STATE OF MICHIGAN
IN THE COURT OF APPEALS

MOORE MURPHY HOSPITALITY, LLC
D/B/A IRON PIG SMOKEHOUSE,

Petitioner-Appellee,

v

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent-Appellant.

_____/

Court of Appeals No. 360175

Otsego County Circuit Court
No. 21-18522-AE

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

THE MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

Treatises

Regulations

Constitutional Provisions

STATEMENT OF JURISDICTION

This Court granted the application for leave filed by the Department of Health and Human Services and thus this Court has jurisdiction over this appeal. See MCR 7.203(B); 7.205(B).

STATEMENT OF QUESTIONS PRESENTED

1. Did the circuit court err in determining that the fine imposed by the Department of Health and Human Services (DHHS) on Iron Pig was unlawful when it ruled that the Legislature improperly delegated statutory authority to the Director of DHHS to issue orders to protect the public health from epidemics?

   Department's answer: Yes.

   Iron Pig's answer: No.

   Circuit court's answer: No.

2. Did the circuit court act outside of its authority when it purported to provide equitable relief – severing an entire section from the Public Health Code – where it was sitting as an appellate body from an administrative appeal and did not have equitable powers?

   Department's answer: Yes.

   Iron Pig's answer: No.

   Circuit court's answer: No.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Michigan Constitution provides for the separation of powers, art 3, § 2:

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

The Michigan Constitution, art 4, § 51, provides:

> 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.

Section 2221 of the Public Health Code, MCL 333.2221, provides as follows:

> (1) Pursuant to section 51 of article 4 of the state constitution of 1963, the department shall continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including prevention and control of environmental health hazards; prevention and control of diseases; prevention and control of health problems of particularly vulnerable population groups; development of health care facilities and agencies and health services delivery systems; and regulation of health care facilities and agencies and health services delivery systems to the extent provided by law.
>
> (2) The department shall:
>
> > (a) Have general supervision of the interests of the health and life of the people of this state.
> >
> > (b) Implement and enforce laws for which responsibility is vested in the department.
> >
> > (c) Collect and utilize vital and health statistics and provide for epidemiological and other research studies for the purpose of protecting the public health.

(d) Make investigations and inquiries as to:

(i) The causes of disease and especially of epidemics.

(ii) The causes of morbidity and mortality.

(iii) The causes, prevention, and control of environmental health hazards, nuisances, and sources of illness.

(e) Plan, implement, and evaluate health education by the provision of expert technical assistance and financial support.
(f) Take appropriate affirmative action to promote equal employment opportunity within the department and local health departments and to promote equal access to governmental financed health services to all individuals in the state in need of service.

(g) Have powers necessary or appropriate to perform the duties and exercise the powers given by law to the department and which are not otherwise prohibited by law.

(h) Plan, implement, and evaluate nutrition services by the provision of expert technical assistance and financial support.

Section 2253 of the Public Health Code, MCL 333.2253, provides as follows:

(1) If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code.

(2) If an epidemic described in subsection (1) involves avian influenza or another virus or disease that is or may be spread by contact with animals, the department of agriculture shall cooperate with and assist the director in the director's response to the epidemic.

(3) Upon request from the director, the department of agriculture shall assist the department in any review or update of the department's pandemic influenza plan under section 5112

INTRODUCTION

The epidemic-response authority conferred on the Director of Health and Human Services under the statute at issue, MCL 333.2253, has long been exercised by public health officials in Michigan. They are necessary powers, and the recognition of their basis and validity is of long standing. The controlling authority confirms the constitutionality of the law. It is true both in the historic precedents of the Court, see *People ex rel Hill v Bd of Ed of City of Lansing*, 224 Mich 388, 392 (1923), and in the recent decision of *In re Certified Questions*, 506 Mich 332 (2020), which invalidated Michigan's law conferring emergency powers on the Governor in the Emergency Powers of the Governor Act (EPGA). The former decision upheld a law similar in character to the one at issue here, and the latter opinion struck down a law for which the majority was "unaware of any other law of this state" like it and for which it did not believe a similar case would "soon come before this Court again," *id.* at 372, n 21, and 384, despite the Court's plain awareness of the law at issue here.

The circuit court erred in ruling otherwise. The court misapplied Michigan's nondelegation jurisprudence and failed to duly engage with the plain language of MCL 333.2253's grant of authority, whose limitations in scope, duration, and standards bring it comfortably in line with that jurisprudence and stand in stark contrast to the delegation struck down in *In re Certified Questions.*

Moreover, the circuit court compounded this error by failing to recognize the limits of its own authority in another way: it did not have the authority to issue any equitable relief here, but nonetheless purported to sever MCL 333.2253, in full, from the Public Health Code. This Court should reverse.

STATEMENT OF FACTS AND PROCEEDINGS

The facts surrounding the COVID-19 pandemic are well-established. SARS-CoV-2 is similar to other coronaviruses (a large family of viruses that cause respiratory illnesses), but the strain is novel. Since December 2019, over 2 million Michigan residents have been diagnosed with COVID-19 and 35,843 Michigan residents have died from the disease at the time of this filing.[1] It is widely known and accepted that COVID-19, the disease that results from the virus, is highly contagious, spreading easily from person to person via "respiratory droplets."[2]

On March 10, 2020, in response to the growing pandemic in Michigan, Governor Whitmer declared a state of emergency and invoked the emergency powers available to the Governor under Michigan law.[3] Soon thereafter, the Department Director began issuing emergency orders under Michigan's Public Health Code, MCL 333.1101, *et seq*.[4]

On November 15, 2020, the Director issued an emergency order under MCL 333.2253 – Gathering and Face Masks Order. (App'x p 39.) This Order came amid a dire surge in viral transmission and death in our state: between October 1 and

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[1] Coronavirus Michigan Data, https://www.michigan.gov/coronavirus/stats (last accessed on November 9, 2022.)

[2] See, e.g., CDC, *Considerations for Restaurants and Bar Operators* (Dec 16, 2020), https://greasemanagement.org/cdcrestaurantguidelines.pdf (last accessed November 9, 2022).

[3] All executive orders can be found at https://www.michigan.gov/whitmer/news/state-orders-and-directives

[4] All MDHHS emergency orders related to COVID-19 are available at https://www.michigan.gov/coronavirus/resources/orders-and-directives/lists/mdhhs-epidemic-orders

November 15, 2020, Michigan's COVID-19 rate of positivity increased by 225% (despite only a 78% increase in administered tests), its per-capita case count increased *fivefold*, and its death rate increased *fourfold*.[5] Furthermore, while safe and effective vaccines for COVID-19 have now become widely available, that was not yet the case at that time.

The Epidemic Order was issued to control this surging spread of COVID-19 and protect public health by establishing restrictions on gatherings, including temporarily prohibiting gatherings of patrons inside food service establishments – a type of gathering recognized as high-risk by public health experts, given the inability to mask consistently when eating or drinking and the heightened risk of transmission that attends sustained indoor gatherings more generally.[6] Section 2(a)(2) of the Epidemic Order stated that indoor gatherings were "prohibited at non-residential venues." Thus, indoor dining at food service establishments like Iron Pig was prohibited, but such businesses were able to continue with take-out, outdoor dining, and delivery services under section 3(b).

Iron Pig openly defies the epidemic order.

On November 25, 2020, Gaylord Police Department Officer Stefan Crane visited Iron Pig, located at 143 West Main Street, Gaylord, Michigan 49735. Officer

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[5] See n 1, Coronavirus Michigan Data, https://www.michigan.gov/coronavirus/stats

[6] CDC, *Community and Close Contact Exposures Associated with COVID-19 Among Symptomatic Adults ≥18 Years in 11 Outpatient Health Care Facilities – United States*, July 2020 (Sept. 11, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6936a5.htm?s_cid=mm6936a5_x (last accessed November 9, 2022).

Crane observed that Iron Pig was open for indoor dining in violation of sections 2(a)(2) and 3(b)(1) of the Epidemic Order. (App'x pp 47–48, 51.) Iron Pig was notified of this violation through an Order to Cease and Desist Food Service Operations by the Health Department of Northwest Michigan. (App'x pp 49–50.)

On December 1, 2020, the Department issued Iron Pig a citation for additional violations of the Epidemic Order. (App'x pp 51–53.) Specifically, it was found that Iron Pig continued to allow indoor dining in violation of the Epidemic Order for a total of five days. (*Id.*)

Iron Pig's defiance of the Epidemic Order on those five days is clear and undisputed. Iron Pig's Facebook page was active with regular posts about being open for indoor dining despite orders to the contrary. (See App'x pp 55–66.) For example, Iron Pig advertised a "Thanksgiving Eve Party!" occurring on Wednesday, November 25, 2020, a date included in the citation. (App'x p 55.) Iron Pig also used its refusal to comply with the Order's public-health measures to attract business, posting on its Facebook page a new slogan to attract customers to its restaurant: "Risk it for the brisket." (App'x p 63.) Further, when interviewed by local news on December 15, 2020, owner Ian Murphy reiterated the restaurant had no intentions of ceasing its indoor dining services.[7] Iron Pig stayed open for indoor dining in defiance of the Department's Order and there was no question it was in direct violation of such Order.

[7] 9&10 News, *Judge Issues Fines, Suspension of Iron Pig Smokehouse Liquor License* (Dec. 15, 2020), https://www.9and10news.com/2020/12/15/judge-issues-fines-suspension-of-iron-pig-smokehouse-liquor-license/ (last accessed November 9, 2022).

An administrative law judge affirms the citation.

Iron Pig timely appealed the Department's Administrative Citation to the Michigan Office of Administrative Hearings and Rules (MOAHR). The Department filed a motion for summary disposition and Iron Pig filed a response. Iron Pig did not dispute it was open for indoor dining on the dates at issue, and it offered only a cursory mootness argument in opposing the motion. (App'x pp 77–78.) On March 3, 2021, Administrative Law Judge Kibit held a hearing on the Department's motion for summary disposition. (See App'x p 80.) Neither party presented any witnesses. (*Id.*)

The ALJ issued and entered a decision and order dated March 10, 2021. (App'x pp 79–87.) The ALJ's order granted the Department's motion for summary disposition and affirmed the Department's Administrative Citation in its entirety. (App'x p 86.) In the decision and order, the ALJ stated that the Department met its burden of proving no genuine issue of material fact existed as to whether Iron Pig was open for indoor dining in violation of the Epidemic Order. (App'x p 85.) The ALJ stated that Iron Pig failed to respond to any factual arguments made by the Department at the hearing or in its briefing. (*Id.*) Further, the ALJ found that Iron Pig's claim of "mootness" failed because Iron Pig offered no justification or argument in support.[8] (*Id.*) Finally, the ALJ found that the Department properly cited Iron Pig for its five violations of the November 15, 2020 Order. (*Id.*)

[8] The ALJ expressly rejected the mootness argument and found that "[Iron Pig] only offered unpersuasive allusions to uncited Michigan case law and unidentified factual issues on the record" at the hearing. (*Id.*)

Iron Pig filed an appeal with the circuit court through a hybrid document also purporting to operate as a lawsuit. The parties then submitted a stipulation to the circuit court, making clear this matter would proceed as an appeal, and not as a lawsuit. (App'x pp 88–92.) The circuit court entered an order on July 27, 2021, after this stipulation of the parties, limiting this appeal to two issues.[9] First, "Does MCL 333.2253(1) violate the non-delegation clause of the Michigan Constitution?" (App'x p 89.) Second, "Are the MDHHS orders a 'rule' as defined in MCL 24.207 and did the MDHHS comply with the notice of public hearing requirements of MCL 24.241?" (*Id.*)

The circuit court reviewing the Agency decision purports to sever Michigan's epidemic authority from the Public Health Code.

On January 13, 2022, the circuit court ruled that the fine was unconstitutional on the basis that the authority granted to the Director of the Department of Health and Human Services to issue orders to protect public health in response to an epidemic was an improper delegation of "uncontrolled, potentially arbitrary power" to the Director. (App'x p 29.) The court reasoned that the Legislature had "pass[ed] off its responsibility for legislating" to the executive branch. (App'x p 27.)

After stating that it "cannot merely throw up its hands and sanction" the standards in § 2253, the circuit court later asserted that "it must invoke its judicial review authority as a co-equal branch of government to now undo that improper

[9] The parties also stipulated to the administrative record that would serve as the basis for the appeal to the circuit court.

delegation." (App'x pp 27, 32.) The circuit court purported to sever the provision from the Public Health Code, despite the fact that this was an administrative appeal:

> As MCL 333.2253 has not survived Petitioner's non-delegation challenge under the Michigan Constitution and is clearly an unconstitutional delegation of power from the Legislature to the Executive Branch, MCL 333.2253 is hereby severed from Michigan's Public Health Code. [App'x p 33.]

Although unstated in the opinion's conclusion, the order had the effect of reversing the fine that the Department had imposed on Iron Pig.[10]

The Department sought leave to appeal, which this Court granted on July 20, 2022, limited to the issues raised in the Department's application and supporting brief.

STANDARD OF REVIEW

This Court reviews questions of law, including the constitutionality of a statute, de novo. *Oshtemo Charter Twp v Kalamazoo Cty Rd Comm'n*, 302 Mich App 574, 583 (2013).

The Administrative Procedures Act (APA) provides the applicable scope of review for an administrative appeal of an agency's decision:

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[10] After the circuit court issued its opinion, the Department sought clarification from the circuit court about the immediate enforceability of its decision and in the alternative sought a stay of the effectiveness of the court's decision. Before the hearing on that motion, the Department filed its application for leave to appeal in this Court. After a hearing, the circuit court concluded "the legal determinations made by the Court . . . do not take effect until the Court of Appeals decides the case." (App'x p 95.)

> (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
>
> (a) In violation of the constitution or a statute.
>
> (b) In excess of the statutory authority or jurisdiction of the agency.
>
> (c) Made upon unlawful procedure resulting in material prejudice to a party.
>
> (d) Not supported by competent, material and substantial evidence on the whole record.
>
> (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
>
> (f) Affected by other substantial and material error of law. [MCL 24.306(1).]

The review by a circuit court of an administrative decision is limited to determining whether the decision was rendered in accordance with law and whether factual findings were supported by competent, material and substantial evidence. *Dignan v Michigan Pub Sch Employees Ret Bd,* 253 Mich App 571, 576 (2002). There are no factual disputes in this appeal as the Department presented substantial – indeed, uncontroverted – evidence of Iron Pig's violations of the order.

A reviewing court does not have equitable jurisdiction over an administrative decision. *Huron Behavioral Health v Dep't of Community Health*, 293 Mich App 491, 497–498 (2011).

ARGUMENT

I. The Legislature's grant of authority to the Director of the Department of Health and Human Services to protect the public health during an epidemic by restricting gatherings and issuing procedures to preserve essential public health services is a proper grant of authority.

The authority of public health officials to take executive action to combat the spread of disease and to prevent epidemics from harming the public health – granted by the Legislature – is one of long standing, in place in different forms in Michigan for a century or more. The Michigan Supreme Court has previously rebuffed delegation challenges to the authority of public health officials to order quarantines to protect the public from dangerous communicable diseases. Section 2253 falls in line with this settled precedent, and the circuit court erred in concluding that it was unconstitutional.

In 2020, the Michigan Supreme Court issued *In re Certified Questions*, 506 Mich 332 (2020), striking down on nondelegation grounds the Emergency Powers of the Governor Act (EPGA) (MCL 10.31 *et seq*.), which conferred on the Governor a general emergency-response authority. The circuit court grafted this same result onto MCL 333.2253, a materially different law that grants public health officials' authority to take certain actions when necessary to protect the public health from epidemic-level spreads of communicable diseases. While the State maintains that *In re Certified Questions* was wrongly decided,[11] regardless the decision provides no

[11] Of course, the State fully recognizes that this Court is bound by *In re Certified Questions* and the State correspondingly assumes the correctness of the decision in the arguments it presents to this Court. And as those arguments demonstrate, the circuit court erred under this (and other) binding precedent.

support for the conclusion that Michigan's longstanding public health laws to limit gatherings and issue procedures to protect the public health where there is an epidemic, see MCL 333.2253, fail to pass muster under Michigan law.

To the contrary, *In re Certified Questions* itself makes clear that it does not stand for any such proposition. As the Court was careful to stress, that ruling reflected what was, in the majority's view, a singularly exceptional intersection between "an extraordinary doctrine, not routinely to be invoked," and an "extraordinary" statute in the EPGA, which was incomparable to "any other law of this state" in the nature of its delegation. *Id.* at 372, n 21. Indeed, the majority expressly stated that "[w]e do not believe that the conflation of circumstances giving definition to the delegated powers in this case . . . will soon come before this Court again," *id*. at 384, all while plainly aware of MCL 333.2253 and its use to combat the instant pandemic, see, e.g., *id.* at 405 (Viviano, J., concurring in part); *id.* at 432 (McCormack, C.J., dissenting in part), as well as of the Court's own endorsement of robust grants of authority to executive officials to combat the spread of disease, see generally *People ex rel Hill v Bd of Ed of City of Lansing*, 224 Mich 388, 392 (1923), cited in *In re Certified Questions*, 506 Mich at 355.

The *Certified Questions* majority, in other words, anticipated claims like this, and signaled they should be rejected. And rightly so, as settled law makes clear that Iron Pig's nondelegation challenge to MCL 333.2253 is baseless. The circuit court's analysis to the contrary is unavailing. This Court should reverse.

A. The epidemic-response authority in § 2253(1) is a constitutional – and wise – grant of limited authority to public health experts during the pendency of an epidemic.

As of today, Michigan's nondelegation doctrine guards against grants of legislative authority to executive actors such as when these grants have an unduly broad scope, can be utilized without end, and lacks any meaningful standards to guide the decisionmaker's discretion. Section 2253(1) checks none of those boxes, and it is a substantially different and more circumscribed authority than that which the Supreme Court struck down in *In re Certified Questions*. Section 2253(1) is valid.

1. The nondelegation doctrine protects against unduly broad and standardless delegations of authority.

The separation of powers doctrine "ha[s] led to the constitutional discipline that is described as the nondelegation doctrine." *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8 (2003). While the legislative power – the power "to make, alter, amend, and repeal laws" – sits with the Legislature, *Harsha v City of Detroit*, 261 Mich 586, 590 (1933), both the U.S. and Michigan Supreme Courts "ha[ve] recognized that the separation of powers principle, and the nondelegation doctrine in particular, do not prevent [the legislative branch] from obtaining the assistance of the coordinate Branches." *Taylor*, 468 Mich at 8 (internal quotes omitted).

The Michigan doctrine of nondelegation has been expressed in terms of a "standards test." *Westervelt v Natural Resources Comm*, 402 Mich 412, 437 (1978) (Williams, J., lead opinion); *id.* at 454 (Ryan, J., concurring). In short, "the standards prescribed for guidance [must be] as reasonably precise as the subject-matter requires or permits." *In re Certified Questions*, 506 Mich at 359.

Of course, whenever the constitutionality of a statute is at issue, "the act must be read as a whole," and is presumed to be constitutional. *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 51–52 (1985). The analysis includes consideration of the safeguards existing to protect against abuses of discretion by those administrative officials exercising statutory power. *Westervelt,* 402 Mich at 442–443.

The *In re Certified Questions* decision homed in on a few aspects of analysis. First, the *scope* of the grant of power is relevant – it should be measured against "the specificity of the standards governing its exercise." 506 Mich at 361, quoting *Synar v United States*, 626 F Supp 1374, 1386 (D DC, 1986). That scope is defined, in part, by "the breadth of subjects to which the power can be applied." *Id.* Second, the Court took into account the durational limit of the statutory power. *Id.* at 362. Third, the Court looked at the relative precision of the standard governing the executive official's discretion. *Id.* at 367–368.

2. The Legislature granted authority in § 2253(1) to control an epidemic.

The inquiry begins by considering the challenged statute in the context of the legislative enactment of which it is a part. See *BCBSM*, 422 Mich at 51 ("the act must be read as a whole"). In that regard, the Legislature has placed a special emphasis on shielding § 2253, along with other provisions of the Public Health Code, from narrow or destructive readings by expressly requiring them to be "liberally construed for the protection of the health, safety, and welfare of the people of this state." MCL 333.1111(2).

By its plain language, MCL 333.2253 is designed to address "an epidemic," and it is included within Michigan's Public Health Code as an epidemic response tool. That the Legislature gave heightened attention to creating a mechanism for an expeditious and fluid response to an epidemic reflects its appreciation for the devastating impact such events can have on the public health. Through their Constitution, Michiganders declared the public health and welfare to be matters of primary public concern and charged their Legislature with the duty to implement laws in furtherance of that directive. Const 1963, art 4, § 51. The Legislature acknowledged this constitutional obligation in ascribing duties to the Department headed by the Director. MCL 333.2221(1). And that Department was charged with making investigations and inquiries into "[t]he causes of disease, and especially epidemics." MCL 333.2221(2)(d). Reading MCL 333.2221 and MCL 333.2253 together, it is clear the Legislature put special emphasis on the investigation of, and response to, epidemics as a quintessential threat to what Michiganders had constitutionally declared to be a primary concern. And for good reason: the Spanish Flu epidemic of more than a century ago, and now COVID-19, have been among the deadliest events in our nation's history.[12] Section 2253 is directed at this particular circumstance; by its plain language, it exists to address only "an epidemic."

[12] Jim Sergent & Ramon Padilla, *Americans dying faster of COVID-19 than our soldiers did in WWII* (Jan. 19, 2021), https://www.usatoday.com/in-depth/news/2021/01/19/covid-19-deaths-americans-dying-faster-than-our-soldiers-did-wwii/6602717002/ (last accessed November 9, 2022).

Within the context of the Public Health Code, it is also significant that the unique and flexible authority under § 2253 was granted specifically to the Director. The Legislature installed guardrails on this authority by requiring the Director to be qualified in public health administration. MCL 333.2202(1). And if the Director is not a physician, the Legislature ensured one would be installed within the Department as Chief Medical Officer to advise the Director. MCL 333.2202(2).

Further, these legislative safeguards are augmented by political ones. Michigan's Supreme Court has recognized safeguards exist when the authority is given to officials appointed by the Governor as opposed to more remote governmental employees. *Westervelt*, 402 Mich at 448–449. Former Director Robert Gordon was a department head appointed by the Governor pursuant to Const 1963, art 5, § 2.[13] And the Chief Medical Officer advising former Director Gordon was appointed by the Governor pursuant to MCL 333.26369, which also makes her a part of the Governor's cabinet. Structurally, this creates accountability through the political process.

Notably, during the pandemic, the Legislature reaffirmed the vitality and validity of § 2253, recognizing the Department's unique expertise in identifying an epidemic and using its determination as a reference point in other laws. In Public Act 167 of 2021, the Legislature authorized out-of-state health care professionals, who were otherwise qualified to be licensed in Michigan, to meet staffing needs in

[13] Current Department Director Elizabeth Hertel replaced former Director Robert Gordon effective January 21, 2021.

Michigan without a license – if, and only if, the Director "determines that control of an epidemic is necessary to protect the public health under [§] 2253." MCL 333.16171(d). Similarly, in Public Act 324 of 2020, the Legislature authorized pharmacists to avoid interruptions in care by issuing emergency prescription refills "while a qualified order or declaration is in effect." MCL 333.17713(1). It defined "qualified order or declaration" to include "[a]n emergency order under [§] 2253." MCL 333.17713(2)(d)(i).

The history of § 2253 underscores the open eyes through which the Legislature granted this authority. In 1918, as Michigan was in the midst of the Spanish Flu epidemic, Governor Albert Sleeper issued a broad order that "banned" "various public meetings." *In re Certified Questions*, 506 Mich at 398 (Viviano, J., concurring in part). Justice Viviano's partial concurrence in *Certified Questions* reflects this history, noting "the 1919 law passed in the wake of the influenza epidemic and Governor Sleeper's actions is still the law, albeit in slightly modified form." *Id.* at 404–405 [14] Those legislative provisions enabled the state health commissioner to respond to "dangerous communicable disease[s]" by

[14] That provision read, in pertinent part:

> In case of an epidemic of any infectious or dangerous communicable disease within this state or any community thereof, the state health commissioner may, if he deem it necessary to protect the public health, *forbid the holding of public meetings of any nature whatsoever* except church services which may be restricted as to number in attendance at 1 time, in said community, or may limit the right to hold such meetings in his discretion. . . . [Public Act 146 of 1919; CL 1948, 325.9.]

"establish[ing] a system of quarantine," or by "forbid[ding] the holding of public meetings." CL 1948, 329.1, 325.9.

And *even earlier*, in the late 19th century, the Legislature granted expansive authority to township boards of health to quarantine those infected with smallpox, and to do so "in the manner in which they shall judge best for the safety of the inhabitants" of the community. CL 1897, 4424. Small city councils were likewise empowered to enact ordinances to preserve the health of residents and prevent "the introduction of malignant, infectious, or contagious diseases" or to act as "the public safety may require." 1895 PA 215, Chapter XIV (Public Health), Sec 1 (repealed 1978 PA 368). In short, for well over a century the Legislature has provided executive actors the tools to prevent the spread of disease.

3. Nearly 100 years ago, the Michigan Supreme Court turned away a similar challenge to broad authority to protect against the spread of disease.

The Supreme Court has long embraced the propriety – indeed, *the necessity* – of a legislative grant of authority to protect against such scourges. *Rock v Carney*, 216 Mich 280, 290 (1921) ("The health of the people is of supreme importance to the State, and measures reasonably calculated to promote the public health have with uniformity been sustained."); *Highland v Schulte*, 123 Mich 360, 363 (1900) (permitting the Detroit board of health to "delegate to the health officer" the authority to quarantine entire homes since, "as from the nature of things, the board could not act collectively on each case that might arise, with the necessary promptness and efficiency").

The Supreme Court's decision in *People ex rel Hill v Bd of Ed of City of Lansing*, 224 Mich 388 (1923), merits emphasis. A challenge was brought to a local board of health's decision to mandate vaccination for children and staff at its schools as well as a quarantine program in a fight against smallpox. *Id.* at 389–390. The Court considered a nondelegation challenge to the local health department's statutory authority, which was not unlike § 2253, and affirmed its validity:

> When the smallpox, or any other disease dangerous to the public health, is found to exist in any township, the board of health shall use all possible care to prevent the spreading of the infection, and to give public notice of infected places to travelers, by such means as in their judgment shall be most effectual for the common safety.
>
> [*Hill*, 224 Mich at 394–395, quoting Section 5081, CL 1915.]

The Court cited approvingly from *Blue v Beach*, 155 Ind 121 (1900), which rejected a nondelegation challenge to broad authority granted to boards of health to require vaccination of students to combat the spread of disease:

> While it is necessary that a law, when it comes from the law-making power, should be complete, still there are many matters relating to methods or details which may be, by the Legislature, referred to some designated ministerial officer or body.
>
> [*Hill*, 224 Mich at 397, quoting *Blue*, 155 Ind at 93.]

The Court expressed no concern that the Legislature had improperly delegated expansive authority in this space. Quite the opposite: *Hill* relied on authority asserting that a "municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law." *Id.* at 398, quoting *Zucht v King*, 260 US 174 (1922).

In its own voice, our Supreme Court declared the local board's authority to be valid, recognizing that "[t]here must be some elasticity, in order to effectually meet varying conditions, and the Legislature has seen fit to fix the ultimate purpose of the regulations to be the 'common safety' and to leave the details necessary to work out that purpose to an administrative board." *Hill*, 224 Mich at 399. Our Supreme Court has permitted the Legislature to issue broad authority to public health experts to combat the spread of disease.

Michigan's jurisprudence on the power of public health laws to protect our residents from communicable disease or epidemics is not some kind of outlier. The same basic authority has served as a black-letter principle of law relevant to the questions here. The eminent treatise, American Jurisprudence, reflects the unremarkable principles that underlie the actions taken here by Michigan's public health officials. See 39 Am Jur 2d Health § 74 ("The right of the public authorities to prohibit gatherings or congregations of persons during the prevalence of an epidemic, and for such purpose to close or require the closing of public places or institutions, has been recognized or assumed.") See also 8 ALR 836 (originally published in 1920) ("A general statutory delegation of power to make regulations for the protection of the public health from contagious or infectious diseases is not unconstitutional, as a delegation of legislative power.") (citing cases).

These principles frame this Court's review of the Legislature's grant of authority to Michigan's top public health official.

4. Section 2253(1) is not an unlawful delegation, as the standards governing the Director's authority are as reasonably precise as the subject matter permits.

Under the long line of settled authority discussed above, the constitutionality of MCL 333.2253 is apparent. *In re Certified Questions* does not compel a different result; to the contrary, applying that decision's analysis, the Legislature's choice here was valid. Again, the majority framed its analysis around the scope of the delegation, its potential duration, and the relative precision of the standard governing the executive official's discretion. *In re Certified Questions*, 506 Mich at 361–362, 367–368. MCL 333.2253(1) provides:

> If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code.

First, the scope of the Director's authority is substantially narrower as compared to the EPGA authority the Court struck in *In re Certified Questions*. By its plain language, § 2253 applies only in the single and unique context of epidemics. The EPGA, meanwhile, could be invoked in myriad circumstances: "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency." MCL 10.31(1). An epidemic like the COVID-19 pandemic clearly falls within these circumstances. See *In re Certified Questions*, 506 Mich at 353. But that highlights the point: while the EPGA granted authority to combat crises, disasters, riots, catastrophes, or other public emergencies, § 2253 is limited to a single subset – epidemics. During its life, the EPGA was invoked to deal with a range of emergencies:

- statewide coal shortages (App'x p 97);
- the wake of a tornado (App'x pp 98–99);
- heavy holiday traffic that may generate increased car accidents (App'x p 100); and
- civil unrest (App'x pp 101–102).

Of course, § 2253 could not have been invoked in any of those circumstances, showing the limitations of its scope.

Moreover, by its language, § 2253 authorizes the Director to issue emergency orders that take two discrete forms of action in response to epidemics: (1) restricting gatherings, and (2) establishing procedures to ensure the continuation of essential public health services and enforcement of health laws. While significant (and life-saving), these authorizations are not carte blanche. They are linked and responsive to the Legislature's specific concern: epidemics. While the EPGA permitted *any* "reasonable" and "necessary" action directed to safeguard people and property during an array of different public emergencies, the § 2253 authority is circumscribed to two categories of regulation that are available in only one type of emergency circumstance.

Second, the duration of the authority vested in the Director is limited to the end it seeks to combat – the epidemic. While epidemics may last for many months, the Legislature's grant was not open ended. The Director's authority under § 2253 may be invoked only so long as an epidemic persists, and furthermore, only so long as control of the epidemic through the invoked authority is necessary to protect the public health. These express requirements limit the duration of the authority in a manner suitable to the subject of the grant of power; epidemics do not follow uniform, predetermined time limits, and the Legislature's decision to tailor the duration of its authorization accordingly is both constitutional and sensible.

Meanwhile, these statutory limits provide a clear path for those affected by the Director's orders to raise a legal challenge, should the epidemic come to an end but the orders remain in place. In that event – or, for that matter, in any event that an affected individual believes represents a violation of the statute – one has an as-applied challenge available. Those concerned by the possibility of executive overreach need not resort to the nondelegation doctrine as a check on that possibility.

Third, the governing standards in § 2253 are not unduly broad. The Director is limited to the two forms of action mentioned above – restricting gatherings and establishing procedures to "insure continuation of essential public health services and enforcement of health laws" – and only when the Director determines such action is "necessary to protect the public health" of Michiganders. MCL 333.2253(1). This kind of necessity standard is a common legislative design, and it has withstood the test of time in Michigan, particularly when coupled with other standards as § 2253 provides. See, e.g., *Mich State Hwy Comm v Vanderkloot*, 392 Mich 159 (1974) (upholding "necessity" as a standard for the exercise of Department of Transportation's authority to take property under eminent domain); *GF Redmond & Co v Michigan Sec Comm'n*, 222 Mich 1, 7 (1923) ("good cause" was sufficient for licensing); cf. *Certified Questions*, 506 Mich at 369 n 20, 371 (recognizing that, while the term "necessary" was not "by itself a sufficient standard, at least not in the context of the remarkably broad powers conferred by the EPGA," it "might be sufficient" in the context of a "less-encompassing delegation").

And the nature of the circumstances to which these standards apply – the single and unique context of epidemics, which are both complex and constantly changing events – only further confirms the standards' adequacy and propriety. See *State Conservation Dep't v Seaman*, 396 Mich 199, 210 (1976) ("The preciseness of the standard will vary with the complexity and/or the degree to which subject regulated will require constantly changing regulation."); *Hill*, 224 Mich at 399 ("There must be some elasticity, in order to effectually meet varying conditions, and the Legislature has seen fit to fix the ultimate purpose of the regulations to be the 'common safety' and to leave the details necessary to work out that purpose to an administrative board.").

In sum, the Legislature granted public health experts targeted tools, to be utilized only when "necessary to protect the public health" and only during the exigency of an epidemic. This wise grant of authority to a nimble, expert agency is not only constitutional under Michigan's nondelegation jurisprudence, including *In re Certified Questions*, but necessary to protect the public health during the spread of an epidemic. The preceding two and one-half years have well illustrated that epidemics are both complex and constantly changing events, with the scientific understanding of both the disease and mitigation measures developing over time.

The need for flexibility in responding to such circumstances is self-evident and paramount. Thankfully, Michigan's nondelegation doctrine, including under *In re Certified Questions*, does not disturb the Director's authority.

B. The circuit court's opinion suffers from fundamental analytic flaws, expanding the nondelegation doctrine well beyond its proper bounds.

Given the principles of Michigan law on the nondelegation doctrine and the long-settled propriety of grants of authority to public health officials to address epidemics and infectious communicable diseases, the circuit court's mistakes below are manifold. The circuit court's analysis of MCL 333.2253 failed to meaningfully address the actual language of the statute. And, as detailed above, a long line of authority unmistakably confirms the propriety of MCL 333.2253's grant of authority to the Director to take the actions specified in the statute when necessary to control the spread of an epidemic and protect the public health. The circuit court's decision is at odds with this settled precedent, most notably *Hill*, and, while the court leaned heavily on *In re Certified Questions*, that decision, as discussed, only confirms the constitutionality of MCL 333.2253. The court's lack of authority to provide the relief it purported to grant only compounded the error. The flaws in the court's analysis are decisive.

1. The court below did not address the actual language of MCL 333.2253 and failed to identify the significant statutory limitations on the Director's authority.

The overarching problem with the analysis of the court below was its failure to evaluate the actual language of § 2253 and to consider the important limitations that constrain the Director. Instructive is the contrast between the lower court's analysis here and the Court of Claims' later decision in *T&V Associates v Hertel*

(COC No. 21-000075), which rightly rejected a nondelegation challenge to the same provision. (See App'x pp 103–117.)[15]

To begin, in discussing the "scope of the power vested in the Director," the circuit court largely neglected a review of the statutory language, instead pointing to the restrictions in the relevant Director's order issued under § 2253 as all-but dispositive. (App'x pp 14–18.) While the terms of the order might be relevant to "illustrate" the authority available to the Director, see *In re Certified Questions*, 506 Mich at 364, the nondelegation doctrine concerns the scope – and thereby the language – of the challenged statute itself, see *id.* at 363–364.[16] The court below made no attempt to evaluate the statute's language and limitations, as discussed above, Section I.A.4. This deficiency likewise pervades the court's consideration of § 2253's standards, treating the words "epidemic" and "necessary" as the only guideposts for or limitations on the statute's grant of authority while ignoring the statute's further delineation of two discrete categories of action the Director can take when control of an epidemic is necessary.

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[15] An appeal of that ruling is currently pending before this Court. See *T&V Associates v Hertel* (COA No. 361727).

[16] Indeed, if a litigant wishes to challenge the executive's exercise of authority, it has ample paths to do so, e.g., through claims challenging the exercise as beyond the scope of the statute's terms, for instance, or as violative of its individual rights. The nondelegation doctrine does not provide a catchall means for a litigant to air, or a court to consider, every grievance there might be with how the executive is exercising a grant of authority. The Court of Claims made this same point in affirming the constitutionality of this very law in *T&V Associates*. (App'x p 113 ("To that end, individual orders can be challenged in court, as can the determination of whether an 'epidemic' exists that would support defendant's decision to issue an order in the first instance. If defendant oversteps her authority, an as-applied challenge can be made and an injunction can issue.").)

The limitations of MCL 333.2253's grant of authority are plainly stated and structural, and may be digested into three levels of constraint:

1. The emergency authority arises only for an "epidemic";

2. The actions may only be taken to "control" an epidemic and must be "necessary to protect the public health";

3. The statute authorizes only two actions, either (A) "prohibit[ing] the gathering of people" or (B) "establish[ing] procedures during the epidemic," which procedures are further constrained by being designed "to insure continuation of essential public health services and enforcement of health laws." [MCL 333.2253(1).]

The circuit court paid little attention to § 2253's plain language and its cascading set of limitations. Indeed, its analysis was wanting with respect to all three levels of limitation.

(1) An epidemic.

The circuit court noted that because "epidemic" is not specifically defined by the statute, it is "solely up to the determination of the Director." (App'x p 20.) The circuit court then speculated that the Director's § 2253 power contained "unfettered discretion" (*id.*), asserting that the Director "could conceivably reach and effect each and every political, social, moral or other societal problem if only the Director determines that the concern can now be categorized as an 'epidemic.' " (App'x p 21.) Not so. This point is unfounded and lacks any legal basis.

Notably, MCL 333.2221(1), which is contained in the same part of the Public Health Code as § 2253, sets forth the Department's charge to "continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including . . . prevention and control of diseases." As

part of this charge, the Department "shall" "[m]ake investigations and inquiries as to . . . *[t]he causes of disease* ***and especially of epidemics***." MCL 333.2221(2)(d)(i) (emphasis added). For an analysis under the nondelegation doctrine, "the act must be read as a whole." *BCBSM*, 422 Mich at 51; see also *In re Certified Questions*, 506 Mich at 381. The fact that the statute anchors "epidemic" to "disease" also reflects the common understanding and dictionary definition of the word "epidemic." See, e.g., *Webster's New World Dictionary*, (ed 1973), p 197, which defines "epidemic" as "spreading rapidly among many people in a community as a disease." Thus, the context of the statute, which the circuit court failed to consider, shows that "epidemic" relates to disease.

In short, the word "epidemic" in the Public Health Code in general and § 2253 in particular is not a concept ripe for the Director to expand beyond epidemics or disease. To the contrary, it provides a meaningful limitation on both the scope of authority granted to the Director and its duration, as the Court of Claims duly recognized in *T&V Associates*. (See App'x p 111 (concluding that the statute is temporally restricted by its "epidemic" requirement, whose language operates to ensure the Director's "authority lasts only during the period of time in which an 'unusual' number of cases of a particular illness can be considered an epidemic").) Words have meaning, and no court may countenance any executive actor stretching a word like "epidemic" beyond recognition. The Director's determination that an epidemic exists is subject to great deference, but it is not beyond judicial review. See *Straus v Governor*, 459 Mich 526, 533 (1999).

And in performing that review, courts are "to construe a statute as constitutional," not to stretch its terms to the point of unconstitutionality. *In re Guardianship of Versalle*, 334 Mich App 173, 179–180 (2020). Contrary to the belief of the court below, the limitation of § 2253's authority to situations in which an "epidemic" has broken out does not provide unfettered discretion. Instead, it restricts, in both scope and duration, the Director's authority to a particular sort of emergency circumstance.

(2) Actions may only be taken to "control" an epidemic and must be "necessary to protect the public health."

Likewise, the court below brushed aside the statutory term "necessary" as "bereft" of any meaningful limitation. (App'x p 25.) As discussed above, ample Michigan jurisprudence, including *In re Certified Questions*, belies that characterization here, particularly where (as here) the term is accompanied by other limiting language. And relatedly, the analysis from the court below did not address the significance of the statute's further limitations of "control[ling]" an epidemic "to protect the public health." On this point, the Court of Claims' analysis in *T&V Associates* is again persuasive, noting that these statutory limitations provided "clear guardrails that were lacking in *In re Certified Questions*." (App'x p 111.)

The language and the case law support the sufficiency of the legislative guidance. It is as specific as the subject matter permits. As our Supreme Court recognized in *Hill*, when confronting the spread of a deadly disease, there must be "some elasticity." 224 Mich at 399. The lower court erred in ruling otherwise.

(3) The emergency power of the Director authorizes two forms of action: (A) to "prohibit gathering[s]" and (B) to "establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws."

As noted, Michigan's emergency epidemic law authorizes the Director to take only two forms of action during the existence of an epidemic to stop the spread of disease: to prohibit gatherings and to establish procedures to ensure the continued provision of "essential health services" and "enforcement of health laws." MCL 333.2253. In opining that § 2253 grants "an overwhelmingly broad power to affect every action of Michiganders' private, business, public lives," (App'x p 17), the circuit court made no effort to address, or even acknowledge, these further limitations on the scope of the Director's authority to take action during the pendency of an "epidemic." And these limitations only further confirm that, under § 2253, the Director by no means has unfettered authority to control "every action" of the private, business, and public lives of all Michigan residents. (App'x p 17.) To the contrary, as noted in *T&V Associates*, the Director's actions must not only meet the tiers of limitations already discussed, but they must also "be tied to these [two] directives," which themselves have "clear goals" and "meaning and give direction to the" Director. (App'x p 112.)

Rather than engage with the actual terms of the statutory grant of power in question, the circuit court fixated on the terms of the Director's epidemic order and the court's view of the order's adverse effect on Michiganders' lives. (App'x pp 15–16.) As discussed, this focus was misplaced, and it left the circuit court's analysis both incomplete and off-point, more akin to an as-applied challenge to the Director's

specific order than a review of the statute. As the Court of Claims rightly explained in *T&V Associates*, the "individual orders can be challenged in court, as can the determination of whether an 'epidemic' exists that would support defendant's decision to issue an order in the first instance." (App'x p 113.) The court decision below appears to neither contemplate this possibility, nor appreciate the fundamental distinction between challenges of that sort and the one at issue.

And as the *T&V Associates* decision aptly reflects, when the focus of the relevant analysis here is placed where it belongs – on the plain text of § 2253 – it is clear that the statute's grant of authority "contains adequate guardrails that are as reasonably precise as is allowed by the nature of epidemics" and passes muster under Michigan's nondelegation doctrine. (*Id.*)

2. The decision below was contrary to *In re Certified Questions*.

For all the reasons discussed, the circuit court's errant nondelegation analysis pulled it out of line with extensive and settled Michigan jurisprudence on the doctrine, including *In re Certified Questions*. It also led the court to miss plain distinctions between the delegation at issue in that case – the EPGA – and the grant of authority at issue here. These distinctions are detailed throughout the discussion above, but the Court of Claims' decision in *T&V Associates* nicely digests them:

> Regarding the scope of the grant of authority, MCL 333.2253 "is much narrower in scope than the nearly unlimited events that could give rise to the Governor's use of emergency authority under the EPGA" (App'x p 110);
>
> Regarding duration, MCL 333.2253 "contains some temporal restrictions" and is "certainly narrower" in that regard than the EPGA's "near-limitless duration" (App'x p 111); and

> Regarding the standards, MCL 333.2253 "contains adequate guardrails that are as reasonably precise as is allowed by the nature of epidemics" and "are unlike the 'illusory' limitations at issue in the EPGA" (App'x pp 111–112).

Thus, reasoned the court, "[a]ny attempt to compare this case to the delegation that was struck down in *In re Certified Questions* is unconvincing." (App'x p 114.)

And the circuit court likewise missed the unmistakable signals *In re Certified Questions* sent about the fact that the other laws in this health emergency arena, specifically MCL 333.2253, would not be ensnared by the nondelegation doctrine. As noted, in addition to stressing the doctrine's "extraordinary" and "rare" nature, *In re Certified Questions,* 506 Mich at 372 n 21, the majority also stated that it was "unaware of any other law of this state" like the EPGA and it did not believe a similar case would "soon come before this Court again." See *id.* at 372 n 21, 384. And the law at issue here was no stranger to the *Certified Questions* Court. See, e.g., *id.* at 405 (Viviano, J., concurring in part); *id.* at 432 (McCormack, C.J., dissenting in part).

Indeed, rather than duly consider these signals – as the Court of Claims in *T&V Associates* did (see App'x p 114) – the circuit court embraced the opposite sentiment, identifying several provisions of the public health code that were not at issue in this case and suggested they all may also violate Michigan's Constitution: Michigan's emergency epidemic laws for local health departments, MCL 333.2453; the authority of the Department to abate public health nuisances, MCL 333.2455; and the entire chapter governing "hazardous communicable diseases," MCL 333.5201 *et seq*. (App'x pp 30–31, 31 n 6.) Remarkably, the circuit court stated that

"it is conceivable that some or all of those statutory provisions may ultimately be determined to suffer from the same fatal delegation flaws as MCL 333.2253," and ominously added "[t]his is not an exhaustive list." (App'x pp 31, 31 n 6.) Such an approach to Michigan law is fundamentally contrary to precedent, ignoring the Court's admonition that this is an "extraordinary" doctrine for "extraordinary" cases, "rarely imposed" and "not routinely to be invoked." *In re Certified Questions,* 506 Mich at 372 n 21.

3. The decision below also lacked judicial restraint.

Lastly, in what it ironically described as an act of "judicial restraint," the circuit court purported to sever all of MCL 333.2253. (App'x p 31.) As detailed below, this act of "restraint" was in fact one of overreach: the circuit court was sitting in an appellate capacity in reviewing an agency determination, with the sole province to determine whether it should "hold unlawful and set aside a decision or order of an agency," namely, the $5,000 fine imposed on Iron Pig. MCL 24.306(1). The circuit court lacked equitable authority in its appellate posture, *Huron Behavioral Health v Dep't of Community Health*, 293 Mich App 491, 497–498 (2011), and failed to respect its limited judicial role here. See Issue II. Indeed, not even Iron Pig had sought this extent of relief.

The unnecessarily broad swipe the circuit court took at MCL 333.2253 not only went beyond the proper bounds of the administrative appeal before the court, but also purported to obliterate the Legislature's passage of Senate Bill 759 of 2021, to alleviate the staffing shortages hospitals and nursing homes were experiencing.

See MCL 333.16171(d) (making the Director's exercise of authority under § 2253 a prerequisite to the allowance of health professionals to practice under the relaxed licensing standards). And as noted above, the court also went out of its way to unduly cast doubt on the constitutionality of numerous other longstanding, and proper, health laws.

The fundamental problems with the circuit court's opinion highlight the danger of an imbalanced nondelegation review. The circuit court acted beyond its authority in striking down a law that it may think should have been drafted or executed differently. That is not the role of the judiciary, and Michigan's nondelegation doctrine, including *Certified Questions*, provides no basis for the circuit court to have assumed it here.

II. The circuit court acted outside of its authority in purporting to issue declaratory relief in this appeal from an administrative decision.

The first argument really answers all of the questions necessary to resolve this appeal. That is, the Legislature's grant of authority to the Director as chief health officer for the State to protect the public health from disease and epidemics in § 2253 is constitutional.

But the circuit court severely compounded its error by purporting to provide drastic equitable relief that was not sought by Iron Pig, that was unnecessary to determine whether Iron Pig was responsible for the $5,000 fine imposed for its noncompliance with the Order, and that was outside of its authority as an appellate tribunal from an agency decision. Again, this matter came to the circuit court as an

administrative appeal. The circuit court purported to agree. (App'x p 4.)[17] Thus, the sole province of the circuit court was to determine whether it should "hold unlawful and set aside a decision or order of an agency," MCL 24.306(1), namely, the $5,000 fine imposed on Iron Pig. The circuit court had no equitable authority in this appellate context. *Huron Behavioral Health*, 293 Mich App at 497–498 (ruling that the circuit "erred" in relying on "equity to reverse the administrative decision" because "[a]dministrative tribunals do 'not have equitable jurisdiction' unless expressly authorized by statute"). Yet the court took it upon itself to "invoke its judicial review authority as a co-equal branch of government to now undo that improper delegation." (App'x p 32.) That, it could not do.

While of course the circuit court could grant relief after reviewing the constitutionality of the agency action, see MCL 24.306(1)(a), the *nature* of the relief itself is still limited by law: it "may affirm, reverse or modify the decision or order or remand the case for further proceedings." MCL 24.306(2). Here, it could have reversed the agency decision which affirmed a $5,000 fine. But it was not at liberty to sever a duly enacted statute from the Public Health Code.

What is more, the circuit court's professed equitable action – declaring unconstitutional and severing a statute – is even further out of bounds because the adverse party is a state department. The Legislature created the Court of Claims to

[17] The circuit court had an independent obligation to confirm its jurisdiction sua sponte. *Reed v Yackell*, 473 Mich 520, 540 (2005). And it is well-established that, generally, "[p]arties cannot give a court jurisdiction by stipulation." *Bowie v Arder*, 441 Mich 23, 56 (1992). Accordingly, to the extent the circuit court misinterpreted the parties' stipulation, that should not have affected the scope of relief.

receive and hear those very types of claims. Those wishing to bring actions seeking equitable relief from allegedly unconstitutional statutes against the Department or other State agencies must seek such relief in the Court of Claims. MCL 600.6419. The Court of Claims has "exclusive" jurisdiction "[t]o hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, *equitable, or declaratory relief* or any demand for an extraordinary writ *against the state or any of its departments or officers* notwithstanding another law that confers jurisdiction of the case in the circuit court." MCL 600.6419(1)(a) (emphases added).[18]

This appropriately broad grant of exclusive jurisdiction makes no relevant exception for circuit judges sitting in an appellate posture from an agency determination,[19] and forecloses the circuit court from awarding the relief it purported to provide here. See also, e.g., *Greenfield Const Co Inc v Mich Dep't of State Hwys*, 402 Mich 172, 198 (1978) (explaining that "the Legislature indicated

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[18] Furthermore, even a declaratory judgment properly sought in that forum would only bind the Department in its relationship to Iron Pig here. See *Associated Builders & Contractors v Dir of Consumer & Indus. Servs Dir*, 472 Mich 117, 124 (2010) ("A declaratory judgment is a binding adjudication of the rights and status of litigants which is conclusive in a subsequent action between the parties as to the matters declared[.]") (cleaned up), overruled on other grounds by *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349 (2010). See also *State of Florida v United States Dep't of Health & Human Serv*, 780 F Supp 2d 1307, 1316 (ND Fl, 2011) ("A declaratory judgment establishes and declares 'the rights and other legal relations' between the parties before the court . . . .").

[19] MCL 600.6419(5) provides that "[t]his chapter does not deprive the circuit court of exclusive jurisdiction over appeals from the district court and administrative agencies as authorized by law." But as discussed, the law authorizing the circuit court's jurisdiction over this administrative appeal, MCL 24.306, does not also authorize the equitable relief the circuit court purported to award.

with ringing clarity that its waiver of sovereign suit immunity under the Court of Claims Act was limited to the prosecution of claims within the Court of Claims" and that, in light of that Act, "the circuit court was without jurisdiction to entertain the plaintiff's suit for judicial review and declaratory judgment under the Administrative Procedures Act, or declaratory judgment under GCR 1963, 521").

The proper course for such relief was taken in *T&V Associates, Inc v Hertel*, Ct of Claims No 21-000075-MM, discussed above, a case likewise involving a nondelegation challenge to § 2253. As a food-service establishment affected by the epidemic orders in *T&V Associates*, the plaintiff filed a complaint against Director Hertel claiming that certain public health orders "were invalid because MCL 333.2[2]53, the statute authorizing defendant to promulgate the orders, contains an unconstitutional delegation of legislative authority to the executive branch." (App'x pp 103–104.) As described above, the Court of Claims properly held that § 2253 is not an unconstitutional delegation of authority. But the point here is that the Court of Claims is the proper and exclusive court to entertain claims for equitable relief against the state.

In short, the circuit court sitting in an appellate posture from an agency decision exceeded its authority in purporting to sever wholesale a duly enacted statute, and it exceeded its jurisdiction by taking action exclusively reserved to the Court of Claims. This error underlies not just the grant of a remedy outside the authority of the court, but its decision in the first instance to purport to strike down a constitutional law that reflects longstanding authority of public health officials in Michigan.

CONCLUSION AND RELIEF REQUESTED

Section 2253 of the Michigan Public Health Code is constitutional and does not violate Michigan's nondelegation doctrine. The circuit court erred in concluding otherwise, and then compounded that error by purporting to sever the statute wholesale as an equitable remedy in this administrative appeal. This Court should reverse.

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