

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

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

Petitioner-Appellee,

v

MICHIGAN DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Respondent-Appellant.

Supreme Court No. 164039

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.**

***Immediate consideration
requested under MCR 7.311(E). ***

**MOTION FOR IMMEDIATE CONSIDERATION
OF THE MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES'
BYPASS APPLICATION FOR LEAVE**

NOW COMES the Michigan Department of Health and Human Services by and through its counsel, Solicitor General Fadwa A. Hammoud, Deputy Solicitor General B. Eric Restuccia, and Assistant Attorney General Darrin F. Fowler, and pursuant to MCR 7.311(E), moves this Court to grant immediate consideration of its bypass application for leave to appeal (filed on February 4, 2022) regarding a circuit court's ruling purporting to sever as unconstitutional the Director of the Department's epidemic-response authority under the Public Health Code, and the Department states the following in support of its motion:

RECEIVED by MSC 2/7/2022 4:42:01 PM

1. On January 13, 2022, in reviewing an administrative decision to affirm a \$5,000 fine that the Department had levied on the Iron Pig Smokehouse restaurant in 2020 for its failure to comply with an order limiting indoor dining, the circuit court ruled that the Public Health Code's grant of authority to the Director to restrict gatherings and issue procedures to ensure the provision of essential public health services during a pandemic was an unconstitutional delegation of legislative authority:

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. [Opinion and Order, p 31.]

2. On February 3, 2022, the Department sought leave in the Michigan Court of Appeals. See Mich Ct App Case No. 360175.

3. On February 4, 2022, under MCR 7.305(C)(1)(b) the Department filed a bypass application, in which it asks this Court to (1) disavow the expansive approach to the nondelegation doctrine adopted in *In re Certified Questions*, *In re Certified Questions*, 506 Mich 332 (2020), and *House of Representatives v Governor*, 506 Mich 934 (2020), and (2) reverse the circuit court's erroneous decision finding the Director's epidemic-response authority under MCL 333.2253(1) is an unconstitutional delegation of legislative authority.

4. Immediate consideration of the Department's bypass application is necessary for a few reasons.

5. The circuit court decision was not only clearly erroneous, but was issued during the ongoing COVID-19 epidemic, which has taken the lives of more than 30,000 Michiganders since its inception and remains a public health threat. Under applicable law, the constitutionality of the Director's authority under § 2253 is, and should remain, unimpeached.

6. Even though the circuit court's opinion lacks precedential value and its purported severance of § 2253 was ineffectual for the reasons explained in the bypass application, it has the practical effect of undermining the Department's efforts to mitigate the effects of this ongoing epidemic. The Department has in place several orders necessary to combat the ongoing epidemic, including those providing for testing to protect the staff and inmates in correctional facilities, and testing of long-term care facility workers.¹ And on January 20, 2022, the Director issued an order requiring nursing homes to make COVID-19 booster shots available to their residents onsite within thirty days of eligibility.²

7. The decision below could engender willful non-compliance with public health orders and sow public confusion about their effect, despite their validity under governing law. Clarity is essential in this moment.

8. Yet, media stories have already picked up on the circuit court's use of broad language purporting to sever this statute from the Public Health Code.³ In

¹ MDHHS Epidemic Orders, https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-533660--,00.html

² *Id.*

³ E.g., Scott McClallen, *Iron Pig wins COVID court battle* (Jan. 17, 2022), https://www.iosconews.com/news/state/article_33886d1f-5e4f-5bfc-8fa4-

one story, counsel for Iron Pig was quoted as encouraging other businesses that have flouted the Director's valid orders to "look to this [circuit court's] decision and seek the same remedies we probably will in this case."⁴

9. The circuit court's decision below is just the first judicial evidence of the mischief caused by *In re Certified Questions*' new nondelegation standard, and of the ease with which it can, and will, be misused as a tool of judicial overreach to usurp executive and legislative powers under the guise of preserving their separation. Indeed, at least one other pending case raises a nondelegation challenge to this same provision. See *T & V Associates, Inc. (River Crest Catering) v Hertel*, No. 21-75-MM (Court of Claims). There are also several challenges to the parallel provision for the local public health officials in MCL 333.2453. *Resurrection v Hertel*, No. 20-cv-010176 (WD Mich); *Morgan v Berrien Co Health*, No. 21-205-cz-w (Berrien Circuit); *Sinawi v Oakland Co Health*, No. 360074 (Mich Ct App); *Let Them Breathe v Health Dep't of NW Mich*, No. 21-18749-cz (Otsego Circuit).

10. Only this Court may correct or clarify the decision in *In re Certified Questions*. Immediate attention to that task is needed in this moment both to preserve the integrity of the authority the Legislature has invested in public health officials, to ensure the safety of Michigan's most vulnerable residents is not

044a1fa01e80.html, Beth LeBlanc, The Detroit News, *Northern Michigan judge's ruling casts doubt on public health orders* (Jan. 19, 2022); Paul Welitzkin, The

⁴ Petoskey News-Review, *Judge: Basis for emergency orders limiting bars, restaurants fail to pass constitutional muster* (Jan. 14, 2022), <https://www.petoskeynews.com/story/news/local/gaylord/2022/01/14/judge-basis-emergency-orders-limiting-bars-restaurants-fail-pass-constitutional-muster/6528282001/>.

compromised, and to prevent further destabilization of Michigan's duly enacted laws and constitutionally enshrined separation of powers. This Court should take immediate action and reverse the decision below.

CONCLUSION AND RELIEF REQUESTED

This Court should grant immediate review and grant the Department of Health and Human Services' bypass application for leave consistent with MCR 7.311(E) and MCR 7.305(C)(1)(b).

Respectfully submitted,

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

B. Eric Restuccia (P49550)
Deputy Solicitor General

Christopher M. Allen (P75329)
Assistant Solicitor General

/s/ Darrin F. Fowler
Darrin F. Fowler (P53464)
Andrea L. Moua (P83126)
Assistant Attorneys General
Attorneys for MDHHS
Respondent–Appellant
Corporate Oversight Division
525 W. Ottawa St., P.O. Box 30736
Lansing, MI 48909
(517) 335-7632

Dated: February 7, 2022