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STATE OF MICHIGAN

IN THE SUPREME COURT

IN THE MATTER OF:

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

Petitioner-Plaintiff,

V

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan

Respondent-Defendant,

Michigan Supreme Court Case No.
Court of Appeals Case No: 360175
Otsego County Circuit Court
Case No: 21-18522-AE
Honorable Colin G. Hunter

/

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IRON PIG APPLCATION FOR LEAVE TO APPEAL

That is what this case is about. Power[1].

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[1] The Great Dissent: Justice Scalia's Opinion in Morrison v Olson; Scalia's Finest Opinion The Weekly Standard (2016)

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THE PRECEDENT CHESS GAME

On January 13, 2022 the Otsego County Circuit Court ruled that MCL 333.2253, under article 3 section 2 of the Michigan Constitution, is clearly an unconstitutional delegation of power from the Legislative to the Executive branch. The court severed MCL 333.2253 from the Michigan Public Health Code under MCL 8.5.

The action is an administrative appeal filed by the *Iron Pig* restaurant in Gaylord Michigan under the Administrative Procedures Act MCL 24.306(1).

On February 3, 2022 the Michigan Department of Health and Human Services (MDHHS) filed an Application for Leave to Appeal in the Court of Appeals.

On the next day, February 4, 2022, MDHHS filed a Bypass Application in the Michigan Supreme Court. In the Bypass Application MDHHS stated that the Otsego County Circuit Court ruling is "dangerous". Amicus briefs were filed by the Michigan Senate and the House of Representatives and the Mackinac Center for Public Policy.

On April 1, 2022, the Michigan Supreme Court denied the application because the Court was not persuaded that the questions presented should be reviewed "before consideration by the Court of Appeals".

Justices Viviano and Bernstein dissented stating "[w]e would take this case now to give the court an opportunity to provide clarity on a topic of great importance to our citizens." The dissent continued "the "present case is a sequel of sorts to *In re Certified Questions*, 506 Mich at 385." "After the Court's decision in *In re Certified Questions*, the executive branch turned to the Public Health Code and **especially MCL 333.2253**, as the primary source of authority for its orders pertaining to the epidemic." (emphasis supplied).

The dissent indicated MDHHS is requesting an "overruling" of *In re Certified Questions*. Finally, the dissent determined that under "the circuit court's ruling, the DHHS can no longer rely on MCL 333.2253."

On May 25, 2022 Judge Shapiro, in a Court of Claims action, determined that the delegation of Legislative power to the Executive branch in MCL 333.2253 is constitutional and the issue is not moot. *T&V Associates v Michigan Department of Health and Human Services* Case No. 21-000075-MM Court of Claims.

T&V is a declaratory action. *The Iron Pig* is an action under the Administrative Procedures Act.

On June 8, 2022 *T&V* filed an appeal in the Court of Appeals. Case No. 361727.

On June 16, 2022 MDHHS filed a letter with the Court of Appeals advising of the *T&V* opinion as a basis to accept its Application.

On July 20, 2022 the Court of Appeals granted the application.

On August 17, 2022 MDHHS filed a Docketing Statement referencing the *T&V* opinion.

On the same date, August 17, 2022 in the *T&V* action, MDHHS filed a motion to dismiss the appeal as moot.

On September 19, 2022, the Court of Appeals denied the motion. In a dissent, Judge Krause stated Plaintiff in this matter "sought only declaratory relief. At this juncture that relief would constitute an advisory opinion, based on a **statute that may or may not still exist** in its present form." (emphasis supplied).

On October 21, 2022 the *T&V* appeal was Noticed.

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On November 9, 2022, in the Iron Pig appeal, MDHHS filed its brief citing the *T&V* opinion.

On November 23, 2022 at 2:44 p.m., the day before Thanksgiving, MDHHS filed a motion for voluntary dismissal of the *Iron Pig* appeal under MCR 7.218.

On December 12, 2022 the Court of Appeals dismissed the *Iron Pig* appeal.

The premise of the MDHHS motion for voluntary dismissal in the *Iron Pig* case is the *T&V* opinion. MDHHS avers in its motion for voluntary dismissal that the Iron Pig and *T&V* decisions are "trial-level" opinions and do not have precedential effect.

However to date, no opinion in *T&V* case by the Court of Appeals has been issued.

If the Court of Appeals decides *T&V* in an unpublished opinion, there is no precedent under MCR 7.215 regarding MCL 333.2253.

Consequently, MCL 333.2253 will lack "clarity" on a topic of "great importance" to our citizens.

The *Iron Pig* had its liquor and food licenses suspended and fines were issued under MCL 333.2253. The owner of the *Iron Pig* was held in contempt of court and fined in the Ingham County Circuit Court under MCL 333.2253.

If the Court of Appeals decides *T&V* in a published opinion, the *Iron Pig* anticipates MDHHS will collaterally enforce MCL 333.2253 against the *Iron Pig* with the *T&V* opinion, even though *T&V* was not decided under the Administrative Procedures Act.

As Justices Viviano and Bernstein stated: the "powers exercised by DHHS altered the course of social and economic life in our state-they interfered with our civil liberties and our daily lives, including where and how we work, socialize, educate our children, and worship.

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It "is our job to decide the extent to which the executive branch may properly wield that power in the first place."

The Iron Pig demonstrates under MCR 7.305:

(1) the issue involves a substantial question about the validity of a legislative act;

(2) the issue has significant public interest and the case is by the state;

(3) the issue involves a legal principle of major significance to the state's jurisprudence;

(4) the appeal is from a ruling that a provision if the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branches of state government is invalid;

(5) the decision will cause material injustice;

(6) the decision conflicts with a Supreme Court decision.

It is not without significance that the Iron Pig is a husband and wife small, family-run business that makes up so much of our restaurants and bars in Michigan, particularly Northern Michigan and operate on narrow financial margins.

This is unlike the Michigan Department of Health and Human Services, Liquor Control Commission and Department of Agriculture and Resource Development that are able to engage in expensive litigation with an unlimited budget.

The *Iron Pig* and other bars and restaurants in the State of Michigan have a justiciable interest in the Otsego County Circuit Court decision.

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INTRODUCTION

REPORTS OF THE NONDELEGATION DOCTRINE'S DEATH ARE GREATLY EXAGGERATED[2]

The nondelegation doctrine is alive and well ***in the states***. Separation of powers is a bedrock principle to the constitutions of each of the fifty states.

Any elementary school student can tell you that the legislature "makes the law", the executive "enforces the law", and the judiciary "interprets the law".

Adopted in 1789, the U.S. Constitution does not explicitly address separation of powers. Most state constitutions contain explicit separation of powers. The overwhelming majority of modern state constitutions contain a strict separation of powers clause. **Michigan** is one of them.

First adopted in 1835, the Michigan Constitution provided in pertinent part:

Article III Section 1 Division of the Powers of Government

The powers of government shall be divided into three distinct departments: the Legislative, the Executive and the Judicial; and one department shall **never** exercise the power of another, except as **expressly** provided in this constitution.

[2] The University of Chicago Law Review September 2003.

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The Michigan Constitution of 1963 provides in pertinent part:

Article III Section 2 Separation of Powers of Government

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 except as **expressly** provided in this constitution.

Thirty-five states contain "strict" separation of powers clauses. Another five have general separation of powers clauses. The remaining ten states have no explicit separation of powers clause. In these states, separation of powers is inferred from the *vesting* of powers to each of the branches of government in a manner similar to its inference from the *vesting* of power among the branches in the U.S. Constitution[3].

Forty-eight state supreme courts have, in recent memory, invoked the separation of powers as justification for their state's nondelegation doctrine (The two exceptions are Delaware and Rhode Island)[4].

In the Rhode Island Constitution the nondelegation doctrine arises when it is contended that there has been an impermissible delegation of legislative power to an administrative agency. Whereas, the separation of powers doctrine prohibits the usurpation of the power of one branch of government by a coordinate branch of government[5].

In other words, in Rhode Island, the *separation of powers* doctrine is violated when one

[3] Vanderbilt Law Review October 1999.
[4] Vanderbilt Law Review 2022
[5] Woonsocket v Chafee 89 A.3d 778 (R.I. 2014)

branch proactively **takes** power "vested" in a coordinate branch. The *nondelegation* doctrine, however, is violated when the legislature **gives away** legislative power-voluntarily-to an agency.

In state and federal nondelegation cases decided between 1940 and 2015, state courts are by far the most popular venue for nondelegation challenges as they heard 85% of all nondelegation challenges[6]. In a 2018 journal review, twenty-two state supreme courts held that the challenged state statutes violated the nondelegation doctrine[7].

US SUPREME COURT AND THE STATES

The 1928 landmark U.S. Supreme Court case[8] that set out the "intelligible principle" doctrine grounded its holding in **state** law.

In 2001, Justice Thomas determined that although "this Court since 1928 has treated the 'intelligible principle' requirement as the only constitutional limit on congressional grants of power to administrative agencies", the "Constitution does not speak of intelligible principles" Rather, it speaks in much simpler terms: All legislative Powers herein granted shall be vested in Congress.

The court continued that "I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than legislative.

The court concluded that "on a future day, however, I would be willing to address the

[6] The Nondelegation Doctrine: Alive and Well, 93 Notre Dame Law Review (2017)
[7] The Journal of Law, Economics and Organization 2018.
[8] Hampton v United States 276 US 394 (1928)

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question whether our delegation jurisprudence has strayed too far from our Founder's understanding of separation of powers".[9]

In 2015, Justice Thomas determined the Court has abandoned all pretense of enforcing a qualitative distinction legislative and executive power. The "intelligible principle" test does not keep executive lawmaking within the bounds of inherent executive discretion. Perhaps we were led astray by the optical illusion caused by different braches carrying out the same functions, believing that the separation of powers would be substantially honored so long as the encroachment were not too great.

For whatever reason, the intelligible principle test now requires nothing more than a minimal degree of specificity in the instructions Congress gives to the Executive when it authorizes the Executive to "make rules having the force and effect of law".

Under the guise of the intelligible principle test, the Court has allowed the Executive to go beyond the safe realm of factual investigation to make political judgments about what is "unfair" and unnecessary". Our mistake lies in assuming that *any* degree of policy judgment is permissible when it comes to establishing generally applicable "rules governing private conduct."

We should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct *only* through the proper exercise of legislative power.

The Constitution categorically forbids Congress to delegate its legislative power. Congress creates the rule of private conduct, and the Executive makes the *factual* determination that causes that rule to go into effect.

The Constitution in the "Vesting Clauses" commits governmental power to three branches

[9] Whitman v American Trucking Association 531 US 457 (2001).

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of Government. When the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, **only** the vested recipient of that power can perform it[10].

Following the US Supreme Court's 2019 *Gundy*[11] decision, a revolution regarding the nondelegation doctrine reached a fever pitch[12].

The court is poised to revisit, and is likely to revive, the constitutional bar on delegating legislative authority[13]. Dissenting in *Gundy*, Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, lamented the court's "intelligible principle misadventure," Justice Alito agreed to reconsider the court's position. *Gundy* was decided before Justice's Kavanaugh and Barrett joined the court. Justice Kavanaugh recently wrote that Justice Gorsuch's thoughtful *Gundy* opinion raised important points[14]. As a law professor, Justice Barrett described the intelligible principle doctrine as "notoriously lax."[15]

On October 2, 2020, the Michigan Supreme Court, citing *Gundy*, struck down the emergency powers of the governor, as a violation of the nondelegation doctrine and the Michigan Constitution's strict separation of powers[16].

In an "appropriate future case, I would consider adopting the approach to nondelegation advocated by justice Gorsuch in *Gundy*." Justice Viviano concurring *In Re Certified Questions*.

On January 13, 2022, the U. S. Supreme Court, citing *Gundy*, struck down the OSHA vaccine mandate as a violation of the nondelegation doctrine and U.S. Constitution's separation of

[10] Department of Transportation v Association of American Railroads 575 US____(2015)
[11] Gundy v U.S. 139 S. Ct. 2116 (2019) Gorsuch dissenting.
[12] Emory Law Journal 2022.
[13] Washington Legal Foundation January 31, 2022.
[14] Paul v United States 589 US ___(2019)
[15] Cornell Law Review January 2014
[16] In Re Certified Questions Michigan Supreme Court Case No. 161492 (2020)

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powers[17].

The *OSHA* court ruled that the government's power to make laws remains where the Constitution says it belongs-with the people's elected representatives. If administrative agencies seek to regulate the daily lives and liberties of millions of, they must at least be able to trace that power to a clear grant of authority from Congress.

The nondelegation doctrine ensures a democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials.

On January 13, 2022, the same date as the *OSHA* ruling, the 46th Circuit Trial Court Otsego County, citing *In Re Certified*, struck down the emergency powers of the state health department as a violation of the nondelegation doctrine and the Michigan Constitution's strict separation of powers[18].

On June 30, 2022, the U.S. Supreme Court, citing *Gundy*, struck down the EPA mandate as a violation the nondelegation doctrine illuminating again the U.S. Constitution's separation of powers[19].

The *EPA* court found that *states* have robust nondelegation doctrines to ensure democratic accountability in their state lawmaking processes. J. Gorsuch concurring

The Supreme Court cited *The Regulatory Review* October 15, 2020, which heralded the Michigan Supreme Court's October 2, 2020 decision in *In Re Certified Questions.*

The U.S. Supreme Court has good reason to consult state nondelegation jurisprudence. State courts seek out common American values.

Many state courts have the constitutional authority to evaluate legislation more frequently

[17] National Federation v OSHA 595 U.S.____(2022)
[18] Moore Murphy Case No. 21-18522-AE (2022)
[19] West Virginia v EPA 597 U.S.____(2022)

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than federal courts; thus, state courts may have more experience addressing the validity of legislative delegations than their federal counterparts[20]. State nondelegation cases should rightly be considered persuasive authority at the federal level when the federal doctrine is revived.

The U.S. Supreme Court could take a cue from Michigan and other states on reviving the nondelegation doctrine.

The U.S. Supreme Court is inviting the inspiration of the Michigan Supreme Court and other state courts to revitalize the nondelegation doctrine that is central to preserving the U.S Constitution's separation of powers. *Regulatory Review*

A PATH FORWARD

I. THIS COURT SHOULD ADOPT THE CONSTITUTION'S PLAIN TEXT OF "VESTED"

II. THIS COURT SHOULD ABANDON THE "INTELLIGIBLE PRINCIPLE" DOCTRINE

III. THIS COURT SHOULD ABANDON THE TERM "DELEGATION"

IV. THE COURT SHOULD REIN IN THE FOURTH BRANCH OF GOVERMNMENT ; THE TYRANNY OF THE ADMINISTRATIVE STATE

[20] 11 Hofstra Law Review 1185 (1983)

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VESTING CLAUSES

Our founding document begins by declaring that "We the People…ordain and establish this Constitution". From that premise, the Constitution proceeded to "vest" the authority to exercise different aspects of the people's sovereign power in three branches of government; legislative, executive and judicial. *Gundy*

Delegation should be abandoned because the Michigan Constitution speaks of **vested** rather than delegating. A congressional transfer of legislative powers violates the Constitution's vesting of such powers in Congress and divests Congress of the power vested in it[21].

The constitution of 1851 **vests** the legislative power in this state in a senate and a house of representatives[22].

The Constitution bars Congress from delegating *any* legislative power. The Constitution does not speak to delegation. The Constitution uses vesting language of powers and *strict* separation of those powers.

The Michigan Constitution vested powers in three branches of government; legislative, executive and judicial. This not merely conveys the powers, but makes their location mandatory:

Article IV Section 1 (legislative); Article V Section 1 (executive); Article VI Section 1 (judicial); Article III Section 2; (separation of powers)

Power is "**vested**" in each branch and one branch "**shall**" not exercise power of another

[21] New Civil Liberties Alliance
[22] People v Collins 3 Mich 343 (1854)

branch.

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LEGISLATIVE POWERS: NOT YOURS TO GIVE AWAY[23]

The Articles of the Michigan Constitution respectively *vest* the legislative, executive, and judicial powers each in a separate department of the government. The separation, by which each department may exercise only its own constitutional powers, is fundamental to the idea of a limited government accountable to the people. The principle is "particularly noteworthy" in regard to the Congress.

That the power assigned to each branch "must remain with that branch", and may be expressed only by that branch, is central to the theory. The Governor and the courts are **vested** with the executive and judicial powers, respectively.

Neither power includes a general power of lawmaking. Nor can the Congress confer such a lawmaking power by statute, for the simple reason that the "Congress has no enumerated to create lawmakers."

When the Constitution says legislative power is vested in Congress, it requires them to be there not elsewhere. That is, when legislative powers are shared with the Executive, they are no longer vested merely in Congress, and the sharing thus violates the Constitution's injunction[24].

The phrase "is vested" is decisive. It is evident the Constitution requires its powers be vested *in their respective branches* of government. Because of the plain text, **vested** and **shall,** this location is mandatory. A power that the Constitution says is *vested* in one branch cannot be

[23] Heritage Foundation January 6, 2011
[24] Nondelegation Blues

located elsewhere. Nor can the body that the Constitution vests with the power be divested of it.

Legislative powers cannot be divested from Congress to an administrative agency or vested elsewhere. This would contradict the Constitution's vesting of legislative powers in Congress. This *sharing* vests legislative powers contrary to where the Constitution says it is **vested.**

Constitutional powers cannot be "vested" anywhere but where the Constitution says it "is vested". The delegation interpretation rewrites the Constitution.

Legislatures have no power to appoint deputy legislatures[25].

"One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust[26].

[25] Nondelegation
[26] Thomas M. Cooley Constitutional Limitations 1868

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DIVESTING

Congress cannot *divest* itself of what is vested in it. The Constitution does not permit Congress to be divested of the powers that the Constitution says is vested in it.

A transfer of power cannot accurately be considered a delegation. It is a divesting of legislative power. Once the Constitution has said that Congress *is vested* with such power, that body cannot be divested of it by a mere statute.

Delegation is a question of sharing. If the Constitution's legislative powers is vested in Congress they cannot be shared outside Congress.

A mere statute cannot vest the executive branch with power that the Constitution says is "**vested**" in the legislative branch and the executive branch "**shall**" not exercise power of the legislative branch. The logic of the Constitution's phrasing is very powerful.

A statute cannot divest Congress of the power that the Constitution says is vested in Congress. The Constitution mandates where its powers must be located. The Constitution bars any divesting of the powers or vesting of them elsewhere.

The people of the State of Michigan "vested" the legislative powers in Congress and thereby precluded congress from vesting in others, or divesting itself of, such powers.

The absence in the Constitution of text allowing delegation shows that delegation of legislative power is forbidden. Congress can do nothing with that power not explicitly permitted elsewhere in the Constitution, and because delegation is not mentioned, it is barred[27].

The "power of enacting laws cannot be delegated by the legislative body even to the

[27] Legislative Powers : Not yours to give away

people". The Constitution **vests** the power of legislation in a select body. There it must remain until the Constitution itself is changed or abrogated. They have no authority to delegate *their* powers. We are not aware of that any jurist in this country has ever expressed a different opinion[28].

The law making power is expressly vested in the legislative department. There it was deliberately and intentionally placed. There and there only, must this general *law making* power and be exercised for weal or for woe, until the government is changed by revolution or by another set of the collective sovereignty.

The law making power is exclusively conferred upon the legislature is absolute and unconditional and it cannot by that body be delegated without an open violation of the constitution. This law making power, the most important of all governmental powers, is absolute and unconditional: that it cannot be delegated to avoid legislative responsibility.

There is no proposition more clear and no principle more plain or certain, than that every act of a delegated authority is void.

The Constitution is a fiduciary instrument[29]. Because the different branches of government are fiduciaries with their powers delegated to them by the people, they cannot subdelegate their authority because there is no express authority to do so in the Constitution. As agents, the powers of Congress and the Executive Branch must be strictly construed[30].

The rule against subdelegation of legislative authority is among the clearest constitutional rules one can imagine[31]. The Constitution does not permit such a subdelegation of legislative

[28] People v Collins
[29] I'm Leavin' It (All) It Up to You *Gundy* and the (Sort-Of) Resurrection of the Subdelegation Doctrine (2019) Gary Lawson
[30] "A Great Power of Attorney" Understanding the Fiduciary Constitution (2017) Lawson & Friedman
[31] Delegating or Divesting

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power to other actors. Indeed, there are few propositions of constitutional meaning as thoroughly overdetermined as the unconstitutionality of subdelegations of legislative authority[32].

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INTELLIGIBLE PRINCIPLE

46TH CIRCUIT TRIAL COURT OTSEGO COUNTY

The January 13, 2022 opinion of the Honorable Colin G. Hunter has been called "a breath of fresh air in many respects". Katherine Henry *Constitutional Attorney Restore Freedom*

Katherine Henry asserted I wish Judge Hunter would "tell these other justices up at the United States Supreme Court they need to start at square one".

In the January 13, 2022 *OSHA* decision citing *Gundy*, Justice Gorsuch observed that the nondelegation doctrine ensures the government power to make the laws that govern us remains where the Constitution says it belongs-with the people's elected representatives.

The separation of powers ensures that any new laws governing the lives of Americans are subject to the robust democratic process the Constitution demands.

In the June 2022 *EPA* decision citing *Gundy*, Justices Gorsuch and Alito found that the Constitution assigns all legislative Powers to Congress and bars their further delegation. Permitting Congress to **divest** its legislative power to the Executive Branch would dash this whole scheme. J. Gorsuch *Gundy June 30, 2022.*

[32] I'm Leavin' It (All) It Up to You

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Judge Hunter and counsel did not have the benefit of the Supreme Court decisions in *OSHA* and *EPA* with respect to the nondelegation and the intelligible principle doctrines.

Accordingly on January 13, 2022, Judge Hunter was bound by *Stare Decisis* to follow the *In Re Certified Questions* decision with respect to the nondelegation and the intelligible principle doctrines.

The "intelligible principal" doctrine now faces the chopping block. The intelligible principal doctrine "has no basis in the original meaning of the Constitution". *Gundy* The intelligible principle doctrine "has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional". *Gundy*

The notion of an intelligible principle sets a ludicrously low standard for what Congress must supply. *Gundy* The intelligible principle rule has been referred to as "toothless"[33].

Justice Clarence Thomas articulated that there are cases in which the "principle is intelligible" and yet the significance of the delegated decision is simply too great for the decision to be called anything other than legislative.[34]

The Michigan Supreme Court ruled that in "interpreting our Constitution, we are not bound by the United States Supreme Court's interpretation of the United States Constitution, even where the language is identical." "We may not disregard the guarantees that our Constitution confers on Michigan citizens merely because the United States Supreme Court has withdrawn or not extended such protection" under the federal Constitution[35].

To reinvigorate the nondelegation doctrine the courts must abandon the "intelligible

[33] Board of Trustees v The Commonwealth of Kentucky Supreme Court of Kentucky No. 2002-SC-0699-DG (2003)
[34] Whitman v American Trucking 531 U.S 457 (2001).
[35] In Re Certified Question citing People v Tanner 496 Mich 199 (2014).

principle fiction"-to do so.[36]

What's the test?

The Executive Branch may engage in fact finding[37] :

(1) Does the statute assign to the executive only the responsibility to make factual findings?

(2) Does it set forth the facts that the executive must consider and the criteria against which to measure them?

(3) And most importantly, did Congress and not the Executive Branch, make the policy judgments ?

The "intelligible principle" the Constitution demands is the traditional rule that Congress may leave the executive the responsibility to find facts and "fill up the details".[38]

A statute unconstitutionally delegates legislative power when it[39];

1) allows the agent (actor to whom the authority is delegated) to issue general rules governing private conduct that carry the force of law;

[36] Out of the Separation of Powers Frying Pan
[37] Gundy
[38] Wayman v Southard 10 Wheat 1 (1825)
[39] Nondelegation

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2) makes the content or effectiveness of those rules dependent upon the agent's policy judgment, rather than upon a factual contingency.

Congress may delegate authority to make rules concerning matters of internal administration.

This court should abandon the intelligible principle doctrine and adopt the fact finding approach recognizing the Constitution bars any *divesting* of its powers.

DELEGATION

Strictly speaking, there is no acceptable delegation of legislative power[40]. The nondelegation doctrine has been presented as a judicial doctrine, not a constitutional provision[41]. The nondelegation doctrine requires a new approach[42].

The Michigan Constitution is an instrument of delegation. In its words "We, the people of the state of Michigan, grateful to Almighty God for the blessings of freedom" provides that "All political power is inherent in the people."

The Michigan Constitution does not speak in terms of delegation and nondelegation. Instead it ***vests*** its powers.

Article VI Section 1 of the Michigan Constitution delegates *from the people* "legislative power… **vested**" in a senate and a house of representatives.

[40] In Re Certified Question Michigan Supreme Court Docket No. 161492
[41] Nondelegation Blues 91 George Washington Law Review (forthcoming 2023)
[42] Delegating or Divesting Columbia Law School 2021

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When there is a pure delegation of legislative power it "is irrelevant whether the standards are adequate".[43] They are "not standards related to the exercise of executive or judicial powers; they are, plainly and simply, standards for further legislation".[44]

It is necessary to flesh out the concept of the "legislative power" that the Constitution vests in Congress. The "essence of the legislative authority is to enact laws, or in other words, to prescribe rules for the regulation of society."[45] Legislative power "prescribes the rules by which the duties and rights of every citizen are to be regulated"[46]

A law is a "rule of conduct imposed by authority"[47]

Legislative Power does not refer to the authority to vote on legislation, but rather the power to make general rules governing private conduct that carry the force of law[48]. A law is a rule enforcing some duty or prohibiting some act[49]

A legislative act that prescribes no rules of conduct for society, but instead empowers another entity to do so, is not only invalid-*it is not a law*[50].

The legislature may not pass an act which is not a law in itself when passed, and has no force or authority as such, and is not to become or be a law, until it shall have been created and established by the will and act of some other person or body[51].

A law must be complete in itself, in all of its terms and provisions when it leaves the legislative branch of government, so that by appropriate judicial review and control any action

[43] Mistratta v United States 488 US v 361 (1989) Scalia dissenting
[44] Mistratta
[45] Federalist 75 Alexander Hamilton
[46] Federalist 78 Hamilton
[47] Oxford English Dictionary
[48] Nondelegation New York University Journal of Law & Liberty 2019
[49] Nondelegation
[50] Nondelegation
[51] Nondelegation

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taken pursuant to such delegated authority may be kept within the defined limits of the authority conferred and within the express and implied limitations of all controlling provisions and principles of dominant law, and it is not left to an administrative authority to decide what should and what should not be deemed infringement of the law[52].

The Legislature may not delegate the power to enact a law or to declare what the law shall be; but it may enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definitive valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose[53].

When the statute is couched in vague and uncertain terms or is so broad in scope that no one can say with certainty, ***from the terms of the law itself***, what would be deemed an infringement of the law, it must be held unconstitutional as attempting to grant to the administrative body the power to say what the law shall be[54].

In 1854, less than twenty years after Michigan adopted its first Constitution in 1835, the Michigan Supreme Court determined that a valid and subsistent law of the state under the constitution, must have been fully enacted by the legislature, so that when it came from the hands of the executive it was in virtue of its own provisions an absolute act otherwise it cannot be a valid law[55].

Legislative power is the power of *prescribing* rules of civil conduct. Laws are complete and positive in themselves when they pass from the legislature, and are not to become laws by the

[52] Connor v Hatton 216 So.2d 209 (1968)
[53] Connor
[54] BH v State 645 So. 2d 987 (Fla. 1994)
[55] People v Collins 3 Mich 343 (1854)

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creative power of other persons.

Congress cannot divest itself of the powers that the Constitution vests in it. A delegated power is one that can be resumed at the will or discretion of the delegator[56].

The legislature cannot transfer the power of making laws to any other hands; for it being a delegated power from the people, they, who have it, cannot pass it over to others[57].

The dissolution of government was, of course, the opportunity for revolution, and Locke's first example of this situation was when laws are made by persons who are not appointed as lawmakers by the people.

When, by means of the Constitution, the people established their legislature, the legislature had no authority to alter their constitution and therefore could not delegate its power.

As an agent of the public, Congress is prohibited from delegating powers granted to it. The nondelegation doctrine was developed out of an elementary maxim of the law of agency, *delegata potestas non potest delagari*-delegated powers cannot be further delegated[58].

OUT OF THE SEPARATION OF POWERS FRYING PAN AND INTO THE NONDELEGATION FIRE[59]

In 2020, the U.S. Supreme Court interpreted a statutory provision that permitted the director of an agency to exercise the removal power of the President. The Supreme Court would have none of it and invalidated the statutory provision on the grounds of a violation of the

[56] Amicus Curiae Brief New Civil Liberties Alliance *Gundy*
[57] John Locke, Two Treatises of Government (1690).
[58] Nondelegation and the Unitary Executive 12 University of Pennsylvania 251 (2010)
[59] The University of Chicago Law Review 2020

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separation of powers.[60]

The agency lived to fight another day since it is still on the ropes because the decision simultaneously exacerbated a second constitutional defect. By divesting itself of legislative power Congress crossed a forbidden line. The unprecedented delegation creates an unchecked, self-sustaining island-cut off from the constitutional mainland.

Congress had thus surrendered its power to the agency instrumental to Congress's ability to rein in executive excesses. Delegating control is unquestionably a divestment of legislative power. Congress tied the hands of every future congress. This is no mere "delegation" of power, a misleading term that implies the unilateral ability for Congress to reverse its grant of authority; this is an outright divestment of power.

It is nonetheless a bargain that the Supreme Court must unwind because it unconstitutionally divests legislative power. As the Supreme Court emphasized in finding a separation of powers violation, perhaps the most telling indication of a "severe constitutional problem" with an executive entity is a lack of historical precedent to support it.

Having rescued the agency from the separation of powers frying pan, the Court has dropped it into a nondelegation fire that is anathema to the constitutional order of government. Unless the Court take up its unfinished business soon to resolve this untenable situation, the agency will slip from the legislature's control and thus from that of the people.

It is constitutionally suspect. Congress may not subdelegate any its power.

The people's initial delegation of power to the legislature does not provide that the legislature could *subdelegate* such powers. The laws forbid the abandonment of legislative

[60] Seila v Consumer Financial Protection Bureau 591 U.S._____(2002)

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responsibility to a transfer of their powers into other hands without consulting the people[61].

One of the problems with the nondelegation doctrine is that courts are not capable of articulating a coherent and consistent nondelegation doctrine[62].

This court should abandon the term delegation and recognize that the Constitution bars any *divesting* of its powers. Delegation is of dubious and disputed authority, it permits what is says it forbids, and it does not help the judges sort out their cases[63].

RISK IT FOR THE BRISKIT; IS ADMINISTRATIVE LAW UNLAWFUL[64]?

On Friday October 2, 2020, the Michigan Supreme Court struck down the emergency powers of the governor as a violation of the Michigan Constitution's strict separation of powers.

On Monday October 5, 2020 the Governor pivoted to the Michigan Public Health Code.

On November 15, 2020, the opening day of deer season, the Department of Health and Human Services (MDHHS) issued an "emergency order" under MCL 333.2253 closing indoor dining at Michigan restaurants.

On November 25, 2020, the Iron Pig restaurant in Gaylord Michigan allowed the indoor "gathering of people".

Without notice or a hearing, representatives of the Michigan Liquor Control Commission (MLCC) walked into the Iron Pig and took the liquor license off the wall. The liquor license was

[61] Thomas Jefferson 1788 Notes on the State of Virginia 135 University of North Carolina 2006
[62] 64 New York University Law Review 1239 (1989).
[63] Nondelegation Blues
[64] Philip Hamburger Columbia Law School 2014

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immediately suspended.

The liquor license was suspended for 90 days, the longest suspension for any restaurant in Michigan, for not complying with the MDHHS emergency order.

The Administrative Law Judge stated:

> The Licensee's slogan, "RISK IT FOR THE BRISKET-BBQ WITH A SIDE OF FREEDOM" rhymes but downplays the incredibly serious nature of the COVID-19 virus. Unfortunately, a more appropriate slogan might "Brisket to die for"

No one died at the Iron Pig.

The MLCC found that the Iron Pig engaged in "illegal acts" in disregarding the MDHHS emergency order and is an "imminent threat" to the public's health, safety and welfare.

The Michigan Department of Agriculture and Rural Development (MDARD) then suspended the food license of the Iron Pig. MDARD found that disregarding the MDHHS emergency order is a "condition" at the Iron Pig that is an "imminent or substantial hazard".

MDARD then filed suit against the Iron Pig in the Ingham County Circuit Court and obtained an ex parte Temporary Restraining Order to shutter the restaurant. MDARD sent an "undercover employee" with a hidden video camera to the Iron Pig.

The Iron Pig owner was held in contempt of court and fined.

The Michigan Department of Health and Human Services (MDHHS) filed a motion for summary disposition requesting a ruling that that the Iron Pig violated the emergency order.

An Administrative Law Judge entered an Order finding that the MDHHS emergency order was issued and in effect at all relevant times, with "nothing to suggest that it was invalid".

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The entire legal foundation of the foregoing proceedings was the MDHHS emergency order.

Judge Hunter found the MDHHS emergency order was in violation of the nondelegation doctrine and the Michigan Constitution's strict separation of powers. MCL 333.2253 is severed from the Michigan Public Health Code. Under the circuit court's ruling, "the DHHS can no longer rely on MCL 333.2253".[65]

POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION[66]

A statute that says "Do not emit more than *x* ponds of pollutant *y"* does not delegate, because it lays down a rule.

However, a statute that says "do not emit unreasonable amounts of pollution" does delegate, unless somehow our customs give the word *unreasonable* a clear meaning in this context.

To become a law, bills receive a majority in the House and Senate and approval by the President or should the president veto a bill, two-thirds majorities in the House and Senate. The Framers, therefore instead of writing into the Constitution a direct prohibition of regulation for private purposes, they sought to discourage such regulation by making it difficult to enact laws that lacked broad public support.

When the lawmakers we elect have others make the law, the people lose.

[65] Michigan Supreme Court Order April 1, 2022.
[66] David Schoenbrod 1993 Yale University

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THE RISE AND *RISE* OF THE ADMINISTRATIVE STATE[67]

In his first inaugural address, Franklin D. Roosevelt compared the impact of the ongoing economic depression to a foreign invasion, arguing that Congress should grant him sweeping powers to fight it. In 1933 he got Congress to pass two statutes designed to raise depressed prices. The statutes handed a few officials concentrated power to move rapidly toward a "New Deal".[68]

In 1935, the U.S. Supreme Court, however, began striking a number of these statutes as a violation of the nondelegation doctrine in a variety of cases, among them *Panama Refining* and *Schecter Poultry.*[69]

President Roosevelt responded with his famous threat to greatly expand the number of Supreme Court associate justices so that he then could "pack the court" and gain judicial acceptance his New Deal reforms. Although Congress failed to expand the Court as Roosevelt wanted, the threat nonetheless succeeded in a manner. The Court suddenly began approving New Deal legislation either expressly or by refusing to hear cases upholding the new laws[70].

Americans must live under a dual system of government-one part established by the Constitution and another circumventing it[71].

The Constitution permits only the legislative branch to make law. The executive branch can enforce the law, but cannot create its own.

Article IV Section 51 of the Michigan Constitution provides that the "**legislature** shall pass

[67] Boston University School of Law 1994
[68] Power Without Responsibility
[69] Panama Refining Co. v Ryan 293 U.S. 388 (1935); A.L.A. Schecter Poultry Corp v United States 295 U.S. 495 (1935).
[70] BH v State SO. 2d 987 (DFLA. 1994)
[71] The Administrative Threat

suitable laws for the protection and promotion of the **public health**."

Rather than speak of administrative law, we should speak of administrative power-indeed of absolute power or more concretely of extra-legal, supra-legal, and consolidated power[72].

The Constitution prohibits Congress from giving the executive branch *carte blanche* to write laws. The Constitution does not endorse this "extraconstitutional" arrangement. *Gundy*

The opportunity to devolve legislative power to administrative agencies invites congressional irresponsibility. Congress can escape accountability for regulatory policy and is therefore free to behave irresponsibly. These agencies make law without any fear of being held to account in an election.

When an executive agency issues a rule constraining Americans-it is an attempt to exercise binding legislative power not through an act of Congress, but through an administrative edict. Similarly, when an executive agency adjudicates a violation of one of these edicts-in order to impose a fine or suspend a license-it is an attempt to exercise judicial power, not through a judicial act, but through an administrative act[73].

A defense of administrative power is that Congress uses statutes to delegate its lawmaking power to administrative agencies. The Constitution expressly bars the delegation of legislative power.

An executive branch agency adopts "emergency orders" then exercises the power to investigate, adjudicate and punish without consulting the people's representatives[74].

The transfer of legislative power to unelected bureaucrats deprives Americans of their

[72] Imprimis A publication of Hillsdale College September 2014
[73] Imprimis A publication of Hillsdale College September 2014
[74] Out of the Separation of Powers Frying Pan

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sense of connection to government[75].

Administrative adjudication evades almost all of the procedural rights guaranteed under the Constitution. Administrative courts substitute inquisitorial process for the due process of law. Administrative adjudication thus becomes an open avenue for evasion of the Bill of Rights.

LIBERTY AND TYRANNY

"[T]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny" *46th Circuit Trial Court v Crawford Co,* 476 Mich 131 (2002), "[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty". Baron de Montesquieu, *The Spirit of the Laws;* James Madison

The Framers gave the judiciary the exclusive power to interpret the Constitution and the laws passed by Congress, so if one of the other branches began to move outside its constitutionally defined territory, the courts would be able to step in and stop it.

The courts cannot endorse this "extraconstitutional arrangement". *Gundy*

It is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as "faithful guardians of the Constitution" if either Congress or the executive branch were to violate or subvert the Constitution's provisions[76].

[75] Nondelegation Blues
[76] Federalist No. 78 Hamilton.

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STATEMENT OF BASIS OF

JURISDICTION OF THE SUPREME COURT

This Court's Jurisdiction is pursuant to MCR 7.305(C)(2)(a). The Court of Appeals Order was entered December 12, 2022.

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STATEMENT OF QUESTIONS INVOLVED

I. WHETHER MCL 333.2253 VIOLATES THE VESTING CLAUSE IN ARTICLE 1 SECTION 1 OF THE U. S. CONSTITUTION ?

II. WHETHER MCL 333.2253 VIOLATES THE VESTING CLAUSE IN ARTICLE IV SECTION 1 OF THE MICHIGAN CONSTITUTION ?

III. WHETHER MCL 333.2253 VIOLATES THE SEPERATION OF POWERS CLAUSE IN ARTICLE III SECTION 2 OF THE MICHIGAN CONSTITUTION ?

IV. WHETHER THE COURT SHOULD ABANDON THE TERM "DELEGATION"

V. WHETHER THE COURT THE COURT SHOULD ADOPT THE MICHIGAN CONSTITUTION'S PLAIN TEXT OF VESTED ?

VI. WHETHER THE COURT SHOULD ABANDON THE "INTELLIGIBLE PRINCIPLE" DOCTRINE ?

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VII. WHETHER THE MICHIGAN ADMINISTRATIVE PROCEDURES ACT VIOLATES THE SEPERATION OF POWERS CLAUSE IN ARTICLE III SECTION 2 OF THE MICHIGAN CONSTITUTION ?

VIII. WHETHER THE COURT OF APPEALS DISMISSAL CONFLICTS WITH A SUPREME COURT DECISION AND WILL CAUSE MATERIAL INJUSTICE ?

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STATEMENT OF FACTS

The Iron Pig incorporates by reference the facts contained in *Risk It For the Briskit: Is Administrative Law Unlawful* ?

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ARGUMENT

I. MCL 333.2253 VIOLATES THE VESTING CLAUSE IN ARTICLE 1 SECTION 1 OF THE U. S. CONSTITUTION.

Our founding document begins by declaring that "We the People…ordain and establish this Constitution". From that premise, the Constitution proceeded to "vest" the authority to exercise different aspects of the people's sovereign power in three branches of government; legislative, executive and judicial. *Gundy*

Article I Section I of the Constitution provides "All legislative powers herein granted shall be vested in a congress of the United States". Congress may not abdicate or transfer to others the essential legislative functions with which it is thus vested *Schechter Poultry*.

MCL 333.2253 provides in pertinent part:

> (1) If the director that determines 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 service and enforcement of health laws. Emergency procedures shall not be limited to this code. (emphasis supplied)

MCL 333.2253 provides no standards. The statute provides no intelligible principles to guide the director's use of discretion.

The consequences of such illusory "non-standard" standards in this case is that the director possesses free rein to exercise a substantial part of our state and local legislative authority—including police powers—for an indefinite period of time.

These facets of MCL 333.2253—its expansiveness, its indefinite durations, and its inadequate standards—are simply insufficient to sustain *this* delegation.

Accordingly, that the delegation of power to the Director to "prohibit the gathering of people for any purpose", constitutes an unlawful delegation of legislative power to an executive agency and is therefore unconstitutional under Art 1, § 1, which prohibits exercise of the legislative power by the executive branch.

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ARGUMENT

II. MCL 333.2253 VIOLATES THE VESTING CLAUSE IN ARTICLE IV SECTION 1 OF THE MICHIGAN CONSTITUTION.

The Michigan Constitution vested powers in three branches of government; legislative, executive and judicial. This not merely conveys the powers, but makes their location mandatory:

Article IV Section 1 (legislative); Article V Section 1 (executive); Article VI Section 1 (judicial); Article III Section 2; (separation of powers)

Power is "**vested**" in each branch and one branch "**shall**" not exercise power of another branch.

The Articles of the Michigan Constitution respectively *vest* the legislative, executive, and judicial powers each in a separate department of the government. The separation, by which each department may exercise only its own constitutional powers, is fundamental to the idea of a limited government accountable to the people. The principle is "particularly noteworthy" in regard to the Congress.

That the power assigned to each branch "must remain with that branch", and may be expressed only by that branch, is central to the theory. The Governor and the courts are **vested** with the executive and judicial powers, respectively.

Neither power includes a general power of lawmaking. Nor can the Congress confer such a lawmaking power by statute, for the simple reason that the "Congress has no enumerated to

create lawmakers."

When the Constitution says legislative power is vested in Congress, it requires them to be there not elsewhere. That is, when legislative powers are shared with the Executive, they are no longer vested merely in Congress, and the sharing thus violates the Constitution's injunction.

The phrase "is vested" is decisive. It is evident the Constitution requires its powers be vested *in their respective branches* of government. Because of the plain text, **vested** and **shall,** this location is mandatory. A power that the Constitution says is *vested* in one branch cannot be located elsewhere. Nor can the body that the Constitution vests with the power be divested of it.

Legislative powers cannot be divested from Congress to an administrative agency or vested elsewhere. This would contradict the Constitution's vesting of legislative powers in Congress. This *sharing* vests legislative powers contrary to where the Constitution says it is **vested.**

Constitutional powers cannot be "vested" anywhere but where the Constitution says it "is vested". The delegation interpretation rewrites the Constitution.

Legislatures have no power to appoint deputy legislatures.

"One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.

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ARGUMENT

III. MCL 333.2253 VIOLATES THE SEPERATION OF POWERS CLAUSE IN ARTICLE III SECTION 2 OF THE MICHIGAN CONSTITUTION.

FIRST IMPRESSION

To date no Michigan Appellate Court has ruled on the constitutionality of MCL 333.2253, which provides in pertinent part:

> (2) If the director that determines 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 service and enforcement of health laws. Emergency procedures shall not be limited to this code. (emphasis supplied)

Thus, this is an important public question of first impression.

EXECUTIVE POWER

This action, at its most basic level, is simple. The Governor has two kinds of power: those given to her in the Constitution, and those given to her by the Legislature under statute. The emergency powers of the Governor are not inherent. They are not listed in the powers given to the Governor in the Constitution but were given to the Governor by the legislature. Any power the Legislature gives to the other branches of government, it can freely rescind, modify, or limit. The Legislature makes the laws. The Governor and the Courts follow them.

In response to the COVID-19 pandemic, the Governor issued several executive orders and agencies issued emergency regulations.

The executive power was challenged in 2020 in what ultimately became *In re Certified Questions*, Docket No. 1691492 Decided October 2, 2020, in the Michigan Supreme Court.

The Michigan Supreme Court Held:

> The governor did not possess the authority to exercise emergency power under the EPGA [Emergency Powers of the Governor Act of 1945] because the act unlawfully delegates legislative power to the executive branch in violation of the Michigan Constitution.
>
> The Court concluded that the EPGA violated the Michigan Constitution because it delegated to the executive branch the legislative powers of state government and allowed the executive branch to exercise those powers indefinitely.
>
> As the scope of the powers conferred upon the Governor by the Legislature becomes increasingly broad, in regard to both the subject matter and their duration, the standards imposed upon the Governor's discretion by the Legislature must correspondingly become more detailed and precise. MCL 10.31(1) of the EPGA delegated broad powers to the Governor to enter orders "to protect life and property or to bring the emergency situation within the affected area under control," and under MCL 10.31(2), the Governor could exercise those powers until a "declaration by the governor that the emergency no longer exists."
>
> Thus, the Governor's emergency powers were of indefinite duration, and the only standards governing the Governor's exercise of emergency powers were the works "reasonable and necessary," neither of which supplied genuine guidance to the Governor as to how to exercise the delegated authority nor constrained the Governor's actions in any meaningful manner. Accordingly, the EPGA constituted an unlawful delegation of legislative power to the executive and was unconstitutional under Const 1963, art 3, § 2, which prohibits exercise of the legislative power by the executive branch.
>
> However, Chief Justice McCormack dissented from the majority's constitutional ruling striking down the EPGA. The United States Supreme Court and the Michigan Supreme Court have struck down statutes under the nondelegation doctrine only when the statues contain no standards to guide the decision-maker's discretion, and the delegation in the EPGA had standards—for the Governor to invoke the EPGA, her actions must be "reasonable" and necessary," the must "protect life and property" or "bring the emergency situation…under control," and they may be taken only at a time of "public emergency" or "reasonable apprehension of immediate danger" when "public safety is imperiled." Those standards were as reasonably precise as the statute's subject matter permitted.

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> Accordingly, the delegation in the EPGA did not violate the nondelegation doctrine.
>
> The conclusion of Justice Markman's opinion, which seems to capture the view of the majority, is clear: "[T]he executive orders issued by the Governor in response to COVID-19 pandemic now lack any basis under Michigan law." (The opinion adds, though, "Our decision leaves open many avenues for the Governor and legislature to work together to address this challenge and we hope that this will take place.")

THE HEALTH DEPARTMENT ORDERS

On November 15, 2020, Governor Whitmer, upon information and belief, advised the now-resigned Director Robert Gordon of MDHHS to issue an emergency order purportedly pursuant to MCL 333.2253 restricting gatherings and requiring that face masks be worn in public. This order provided the following restrictions with respect to restaurants, bars, and banquet halls:

> Food service establishments must prohibit gatherings in all the following circumstances:
>
> (a) In indoor common areas in which people can congregate, dance, or otherwise mingle;
>
> (b) If there is less than six fee of distance between each party;
>
> (c) If they exceed 50% of normal seating capacity;
>
> (d) Anywhere alcoholic beverages are sold for consumption onsite, unless parties are seated and separated from one another by at least six feet, and do on intermingle.
>
> (e) If they involve any persons not seated at a table or at the bar top (customers must wait outside the food service establishment if table or bar top seating is unavailable.

MDHHS continued to issue orders until July 1, 2021.

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MICHIGAN STATE BOARD OF HEALTH

As far back as 1873, the Legislature had created the State Board of Health, which was given "general supervision of the interests of the health and life of the citizens of this State". 1873 PA 81, The Board was to "make sanitary investigations and inquiries respecting the causes of disease, and especially of epidemics.

In 1883, the Legislature authorized minimal health offices to order isolation of the sick.

The Legislature granted similar powers to the State Board of Health allowing it to isolate individuals suspected of having communicable diseases. 1893 PA 47.

The statutory structure in place in 1945 took shape in the wake of the influenza epidemic of 1918. In the midst of that epidemic, the Governor banned by order various public meetings. *State Closing is "Flu" Order,* Lansing State Journal (October 19, 1918. The order did not cite any authority allowing the Governor to take such action, but the closures lasted only a few weeks. *Id. Governor Lifts "Flu" Ban,* The Sebawaing Blade (November 7, 1918).

In case of an epidemic the state health commission may forbid the holdings of public meetings. Such action shall not be taken without the consent and approval of the Advisory Council of Heath and if applicable to the entire state, be countersigned by the Governor 1919 PA 1946. 1948 CL 325.9.

The Governor's interpretation makes nonsense out of the current body of statutes. Many laws similar to those above remain on the books. Most notable, the 1919 law passed in the wake of the influenza epidemic and the Governor's actions is still the law, albeit in slightly modified form. See MCL 333.2253 (allowing the director of the health department to "prohibit the gathering of people for any purpose and [to] establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws"). But this

law is redundant alongside the EPGA. As if to prove this, the Director of the Department of Health and Human Services (DHHS) has issued a series of orders under MCL 333.2253 simply 'reinforcing" key executive orders on COVID-19, such as those mandating masks and instituting the Safe Start Program, which itself contains the Governor's overarching regulatory response to COVID-19 (e.g., remote-work requirements, public-accommodation restrictions, and prohibitions on large gatherings).

In other words, nearly everything the Governor has done under the EPGA, she has also purported to do, via the DHHS Director, under MCL 333.2253. *In re Certified Question Justice Viviano Concurring*

In *In re Certified Question,* the plaintiffs sought a declaration prohibiting the defendants from enforcing Department of Health and Human Services orders issued by defendant Director Robert Gordon. Those orders proclaim to draw their authority not from the EMA or EPGA but from MCL 333.2253. The federal district court did not certify to this Court any question regarding the validity of those orders, and this Court does not offer any opinion on the validity of continued enforcement of those orders. *(McCormack dissenting)*

WISCONSIN PUBLIC HEALTH EMERGENCY POWERS

On March 31, 2021, the Wisconsin Supreme Court struck down Gov. Tony Evers' statewide mask mandate.

"The question in this case is not whether the governor acted wisely; it is whether he acted lawfully. We conclude he did not," Justice Brian Hagedorn wrote for the majority.

On April 14, 2021, the Wisconsin Supreme Court further whittled away the state government's public health emergency powers, ruling Gov. Tony Evers' administration

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overstepped its authority last year when it tried to restrict bar and restaurant capacity to slow the spread of COVID-19.

It is the third time the court has ruled against the Evers administration's efforts to address the coronavirus pandemic and the second time in just the past month.

Former state Department of Health Services Secretary Andrea Palm issued the restrictions in question on Oct. 6, citing a surge in COVID-19 cases. While the order included myriad exemptions, it limited business like bars and restaurants to 25 percent of their usual indoor capacity.

While Palm's order was far more limited than the "Safer at Home" order the state Supreme Court struck down in May 2020, it relied on the same set of laws. In its ruling handed down, the court's majority said that meant the order needed to be advanced as an "emergency rule," meaning it needed the Legislature's approval.

MICHIGAN'S STRICT SEPARATION OF POWERS

Art 3, § 2 summarizes the separation of powers principle in Michigan as follows:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising power of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

A. Adequacy of Standards

> [C]hallenges of unconstitutional delegation of legislative power are generally framed in terms of the adequacy of the standards fashioned by the Legislature to channel the agency's or individual's exercise of the delegated power. *Blue Cross & Blue Shield of Mich v Milliken,* 422 Mich 1, (1985).

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"[T]he constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion." *Gundy v United States*, 139 S Ct 2116 (2019).

When broad power is delegated with few or no constraints, the risk of an unconstitutional delegation is at its peak. Therefore, whether a delegation is unconstitutional depends on two factors—the amount of discretion and the scope of authority.

Furthermore, [t]he area of permissible indefiniteness narrows…when the regulation invokes criminal sanctions and potentially affects fundamental rights…. *United States v Robel*, 389 US 258 (1967).

Finally, the durational scope of the delegated power also has some relevant bearing, on whether the statute violates the nondelegation doctrine.

Of course, an unconstitutional delegation is no less unconstitutional because it last for only two days. But it is also true, as common sense would suggest, that the conferral of indefinite authority accords a greater accumulation of power than does the grant of temporary authority.

B. Scope of Delegated Power

The police power is legislative in nature. *Bolden v Grand Rapids Operating Corp*, 239 Mich 318 (1927). The power we allude to is rather the police power, the power vested in the Legislature by the Constitution, to make, ordain and establish all manner of wholesome and reasonable laws. "The invocation of a curfew or restriction on the right to assemble or prohibiting the right to carry on business licensed by the State of Michigan involves the suspension of constitutional liberties of the people."

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C. Duration of Delegated Power

Under the EPGA, the powers maybe exercised until a declaration by the Governor that the emergency no longer exists. Thus, the Governor's emergency powers are of an indefinite duration.

Under MCL 333.2253 the health director, to control an epidemic by emergency order may prohibit the gathering of people for any purpose.

The director's emergency powers are of an indefinite duration.

ANALYSIS

MCL 333.2253 provides no standards. The statute provides no intelligible principles to guide the director's use of discretion.

Moreover, MCL 333.2253 invokes criminal sanctions and involves the suspension of constitutional liberties of the people.

The EPGA provides for reasonable orders, necessary to protect life and liberty. However, the court determined these standards neither supplies genuine guidance as to how to exercise authority delegated nor constrains actions in any meaningful manner.

The director has issued the following emergency orders:

- Close indoor dining
- Prohibit indoor gatherings anywhere alcoholic beverages are sold
- Indoor sports no concessions are sold
- organized sports athletes wear a face covering
- Permit indoor gatherings up to 10 persons at a residence
- Outdoor gatherings of up to 100 persons occurring at a residence

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- Venues with fixed seating occupancy must not exceed 20%
- Food service venues patrons are separated by at least 6 feet
- Food service establishments must close at 10pm
- Retail store must establish lines to regulate entry and checkout
- Businesses must obtain names of patrons, contact information and date and time of entry
- Prohibit indoor sports

The consequences of such illusory "non-standard" standards in this case is that the director possesses free rein to exercise a substantial part of our state and local legislative authority—including police powers—for an indefinite period of time.

These facets of MCL 333.2253—its expansiveness, its indefinite durations, and its inadequate standards—are simply insufficient to sustain *this* delegation.

Accordingly, that the delegation of power to the Director to "prohibit the gathering of people for any purpose", constitutes an unlawful delegation of legislative power to an executive agency and is therefore unconstitutional under Art 3, § 2, which prohibits exercise of the legislative power by the executive branch.

The above language is severable from the Michigan Public Health Code as provided in MCL 8.5.

EXECUTIVE AND AGENCY LEGISLATIVE AUTHORITY

The Health Department will argue that striking down a portion of MCL 333.2253 will defeat the state's ability to regulate the health of its citizen. This is erroneous.

The Emergency Management Act MCL 30.403 affords the governor the power to declare

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a state of emergency for an epidemic with an extension approved by resolution of both houses of the legislature.

Further, local municipalities, are authorized to establish rules and regulation and adopt ordinances and resolutions. County Board of Commissioners Act 156 of 1851; Township Ordinances Act 246 of 1945; Cities and Villages Article 7 Section 22 of the Michigan Constitution; 1909 PA 278 The Home Rule City Act and 1909 PA 278, The Home Rule Village Act.

On June 30, 2020 a civil emergency ordinance was introduced in the City of East Lansing under the Code of the City of East Lansing. The Ordinance was adopted on the same date June 30, 2020. The Ordinance, in part, limited the size and location of gatherings on public property. The orders shall not be continued or renewed for a period in excess of 7 days except with the consent of the City Council.

Recently, in Tiger Lily v HUD United States District Court Western District of Tennessee No 2:20-CV-02692 decided March 29, 2021, the Centers for Disease Control (CDC) issued an order temporarily halting residential eviction for any tenants for failure to pay rent (The Halt Order).

The court ruled:

The Supreme Court has recognized that "the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches." "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power'"

Congress is vested with the sole authority to legislate. Under the non-delegation doctrine, "Congress is not permitted to abdicate or to transfer to others the essential legislative functions

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with which it is vested." Upholding the Halt Order under these circumstances, particularly where criminal sanctions are ultimately ordered by the CDC, goes too far. It would amount an impermissible delegation by Congress authorizing the CDC to make law.

Stay-at-home orders issued pursuant to a state emergency management act with proper limitations seem acceptable under the nondelegation doctrine. Orders issued by administrative can be on shakier grounds, especially if they attempt to bypass the rulemaking process. Acceptable limitations can be time-limits that require legislative approval to extend, such as the time limits imposed by the Wisconsin emergency management statute or Michigan's EMA. A state of emergency that can be terminated anytime by concurrent resolution of the legislature may also pass muster, as in the case in California, New York, Pennsylvania. As long as the legislature is given the opportunity to override the state of emergency, it appears, so far, that the emergency management act and the accompanying executive orders will be upheld. *Government Authority to Respond to COVID-19, the Nondelegation Doctrine, and The Legislature vs Governors Harvard Law, January 28, 2021*.

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ARGUMENT

III. THE COURT SHOULD ABANDON THE TERM "DELEGATION".

Strictly speaking, there is no acceptable delegation of legislative power. The nondelegation doctrine has been presented as a judicial doctrine, not a constitutional provision. The nondelegation doctrine requires a new approach.

The Michigan Constitution does not speak in terms of delegation and nondelegation. Instead it ***vests*** its powers.

Article VI Section 1 of the Michigan Constitution delegates *from the people* "legislative power… **vested**" in a senate and a house of representatives.

When there is a pure delegation of legislative power it is irrelevant whether the standards are adequate. They are not standards related to the exercise of executive or judicial powers; they are, plainly and simply, standards for further legislative power.

It is necessary to flesh out the concept of the "legislative power" that the Constitution vests in Congress.

A law is a rule of conduct imposed by authority.

A legislative act that prescribes no rules of conduct for society, but instead empowers another entity to do so, is not only invalid-*it is not a law*.

The legislature may not pass an act which is not a law in itself when passed, and has no force or authority as such, and is not to become or be a law, until it shall have been created and established by the will and act of some other person or body.

When the statute is couched in vague and uncertain terms or is so broad in scope that no one can say with certainty, ***from the terms of the law itself***, what would be deemed an infringement of the law, it must be held unconstitutional as attempting to grant to the administrative body the power to say what the law shall be.

Legislative power is the power of *prescribing* rules of civil conduct. Laws are complete and positive in themselves when they pass from the legislature, and are not to become laws by the creative power of other persons.

Congress cannot divest itself of the powers that the Constitution vests in it. A delegated power is one that can be resumed at the will or discretion of the delegator.

Congress cannot divest itself of the powers that the Constitution vests in it. A delegated power is one that can be resumed at the will or discretion of the delegator.

The legislature cannot transfer the power of making laws to any other hands; for it being a delegated power from the people, they, who have it, cannot pass it over to others.

When, by means of the Constitution, the people established their legislature, the legislature had no authority to alter their constitution and therefore could not delegate its power.

As an agent of the public, Congress is prohibited from delegating powers granted to it. The nondelegation doctrine was developed out of an elementary maxim of the law of agency, *delegata potestas non potest delagari*-delegated powers cannot be further delegated.

One of the problems with the nondelegation doctrine is that courts are not capable of articulating a coherent and consistent nondelegation doctrine.

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This court should abandon the term delegation and recognize that the Constitution bars any *divesting* of its powers. Delegation is of dubious and disputed authority, it permits what is says it forbids, and it does not help the judges sort out their cases.

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ARGUMENT

V. THE COURT SHOULD ADOPT THE MICHIGAN CONSTITUTION'S PLAIN TEXT OF VESTED

DIVESTING

Congress cannot *divest* itself of what is vested in it. The Constitution does not permit Congress to be divested of the powers that the Constitution says is vested in it.

A transfer of power cannot accurately be considered a delegation. It is a divesting of legislative power. Once the Constitution has said that Congress *is vested* with such power, that body cannot be divested of it by a mere statute.

Delegation is a question of sharing. If the Constitution's legislative powers is vested in Congress they cannot be shared outside Congress.

A mere statute cannot vest the executive branch with power that the Constitution says is "**vested**" in the legislative branch and the executive branch "**shall**" not exercise power of the legislative branch. The logic of the Constitution's phrasing is very powerful.

A statute cannot divest Congress of the power that the Constitution says is vested in Congress. The Constitution mandates where its powers must be located. The Constitution bars any divesting of the powers or vesting of them elsewhere.

The people of the State of Michigan "vested" the legislative powers in Congress and thereby precluded congress from vesting in others, or divesting itself of, such powers.

The absence in the Constitution of text allowing delegation shows that delegation of legislative power is forbidden. Congress can do nothing with that power not explicitly permitted

elsewhere in the Constitution, and because delegation is not mentioned, it is barred.

The law making power is exclusively conferred upon the legislature is absolute and unconditional and it cannot by that body be delegated without an open violation of the constitution. This law making power, the most important of all governmental powers, is absolute and unconditional: that it cannot be delegated to avoid legislative responsibility.

There is no proposition more clear and no principle more plain or certain, than that every act of a delegated authority is void.

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ARGUMENT

VI. THE COURT SHOULD ABANDON THE "INTELLIGIBLE PRINCIPLE" DOCTRINE.

The "intelligible principal" doctrine now faces the chopping block. The intelligible principal doctrine "has no basis in the original meaning of the Constitution". *Gundy* The intelligible principle doctrine "has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional". *Gundy*

The notion of an intelligible principle sets a ludicrously low standard for what Congress must supply. *Gundy* The intelligible principle rule has been referred to as "toothless".

A statute unconstitutionally delegates legislative power when it;

1) allows the agent (actor to whom the authority is delegated) to issue general rules governing private conduct that carry the force of law;
2) makes the content or effectiveness of those rules dependent upon the agent's policy judgment, rather than upon a factual contingency.

To reinvigorate the nondelegation doctrine the courts must abandon the "intelligible principle fiction"-to do so.

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What's the test?

The Executive Branch may engage in fact finding :

(1) Does the statute assign to the executive only the responsibility to make factual findings?

(2) Does it set forth the facts that the executive must consider and the criteria against which to measure them?

(3) And most importantly, did Congress and not the Executive Branch, make the policy judgments ?

The "intelligible principle" the Constitution demands is the traditional rule that Congress may leave the executive the responsibility to find facts and "fill up the details".

This court should abandon the intelligible principle doctrine and adopt the fact finding approach recognizing the Constitution bars any *divesting* of its powers.

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ARGUMENT

VII. THE MICHIGAN ADMINISTRATIVE PROCEDURES ACT VIOLATES THE SEPERATION OF POWERS CLAUSE IN ARTICLE III SECTION 2 OF THE MICHIGAN CONSTITUTION.

MCL 24.207 provides that a "Rule does not include any of the following:"

> (j) A decision by an agency to exercise or not to exercise a **permissive statutory power**, although private rights or interests are affected. (emphasis supplied)

An agency does not have permissive statutory power.

The Constitution bars Congress from delegating *any* legislative power. The Constitution does not speak to delegation. The Constitution uses vesting language of powers and *strict* separation of those powers.

The separation of powers ensures that any new laws governing the lives of Americans are subject to the robust democratic process the Constitution demands.

The Constitution permits only the legislative branch to make law. The executive branch can enforce the law, but cannot create its own.

When an executive agency issues a rule-it is an attempt to exercise binding legislative power not through an act of Congress, but through an administrative edict. Similarly, when an executive agency adjudicates a violation of one of these edicts-in order to impose a fine or suspend a license-it is an attempt to exercise judicial power, not through a judicial act, but through an

administrative act. Administrative adjudication evades almost all of the procedural rights guaranteed under the Constitution.

The Framers gave the judiciary the exclusive power to interpret the Constitution and the laws passed by Congress, so if one of the other branches began to move outside its constitutionally defined territory, the courts would be able to step in and stop it.

The courts cannot endorse this "extraconstitutional arrangement". *Gundy*

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ARGUMENT

VIII. THE COURT OF APPEALS DISMISSAL CONFLICTS WITH A SUPREME COURT DECISION AND WILL CAUSE MATERIAL INJUSTICE.

On February 4, 2022, MDHHS filed a Bypass Application in the Michigan Supreme Court. In the Bypass Application MDHHS stated that the Otsego County Circuit Court ruling is "dangerous". Amicus briefs were filed by the Michigan Senate and the House of Representatives and the Mackinac Center for Public Policy.

On April 1, 2022, the Michigan Supreme Court denied the application because the Court was not persuaded that the questions presented should be reviewed "before consideration by the Court of Appeals".

Justices Viviano and Bernstein dissented stating "[w]e would take this case now to give the court an opportunity to provide clarity on a topic of great importance to our citizens." The dissent continued "the "present case is a sequel of sorts to *In re Certified Questions*, 506 Mich at 385." "After the Court's decision in *In re Certified Questions*, the executive branch turned to the Public Health Code and **especially MCL 333.2253**, as the primary source of authority for its orders pertaining to the epidemic." (emphasis supplied).

The dissent indicated MDHHS is requesting an "overruling" of *In re Certified Questions*. Finally, the dissent determined that under "the circuit court's ruling, the DHHS can no longer rely on MCL 333.2253."

On May 25, 2022 Judge Shapiro, in a Court of Claims action, determined that the delegation of Legislative power to the Executive branch in MCL 333.2253 is constitutional and the issue is not moot. *T&V Associates v Michigan Department of Health and Human Services* Case No. 21-000075-MM Court of Claims.

T&V is a declaratory action. *The Iron Pig* is an action under the Administrative Procedures Act.

On June 8, 2022 *T&V* filed an appeal in the Court of Appeals. Case No. 361727.

On August 17, 2022 in the *T&V* action, MDHHS filed a motion to dismiss the appeal as moot.

On September 19, 2022, the Court of Appeals denied the motion. In a dissent, Judge Krause stated Plaintiff in this matter "sought only declaratory relief. At this juncture that relief would constitute an advisory opinion, based on a **statute that may or may not still exist** in its present form." (emphasis supplied).

T&V conflicts with *In Re Certified Questions.*

The *Iron Pig* anticipates MDHHS will collaterally enforce MCL 333.2253 against the *Iron Pig* with the *T&V* opinion, even though *T&V* was not decided under the Administrative Procedures Act.

As Justices Viviano and Bernstein stated: the "powers exercised by DHHS altered the course of social and economic life in our state-they interfered with our civil liberties and our daily lives, including where and how we work, socialize, educate our children, and worship. It "is our job to decide the extent to which the executive branch may properly wield that power in the first place."

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The U. S, Supreme Court is poised to revisit, and is likely to revive, the constitutional bar on delegating legislative authority. Dissenting in *Gundy,* Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, lamented the court's "intelligible principle misadventure," Justice Alito agreed to reconsider the court's position. *Gundy* was decided before Justice's Kavanaugh and Barrett joined the court. Justice Kavanaugh recently wrote that Justice Gorsuch's thoughtful *Gundy* opinion raised important points. As a law professor, Justice Barrett described the intelligible principle doctrine as "notoriously lax."

On October 2, 2020, the Michigan Supreme Court, citing *Gundy*, struck down the emergency powers of the governor, as a violation of the nondelegation doctrine and the Michigan Constitution's strict separation of powers.

In an "appropriate future case, I would consider adopting the approach to nondelegation advocated by justice Gorsuch in *Gundy*." Justice Viviano concurring *In Re Certified Questions*.

We should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct *only* through the proper exercise of legislative power.

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RELIEF SOUGHT

WHEREFORE, the Iron Pig respectfully requests that this Honorable Court grant the Application For Leave to Appeal; in the alternative stay the application until a decision or application in *T&V* and join the cases and for such other and further relief as this Court deems just and equitable.

Respectfully Submitted,

January 16, 2023

/s/ David M. Delaney
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WORD COUNT STATEMENT

This document contains 13730 words and complies with MCR 7.312 (A).

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