

STATE OF MICHIGAN
IN THE 46th CIRCUIT COURT
OTSEGO COUNTY

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

File No.:21-18522-AE
Hon. Colin G. Hunter

vs.

MICHIGAN DEPARTMENT OF HEALTH
AND HUMAN SERVICES,
Respondent-Appellee.

OPINION AND ORDER REGARDING PETITIONER'S APPEAL

Procedural History and Background Facts

On November 15, 2020, the Michigan Department of Health and Human Services (MDHHS) Director Robert Gordon¹ issued what he termed an emergency order under MCL 333.2253 entitled the "Gathering and Face Masks Order" (the Order). The Order, pertinent to this appeal, prohibited gatherings of individuals and specifically required that restaurants and food service establishments not permit any indoor dining. After the effective date of the Order, Petitioner's restaurant, known as the Iron Pig Smokehouse, refused to comply with the Order

¹ Director Gordon was replaced effective January 21, 2021 with current Director Elizabeth Hertel. Because the identity of the specific Director does not appear to be a relevant issue, however, all references to the MDHHS Director will refer broadly to the current Director at any relevant time.

and allowed indoor dining. MDHHS asserts, and the evidence appears uncontroverted, that Petitioner's alleged violations continued for a total of five days. Ultimately on December 1, 2020, MDHHS issued Petitioner a citation for violations of the Order. Petitioner timely appealed the citation to the Michigan Office of Administrative Hearings and Rules (MOAHR), which concluded with the issuance of a decision and order by Administrative Law Judge (ALJ) Steven Kibit. In sum, ALJ Kibit's decision found that there was no genuine issue of material fact remaining regarding the allegation by MDHHS that Petitioner had violated the Order, and accordingly, summary disposition was granted in favor of MDHHS, the violations were upheld, and a total fine of \$5,000.00 was levied against Petitioner.

Petitioner then filed its claim of appeal with this Court, challenging MDHHS's determinations below as well as the legality of the \$5,000.00 fine. Eventually, the parties stipulated and then the Court ruled that the instant appeal would be limited to the following two issues: one, are the MDHHS orders a "rule" as defined in MCL 24.207 and therefore subject to notice and public hearing requirements of MCL 24.241?; and two, does MCL 333.2253(1) violate the non-delegation clause of the Michigan Constitution?

Standard of Review

The Administrative Procedures Act (APA) provides the scope of review regarding an agency's decision at MCL 24.306(1):

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

This Court's review of the administrative decision is generally limited to determining whether the decision was rendered in accordance with law and whether factual findings were supported by competent, material, and substantial evidence on the record. However, this Court reviews de novo issues of constitutional law and statutory construction.

Uniquely, while the parties have stipulated that the appeal is limited to the two issues described, above, the totality of the administrative record below lacks *any* argument or determination regarding either the non-delegation clause or whether the Orders at issue were "rules" that are subject to the APA process. Thus,

even though a Circuit Court review of an agency decision is generally limited to a review of the record before the agency, because the attorneys for each party have stipulated to which issues this Court should consider on appeal, and because the Court has broad de novo authority to review issues related to constitutional law and statutory construction, the Court will analyze each question in turn regardless of whether the lower agency determination addressed those issues or not. That is, based upon the stipulation of the parties, the Court finds that a genuine justiciable controversy does indeed exist between the parties regarding each of the issues identified, and both issues directly involve either statutory construction and/or Constitutional law.

Legal Analysis

- I. Are the MDHHS emergency orders issued under the authority of MCL 333.2253 “rules” as defined in MCL 24.207 thus requiring public hearings and other requirements before implementation?**

After review of the record on appeal in combination with each brief filed by the parties, and the Court being fully aware that issues regarding statutory construction are reviewed de novo by the Court even on an appeal from an administrative agency, the Court finds that the termed “emergency orders” issued by the MDHHS on November 15, 2020 or at any time thereafter are not “rules” as envisioned by the APA. Because the emergency orders are an explicit exception to

the rule-making process within the APA, Petitioner's claim that the orders are somehow invalid because they did not follow the rule-making provisions within the APA is found by the Court to be without merit.

As a starting point, MCL 24.207(j) provides that "rule" under the APA does *not* include "a decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are effected". Turning to the statute at issue in this case, MCL 333.2253(1) provides the following, in full:

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

Where statutes are clear and unambiguous, no judicial construction is permissible and the Court must enforce the statutory language as written. Here, the Court finds that for purposes of this analysis, MCL 333.2253 is clear, and it is unambiguous. The statute explicitly grants the Director "permissive statutory power" as envisioned by the APA. The permissive nature of that statutory power is captured by the Legislature's use of the words "if" and "may": "...[I]f the director determines"...and "may prohibit the gathering of people for any purpose", and "...may establish procedures".

Because the Legislature not only provided permissive statutory authority to the Director under MCL 333.2253, but because the Legislature also provided in the APA that a “rule” under the APA does not include a decision to exercise a permissive statutory power, and finally, because MCL 333.2253 explicitly refers to the fact that the “director may by emergency order” take the actions permitted, it is clear that in reading the statutory provisions together, emergency orders under MCL 333.2253 are not “rules” under the APA. Because the orders at issue in this case were not “rules” under the APA but instead were emergency orders, no rule-making provisions or steps within the APA needed to be followed before the Director could institute the emergency orders. And, while Petitioner argued during oral argument that the Court of Claims determination in *Let Them Play, et al. v Hertel*, Court of Claims No. 21-60-MS is not binding upon this Court, the Court nonetheless finds the analysis from Hon. Elizabeth L. Gleicher in that case to be persuasive in application to this case even if it is not binding. In other words, the Court adopts Judge Gleicher’s reasoning from *Let them Play, supra* that the “orders” contemplated in MCL 333.2253(1) differ in a fundamental way from the “rules” addressed in the APA, and that as such, the Legislature plainly afforded MDHHS through its Director the option of issuing emergency orders, which is an explicit exception to the rule-making process.

II. Does the enactment of MCL 333.2253 violate the non-delegation clause of the Michigan Constitution?

Applicable Law

In order to have the full force and effect of law, MDHHS' emergency order must draw its authority from a lawful delegation of power. To be clear, the Court here is *not* tasked with deciding whether the emergency orders promulgated by the Director had a solid foundation in medicine or science, had a positive impact on the Covid-19 pandemic or lessened the virus' transmission, or otherwise constituted a reasonable response to an actual emergency. Nor is the Court herein expressing any view on whether or not the Legislature should delegate any of its rulemaking authority related to this or any other circumstance. Rather, the limited Constitutional question presented to the Court is whether the Director was afforded the authority to make rules lawfully, without violating the separation of powers or non-delegation doctrines of the Michigan Constitution. For if the Director's ability to implement emergency orders under MCL 333.2253 arose from an illegal delegation of Constitutional authority from the Legislative to the Executive branch of government, then no amount of medical underpinnings, scientific reason, or common sense arguments regarding the need to protect the

public can withstand scrutiny, at least not when viewed solely from a Constitutional framework, a task which the Court undertakes herein.

The Michigan Constitution of 1963 provides for the separation of powers among the three branches of state government in article 3, section 2:

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

The principal function of the separation of powers...is to...protect individual liberty.

Clinton v City of New York, 524 US 417 (1998) (Breyer, J., dissenting). The Legislative power has been defined as the power to regulate public concerns, and to make law for the benefit and welfare of the state. *46th Circuit Trial Court v Crawford Co.*, 476 Mich 131, 141 (2006). As noted in the Michigan Supreme Court case of *In re Certified Questions From United States District Court, Western District of Michigan, Southern Division*, 506 Mich 332 (2020) (hereafter, *In Re Certified Questions*):

Strictly speaking, there is *no* acceptable delegation of legislative power. The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made. A certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action. The focus of controversy has been whether *the degree* of generality contained in the authorization for exercise of executive or judicial powers in a particular field

is so unacceptably high as to *amount* to a delegation of legislative powers. (internal citations omitted; cleaned up; emphasis in original)

However, despite the Constitutional requirement of separation of powers, Michigan Courts have still interpreted the provision to allow for some overlap of functions between the branches, and the Michigan Supreme Court has even recognized that despite the separation of powers principle—and the non-delegation doctrine in particular—branches of government are not prohibited from obtaining the assistance of coordinate branches. *Taylor v Smithkline Beecham Corp*, 468 Mich 1 (2003). Further, if sufficient standards and safeguards direct and check the exercise of delegated power, the Legislature can safely avail itself of the resources and expertise of agencies and individuals to assist the formulation and execution of Legislative policy. For example, Chief Justice Taft wrote in the United States Supreme Court case of *JW Hampton, Jr. & Co. v United States*, 276 US 394 (1928) that “in determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government coordination.” So long as Congress “shall lay down by legislative act an intelligible principle to which the person or body authorized is directed to conform, such legislative action is not a forbidden delegation of legislative power. *Id.* Accordingly, the United

States Supreme Court has deemed it Constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. *American Power and Light Co. v SEC*, 329 US 90 (1946).

Challenges of unconstitutional delegation of legislative power, therefore, 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. The Michigan Supreme Court has held, for example, in *Dep't of Natural Resources v Seaman*, 396 Mich 299 (1976), that the criteria utilized in evaluating the legislative standards is 1) the act must be read as a whole; 2) the act carries a presumption of constitutionality, and 3) the standards must be as reasonably precise as the subject matter requires or permits. Other Michigan Courts have held that the preciseness required of the standards will depend on the complexity of the subject and that due process requirements must be satisfied for the statute to pass Constitutional muster. *Argo Oil Corp v Atwood*, 274 Mich 47 (1935). In making the determination whether the statute contains sufficient limits or standards, Courts must be mindful of the fact that such standards must be sufficiently broad to permit efficient administration in order to properly carry out the policy of the Legislature but not so broad as to leave the people unprotected from uncontrolled, arbitrary

power in the hands of administrative officials. In other words, the standards prescribed for guidance must be as reasonably precise as the subject-matter requires or permits. *Osius v St. Clair Shores*, 344 Mich 693 (1956). Ultimately, the Constitutional question becomes whether the Legislature has supplied intelligible principles to guide the delegee's exercise of discretion. The answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides. *Gundy v United States*, 139 S.Ct. 2116 (2019).

Other courts have held that the scope of the delegation is also relevant when assessing the sufficiency of the standards, and that the degree of agency discretion that is acceptable varies according to the scope of the power conferred. Consequently, the ultimate judgment regarding the Constitutionality of any delegation must be made not on the basis of the scope of the power alone, but on the basis of its scope *plus* the specificity of the standards governing its exercise. When the scope increases to immense proportions the standards must be correspondingly more precise. See *Schechter Poultry Corp. v United States*, 295 US 495 (1935). In other words, it is one thing if a statute confers a great degree of discretion, i.e., power, over a narrow subject; it is quite another if that power can be brought to bear on something as "immense" as an entire economy. *Id.* As concluded by the Michigan Supreme Court in *In re Certified Questions, supra*:

as the scope of 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.² (emphasis in original)

Of course, Michigan law is also abundantly clear that statutes are presumed to be Constitutional and courts have a duty to construe statutes as Constitutional unless their unconstitutionality is clearly apparent. Accordingly, assuming that there are two reasonable ways of interpreting a statute—one that renders the statute unconstitutional and one that renders it Constitutional—courts should choose the interpretation that renders the statute Constitutional. *People v Skinner*, 502 Mich 89, 110-111 (2018).

Legal Analysis

i. **The scope of the power vested in the Director by the Legislature.**

On November 15, 2020, following the October 2, 2020 Michigan Supreme Court determination in *In re Certified Questions, supra*, the Director issued the emergency order at issue in this case under the authority of MCL 333.2253. The order was a total of eight pages in length and contained mostly single-space type.

² Of course, *In re Certified Questions, supra* considered a delegation of Legislative authority to the Governor of the State of Michigan directly, whereas the instant statute concerns a delegation of Legislative authority to the Director, who heads an executive agency under the ultimate authority of the chief executive: the Governor. Despite that minor difference, there is no question that the instant delegation was indeed from the Legislative to the Executive Branch of Government, even if it was not in the same exact form as in *In re Certified Questions, supra*.

The order had seven total sub-parts of applicable requirements, in addition to a definitional section and a section regarding face mask exceptions. Those seven parts of the order provided, broadly:

- a—general capacity limitations at indoor and outdoor gatherings, including at Michigander’s own homes and businesses
- b—specific and detailed gathering restrictions at particular types of facilities which included nearly all entertainment or recreational facilities and places of public amusement within the entire state
- c—specific and detailed gathering restrictions for other facilities, which encompassed nearly every conceivable retail store or business within the entire state
- d—gathering limitations at all schools, colleges, and universities
- e—gathering restrictions regarding organized sports which also included an enhanced testing program for all student athletes
- f—face mask requirements for all gatherings, regardless of location, and which further required business owners and operators to refuse entry and/or service to individuals who refused to wear a face mask
- and g—contact tracing requirements for particular gatherings, mostly targeted at several varieties of particular business operations, schools, and other facilities.

All told, the 8-page order immediately imposed requirements on nearly every aspect of Michiganders’ lives, even within the confines of their own homes, and severely curtailed operations across nearly every sector of public and private business within the state. Every public school within the state was also subject to vast restrictions, making the reach of the order nearly total. Specifically as it relates to the instant case, the order effectively issued a shut-down (aside from take-out) of a large portion of restaurant businesses in an instant, given that many

restaurants did not have the space or capability to offer outdoor dining³. In addition, by requiring businesses to enforce the Director's mask and contact tracing requirements, businesses were forced to make a decision: either follow the order's guidance and undertake the responsibility of enforcing the directives on the one hand, which risked the business owner's own possible financial security given the immediate and divisive impact that the order created in the public, or on the other hand, ignore the imposed duty to enforce and face potential closure of their businesses or the institution of fines by the Department. Thus, not only were the effects of the order far-reaching, the order effectively mandated Michigan-wide business enforcement of the Director's order. As noted by the Michigan Supreme Court in *In re Certified Questions, supra*, in examining the breadth of the Governor's exercise of power under the EPGA, which is very similar, even if admittedly broader than the authority exercised by the Director in this case:

What is more, these policies exhibit a sweeping scope, both with regard to the subjects covered and the power exercised over these subjects. Indeed, they rest on an assertion of power to reorder social life and to limit, if not altogether displace, the livelihood of residents across the state and throughout wide-ranging industries.

³ The order did not allow any indoor gathering at any food service establishment except in custodial settings, medical facilities, school and university cafeterias, shelters, and soup kitchens. Order, section 3(b)(1).

Under the terms of the Director's order in this case, the Court finds a great degree of similarity in the effect of the order, again, even if the scope of the Director's order was less than the original orders issued by the Governor under the EPGA: the Director's combined requirements effectively continued the reorganization and reordering of social life and continued the limitation, if not displacement, of residents across the state and throughout wide-ranging industries, in much the same fashion as our Governor's previous Orders had done. Considering the context of the Director's sweepingly broad exercise of power under MCL 333.2253, buttressed by enforcement and implementation procedures which were also detailed in the order in addition to warnings that violators would be subject to a misdemeanor conviction and imprisonment for up to 6 months, any claim that the exercise of power was somehow a "carefully tailored and targeted fashion" or otherwise not extremely substantial in scope and effect is found unavailing by the Court.

The power the Director holds under MCL 333.2253 is no mere "filling in the details" as stated by Justice Viviano in his concurrence in part in *In re Certified Questions, supra*. Rather, it is an overwhelmingly broad power to affect every action of Michiganders' private, business, and public lives. Lawmaking, the framers of the federal Constitution believed, should be difficult because it poses dangers to

liberty. Acting under the authority granted in MCL 333.2253, however, is not difficult as it requires merely the determination and pen-stroke of but one individual, and allows for an unprecedentedly broad use of power to affect every aspect of Michiganders' daily lives. Such immense authority being exercised by an administrative official—as compared to by the Legislative branch of government, which has the lawmaking authority to begin with, in addition to its own various requirements to pass any law—therefore, poses even more serious risks to the liberty of each and every citizen of Michigan, *unless* the safeguards and standards placed by the Legislature in the delegating statute meaningfully direct or channel the exercise of such power.

ii. The durational length of the exercise of authority under the statute.

Having determined that the scope of power conferred by the Legislature to the Director under MCL 333.2253 is comprehensively broad, the next consideration is whether or not the statute is limited in any temporal manner such that the broad grant of authority is somehow lessened. Of course, an unconstitutional delegation is no less unconstitutional because it lasts 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. Courts have recognized this consideration, although they have also acknowledged that it

is often not dispositive. *In re Certified Questions, supra*, at 362. Here, despite being extreme in breadth, the statute does indeed contain at least *some* measure of limitation on duration: an order under MCL 333.2253 can only be in place if the Director determines that an epidemic exists. And, as will be detailed below, the Public Health Code as a whole declares public health to be of primary public concern and directs that the Department shall make investigations and inquiries into the causes of disease, and particularly of epidemics. MCL 333.2221. Despite the language (control of an epidemic) that appears to limit the durational scope of the exercise of authority, however, another problem arises when viewing the statute as a whole: no part of the statutory scheme provides any definition of the triggering event for the exercise of that extensive authority: “epidemic”. For example, within the definitional section of the public health code, MCL 333.1104 through 1108, “epidemic” is not given any specific definition, even though MCL 333.1103 states that “[o]ther definitions applicable to specific articles, parts, or sections of the code are found in those articles, parts, or sections”. Nor is epidemic given any specific meaning within the confines of the statutory part itself. Accordingly, although there appears to be some temporal limitation within MCL 333.2253 because of the use of the word “epidemic”, there is no definition of what that important word means—or *how its definition is in any way limited or*

channeled by the Legislature—within any of the entire statutory scheme. As a result, the Director alone is left with unfettered discretion to determine when an epidemic begins or ends or whether it exists at all, which causes this Court even greater concern regarding the durational scope of the delegated power.

Further, as it relates to the broad ability to exercise power under MCL 333.2253, the Court also notes that since the word “epidemic” remains undefined and solely up to the determination of the Director, the potential for even more extreme uses of that broad emergency order authority clearly exist, even if they have not yet been utilized. For example, consider the fact that that the Department, in 2019, promulgated emergency rules (under different statutory authority than in the instant case) related to “vapor products” and “alternative nicotine products” in response to the Department’s finding that Michigan was confronted with a “vaping crisis among youth”. See *Slis v State*, 332 Mich App 312 (2020)⁴. In enacting those emergency rules, the Department articulated many reasons for its finding, noting, of particular potential application to this case, that

⁴ In *Slis*, the Michigan Court of Appeals affirmed the Michigan Court of Claims determination to grant a preliminary injunction *against* the enactment of the emergency rules at issue in that case. However, the *Slis* case nonetheless illustrates some of the exercise of authority that the Department has recently attempted to exercise, which the Court finds important to consider in context of the question of just how broad of authority, utilized or not, the Director has been granted under MCL 333.2253.

“in December of 2018 the United States Surgeon General Jerome Adams officially declared e-cigarette use among youth in the United States an epidemic”.

Drawing from the broad authority vested in the Director in MCL 333.2253, if the Director determines that e-cigarette use constitutes an epidemic, the Director could prohibit gatherings of any nature for any purpose, and could establish procedures to be followed during that “epidemic” to insure continuation of essential public health services and enforcement of health laws. Again, the only triggering events necessary for the extreme breadth of power under the statute is the Director’s determination that an epidemic exists and that control of it is necessary to protect public health. Under the statutory language in MCL 333.2253, the question necessarily becomes for how long such a declaration of “epidemic” exists, and what channeling of that exercise of discretion is found within the statutory text related to such a declaration? What if the Director finds that Michigan is in the grips of an “obesity epidemic”? An “opiate epidemic”? The prospective list goes on.

Regardless, the clear point is that the *unexercised, but available* use of the Director’s authority could conceivably reach and effect each and every political, social, moral or other societal problem if only the Director determines that the concern can now be categorized as an “epidemic”, and that the Director believes

that control of the epidemic is necessary to protect public health. To find that the grant of authority to the Director is somehow limited—given that possible enormously expansive interpretation—would be to ignore an allowable use of the statutory power, whether wielded by the Director to this point or not. Regardless, and turning back to the case at hand, as the Director’s *actual* use of authority drawn from the statute has shown to date, above, the Director’s *exercised* authority under the statute has already proven demonstrably immense. To repeat, however, whether there are limits on the duration of the exercise of power under delegated authority is often not dispositive, although it can be a factor in the court’s analysis.

iii. Are the standards imposed by the Legislature on the Director’s exercise of discretion as detailed and precise as needed in comparison to the immense scope and duration of power authorized by MCL 333.2253?

Considering the fact that the Legislature granted to the Director an enormously broad scope of power which is limited in duration only by the Director’s own determination of when an epidemic begins or ends and that control of the epidemic is necessary to protect public health, the Constitutional inquiry next turns to whether the standards imposed by the Legislature in the delegation are as detailed and precise as the subject matter requires. Again, as explained by our high Court in *In re Certified Questions, supra*, as the scope of powers conferred upon the [Director] by the Legislature becomes increasingly broad, in regard to both the

subject matter and their *duration*, the *standards* imposed upon the [Director's] discretion by the Legislature must correspondingly become more detailed and precise. (emphasis in original).

In consideration of the precise language chosen by the Legislature in MCL 333.2253—"If the director determines that control of an epidemic is necessary to protect the public health"—it is obvious that minimal "standards" to guide the exercise of the Director's discretion exist. If the Director unilaterally determines that an "epidemic" exists and that it is "necessary" to protect the public health, the Director is empowered to enact broad, sweeping, and temporally unlimited emergency orders. In other words, the only channeling of discretion occurs, if it occurs at all, at the sole determination of the Director, without any ability of the Legislature itself (the lawmaking body) to impact that exercise of discretion after the delegation is made. And even giving the benefit of the doubt to the arguments proffered by the Department that the orders may or did save lives, that they have scientific backing, that they will control the spread of an epidemic, or that they exist solely to protect public health, these points largely side-step the question presented: given the scope of power and the durational length of its exercise, has the Legislature supplied *intelligible principles* to guide the delegee's exercise of

discretion? **Gundy, supra**. The answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides.

While MCL 333.2253 clearly delegates to the Director the *task* of determining that control of an epidemic is necessary to protect public health, the Court finds that the Legislature wholly abandoned its requirement to provide any intelligible principles or instructions to guide the delegee's exercise of power when it enacted the statute. Allowing the Director to have control over nearly every aspect of Michigander's public and private lives by the unilateral determinations of the existence of an epidemic and that control of it is necessary to protect public health provides literally no channeling of any specific discretion, but instead provides only broad directives. And as noted above, those broad directives come not from any Legislative determination or guidance, but from determinations made solely by the person empowered to act under the statute. Moreover, because the preciseness required of the standards depends upon on the complexity of the subject (***Argo Oil Corp, supra***), and because there can be no doubt that the subject matter is very complex and quickly changing—control of an epidemic which effects the entire economy and all persons within the state—specific precision in standards and checks on the exercise of delegated power is required. Here, no such specificity or

detail on any standards exists. Without those necessary instructions or intelligible principles, no lawful delegation of Legislative authority to the Director occurred.

To reiterate, scrutiny of the text of MCL 333.2253 reveals that although the authority to issue broad orders is apparent, the statute contains an absence of any actual principle whatsoever to guide the exercise of power, aside from the broad and limited determinations by the Director that his chosen course of action is necessary and that an epidemic exists. Of course, in *In re Certified Questions, supra*, where the statutory language of the EPGA delegated power to the Governor to “promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property”, our high Court struck down the delegation as unlawful *precisely* due to a lack of guiding principles other than the words “reasonable” and “necessary”, when balanced against the broad grant of authority within the EPGA. Here, MCL 333.2252 is even further bereft of any guiding language as it does not even require orders issued by the Director to even be minimally reasonable.⁵

Like the Michigan Supreme Court in *In re Certified Questions, supra*, the Court here finds that the consequence of the illusory “non-standard” standards in

⁵ Of course, it would seem obvious that the Legislature would not approve of any use of authority that was not reasonable; yet, even while the *In re Certified Questions, supra* Court noted this, the Court held that even those combined limitations on the exercise of discretion—“reasonable” and “necessary”—were not enough to pass Constitutional muster given the vast delegation of authority.

MCL 333.2253—“If the director determines that control of an epidemic is necessary to protect the public health”—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, limited only by the Director’s determinations that an epidemic exists and that his actions are necessary. In other words, there is nothing within the sole standards provided, “necessary” or “epidemic”, that serve in any realistic way to guide the Director’s exercise of discretion under the statute or to channel or check that power, outside of the Director’s own findings.

Although Michigan law is clear that the three branches of government are indeed permitted to have some overlap between the branches or obtain assistance from each other, that overlap cannot mean that one branch of government wholly abdicates its authority to another branch with little or no check on the exercise of discretion. As observed by Justice Gorsuch is his dissent in *Gundy, supra*, the strict requirements for legislation would mean nothing if the legislative branch could pass off its legislative power to the executive branch. So when a court throws up its hands and says an airy standard like “reasonableness” is enough to make a delegation proper, the court is not simply letting the legislature recalibrate its institutional interests—it is allowing the legislature to pass off responsibility for

legislating, thereby endangering the liberties of the people, as the present case has vividly demonstrated. *In Re Certified Questions, supra*.

In examination of MCL 333.2253, the Court finds that it cannot merely throw up its hands and sanction airy standards like “necessary” or a finding that an “epidemic” exists as enough guidance on the exercise of the Director’s discretion to make the delegation proper, especially not when considering the monumental breadth of lawmaking authority delegated. The Court finds that to allow *this* delegation of exceedingly broad power without any real check on the exercise of such authority would allow the Legislature to pass off its responsibility for legislating, thereby endangering the liberty of the people.

iv. The 3-part standards test as stated in *Dep’t of Natural Resources v Seaman, supra*.

Having above determined that the grant of authority within MCL 333.2253 is enormously broad, without meaningful temporal limitation, and lacking any concrete standards to channel the exercise of the Director’s discretion, it can be predicted how the Court will analyze the so-called “standards test” that remains a central component of non-delegation clause analysis. First, the Court has determined that review of the act as a whole illuminates no further context that would make the delegation of *this* broad, temporally unchecked authority to the

Director proper. It is accurately recounted by Respondent that the statute is found within Michigan's Public Health Code, the statute applies to epidemics, and that the Director is tasked with responding specifically to epidemics under the context of that code. Just as accurately, Respondent argues and the Court agrees that by installing guardrails upon who can hold the position as Director, the Legislature indicated some special emphasis on the investigation of, and response to, epidemics as a real public health threat, and installed requirements that those persons advising the Director be qualified to make such recommendations. Just as clearly, under the second prong of the standards test, this and all statutes are presumed Constitutional, and no non-delegation attack does anything to abrogate that presumption. And, as referenced by Respondent and again found accurate by the Court, this statute must be liberally construed for the protection of the health, safety and welfare of the people of this state.

Those first two prongs being clearly met, the Court's focus—and the essential disagreement in this case between the parties—turns to whether or not the standards contained within the statute are as reasonably precise as their subject matter permits. Without repeating the analysis above, but simply to reiterate, the Court finds that the airy standards in existence in the text of the statute—"epidemic" and "necessary"—cannot and do not guide or channel the

exercise of the Director's discretion in any significant manner, especially not considering the breadth of the subject matter and the amount of authority delegated under MCL 333.2253. In fact, by delegating lawmaking authority from the Executive to the Legislative branch to be used on an expedited basis with none of the ordinary checks and balances that underlie our system of government, in effect, transitions an overwhelming level of Legislative lawmaking authority to another branch of government and does nothing to check the use of that authority.

In light of the unique and wide-ranging delegation of Legislative power and durational scope of said power to the Director, the Court finds the standards in MCL 333.2253 woefully inadequate in channeling the Director's exercise of discretion in any meaningful way. Instead, the standards in the statute when compared to the amount of authority granted are, in application, so broad as to leave the people unprotected from uncontrolled, potentially arbitrary power in the hands of administrative officials. Accordingly, the statute does not survive this delegation challenge.

v. Can MCL 333.2253 can be severed from Michigan's Public Health Code?

Having reached the conclusion that MCL 333.2253 does not survive this delegation challenge, the Court must then address whether the unlawful

delegation is severable from the Public Health Code as a whole. MCL 8.5 provides as follows:

In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:

If any portion of an act or the applicable thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

The Michigan Supreme Court has long held that it is the law of this State that if invalid or unconstitutional language can be deleted from an ordinance and still leave it complete and operative then such remainder of the ordinance be permitted to stand. *Eastwood Park Amusement Co. v East Detroit Mayor*, 325 Mich 60 (1949).

After examination of the whole of the Public Health Code, the Court finds that removal of MCL 333.2253 from that act will not make the rest of the Public Health Code inoperable. First, on its face, MCL 333.2253 reminds readers that “[e]mergency procedures shall not be limited to this code”. In addition, various other statutes within the broad Public Health Code also apply to similar, albeit

slightly different circumstances⁶. Though it is conceivable that some or all of those statutory provisions may ultimately be determined to suffer from the same fatal delegation flaws as MCL 333.2253, under the doctrine of judicial restraint, this Court will not venture to guess at the scope, duration, or channeling of exercise of discretion that relates to those particular statutes. However, since there are numerous other statutory provisions within the Public Health Code which cover similar areas as MCL 333.2253, the rest of the code would not be rendered inoperable by severing the statute. Accordingly, the Court finds it appropriate to sever MCL 333.2253 from the Public Health Code under MCL 8.5.

Conclusion & Order

In sum, the Court finds that MCL 333.2253, while likely the product of well-meaning forethought by the Legislature to permit quick action in times of actual emergency, fails to pass Constitutional muster because, read as a whole, the statute fails to include any meaningful standards that channel either the scope of the Director's exercise of sweepingly broad authority, or the duration of the exercise of such authority, in any material way. As such, the delegation of power contained within MCL 333.2253 violates the Michigan Constitution's non-

⁶ For example, MCL 333.2453 (Epidemics, local health departments, emergency procedures); MCL 333.5201 (Hazardous communicable diseases); MCL 333.2455 (Nuisance or unsanitary condition, correction or removal); MCL 333.5101 (Prevention and control of diseases). This is not an exhaustive list.

delegation doctrine; consequently, any penalty imposed under a claimed violation of the statute—including the \$5,000.00 fine at issue in this case—is void *ab initio*, and is of no continuing legal effect. It should again be emphasized, as was concisely stated by the Michigan Supreme Court in *In re Certified Questions, supra*, that this Order leaves open many avenues for the Executive branch and the Legislative branch of our government to work together in a cooperative spirit and Constitutional manner to respond to this, or any other, emergent condition.

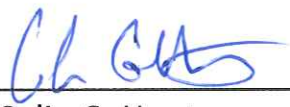
Though the Court has taken into account the Public Health Code in its entirety and has begun, as required, with the presumption that MCL 333.2253 is Constitutional, the Court finds that the presumption of Constitutionality of MCL 333.2253 has been decisively overcome and thoroughly rebutted by the Legislature's failure to channel the Director's exercise of discretion in wielding the broad and temporally unlimited power held under the statute. As such, the Court finds that by enacting MCL 333.2253, the Legislature clearly and unambiguously abandoned its role to delegate lawmaking authority *only* when appropriate checks and guidance on the use of such authority are in place. By doing so, the Legislature violated the separation of powers doctrine of the Michigan Constitution, and this Court must invoke its judicial review authority as a co-equal branch of government to now undo that improper delegation.

As MCL 333.2253 has not survived Petitioner's non-delegation challenge under the Michigan Constitution and is clearly an unconstitutional delegation of power from the Legislative to the Executive branch, MCL 333.2253 is hereby severed from Michigan's Public Health Code.

This Order constitutes a final Order and closes this case.

IT IS SO ORDERED.

Date: 1-13-2022




Hon. Colin G. Hunter
46th Circuit Court
Otsego County

PROOF OF SERVICE

I certify that copies of this Opinion and Order were mailed to the parties and/or their attorneys by first class mail this date.

Date mailed: 1/13/22



Clerk