Order

Michigan Supreme Court
Lansing, Michigan

April 1, 2022

Bridget M. McCormack,
Chief Justice

164039 & (7)

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

MOORE MURPHY HOSPITALITY, LLC,
d/b/a IRON PIG SMOKEHOUSE,
Petitioner-Appellee,

v

SC: 164039
COA: 360175
Otsego CC: 21-018522-AE

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent-Appellant.
_____/

On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal prior to decision by the Court of Appeals is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court before consideration by the Court of Appeals.

VIVIANO and BERNSTEIN, JJ. (*dissenting*).

The COVID-19 pandemic, and the government's response to it, has disrupted the daily lives of the residents of our state. For a large portion of the last two years, individuals were isolated, students were left without regular schooling, workers were laid off, and business owners were forced to shutter their shops. Often, these were not simply incidents of the epidemic but the consequences of policies mandated by the executive branch. Of course, "it is not our role to consider or debate the practicality of any of these measures . . . ." *In re Certified Questions From the US Dist Court, Western Dist of Mich*, 506 Mich 332, 434 (2020) (BERNSTEIN, J., concurring in part and dissenting in part). It is our job, however, to timely resolve legal challenges to them. The Department of Health and Human Services (DHHS) seeks this Court's immediate review of the circuit court's decision declaring unconstitutional the statute that the DHHS has cited as authority for many of its COVID-19 orders. We would take the case now to give the Court an opportunity to provide clarity on a topic of great importance to our citizens: the extent of the executive branch's powers to respond to the COVID-19 pandemic. Because the majority has declined to do so, we respectfully dissent.

The present case is a sequel of sorts to *In re Certified Questions*, 506 Mich at 385 (majority opinion). There, this Court held that the statute the Governor had relied on for many of her executive orders addressing the epidemic—the Emergency Powers of the Governor Act (the EPGA), MCL 10.31 *et seq*.—represented an unconstitutional delegation of legislative power to the executive branch. Even before the EPGA was declared unconstitutional, however, the director of the DHHS had issued orders under the statute at issue in this case, MCL 333.2253, part of the Public Health Code, 333.1101 *et seq*. See *In re Certified Questions*, 506 Mich at 405 (VIVIANO, J., concurring in part and

dissenting in part) (discussing the DHHS orders).[1] In essence, "nearly everything the Governor ha[d] done under the EPGA, she ha[d] also purported to do, via the DHHS Director, under MCL 333.2253." *Id*. at 405-406. Although MCL 333.2253 was noted in *In re Certified Questions*, none of the opinions produced in that case opined on the constitutionality of that statute. See *In re Certified Questions*, 506 Mich at 397-406 (VIVIANO, J., concurring in part and dissenting in part) (discussing the statute and its history but not addressing its constitutionality).

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. Just days after the Court's decision, the DHHS director issued an emergency order under MCL 333.2253 establishing significant restrictions across the state, including the closing of "indoor common areas" in restaurants. DHHS, *Emergency Order Under MCL 333.2253—Gathering Prohibition and Mask Order* (October 5, 2020). Roughly one month later, the director issued a new, more extensive order. DHHS, *Emergency Order Under MCL 333.2253—Gatherings and Face Mask Order* (November 15, 2020). Indoor gatherings were "prohibited at non-residential venues," and restaurants in particular were prohibited from providing indoor seating. *Id*. The order was later rescinded, but not before the current case arose.

After the November order was issued, Moore Murphy Hospitality, LLC (Moore Murphy), opened the Iron Pig Smokehouse for indoor dining in violation of the order. Moore Murphy was ordered to stop and was later issued a citation and a $5,000 fine. Moore Murphy appealed the citation to the Michigan Office of Administrative Hearings and Rules. On March 10, 2021, an administrative law judge (ALJ) granted the DHHS summary disposition, affirming the citation and fine. The case then went to the circuit court, which reversed the ALJ's decision. The court held that MCL 333.2253, like the EPGA, was an unconstitutional delegation of legislative power to the executive branch. The circuit court severed the statute from the Public Health Code.

[1] The statute states in relevant part:

> If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code. [MCL 333.2253(1).]

The DHHS has filed the present bypass application in this Court, arguing that we should reverse the circuit court's ruling on various alternative grounds: by overruling *In re Certified Questions*, by holding that MCL 333.2253 is constitutional even under that case, or by holding that the circuit court overstepped its statutory authority under MCL 24.306(1) in severing the statute. The majority declines to hear the case now, sending it back through the normal appellate process, which could take years to fully resolve.

With the director's order already rescinded, and with COVID case numbers down, perhaps the case appears less urgent to some. But not to us. The epidemic has been cyclical, with new variants appearing just when the outlook has improved and restrictions are eased.[2] And then the cycle begins anew, with the imposition of new restrictions mandated by executive orders. Under the circuit court's ruling, the DHHS can no longer rely on MCL 333.2253. That may be a comfort to some and a cause of concern to others. But, until this Court rules, our citizens will not know what their rights are or whether they will continue to be subject to the emergency powers of the executive branch.

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. Whether those powers were exercised wisely is not for us to judge. But it is our job to decide the extent to which the executive branch may properly wield that power in the first place. By passing up the opportunity to put this issue to rest, the majority lets the uncertainty fester. We therefore dissent from the majority's order and would grant the bypass application to decide the questions of immense importance presented in this case.[3]

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[2] Indeed, there are early reports that another wave of infections could occur in Michigan. Chambers, *'Stealth omicron' cases starting to add up in Metro Detroit, Washtenaw County*, The Detroit News (March 19, 2022) (noting "a surge in coronavirus infections in Western Europe" and concerns about another outbreak here), available at <https://www.detroitnews.com/story/news/local/michigan/2022/03/19/stealth-omicron-cases-adding-up-metro-detroit-washtenaw-co/7103296001/> (accessed March 22, 2022) [https://perma.cc/SH7Y-SQUR].

[3] The bypass application meets our standards for granting such applications, as the underlying decision held that a Michigan statute is invalid. See MCR 7.305(B)(4)(b) (allowing bypass applications when "the appeal is from a ruling that a provision of . . . a Michigan statute . . . is invalid"). While we normally let the full appellate process run its course, we believe that the finality concerns mentioned above weigh in favor of granting the application, especially given that the issue of emergency powers has continued to arise, a party has asked us to overrule our precedent, and this precedent is recent and guides the analysis here.