STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

MOORE MURPHY HOSPITALITY, LLC, d/b/a IRON PIG SMOKEHOUSE,,	S. Ct. No. 164039
Petitioner-Appellee,	CoA No. 360175
v	L.C. No. 21-18522-AE Otsego Circuit Court
MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,	**This appeal involves a ruling that a provision of the constitution, a statute, rule, or regulation or other state governmental action is invalid.**
Respondent-Appellant.	

David M. Delaney (P43485)
DAVID M. DELANEY PLC
Attorneys for Petitioner-Appellee
113 N. Illinois Avenue
Gaylord, MI 49735
(989) 731-1508
dmdlawyer@gmail.com

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

James R. Peterson (P43102)
Stephen J. van Stempvoort (P79828)
Amy E. Murphy (P82369)
MILLER JOHNSON
Attorneys for Amicus Curiae
The Mackinac Center for Public Policy
45 Ottawa Avenue SW, Suite 1100
Grand Rapids, MI 49503
(616) 831-1700
petersonj@millerjohnson.com
vanstempvoorts@millerjohnson.com
murphya@millerjohnson.com

Patrick J. Wright (P54052)
MACKINAC CENTER LEGAL FOUNDATION
Co-Counsel for Amicus Curiae
140 W. Main Street
Midland, MI 48640
(989) 631-0900
wright@mackinac.org

THE MACKINAC CENTER FOR PUBLIC POLICY'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN OPPOSITION TO THE MDHHS' APPLICATION FOR LEAVE TO APPEAL

The Mackinac Center for Public Policy moves this Court under MCR 7.212(H) for leave to file a brief as amicus curiae in this Court, and states in support of its motion:

1. The Mackinac Center for Public Policy is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987.

2. The Mackinac Center for Public Policy has a profound interest in the outcome of this matter, because the Governor's executive orders related to the COVID-19 pandemic imposed severe restrictions on the rights and liberties of individuals and businesses in Michigan, as well as significant financial burdens, and because the orders violated the principles of separation of powers. This Court's ruling in *In re Certified Questions*, 506 Mich 332; 958 NW2d 1 (2020), is an important component of this Court's jurisprudence defining the limits of executive and legislative power under Michigan's Constitution, and the Mackinac Center for Public Policy has a significant interest in advocating for the appropriate application of the Court's ruling.

3. As friend of the Court, the Mackinac Center for Public Policy seeks to present to the Court a different perspective regarding the issues in this case than those presented by the parties.

4. Michigan's judicial policy favors amicus filings. *Grand Rapids v Consumers Power Co*, 216 Mich 409, 414-415; 185 NW 852 (1921).

WHEREFORE, The Mackinac Center for Public Policy requests that this Court enter an order granting this Motion for Leave to File Amicus Curiae Brief and accept for filing The Mackinac Center for Public Policy's proposed amicus curiae brief, which is attached as **Exhibit A**.

MILLER JOHNSON
Attorneys for Amicus Curiae
The Mackinac Center for Public Policy

Dated: March 7, 2022

By /s/ Stephen J. van Stempvoort

James R. Peterson (P43102)
Stephen J. van Stempvoort (P79828)
Amy E. Murphy (P82369)
45 Ottawa Avenue SW, Suite 1100
Grand Rapids, Michigan 49503
(616) 831-1700
petersonj@millerjohnson.com
vanstempvoorts@millerjohnson.com
murphya@millerjohnson.com

EXHIBIT A

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

MOORE MURPHY HOSPITALITY, LLC, d/b/a IRON PIG SMOKEHOUSE,,	S. Ct. No. 164039
Petitioner-Appellee,	CoA No. 360175
v	L.C. No. 21-18522-AE Otsego Circuit Court
MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,	
Respondent-Appellant.	

David M. Delaney (P43485)
DAVID M. DELANEY PLC
Attorneys for Petitioner-Appellee
113 N. Illinois Avenue
Gaylord, MI 49735
(989) 731-1508
dmdlawyer@gmail.com

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

James R. Peterson (P43102)
Stephen J. van Stempvoort (P79828)
Amy E. Murphy (P82369)
MILLER JOHNSON
Attorneys for Amicus Curiae
The Mackinac Center for Public Policy
45 Ottawa Avenue SW, Suite 1100
Grand Rapids, MI 49503
(616) 831-1700
petersonj@millerjohnson.com
vanstempvoorts@millerjohnson.com
murphya@millerjohnson.com

Patrick J. Wright (P54052)
MACKINAC CENTER LEGAL FOUNDATION
Co-Counsel for Amicus Curiae
140 W. Main Street
Midland, MI 48640
(989) 631-0900
wright@mackinac.org

AMICUS BRIEF OF THE MACKINAC CENTER FOR PUBLIC POLICY IN OPPOSITION TO THE MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES' BYPASS APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

Introduction 1

Argument 2

I. This appeal is a flawed vehicle through which to address the viability of *In re Certified Questions*. 2

II. There is no urgent necessity that justifies short-circuiting the ordinary appellate process. 4

III. Granting the bypass application would likely foster an unwarranted, politicized view of the Court. 6

Conclusion 8

TABLE OF AUTHORITIES

Page(s)

Cases

Biden v Missouri,
142 S Ct 647 (2022).....5

Boertmann v Cincinnati Ins Co,
493 Mich 963; 828 NW2d 675 (2013).....8

In re Certified Questions,
506 Mich 332; 958 NW2d 1 (2020).....1, 2, 3, 4, 6, 7, 8

House of Representatives v Governor,
943 NW2d 365 (Mich. 2020).....2

Joseph v Auto Club Ins Ass'n,
491 Mich 200; 815 NW2d 412 (2012).....7

Nat'l Fed'n of Indep Bus v Dep't of Labor,
142 S Ct 661 (2022).....5, 6

Robinson v City of Detroit,
462 Mich 439; 613 NW2d 307 (2000).....7

Rules

MCR 7.215(C)(1).....4

Statutes

MCL 333.2253.....3

Other Authorities

https://www.cnbc.com/2022/03/03/more-than-90percent-of-us-population-can-ditch-facemasks-under-cdc-covid-guidance.html (last visited March 4, 2022).....6

MDHHS Order, June 17, 2021 (eff. June 22, 2021).....5

Introduction

This case involves a $5,000 fine that was imposed in an administrative appeal under an administrative-agency order that was rescinded months ago. The trial court's ruling has no binding precedential effect. There is no particular urgency that would warrant the unusual step of granting a bypass application and circumventing the ordinary appellate process.

Despite the comparatively low stakes of this case, the Michigan Department of Health and Human Services seeks to use this appeal as a vehicle for overruling this Court's recent decision in *In re Certified Questions*, 506 Mich 332; 958 NW2d 1 (2020). But the Department itself argues that *In re Certified Questions* should make no difference to the result of the Department's appeal: "[While the court leaned heavily on *In re Certified Questions*, that decision . . . does not provide a viable path to a different outcome." (Application, at 34). Instead, the Department asserts that the appeal can be resolved in its favor on the basis of this Court's "settled precedent" apart from *In re Certified Questions*. (Application, at 34).

It is therefore unclear why the Department believes that this appeal warrants unusual and expedited relief through a bypass application. If the Court of Appeals agrees with the Department that *In re Certified Questions* has no effect on its appeal, there will be no need for this Court to re-enter the highly politicized debate over pandemic-related executive authority. This appeal is a flawed vehicle with which to address the viability of *In re Certified Questions*, especially when it very well may be entirely needless for this Court to do so.

It is possible that the Department believes that the time is ripe to obtain a reversal of *In re Certified Questions*, simply because the composition of this Court has changed. But that would be an unwarranted and cynical view of the Court. It also underestimates the problematic public perceptions that would be caused by overruling *In re Certified Questions* less than two years after deciding it. The *In re Certified Questions* decision was one of the most widely publicized

decisions of this Court in decades, and if it is reversed so soon, many members of the public would be likely to make an unfortunate connection between the Court's change in composition and any such reversal. Many Michigan citizens would also be surprised to learn that the issue of the executive branch's authority to issue pandemic-related executive orders was back up for debate, two years after that issue had been laid to rest.

The bypass application should be denied, and the Department's appeal should proceed in the Court of Appeals in the normal course.

Argument

I. This appeal is a flawed vehicle through which to address the viability of *In re Certified Questions*.

There are both procedural and substantive flaws in this case—both of which make it an unsuitable candidate for this Court to review the viability of *In re Certified Questions*.

First, as has been noted elsewhere, the Department failed to preserve its argument that *In re Certified Questions* should be reversed. (Amicus Br. of Legislature, at 5-6). The Department is asking this Court to short-circuit the ordinary appellate process in order to review an argument that has never been raised in or ruled upon by any other court in any other case at any other level. It would be highly unusual for this Court to accept that invitation. Ordinarily, "full and thorough appellate consideration" is preferred over a bypass application. *House of Representatives v Governor*, 943 NW2d 365, 365 (Mich. 2020) (Bernstein, J., concurring); see also *id*. at 369 (Clement, J., concurring).

Second, the Department's own bypass application advances a host of reasons why a ruling on the viability of *In re Certified Questions* is not necessary to the resolution of this case. For example, the Department observes that the trial court's ruling was rendered in an administrative appeal, in which the trial court lacked the authority (and was not asked) to strike

the statute as unconstitutional on non-delegation grounds. (Application, at 39-40). If the Court of Appeals agrees with the Department on this issue, there would be no need for this Court to wade back into the highly charged debate over the scope of executive authority with respect to pandemic-related measures.

Similarly, the Department argues repeatedly that it should prevail in the Court of Appeals even under the standard set forth in *In re Certified Questions*, such that there is no need for that case to be overruled. The Department's bypass application points out that *In re Certified Questions* involved a "substantially different" statute than the one at issue here, and argues that the Department should prevail in this case "even under *In re Certified Questions*." (Application, at 23; *id*., at 10). In fact, the Department argues that the *In re Certified Questions* majority was fully cognizant of MCL 333.2253 and intended the Court's decision essentially to be limited to its facts:

> *In re Certified Questions* characterized itself as a singularly exceptional intersection between "an extraordinary doctrine, not routinely to be invoked," and an "extraordinary" statute in the EPGA, which was incomparable to "any other law of this state" in the nature of its delegation. *Id*. at 372 n 21 (emphasis added). The majority expressly stated that "[w]e do not believe that the conflation of circumstances giving definition to the delegated powers in this case . . . will soon come before this Court again," *id*. at 384, all while plainly aware of MCL 333.2253 and its use to combat the instant pandemic, *id*. at 405 (Viviano, J., concurring in part); *id*. at 432 (McCormack, C.J., dissenting in part), as well as of the Court's own endorsement of robust delegations by the Legislature to executive officials to combat the spread of disease. See *id*. at 355, citing *People ex rel Hill v Bd of Ed of City of Lansing*, 224 Mich 388, 392 (1923).
>
> *In re Certified Questions*, in other words, anticipated claims like this, and signaled they should be rejected. And on this point, at least, the decision was correct.

(Application, at 22).

If the Court of Appeals agrees with the Department, then there will be no need for this Court to opine on the matter. At this point, *In re Certified Questions* is not directly implicated in this case—and it may never be. The Department's appeal may very well be disposed of on alternative grounds, meaning that the Department's challenge to *In re Certified Questions* may never need to be resolved by any appellate court, much less this one.

II. There is no urgent necessity that justifies short-circuiting the ordinary appellate process.

Despite the Department's overwrought rhetoric, the analysis in *In re Certified Questions* does not pose any urgent threat to the balance of powers in this State. Although the Department cites several pending cases posing various non-delegation claims, the Department does not cite any decision—other than the trial court in this case—striking down any statute on non-delegation grounds. There is no burgeoning crisis of non-delegation cases engendered by *In re Certified Questions*.

Nor is there any reason to suspect that this particular case will substantially reorient Michigan's non-delegation jurisprudence. According to the Department, the Court of Appeals should reverse the trial court without needing to revisit *In re Certified Questions*. Moreover, this case involves a $5,000 fine that was based on an administrative order that has long since been rescinded. Given the low stakes of the case, the Court of Appeals may choose to issue an unpublished decision that has no precedential authority. MCR 7.215(C)(1). Despite the Department's concerns, this is not an appeal that is likely to significantly alter the status quo.

The Department's assertion that there may be overreach by trial courts in future cases is speculative. The much more likely scenario is that each of those claims will be resolved thoroughly and professionally by the various courts adjudicating them. The federal Supreme Court's recent disposition of claims challenging COVID-19 vaccine mandates exemplifies the

approach that Michigan's courts are likely to apply. Instead of striking down each mandate, the Supreme Court upheld the CMS mandate and invalidated the OSHA mandate, recognizing that the two agencies were governed by different statutes and had been given differing scopes of authority. See *Biden v Missouri*, 142 S Ct 647, 653 (2022) (upholding CMS mandate); *Nat'l Fed'n of Indep Bus v Dep't of Labor*, 142 S Ct 661, 665 (2022) (invalidating OSHA mandate).

Michigan's courts are likewise fully capable of appreciating the nuances of each factual scenario and statute that comes before them on non-delegation grounds. And even if one or two trial courts do misapply Michigan's non-delegation principles along the way, those determinations can be resolved in the first instance in the Court of Appeals consistent with the ordinary appellate process. The Department offers no reason to believe that any of the ills that it forecasts will actually come to fruition, nor does it provide any reason to suspect that the ordinary appellate process is unable to adequately resolve appeals involving non-delegation claims.

The existence of the COVID-19 pandemic does not make the analysis any different. As the Department argues, the trial court's order in this case was issued only within the context of an administrative appeal that could properly resolve only the validity of a $5,000 fine. The trial court's order did not empty the Department's toolkit of options with which to respond to the pandemic.

The need for exigent rulings related to the pandemic has also dissipated. The Department rescinded the large majority of its pandemic-related orders almost nine months ago—on June 17, 2021—and has never reinstated them. (MDHHS Order, June 17, 2021 (eff. June 22, 2021)). Federal decision-makers have followed the same trend. For example, according to the CDC's guidance updated as of February 25, 2022, the CDC assesses that almost 90% of Americans

no longer need to wear facial coverings.[1] Those favorable trends have not been derailed by pandemic-related litigation. In January 2022, for example, the Supreme Court struck down OSHA's vaccine mandate on the ground that "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance," *Nat'l Fed'n of Indep Bus*, 142 S Ct at 665. That decision, however, appears to have had little to no impact on coronavirus data curves, which continue to trend downwards.

Here, too, even if the trial court's analysis was incorrect, there is not an urgent coronavirus-related need to expedite review of the trial court's decision. The pandemic has continued to relax its grip on this State, allowing the judiciary to forego expediting pandemic-related litigation and to instead permit the litigation process to follow its normal course. There is no reason to believe that untoward harm would occur from allowing the Court of Appeals to adjudicate the appeal in the first instance.

III. Granting the bypass application would likely foster an unwarranted, politicized view of the Court.

Granting the bypass application and overruling *In re Certified Questions* so soon after it was decided would also unnecessarily harm the public perception of this Court. As the Department observes, the *In re Certified Questions* was issued in "a fractured period of time" in Michigan's politics. (Application, at 20). But it would only exacerbate this State's fractured polity to short-circuit the ordinary appellate process, grant leave to review without any compelling necessity to do so, and overrule what is perhaps the most widely publicized decision of this Court in the last several decades.

[1] Kimball, Spencer. "More than 90% of U.S. population can ditch facemasks under CDC Covid guidance," CNN. Available at, https://www.cnbc.com/2022/03/03/more-than-90percent-of-us-population-can-ditch-facemasks-under-cdc-covid-guidance.html (last visited March 4, 2022).

Adherence to stare decisis is particularly appropriate where there are strong reliance interests—that is, where "the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Robinson v City of Detroit*, 462 Mich 439, 466; 613 NW2d 307 (2000). Although the Department claims that few people have relied upon *In re Certified Questions* due to its relatively recent vintage, this Court's decision in *In re Certified Questions* had significant and immediate practical effects for every Michigan citizen as soon as it was decided. When *In re Certified Questions* was decided, the Governor's pandemic-related executive orders—which touched many facets of everyday life for every Michigan resident—were invalidated. It would be a shock to many Michigan citizens to discover that, only 18 months after *In re Certified Questions*, the issue of the Governor's pandemic-related authority was back on the table once more.

When this Court has previously declined to apply stare decisis and overruled recent precedent, it did not contribute positively to the public perception of the Court. See, e.g., *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 223; 815 NW2d 412 (2012) (Marilyn Kelly, J., dissenting). Moreover, on previous occasions in which the Court changed its mind after its composition changed, the legal issues were relatively opaque to the general public. See, e.g., *id*. at 203 (involving the tolling of a statute of limitations). The ruling in *In re Certified Questions*, by contrast, is one of the most significant decisions that the Court has issued in decades, and it had an immediate effect on every citizen in Michigan as soon as it was decided. If it is overruled less than two years after it was decided, many members of the general public will seize upon the fact that the composition of the Court has changed in the interim. The perception that the law of this State

depends upon the composition of the Court will have unfortunate consequences for the public's perception of the institutional legitimacy of the Court.

To the extent that the Department is trying to obtain a reversal of *In re Certified Questions* simply because the composition of the Court has changed in the interim, any such motivation underestimates this Court's commitment to the rule of law. See, e.g., *Boertmann v Cincinnati Ins Co*, 493 Mich 963; 828 NW2d 675 (2013) (rejecting the notion that rehearing may be granted simply because the composition of the Court changed). This Court should not accept the Department's invitation to depart from this Court's practice and unnecessarily reopen a contentious debate that has already been put to rest.

Conclusion

The bypass application should be denied.

MILLER JOHNSON
Attorneys for Amicus Curiae
The Mackinac Center for Public Policy

Dated: March 7, 2022

By /s/ Stephen J. van Stempvoort

James R. Peterson (P43102)
Stephen J. van Stempvoort (P79828)
Amy E. Murphy (P82369)
45 Ottawa Avenue SW, Suite 1100
Grand Rapids, Michigan 49503
(616) 831-1700
petersonj@millerjohnson.com
vanstempvoorts@millerjohnson.com
murphya@millerjohnson.com