the sale of commodities or goods. *See* Laws of 1969, 1st Ex. Sess., ch. 186, § 3, page no. 1438. The statute has always included the general catch-all clause, allowing the Governor to prohibit "[s]uch other activities as he reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace." *Id.* There are no limitations for riots or civil unrest. Constraining the statute, as CADF urges, would require

the Court to add words to a statute "'where the [L]egislature has chosen not to include them'" and prevent the Court from giving "'all of the language'" its effect. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (quoting *Rest. Dev., Inc. v. Canawill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003)).

CADF also misreads later changes and their legislative histories to wrongly constrain the Governor's emergency powers. Most recently, in 2019, the Legislature expanded on the Governor's emergency powers by granting the office authority to waive or suspend "[s]uch other statutory and regulatory obligations or limitations" for certain executive functions if strict compliance would hinder or delay action in coping with the emergency. *See* RCW 43.06.220(2)(g). While also adding this power, the Legislature provided a statement of legislative intent, expressing "that the governor has broad authority to proclaim a state of emergency . . . *and to exercise emergency powers during the emergency*." Laws of 2019, ch. 472, § 1, page no. 4227

(emphasis added). Legislative history confirms the Legislature's recognition of the Governor's emergency power to prohibit activities under RCW 43.06.220(1)(h). The Legislature explained that a declaration of emergency "enables the Governor to prohibit specific activities, such as public gatherings." Final Bill Report on S.B. 5260, at 1, 66th Leg., Reg. Sess. (Wash. 2019), https://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bill%20Reports/Senate/5260%20SBR%20FBR%2019.pdf?q=20230123224404. The Governor "may also prohibit activities as the Governor reasonably believes is necessary to help preserve and maintain life, health, property, or the public peace." *Id.*; *see* RCW 43.06.220(1)(h).

The 2019 legislative change to add the residual clause discussed above followed changes the Legislature made in 2008, where the Legislature gave the Governor the authority to suspend certain specific statutory obligations like taxes and tariffs during declared emergencies. *See* Laws of 2008, ch. 181, § 1(2), page no. 918. Here too, the Legislature confirmed

that the Governor's emergency powers also include "prohibiting activities that the Governor believes should be prohibited to help preserve and maintain life, health, property, or the public peace." Final Bill Report on S.B. 6950, at 1, 60th Leg., Reg. Sess. (Wash. 2008), https://lawfilesext.leg.wa.gov/biennium/2007-08/Pdf/Bill%20Reports/Senate/6950.FBR.pdf?q=20230123231939.

3. This Court has repeatedly recognized that the Governor's emergency powers are broad

CADF's arguments to narrowly cabin the Governor's powers also conflict with this Court's holdings that the emergency powers statutes, including RCW 43.06.220, are broad grants of authority that "evidence a clear intent by the legislature to delegate requisite police power to the governor in times of emergency[,]" and that "*[t]he necessity for such delegation is readily apparent*[.]" *Cougar Bus. Owners Ass'n v. State*, 97 Wn.2d 466, 474, 647 P.2d 481 (1982), *abrogated in part by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019) (emphasis added). Recognizing that "[i]n times of natural catastrophe or

civil disorder, immediate and decisive action by some component of state government is essential[,]" and that "the executive is inherently better able than the legislature to provide this immediate response," this Court observed that "the center of governmental response is usually the governor's office" and they are given "substantial discretionary authority in the form of emergency powers to deal with anticipated crisis." *Id.* at 474–75 (internal quotation marks and citation omitted).

And just thirteen years after the Legislature first delegated emergency powers to the Governor, this Court refused to adopt an interpretation of "disaster" that would "unduly narrow and restrict[] the legislative intent to empower the governor to respond to emergencies." *Id.* at 475. The Court upheld the Governor's exercise of authority to take preventative measures in the face of volcanic activity at Mount St. Helens. *See id.* at 470–71. Unsurprisingly then, this Court and others have rejected arguments like CADF's that the Governor's emergency

powers do not reach pandemics. *See Inslee I*, 199 Wn.2d at 433; *Slidewaters*, 4 F.4th at 754–55.

Since first upholding the Governor's emergency power in *Cougar*, this Court has repeatedly recognized the Governor's "broad" emergency powers, *Colvin*, 195 Wn.2d at 895, including his "broad discretionary authority" to issue emergency proclamations under RCW 43.06.220(1)(h), *Inslee II*, 2023 WL 308217, at *7. This includes the authority under RCW 43.06.220(1)(h) to issue the Moratorium. *Inslee I*, 199 Wn.2d at 427 (holding Proclamation 20-19 was not "a manifestly unreasonable exercise of Governor Inslee's discretionary authority under RCW 43.06.220(1)(h)").

As this Court has repeatedly emphasized, "[p]articularly in areas 'fraught with medical and scientific uncertainties,' the governor's 'latitude must be especially broad,'" and courts should 'appropriately defer to such decisions.'" *Inslee II*, 2023 WL 308217, at *8 (citation omitted); *see also Inslee I*, 199 Wn.2d at 431.

B. The Pandemic Influenza Preparedness Act Does Not Constrain the Governor's Emergency Powers

CADF's argument that ch. 70.26 RCW (the Pandemic Influenza Preparedness Act) somehow limits the Governor's emergency powers and devolves state authority during a public health crisis to local officials is also flawed. It disregards the plain text of the statute, which simply requires that local health jurisdictions prepare and submit plans to prepare for and respond to a pandemic of influenza (a different virus from COVID-19) to the Washington Secretary of Health for approval to qualify for state and federal funds. That statute does nothing to limit the Governor's broad statutory powers to proclaim and manage an emergency involving a "public disorder . . . affect[ing] life, health, property, or the public peace[.]" RCW 43.06.010(12). Also, consistent with the statutory text, the context in which the Legislature enacted the Pandemic Influenza Preparedness Act confirms that it was a narrow piece of legislation designed to

secure federal funds for influenza preparedness to be distributed to local health jurisdictions.

1. The text of the Pandemic Influenza Preparedness Act does not limit the Governor's emergency powers

The Pandemic Influenza Preparedness Act is a simple statute. Its purpose was to ensure that "adequate pandemic flu preparedness and response plans be developed and implemented by local public health jurisdictions statewide[.]" RCW 70.26.010(6). It accomplished that purpose in three steps. First, it required the Secretary of Health to "establish requirements and performance standards, consistent with any requirements or standards established by the [U.S. Department of Health and Human Services (HHS)], regarding the development and implementation of local pandemic flu preparedness and response plans." RCW 70.26.030(1). Second, it required "each local health jurisdiction" to "develop a pandemic flu preparedness and response plan, consistent with [the state] requirements and performance standards[,]"

RCW 70.26.030(2), and to "submit" them to the Secretary for "approv[al] or reject[ion]" by November 1, 2006, RCW 70.26.030(1), .050. Third, the Secretary was to grant "additional state or federal funding appropriated" to local jurisdictions whose plans he "determined . . . to comply with [DOH] requirements." RCW 70.26.050.

In other words, the entire statute is directed towards *planning* for an influenza pandemic and says nothing at all about how to *respond* to a (non-influenza) pandemic. And even within the scope of preparation, the Act contemplates state involvement and supervision. *See, e.g.*, RCW 70.26.050 (requiring state approval of local plans). How to respond to an emergency, including public health ones, is addressed in various emergency management statutes that allocate powers and duties to state officials. *See* RCW 43.06.010(12) ("The governor may, after finding that a public disorder, disaster, energy emergency, or riot exists within this state or any part thereof which affects life, health, property, or the public peace, proclaim a state of

emergency . . . ."); RCW 43.06.220(1) (authorizing the Governor after proclaiming a state of emergency to "issue an order prohibiting: . . . (h) Such other activities as he or she reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace[]"); RCW 43.06.220(2) (authorizing the Governor after proclaiming state of emergency "waive[]" or "suspen[d]" any "statutory and regulatory obligations or limitations prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency if strict compliance with the provision of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency"); RCW 38.52.050(1) (vesting in the Governor the "general supervision and control of the emergency management functions in the department" and providing that "in the event of disaster beyond local control, [the Governor] may assume direct

operational control over all or any part of the emergency management functions within this state").[3]

The Pandemic Influenza Preparedness Act does not mention those broad emergency and management statutes nor suggests that the Legislature intended to curb them during a flu pandemic (let alone a non-flu pandemic) by requiring a county-by-county emergency response. To read the Act in this way would ignore not only the established presumption against "repeal by implication," *ATU Legislative Council of Washington State v. State*, 145 Wn.2d 544, 552, 40 P.3d 656 (2002), but also the maxim that legislatures do not "hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001).

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[3] *See also* RCW 43.70.130 (authorizing the Secretary of Health to "[i]nvestigate outbreaks and epidemics of disease that may occur and advise local health officers as to measures to be taken to prevent and control the same," "exercise general supervision over the work of all local health departments," and exercise "the same authority as local health officers . . . when in an emergency the safety of the public health demands it").

Nor does the Act suggest that the required local plans are the *exclusive* means of planning for (much less responding to) public health emergencies. Under long-established principles of statutory interpretation, because there is no conflict between RCW 43.06 and RCW 70.26, neither supersedes the other. *See In re Estate of Kerr*, 134 Wn.2d 328, 343, 949 P.2d 810 (1998). While a general statutory provision yields to a more specific one where there is a conflict, the Pandemic Influenza Preparedness Act and the Governor's emergency powers under RCW 43.06.220 pertain to different subject matter and CADF does not otherwise identify any conflict between the two.

CADF's argument also wrongly conflates influenza and COVID-19. It bears emphasizing that while both cause respiratory illnesses, COVID-19 is not a form of influenza. They are caused by infections of biologically distinct viruses. CP 557. Further, COVID-19 is more contagious, can cause more severe illness, and has a higher severe disease and mortality rate. Ctrs. for Disease Control & Prevention, *Similarities and*

Differences between Flu and COVID-19, https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm (last visited Feb. 1, 2023); Johns Hopkins School of Medicine, *No, COVID-19 Is Not the Flu* (Oct. 20, 2020), https://publichealth.jhu.edu/2020/no-covid-19-is-not-the-flu.

The differences between influenza and COVID-19 are starkly highlighted by the Legislature's predictions: The Legislature, in passing the Pandemic Influenza Preparedness Act, estimated in its findings that "another pandemic influenza would cause more than two hundred thousand deaths in our country, with as many as five thousand in Washington. Our State could also expect ten thousand to twenty-four thousand people needing hospital stays[.]" RCW 70.26.010(3). To date, COVID-19 has caused more than 1.1 million deaths in our country and over 15,300 Washingtonians have died.[4]

[4] Ctrs. for Disease Control & Prevention, *COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker/#datatracker-home (last visited Feb. 1, 2023); Wash. Dep't of Health, *COVID-*

In sum, the text of RCW 70.26 shows that the Act does not constrain the Governor's emergency powers. "Because the governor may lawfully proclaim a public emergency related to disease outbreak, authority to enforce public health rules related to a pandemic is not vested 'exclusively' in local health officers." *Slidewaters LLC v. Wash. Dep't of Lab. & Indus.*, No. 2:20-CV-0210-TOR, 2020 WL 3130295, at *3 (E.D. Wash. June 12, 2020), *aff'd,* 4 F.4th 747 (9th Cir. 2021) (rejecting argument that Pandemic Influenza Preparedness Act permits only local health officers to issue COVID-19 directives).

2. The history of the Pandemic Influenza Preparedness Act also confirms its plain text

The history of the Pandemic Influenza Preparedness Act further confirms that it does not have the expansive effect CADF attributes to it. The Legislature adopted RCW 70.26 in direct response to a major federal initiative designed to improve and coordinate federal, state, and local public health infrastructure in

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19 Data Dashboard, https://doh.wa.gov/emergencies/covid-19/data-dashboard (last visited Feb. 1, 2023).

anticipation of the next major flu pandemic. *See* H.B. Rep. on Engrossed Substitute S.B. 6366, 59th Leg., Reg. Sess. (Wash. 2006) (describing federal findings and policy on preparedness for pandemic influenza).

In 2005, as the avian influenza virus A (H5N1) spread throughout Asia, U.S. public health experts and policymakers grew concerned that the world was on the verge of an influenza pandemic. John Iskander, et al., *Pandemic Influenza Planning, United States, 1978–2008*, 19 EMERGING INFECTIOUS DISEASES 879, 881 (June 2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3713824/. The White House Homeland Security Council then released the National Strategy for Pandemic Influenza (Strategy) and later supplemented the Strategy with a detailed Implementation Plan containing 300 required actions for federal agencies, state and local governments, and the private sector. The Strategy "recognize[d] that preparing for and responding to a pandemic cannot be viewed as a purely federal responsibility, and that the nation must have a system of plans at all levels of

government . . . that can be integrated to address the pandemic threat." Homeland Security Council, *National Strategy for Pandemic Influenza* 2 (Nov. 2005), https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-strategy-2005.pdf. The Implementation Plan provided that "State, local and tribal entities should develop and exercise pandemic influenza plans that address key response issues and outline strategies to mitigate the human, social, and economic consequences of a pandemic[.]" Homeland Security Council, *National Strategy for Pandemic Influenza Implementation Plan* 115 (May 2006), https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-implementation.pdf.

In December 2005, Congress provided $3.8 billion in emergency supplemental appropriations, including $350 million for state and local public health capacity. Pub. L. No. 109-148, Title II, ch. 6, 119 Stat. 2680, 2786, Dec. 30, 2005. Specifically, Congress intended that the appropriation be used to support the development of "pandemic response plans by State and local

officials." H.R. Rep. No. 109-359, at 523 (2006) (Conf. Rep.), *as reprinted in* 2005 U.S.C.C.A.N. 1457, 1522. As a condition of eligibility for those federal funds, HHS required states to submit state pandemic influenza response plans by February 2007. Ctrs. for Disease Control & Prevention, *Pandemic Influenza Guidance Supplement to the 2006 Public Health Emergency Preparedness Cooperative Agreement Phase II* at 12 (July 10, 2006), https://www.cdc.gov/cpr/documents/coopagreement-archive/fy2006/phase2-panflu-guidance.pdf .

In March and July 2006, HHS awarded $325 million of the total $350 million Congress had appropriated to 62 jurisdictions, including Washington State. HHS, Office of Inspector General, *Memorandum Report from Inspector General Daniel R. Levinson to Dr. Julie L. Gerberding Re: Laboratory Preparedness for Pandemic Influenza* at 2 n.8 (Oct. 24, 2007), https://oig.hhs.gov/oei/reports/oei-04-07-00670.pdf. Washington was among those states, having enacted the Pandemic Influenza Preparedness Act in March 2006. S.B.

Rep. on S.B. 6366, 59th Leg., Reg. Sess. (Wash. 2006); Laws of 2006, ch. 63, page nos. 287–91.

The Pandemic Influenza Preparedness Act largely served to assess capacity to respond to influenza outbreaks in order to qualify for federal funds. The Legislature did not enact the law to make management of all kinds of pandemics exclusively local, as CADF asserts.

* * *

CADF appeals to principles of exclusive local control of public health measures. *See* CADF Br. at 10–11. Whatever merit this policy may have (and, in the midst of a deadly disease that cares not at all for political and geographical boundaries, it has very little merit), that is not the policy adopted by our Legislature. *See* RCW 43.06.010(12) (authorizing Governor to declare statewide emergency). Local public health officials had, and continue to have, a critical role to play in responding to the COVID-19 pandemic, but not to the exclusion of coordinated statewide measures. *See* CP 556–57.

C. The Legislature's Delegation of Emergency Powers to the Governor is Constitutional

CADF's argument that RCW 43.06.220 unconstitutionally delegates legislative powers to the Governor, CADF Br. at 21–22, has been foreclosed by this Court. The practical consequences of CADF's argument would seriously impair the government's ability to quickly and flexibly respond in times of emergency.

It would be astonishing for the Court to invalidate the Governor's RCW 43.06.220 powers as an unconstitutional delegation more than 50 years after its enactment and more than 40 years after the Court first upheld them in *Cougar*. Laws of 1969, 1st Ex. Sess., ch. 186, § 3, page no. 1438; *Cougar*, 97 Wn. 2d at 475–76.

But even if *Cougar* did not foreclose CADF's delegation argument, that argument still fails under the well-established delegation standard as addressed in the State's brief. *See* State Suppl. Br. 21–23; *see also Slidewaters*, 4 F.4th at 756 ("delegation of power by the legislature to the executive to act in

a time of emergency . . . does not present separation of powers concerns[ ]" (citing *Barry & Barry, Inc. v. State*, 81 Wn.2d 155, 155, 500 P.2d 540 (1972))).

RCW 43.06.220 provides clear "standards or guidelines" delineating in "general terms" the Governor's exercise of his emergency powers, which are operative only during a proclaimed state of emergency. *Barry*, 81 Wn.2d at 159; *see* RCW 43.06.010(12) (requiring a "public disorder, disaster, energy emergency, or riot" that "affects life, health, property, or the public peace"). And procedural safeguards exist—including filing a declaratory judgment action as the Landlords have done here. RCW 7.24.010; *cf. McDonald v. Hogness*, 92 Wn.2d 431, 446, 598 P.2d 707 (1979) ("[W]e repeatedly have found adequate procedural safeguards" in the availability of "judicial review of an agency's decision.").

As this Court has observed, "the three branches are not 'hermetically sealed,' the separation of powers doctrine allows the government a measure of 'flexibility and practicality.' " *State*

v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002) (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). CADF's arguments, however, would perilously constrain the executive's abilities to respond quickly and flexibly in times of emergency.

CADF is wrong to assert that the Governor had "unlimited authority to take action" and that he "effectively suspend[ed] . . . the Residential Landlord-Tenant Ac by fiat[.]" CADF Br. at 21. That contention is baseless because the Moratorium did not suspend any statutory "obligations" or "limitations" under the RLTA, so the Governor did not issue it under his subsection (2) powers. *See* State Suppl. Br. at 17–19. Nor is the Governor's subsection (2) authority "unlimited," as CADF claims, because that authority requires legislative approval to extend any suspension beyond 30 days. RCW 43.06.220(4).[5]

[5] Notably, the Governor did not hesitate to exercise his subsection (2) authority during the COVID-19 emergency to waive or suspend statutory provisions. But, consistent with subsection (2)'s text, he only exercised that authority in

The emergency powers statute does not violate the delegation doctrine. To the contrary, for the Court to "dictat[e] how the executive branch must exercise these discretionary powers" would "'usurp the authority of the coordinate branches of government.'" *Colvin*, 195 Wn.2d at 898 (quoting *Walker v. Munro*, 124 Wn.2d 402, 410, 879 P.2d 920). Particularly during the gravest public health crisis in more than a century, "[i]nterfering with the governor's choices in responding to this emergency would contravene the historical roles of the executive

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applicable areas. For example, the Governor temporarily waived statutory provisions concerning Department of Licensing requirements for driver license renewal, *see* Proclamation 20-15 (waiving in part RCW 46.20.130(1)(a), .120(3)(b)), and penalties for late tax filings assessed by the Department of Revenue, *see* Proclamation 20-20 (waiving in part, inter alia, RCW 84.36.825). Those orders all fit well within the Governor's subsection (2) authority because they concerned "statutory and regulatory obligations or limitations prescribing the procedures for conduct of state business, or the orders, rules, or regulations of a[ ] state agency[.]" RCW 43.06.220(2)(g). And pursuant to RCW 43.06.220(4), these Proclamations were approved and extended by the legislative leadership and then the full Legislature by concurrent resolution. *See* S. Con. Res. 8402, at 1–2, 66th Leg., Reg. Sess. (Wash. 2021).

and judicial branches," which should "not use this emergency as an occasion to wield powers that exceed [their] constitutional authority." *Id.* at 898–99.

III. CONCLUSION

To combat the transmission COVID-19 and avoid mass evictions, the Governor issued Proclamation 20-19—an action plainly justified by RCW 43.06.220(1)(h). The State respectfully requests the Court affirm the decision of the Court of Appeals.

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RESPECTFULLY SUBMITTED this 2nd day of February 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically filed in the Washington State Supreme Court and electronically served according to the Court's protocols for electronic filing and service upon all parties.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 2nd day of February, 2023, at Tacoma, Washington.

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