STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

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

Petitioner-Appellee,

v

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent-Appellant.

_____/

Supreme Court No.

Court of Appeals No. 360175

Otsego County Circuit Court
No. 21-18522-AE

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

THE BYPASS APPLICATION OF THE MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES FOR LEAVE TO APPEAL

Dana Nessel
Attorney General

Fadwa A. Hammoud
Solicitor General

B. Eric Restuccia (P49550)
Deputy Solicitor General

Christopher M. Allen (P75439)
Assistant Solicitor General

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

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STATEMENT OF JURISDICTION

In its ruling sitting in an appellate posture from an appeal from an administrative decision, on January 13, 2022, the circuit court reversed the administrative decision below and ruled that the fine imposed by the Department of Health and Human Services on the Iron Pig Smokehouse restaurant was unlawful. The Department filed an application for leave in the Court of Appeals on February 3, 2022, i.e., within 21 days of that decision. See MCR 7.203(B); 7.205(B). The Department now files this bypass application for leave with this Court. See MCR 7.305(C)(1).

STATEMENT OF QUESTIONS PRESENTED

1. Should this Court disavow *In re Certified Questions,* 506 Mich 332 (2020), for expanding Michigan's nondelegation doctrine beyond its proper bounds?

   Department's answer: Yes.

   Iron Pig's answer: No.

   Circuit court's answer: Not answered.

2. Did the circuit court err in determining that the MCL 333.2253, a longstanding grant of authority to the Director of the Department of Health and Human Services to take certain types of action when necessary to protect the public health from an epidemic, was an unconstitutional delegation of legislative authority?

   Department's answer: Yes.

   Iron Pig's answer: No.

   Circuit court's answer: No.

3. Did the circuit court act outside of its authority when it purported to provide equitable relief – severing an entire section from the Public Health Code – where it was sitting as an appellate body from an administrative appeal of a $5,000 fine and did not have equitable powers?

   Department's answer: Yes.

   Iron Pig's answer: No.

   Circuit court's answer: No.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Michigan Constitution provides for the separation of powers, art 3, § 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.

Section 2221 of the Public Health Code, MCL 333.2221, provides as follows:

> (1) Pursuant to section 51 of article 4 of the state constitution of 1963, the department shall continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including prevention and control of environmental health hazards; prevention and control of diseases; prevention and control of health problems of particularly vulnerable population groups; development of health care facilities and agencies and health services delivery systems; and regulation of health care facilities and agencies and health services delivery systems to the extent provided by law.
>
> (2) The department shall:
>
> (a) Have general supervision of the interests of the health and life of the people of this state.
>
> (b) Implement and enforce laws for which responsibility is vested in the department.
>
> (c) Collect and utilize vital and health statistics and provide for epidemiological and other research studies for the purpose of protecting the public health.
>
> (d) Make investigations and inquiries as to:
>
> (i) The causes of disease and especially of epidemics.
>
> (ii) The causes of morbidity and mortality.
>
> (iii) The causes, prevention, and control of environmental health hazards, nuisances, and sources of illness.
>
> (e) Plan, implement, and evaluate health education by the provision of expert technical assistance and financial support.

(f) Take appropriate affirmative action to promote equal employment opportunity within the department and local health departments and to promote equal access to governmental financed health services to all individuals in the state in need of service.

(g) Have powers necessary or appropriate to perform the duties and exercise the powers given by law to the department and which are not otherwise prohibited by law.

(h) Plan, implement, and evaluate nutrition services by the provision of expert technical assistance and financial support.

Section 2253 of the Public Health Code, MCL 333.2253, provides as follows:

(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.

(2) If an epidemic described in subsection (1) involves avian influenza or another virus or disease that is or may be spread by contact with animals, the department of agriculture shall cooperate with and assist the director in the director's response to the epidemic.

(3) Upon request from the director, the department of agriculture shall assist the department in any review or update of the department's pandemic influenza plan under section 5112

INTRODUCTION

As COVID-19 cases surged, a lone circuit court judge, reviewing an administrative appeal of a $5,000 citation, invoked *In re Certified Questions*, 506 Mich 332 (2020), to conclude that MCL 333.2253—a century-old tool to protect Michiganders from epidemics—is an unconstitutional delegation of legislative authority. The judge further purported to sever the law entirely from the Public Health Code. This ruling was wrong, on the merits and as matter of jurisdiction. It was dangerous, in that it destabilized an important source of public-health protections presently needed by our most vulnerable residents.[1] And it illustrates what's to come, so long as *In re Certified Questions* tempts judges to invalidate laws that, in their view, delegate too much power or power of the wrong kind.

Under Michigan's settled nondelegation caselaw, MCL 333.2253 is plainly constitutional. *In re Certified Questions* deviated from that caselaw to strike down the Emergency Powers of the Governor Act (EPGA), MCL 10.31 *et seq.*, deploying a new nondelegation analysis that was more invasive and subjective than Michigan's doctrine had ever been. Yet even under this expansive new standard, MCL 333.2253 passes muster.

The circuit court's errors in concluding otherwise are telling—of the mischief caused by *In re Certified Questions*' new nondelegation standard, and of the ease

[1] See, e.g., Nursing Home Vaccine Order, available at https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-575843--,00.html (an order under MCL 333.2253 requiring Michigan nursing homes to offer their residents the opportunity to get the most up-to-date immunization for COVID-19).

with which it can, and will, be used as a tool of judicial overreach, usurping executive and legislative powers under the guise of preserving their separation.

As this case illustrates, these dangers are real. They imperil far more than this one statute, and they cast a heavy cloud over both legislative and executive action that, if left unaddressed, will engender uncertainty, instability, and litigation—and will impede state government's ability to serve its people, including (and perhaps especially) when they need it most.

This case is just the first.[2] This Court should not wait for another, or for intermediate appellate review. Only this Court can address the pressing problems this case exposes. *In re Certified Questions* distorted Michigan's nondelegation doctrine beyond recognition. So long as this Court leaves it be, the more harm it will do: the more laws that will be undermined by it, the more courts that will misuse or be misled by it, and the more dysfunction that it will create for our democracy and its institutions. For the sake of our state's nondelegation doctrine as well as its public health, a definitive fix is needed now.

This Court should grant leave on this bypass application under MCR 7.305(C)(1), reverse the circuit court, and disavow the expansive approach to the nondelegation doctrine adopted in *In re Certified Questions*.

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[2] Even in just the public-health context, other nondelegation challenges—to MCL 333.2253 and otherwise—are pending. See, e.g., *T&V Assocs v Hertel,* No. 21-75-MM (COC) (§ 2253); *Resurrection v Hertel,* No. 20-cv-010176 (WD Mich) (challenge to local health department authority under MCL 333.2453); *Morgan v Berrien Co Health,* No. 21-205-cz-w (Berrien Circuit) (same); *Sinawi v Oakland Co Health,* No. 360074 (Mich Ct App) (same); *Let Them Breathe v Health Dep't of NW Mich,* No. 21-18749-cz (Otsego Circuit) (same).

STATEMENT OF FACTS AND PROCEEDINGS

The facts surrounding the COVID-19 pandemic are well-established. SARS-CoV-2 is similar to other coronaviruses (a large family of viruses that cause respiratory illnesses), but the strain is novel. Since December 2019, over 1.2 million Michigan residents have been diagnosed with COVID-19 and 30,170 Michigan residents have died from the disease at the time of this filing.[3] It is widely known and accepted that COVID-19, the disease that results from the virus, is highly contagious, spreading easily from person to person via "respiratory droplets."[4] A person can spread the disease before even perceiving symptoms.[5]

On March 10, 2020, in response to the growing pandemic in Michigan, Governor Whitmer declared a state of emergency and invoked the emergency powers available to the Governor under Michigan law.[6] Soon thereafter, the Department Director began issuing emergency orders under Michigan's Public Health Code, MCL 333.1101, *et seq*.[7]

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[3] Coronavirus Michigan Data, https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html.

[4] See, e.g., CDC, *Considerations for Restaurants and Bar Operators* (Dec. 16, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businessemployers/bars-restaurants.html.

[5] CDC, *Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic* (May 4, 2020), https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article (explaining that "[o]ne report suggested that up to 13% of infections may be transmitted during the presymptomatic period of illness").

[6] All executive orders can be found at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html.

[7] All MDHHS emergency orders related to COVID-19 are available at https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-533660--,00.html

On November 15, 2020, the Director issued an emergency order under MCL 333.2253—Gathering and Face Masks Order. (Epidemic Order).[8] This Order came amidst a dire surge in viral transmission and death in our state: between October 1 and November 15, 2020, Michigan's COVID-19 rate of positivity increased by 225% (despite only a 78% increase in administered tests), its per-capita case count increased fivefold, and its death rate increased fourfold.[9] Furthermore, while safe and effective vaccines for COVID-19 have now become widely available, that was not yet the case at that time.

The Epidemic Order was issued to control this surging spread of COVID-19 and protect public health by establishing restrictions on gatherings, including temporarily prohibiting gatherings of patrons inside food service establishments—a type of gathering recognized as high-risk by public health experts, given the inability to mask consistently when eating or drinking and the heightened risk of transmission that attends sustained indoor gatherings more generally.[10] Section 2(a)(2) of the Epidemic Order stated that indoor gatherings were "prohibited at non-residential venues." Thus, indoor dining at food service establishments like Iron Pig were prohibited, but such businesses were able to continue with take-out, outdoor dining, and delivery services under section 3(b).

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[8] App'x A, Motion for Summary Disposition filed on January 11, 2021, Ex A.

[9] *Id.*

[10] See n 2; CDC, *Community and Close Contact Exposures Associated with COVID-19 Among Symptomatic Adults ≥18 Years in 11 Outpatient Health Care Facilities – United States*, July 2020 (Sept. 11, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6936a5.htm?s_cid=mm6936a5_x.

On November 25, 2020, Gaylord Police Department Officer Stefan Crane visited Iron Pig, located at 143 West Main Street, Gaylord, Michigan 49735. Officer Crane observed that Iron Pig was open for indoor dining in violation of sections 2(a)(2) and 3(b)(1) of the Epidemic Order. (App'x B, Motion for Summary Disposition filed on January 11, 2021, Ex B.) Iron Pig was notified of this violation through an Order to Cease and Desist Food Service Operations by the Health Department of Northwest Michigan. (App'x C, *id.*, Ex C.)

On December 1, 2020, the Department issued Iron Pig a citation for additional violations of the Epidemic Order. (App'x D, *id.*, Ex D.) Specifically, it was found that Iron Pig continued to allow indoor dining in violation of the Epidemic Order for a total of five days. Iron Pig's defiance of the Epidemic Order on those five days is clear and undisputed. Iron Pig's Facebook page was active with regular posts about being open despite orders to the contrary. For example, Iron Pig advertised a "Thanksgiving Eve Party!" occurring on Wednesday, November 25, 2020, a date included in the citation. (App'x E, *id.*, Ex E.) Iron Pig also posted on its Facebook page a new slogan to attract customers to its restaurant: "Risk it to get the brisket." (*Id.*) Further, when interviewed by local news on December 15, 2020, owner Ian Murphy reiterated the restaurant had no intentions of closing.[11] Iron Pig stayed open in defiance of the Department's Order and there was no question it was in direct violation of such Order.

[11] 9&10 News, *Judge Issues Fines, Suspension of Iron Pig Smokehouse Liquor License* (Dec. 15, 2020), https://www.9and10news.com/2020/12/15/judge-issues-fines-suspension-of-iron-pig-smokehouse-liquor-license/

Administrative proceedings

Iron Pig timely appealed the Department's Administrative Citation to the Michigan Office of Administrative Hearings and Rules (MOAHR). The Department filed a Motion for Summary Disposition and Iron Pig filed a response. Iron Pig did not dispute it was open for indoor dining on the dates at issue, and offered only a cursory mootness argument in opposing the motion. (App'x A1, Motion for Summary Disposition; Response.) On March 3, 2021, Administrative Law Judge (ALJ) Kibit held a hearing on the Department's Motion for Summary Disposition. (ALJ Order dated March 10, 2021.) Neither party presented any witnesses. (*Id.*) ALJ Kibit issued and entered a decision and order dated March 10, 2021. (App'x A, Motion for Summary Disposition.)

The ALJ's order granted the Department's motion for summary disposition and affirmed the Department's Administrative Citation in its entirety. (ALJ Order dated March 10, 2021.) In the decision and order, ALJ Kibit stated that the Department met its burden of proving no genuine issue of material fact existed as to whether Iron Pig was open for indoor dining in violation of the Epidemic Order. (*Id.*) ALJ Kibit stated that Iron Pig failed to respond to any factual arguments made by the Department at the hearing or in its briefing. (*Id.*) Further, ALJ Kibit found that Iron Pig's claim of "mootness" of the Administrative Citation failed because Iron Pig offered no justification or argument in support.[12] (*Id.*)

[12] ALJ Kibit expressly rejected the mootness argument and found "[Iron Pig] only offered unpersuasive allusions to uncited Michigan case law and unidentified factual issues on the record" at the hearing. *Id.*

Finally, ALJ Kibit found that the Department properly cited Iron Pig for its five violations of the November 15, 2020 Order. (*Id.*) On May 6, 2021, Iron Pig filed an "Appeal of Administrative Order and Complaint" with the circuit court.

The parties then submitted a stipulation to the circuit court making clear this matter would proceed as an appeal, and not as a lawsuit. The circuit court entered an order on July 27, 2021, after this stipulation of the parties, limiting this appeal to two issues.[13] First, "Does MCL 333.2253(1) violate the non-delegation clause of the Michigan Constitution?" (App'x F, Stip.) Second, "Are the MDHHS orders a 'rule' as defined in MCL 24.207 and did the MDHHS comply with the notice of public hearing requirements of MCL 24.241?" (*Id.*)

The circuit court sitting on appeal

On January 13, 2022, the circuit court ruled that the fine was unconstitutional on the basis that the authority granted to the Director of the Department of Health and Human Services to issue orders to protect public health in response to an epidemic was an improper delegation of "uncontrolled, potentially arbitrary power" to the Director. (App'x G, Opinion and order, dated Jan 13, 2022, p 27.) The court reasoned that the Legislature had "pass[ed] off its responsibility for legislating" to the executive branch. (*Id.* at 25.) In the body of its opinion, and in its conclusion, the circuit court purported to sever the provision from the Public Health Code, despite the fact that this was an administrative appeal:

[13] The parties also stipulated to the administrative record that would serve as the basis for the appeal to the circuit court.

> As MCL 333.2253 has not survived Petitioner's non-delegation challenge under the Michigan Constitution and is clearly an unconstitutional delegation of power from the Legislature to the Executive Branch, MCL 333.2253 is hereby severed from Michigan's Public Health Code. [App'x G, p 31.]

Although unstated in the opinion's conclusion, the order had the effect of reversing the fine that the Department had imposed on Iron Pig.

On February 3, 2022, the Department filed an application for leave to appeal in the Court of Appeals. See Case No. 360175. The Department now seeks a bypass application in this Court. See MCR 7.305(C)(1).

STANDARD OF REVIEW

This Court reviews questions of law, including the constitutionality of a statute, de novo. *Hunter v Hunter,* 484 Mich 247, 257 (2009).

As an administrative appeal, the Administrative Procedures Act (APA) provides the applicable scope of review for an agency's decision:

> (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. [MCL 24.306(1).]

The review by a circuit court of an administrative decision is limited to determining whether the decision was rendered in accordance with law and whether factual findings were supported by competent, material and substantial evidence. *Dignan v Michigan Pub Sch Employees Ret Bd,* 253 Mich App 571, 576 (2002). There are no factual disputes in this appeal as the Department presented substantial evidence of Iron Pig's violations of the order.

A reviewing court does not have equitable jurisdiction over an administrative decision. *Huron Behavioral Health v Dep't of Community Health*, 293 Mich App 491, 497–498 (2011).

ARGUMENT

I. This Court should disavow *In re Certified Questions*' expansive approach to the nondelegation doctrine.

In re Certified Questions "announce[d] a new constitutional rule" that "needlessly insert[ed] the Court into what has become an emotionally charged political dispute." 506 Mich at 422–423 (McCormack, J., dissenting in part). The decision's immediate effects were monumental—in using the nondelegation doctrine to undo the People's will, in tossing out a 75-year-old statute whose propriety had never been previously questioned, and in stripping the Governor of authority to combat a deadly pandemic.

Until that case, this Court's nondelegation jurisprudence was rarely invoked. Michigan followed the federal judiciary's lead in reserving it for those statutes which lacked *any* standards guiding the executive's discretion—and rightly so. There is scant historical support for the doctrine at the nation's founding, and *In re Certified Questions*' new expansion of the doctrine raises serious concerns about the judiciary's license to interpose itself in legislative decisions.

This case is the first, but likely not the last, result of that decision: a circuit court, invoking *In re Certified Questions*, has purported to strike down an essential tool the State has long used to respond to epidemics and protect the public health. As detailed *infra*, the court erred in doing so, even under *In re Certified Questions*. The court's errors, however, were seeded by that opinion and the invasive, subjective review it deployed to strike down the EPGA. *In re Certified Questions*

was an errant aberration, and the circuit court's decision here lays bare how easily its expansive holding can metastasize from an exception to the rule.

This is not a mere academic concern. An outsized nondelegation doctrine destabilizes both our laws and their execution, leaving enactments subject to invalidation at any time a court should happen to disapprove of exactly how the Legislature chose to delegate authority. This looming threat of invalidation not only undermines current laws, but impedes the lawmaking process by sowing uncertainty about legislative proposals dependent on delegation of authority to state agencies. The real-world consequences of this are particularly striking where, as here, the law at issue provides—and has provided for roughly 100 years—critical protections for the public health of our state, and health officials are, at this moment, actively trying to use it to help our most vulnerable residents.[14]

In re Certified Questions has enabled this instability. More nondelegation challenges are pending, and their number—and the attendant opportunities for error and mischief—will only grow the longer the decision is allowed to persist.

This Court does not, and should not, disrupt its prior rulings lightly. This is the rare instance where such intervention is in order. *In re Certified Questions* was wrongly decided, and the analysis it encourages constitutes a standing invitation for judicial overreach and threatens the very separation of powers it purports to

[14] See https://www.michigan.gov/coronavirus/0,9753,7-406- 98178_98455-533660--,00.html (listing current § 2253 epidemic orders, which provide for, inter alia, testing to protect the staff and inmates in correctional facilities, testing of long-term care facility workers, and requiring Michigan nursing homes to offer their residents the opportunity to get the most up-to-date immunization for COVID-19).

preserve. This Court should disavow the decision and reaffirm its traditional understanding of the nondelegation doctrine, striking down legislative choices duly enacted into law only when they fail to provide any guidance to the executive.

A. Successful nondelegation challenges generally concern statutes with no limitation on a decisionmaker's authority.

Traditionally, nondelegation challenges are rarely successful. The first and last year that the U.S. Supreme Court struck down a statute on that ground was 1935. See *Panama Refining Co v Ryan*, 293 US 388 (1935); *ALA Schechter Poultry Corp v United States*, 295 US 495 (1935). None have been successful in the U.S. Supreme Court since. Before *In re Certified Questions*, Michigan courts similarly abstained from employing nondelegation to disrupt a duly enacted law except on very rare occasion. See *Blue Cross & Blue Shield of Michigan v Milliken*, 422 Mich 1, 53 (1985).[15]

The common thread in these cases is the lack of *any* standard to guide the decisionmaker's discretion. In *Blue Cross & Blue Shield*, this Court determined that "the power delegated to the Insurance Commissioner" regarding approval of actuarial risk factors was "completely open ended." 422 Mich at 53. And for good reason—the commissioner's authority was not guided at all. Instead, the commissioner was granted complete authority to " 'approve' or 'disapprove' the

[15] While the doctrinal language in the state and federal systems are nominally different, this Court has treated them as twins. See *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 7–10 (2003); *id.* at 10 ("[W]e have rejected [nondelegation] claims on a basis similar to the federally developed rationale.").

proposed risk factors; the basis of the evaluation is not addressed." *Id.* The same was true in *Panama Refining*, where there was simply no purported guidance whatsoever to guide the President's discretion. 293 US at 430 ("[T]he Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."); see also *Mistretta v United States*, 488 US 361, 373 n 7 (1989) (describing its conclusions in *Panama Refining* and *ALA Schechter* "that Congress had failed to articulate *any* policy or standard") (emphasis added). As Justice Scalia noted, the U.S. Supreme Court "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman*, 531 US at 474–475, quoting *Mistretta,* 488 US at 416 (Scalia J., dissenting).

These cases stand for the proposition that only where the Legislature provides no guidance whatever—and with it no opportunity for meaningful judicial review—it has abdicated its lawmaking authority. Given the dangers of injecting the courts into standardless review of valid legislative enactments, this hands-off approach is a feature, not a bug.

B. Both historically and presently, nondelegation challenges are rightfully rare, since they lack a basis in the constitution and permit judges to invalidate laws with only an opaque doctrine.

The doctrine's disuse use should not be surprising. Before *In re Certified Questions*, this Court's nondelegation doctrine closely resembled its federal counterpart, in no small part due to the similarity of the State and federal

separation-of-powers clauses. *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 10 (2003). See also *id.* at 7 (comparing US Const., art I, § 1 to Const 1963, art 4, § 1). Thus, the historical support for the federal doctrine merits discussion.

Neither the text of the U.S. Constitution nor the history surrounding its ratification provide clear support for the nondelegation doctrine. Cass R. Sunstein, *Nondelegation Canons*, 67 U Chi L Rev 315, 322 (2000); US Const, art I, § 1. In fact, mounting historical evidence (or, better put, the lack thereof) strongly suggests that "[t]he nondelegation doctrine thus had no illustrious birth at the Founding;" indeed, "[i]t was never alive to begin with." Mortenson and Bagley, *Delegation at the Founding*, 121 Colum L Rev 277, 285 (2021).

There is a dearth of "any indication, in the founding era, that such delegations were originally thought to be banned." Sunstein, *Nondelegation Canons*, 67 U Chi L Rev at 322. In fact, the very first Congresses granted broad authority to the executive. *Id.* at 322, citing 1 Stat 95 (1789) (permitting pensions for military members "under such regulations as the President of the United States may direct") and 1 Stat 137 (1790) (granting authority to the President to issue trading licenses with Indian tribes under "such rules and regulations as [he] shall prescribe").

Illustrative is Congress's quick delegation of one of its newfound powers—its sole authority to issue patents. US Const, art I, § 8, clause 8.[16] Though plainly

[16] It states, "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

reserved for Congress, in 1790, the First Congress "gave the Secretary of State, the Secretary of War, and the Attorney General ('or any two of them') the power to grant patents to new inventions." *Delegation at the Founding*, 121 Colum L Rev at 339, quoting Patent Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat 109, 110 (YEAR). The purported "guidance"? Those executive officials "must 'deem the invention or discovery *sufficiently useful and important*' to warrant protection for up to fourteen years." *Id.* (emphasis added). Congress's nearly carte blanche delegation of one of its specific powers is one of many that reveals that the Founding-era Congresses did not flinch in seeking assistance of its coordinate branch. Similar examples are too numerous to recount here. See *Delegation at the Founding*, 121 Colum L Rev at 332–349. This Court recognized this historical fact over a century ago. *Hurst v Warner*, 102 Mich 238, 244 (1894) ("The practice of giving discretionary power to other departments or agencies, who were intrusted [sic] with the duty of carrying into effect some general provisions of the law, had its origin at the adoption of the constitution, *and in the action of the first congress under it, as the federal legislation abundantly shows*.") (emphasis added), quoting *In re Griner*, 16 Wis 423, 434 (1863).

What is more, while the early historical Congressional record is replete with myriad disagreements about Congressional power in the wake of the newly ratified Constitution, the "lack of evidence of even a half-hearted argument" about broad delegations to executive authorities speaks volumes. *Id.* at 333–334.

Here in Michigan, this Court early recognized that the Legislature is empowered to exercise its lawmaking authority to "create subordinate bodies with

certain powers of legislation." *People v Collins*, 3 Mich 343, 350 (1854) (affirming by even vote). This Court found it "sufficiently clear then, that it is in the very nature of legislative power, that it may, to some extent at least, be delegated, and that the maxim, *delegata potestas, non potest delegari,* has no application, as has been supposed by a learned judge." *Id.* at 351, referencing *Parker v Commonwealth*, 6 Pa 507, 515 (1847).

This brief history is not to suggest that the nondelegation doctrine does not exist—just that it is, by origin and nature, a fundamentally different creature than the invasive and subjective analysis seen in *In re Certified Questions*. That latter analytical approach to nondelegation is unmoored from any textual or historical guidance and "raise[s] serious problems of judicial competence and would greatly magnify the role of the judiciary in overseeing the operation of modern government." *Nondelegation Canons*, 67 U Chi L Rev at 321.

By their very nature, questions under such a nondelegation doctrine "are ones of degree," making any stark rules all but impossible, thus begging for judicial entanglement with duly enacted laws. *Id.*; see also Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 Cardozo L Rev 775, 792–793 (1999) ("[T]he nondelegation doctrine is a prescription for judicial supervision of both the substance and forms of legislation and hence of politics and public policy, without the existence or even the possibility of any coherent, principled, or manageable judicial standards.").

C. This Court should return to its long-held understanding of the nondelegation doctrine.

"[U]ntil today, the United States Supreme Court and this Court have struck down statutes under the nondelegation doctrine only when the statutes contained *no* standards to guide the decision-maker's discretion." *In re Certified Questions*, 506 Mich 332, 426 (2020) (McCormack, J., dissenting in part). It is to that version of the nondelegation doctrine to which this Court should return, leaving behind the aberrational decision issued in the midst of a divisive and ongoing public health crisis.

A well-established body of Michigan precedent illustrates the traditional deference to the Legislature to delegate with some minimal guiding principles. See, for example, *G.F. Redmond & Co v Michigan Sec Comm'n* where this Court held that "the term 'good cause' for revocation of the license, relating, as it does, to the conduct of the business regulated by the policy declared in the statute, is sufficiently definite." 222 Mich 1, 7 (1923). See also *State Highway Comm v Vanderkloot*, 392 Mich 159, 172 (1974) ("'[N]ecessity' is an adequate standard in the context of delegated eminent domain authority."); *Smith v Behrendt*, 278 Mich 91, 97–98 (1936) (holding that allowing the executive to grant oversize loads for freeway travel in "special cases" was a limited and proper delegation of authority); *Klammer v Department of Transportation*, 141 Mich App 253, 262 (1985) (the word "necessary" was a sufficiently precise standard for the retirement board in the context of considering the length of time a certain state worker could continue after reaching the mandatory retirement age).

Likewise, under a substantially similar standard, the U.S. Supreme Court has "over and over upheld even very broad delegations." *Gundy v United States*, 139 S Ct 2116, 2129 (2019). *Gundy* highlighted the consistency with which the Court had granted deference to Congress in applying its "intelligible principle" test, mentioning cases upholding Congressional delegations to regulate in the "public interest," or for agencies to "set 'fair and equitable' prices and 'just and reasonable' rates." *Id.* at 2129. And the Court turned away a delegation challenge to an agency's charge to promulgate nationwide air quality standards that are "*requisite* to protect the public health." *Whitman v Am Trucking Associations*, 531 US 457, 472–473 (2001) (emphasis added). As Justice Scalia asserted in his majority opinion, "even in sweeping regulatory schemes we have never demanded . . . that statutes provide a 'determinate criterion' for saying 'how much [of the regulated harm] is too much.'" *Whitman*, 531 US at 475, quoting *Am Trucking Ass'n, Inc v US EPA*, 175 F3d 1027, 1034 (CA DC), opinion mod on reh 195 F3d 4 (DC Cir, 1999).

Instead of following both this Court's precedent and the U.S. Supreme Court's guidance, *In re Certified Questions* fashioned a new nondelegation doctrine by cobbling together statements and sentiments from disparate courts. For one newfound idea, this Court held that "the durational scope of the delegated power also has some relevant bearing, in our judgment, on whether the statute violates the nondelegation doctrine." 506 Mich at 362. This Court cited a patchwork of

federal appellate and district court cases, *id.* at 362–363,[17] "common sense," *id.* at 362, and a U.S. Supreme Court plurality opinion, which noted that the statute under scrutiny "afforded the executive 'only temporary authority." *Id.* at 362, quoting *Gundy v United States*, 139 S Ct 2116, 2130 (2019). Setting aside the bare reference to "common sense," as well as the fact that *Gundy* mentioned this facet of the law only in passing, this Court's reliance on *Gundy* is curious for another reason. *Gundy* not only upheld the statute at issue, but it emphasized the countless cases in which the Court had found proper delegations even with minimal guidance. 139 S Ct at 2129. See also *In re Certified Questions*, 506 Mich at 425 (McCormack, J., dissenting in part) (citing *Gundy* and identifying "a far-from-exhaustive list" including a dozen U.S. Supreme Court cases upholding delegations).

This is but one example of how the analysis of *In re Certified Questions* departed from the nondelegation jurisprudence that preceded it; there are certainly more. See *id.* at 423–429. The outcome was an outlier ruling wrong in both result and rationale. Not only was *In re Certified Questions* wrongly decided, *Robinson v Detroit,* 462 Mich 439, 463–468 (2000), it is unworkable. *Id.* at 464. The decision

[17] Notably, this Court relied on *United States v Emerson*, 846 F2d 541, 545 (CA 9, 1988) in support of this durational limitation, stating that *Emerson* upheld a delegation "because, in part, the delegated power was temporary." *In re Certified Questions*, 506 Mich at 363. This is true, but is colored by the fact that, "[t]he temporary scheduling of a controlled substance is an emergency measure, *lasting at most eighteen months*." *Emerson*, 846 F2d at 545. This Court took that lengthy (but temporary) time period as supporting the decision to strike the EPGA, which the Governor had utilized for roughly six months. If nothing else, this shows how the multi-factor, sliding scale approach of *In re Certified Questions* can quickly devolve into murky comparisons.

injects variability into an important and delicate area of constitutional law, yielding problematic results as demonstrated by the circuit court's decision below. Moreover, reliance interests are low, given the infancy of the decision. *Id.* There has been little time for the Legislature to take it into account when passing new laws. Finally, the decision was not justified in the first place, and its issuance during such a fractured period of time in Michigan casts all the more doubt on its justification. *Id.*

In sum, the *In re Certified Questions* majority imported several new principles into Michigan law that are not only foreign to Michigan's doctrine, but lack both a historical foundation and safeguards from judicial management of the Legislature's role—when and how to delegate its authority in the public interest. This case is an illustration of the harm to not just Michigan's public health code, but the Legislature's authority and its judgment. For the sake of this case and the others to follow, this Court should disavow *In re Certified Questions*, overruling it or expressly limiting its reach to the single, since-repealed statute it struck down.[18]

[18] Correspondingly, this Court should disavow the order that relied on *In re Certified Questions*. See *House of Representatives v Governor*, 506 Mich 934 (2020).

II. The Legislature's grant of authority to the Director of the Department of Health and Human Services to protect the public health during an epidemic by restricting gatherings and issuing procedures to preserve essential public health services is a proper delegation of authority.

The authority of public health officials to take executive action to combat the spread of disease and to prevent epidemics from harming the public health – granted by the Legislature – is one of long standing, in place in different forms in Michigan for a century or more. This Court has previously rebuffed delegation challenges to the authority of public health officials to order quarantines to protect the public from dangerous communicable diseases. Section 2253 falls easily in line with this grant of power, and the circuit court erred in concluding that it was unconstitutional.

Absent *In re Certified Questions*, this conclusion is crystal clear—as it should be. But the same conclusion holds even if this Court declines to disavow that decision. *In re Certified Questions* struck down the general emergency-response authority conferred on the Governor under the EPGA. The circuit court mistakenly grafted this same result onto MCL 333.2253, a materially different law that grants public health officials authority to take certain actions when necessary to protect the public health from epidemic-level spreads of communicable diseases. Even if left undisturbed, *In re Certified Questions* provides no support for the conclusion that Michigan's longstanding public health laws to limit gatherings and issue procedures to protect the public health where there is an epidemic, see MCL 333.2253, fail to pass muster under Michigan law.

To the contrary, *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. The circuit court's analysis to the contrary is unavailing, and its erroneous ruling has destabilized a critical, century-old public-health tool amidst the very circumstance it was duly designed—and is presently needed[19]—to address. This Court should grant the bypass application and reverse.

[19] See footnote 14, above.

A. The epidemic-response authority in § 2253(1) is a constitutional—and wise—delegation of limited authority to public health experts during the pendency of an epidemic.

Under the standard articulated in *In re Certified Questions*, Michigan's nondelegation doctrine guards against the Legislature's grant of authority to executive actors when they have an unduly broad scope, can be utilized without end, and lack any meaningful standards to guide the decisionmaker's discretion. Section 2253(1) checks none of those boxes, and it is a substantially different and more circumscribed authority than that which this Court struck down in *In re Certified Questions*. In brief, § 2253(1) is valid.

1. The nondelegation doctrine protects against unduly broad and standardless delegations of authority.

The separation of powers doctrine "ha[s] led to the constitutional discipline that is described as the nondelegation doctrine." *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8 (2003). While the legislative power—the power "to make, alter, amend, and repeal laws"—sits with the Legislature, *Harsha v City of Detroit*, 261 Mich 586, 590 (1933), both the U.S. and Michigan Supreme Courts "ha[ve] recognized that the separation of powers principle, and the nondelegation doctrine in particular, do not prevent [the legislative branch] from obtaining the assistance of the coordinate Branches." *Taylor*, 468 Mich at 8 (internal quotes omitted).

The Michigan doctrine of non-delegation has been expressed in terms of a "standards test." *Westervelt v Natural Resources Comm*, 402 Mich 412, 437 (1978) (Williams, J., lead opinion); *id*. at 454 (Ryan, J., concurring). In short, "[T]he standards prescribed for guidance [must be] as reasonably precise as the subject-

matter requires or permits." *In re Certified Questions*, 506 Mich at 359, quoting *Osius v St Clair Shores*, 344 Mich 693, 698 (1956). Of course, like in all endeavors of the constitutional evaluation of statutes, "the act must be read as a whole," and is presumed to be constitutional. *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 51–52 (1985). The analysis includes consideration of the safeguards existing to protect against abuses of discretion by those administrative officials exercising delegated power. *Westervelt,* 402 Mich at 442–443.

In re Certified Questions homed in on a few aspects of analysis. First, that the *scope* of the delegation is relevant—it should be measured against "the specificity of the standards governing its exercise." 506 Mich at 361, quoting *Synar v United States*, 626 F Supp 1374, 1386 (D DC, 1986). That scope is defined, in part, by "the breadth of subjects to which the power can be applied." *Id.* Second, the Court took into account the durational limit of the delegated power. *Id.* at 362. Third, the Court looked at the relative precision of the standard governing the executive official's discretion. *Id.* at 367–368.

2. The Legislature granted certain authority in § 2253(1) to the Director to control an "epidemic."

The inquiry begins by considering the challenged statute in the context of the legislative enactment of which it is a part. See *BCBSM*, 422 Mich at 51 ("the act must be read as a whole"). To begin, the Legislature has placed a special emphasis on shielding § 2253 and the other provisions of the Public Health Code from narrow or destructive readings by expressly requiring them to be "liberally construed for

the protection of the health, safety, and welfare of the people of this state." MCL 333.1111(2).

By its plain language, MCL 333.2253 exists to address "an epidemic." The statute is included within Michigan's Public Health Code, which has constitutional origins. Through their Constitution, Michiganders declared the public health and welfare to be matters of primary public concern and charged their Legislature with the duty to implement laws in furtherance of that directive. Const 1963, art 4, § 51. The Legislature acknowledged this constitutional obligation in ascribing duties to the Department headed by the Director. MCL 333.2221(1). And that Department was charged with making investigations and inquiries into "[t]he causes of disease, and especially epidemics." MCL 333.2221(2)(d). Reading MCL 333.2221 and MCL 333.2253 together, it is clear the Legislature put special emphasis on the investigation of, and response to, epidemics as the quintessential threat to what Michiganders had constitutionally declared to be a primary concern. And for good reason; the Spanish Flu epidemic of more than a century ago, and now COVID-19, have been among the deadliest events in our nation's history.[20]

Within the context of the Public Health Code, it is also significant that the unique and flexible authority under § 2253 was delegated specifically to the Director. The Legislature installed guardrails on this authority by requiring the

[20] Jim Sergent & Ramon Padilla, *Americans dying faster of COVID-19 than our soldiers did in WWII* (Jan. 19, 2021), https://www.usatoday.com/in-depth/news/2021/01/19/covid-19-deaths-americans-dying-faster-than-our-soldiers-did-wwii/6602717002/

Director to be qualified in public health administration. MCL 333.2202(1). And if the Director is not a physician, the Legislature ensured one would be installed within the Department as Chief Medical Officer to advise the Director. MCL 333.2202(2).

Further, these legislative safeguards are augmented by political ones. This Court has recognized safeguards exist when a delegation is made to officials appointed by the Governor as opposed to more remote governmental employees. *Westervelt*, 402 Mich at 448–449. Former Director Robert Gordon was a department head appointed by the Governor pursuant to Const 1963, art 5, § 2.[21] And the Chief Medical Officer advising former Director Gordon was appointed by the Governor pursuant to MCL 333.26369, which also makes her a part of the Governor's cabinet.[22] Structurally, this creates accountability through the political process. See *In re Certified Questions*, 506 Mich at 422 (McCormack J., concurring in part) ("[T]he Governor undoubtedly will be politically accountable to voters for her actions in our next gubernatorial election, the ultimate check.").

The history of § 2253 underscores the open eyes through which the Legislature granted this authority. In 1918, as Michigan was in the midst of the Spanish Flu epidemic, Governor Albert Sleeper issued a broad order closing schools and businesses and prohibiting gatherings. Justice Viviano's partial concurrence in

[21] Current Department Director Elizabeth Hertel replaced former Director Robert Gordon effective January 21, 2021.

[22] See https://www.michigan.gov/mdhhs/0,5885,7-339-73970_73993-497860--,00.html.

In re Certified Questions reflects this history, noting "the 1919 law passed in the wake of the influenza epidemic and Governor Sleeper's actions is still the law, albeit in slightly modified form." *In re Certified Questions*, 506 Mich at 404–405 (Viviano, J., concurring in part).[23] Those provisions enabled the state health commissioner to respond to "dangerous communicable disease[s]" by "establish[ing] a system of quarantine," or by "forbid[ding] the holding of public meetings." CL 1948, 329.1, 325.9.

And *even earlier*, in the late 19th century, the Legislature granted expansive authority to township boards of health to quarantine those infected with smallpox, and to do so "in the manner in which they shall judge best for the safety of the inhabitants" of the community. Compiled Laws 1897, Section 4424. Small city councils were likewise empowered to enact ordinances to preserve the health of residents and prevent "the introduction of malignant, infectious, or contagious diseases" or to act as "the public safety may require." 1895 PA 215, Chapter XIV (Public Health), Sec 1 (repealed 1978 PA 368). In short, for well over a century, the Legislature has provided executive actors the tools to prevent the spread of disease.

[23] That provision read, in pertinent part:

> In case of an epidemic of any infectious or dangerous communicable disease within this state or any community thereof, the state health commissioner may, if he deem it necessary to protect the public health, *forbid the holding of public meetings of any nature whatsoever* except church services which may be restricted as to number in attendance at 1 time, in said community, or may limit the right to hold such meetings in his discretion. . . . [Public Act 146 of 1919; CL 1948, 325.9.]

3. Nearly 100 years ago, this Court turned away a similar challenge to broad authority to protect against the spread of disease.

This Court has long embraced the propriety – indeed, *the necessity* – of the Legislature delegating authority to protect against such scourges. *Rock v Carney*, 216 Mich 280, 290 (1921) ("The health of the people is of supreme importance to the State, and measures reasonably calculated to promote the public health have with uniformity been sustained."); *Highland v Schulte*, 123 Mich 360, 363 (1900) (permitting the Detroit board of health to "delegate to the health officer" the authority to quarantine entire homes since, "as from the nature of things, the board could not act collectively on each case that might arise, with the necessary promptness and efficiency").

This Court's decision in *People ex rel Hill v Board of Education of City of Lansing*, 224 Mich 388 (1923), merits emphasis. A challenge was brought to a local board of health's decision to mandate vaccination for children and staff at its schools as well as a quarantine program in a fight against smallpox. *Id.* at 389–390. The Court considered a nondelegation challenge to the local health department's statutory authority, which was not unlike § 2253, and affirmed its validity:

> When the smallpox, or any other disease dangerous to the public health, is found to exist in any township, the board of health shall use all possible care to prevent the spreading of the infection, and to give public notice of infected places to travelers, by such means as in their judgment shall be most effectual for the common safety. [*Hill*, 224 Mich at 394–395, quoting Section 5081, CL 1915.]

The Court cited approvingly from *Blue v Beach*, 155 Ind 121 (1900), which rejected a nondelegation challenge to broad authority granted to boards of health to require vaccination of students to combat the spread of disease:

> While it is necessary that a law, when it comes from the law-making power, should be complete, still there are many matters relating to methods or details which may be, by the Legislature, referred to some designated ministerial officer or body. [*Hill*, 224 Mich at 397, quoting *Blue*, 155 Ind at 93.]

The Court expressed no concern that the Legislature had improperly delegated expansive authority in this space. Quite the opposite: *Hill* relied on authority asserting that a "municipality may vest in its officials' broad discretion in matters affecting the application and enforcement of a health law." *Id.* at 398, quoting *Zucht v King*, 260 US 174 (1922).

In its own voice, the Court declared the broad local authority to be valid, recognizing that "[t]here must be some elasticity, in order to effectually meet varying conditions, and the Legislature has seen fit to fix the ultimate purpose of the regulations to be the 'common safety' and to leave the details necessary to work out that purpose to an administrative board." *Hill*, 224 Mich at 399. This Court has thus long permitted the Legislature to issue broad authority to public health experts to combat the spread of disease.

Michigan's jurisprudence on the power of public health laws to protect our residents from communicable disease or epidemics is not some kind of outlier. The same basic authority has served as a black-letter principle of law relevant to the questions here. The eminent treatise, American Jurisprudence, reflects the unremarkable principles that underlie the actions taken here by Michigan's public

health officials. See 39 Am Jur 2d Health § 74 ("The right of the public authorities to prohibit gatherings or congregations of persons during the prevalence of an epidemic, and for such purpose to close or require the closing of public places or institutions, has been recognized or assumed.") See also 8 ALR 836 (originally published in 1920) ("A general statutory delegation of power to make regulations for the protection of the public health from contagious or infectious diseases is not unconstitutional, as a delegation of legislative power.") (citing cases).

These principles frame this Court's review of the Legislature's grant of authority to Michigan's top public health official.

4. Section 2253(1) is not an unlawful delegation, as the standards governing the Director's authority are as reasonably precise as the subject matter permits.

Under the long line of authority discussed above, MCL 333.2253's constitutionality is readily apparent. *In re Certified Questions* does not compel a different result. Again, that decision framed its analysis around the scope of the delegation, its potential duration, and the relative precision of the standard governing the executive official's discretion. 506 Mich at 361–362, 367–368.

MCL 333.2253(1) provides:

> 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.

First, the scope of this delegation is substantially narrower as compared to the EPGA authority the Court struck in *In re Certified Questions*. By its plain

language, § 2253 applies only in the single and unique context of epidemics. The EPGA, meanwhile, could be invoked in myriad circumstances: "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency." MCL 10.31(1). An epidemic like the COVID-19 pandemic clearly falls within these circumstances. See *In re Certified Questions*, 506 Mich at 353. But that highlights the point: while the EPGA granted authority to combat crises, disasters, riots, catastrophes, or other public emergencies, § 2253 focuses on and is limited to a single subset—epidemics. During its life, the EPGA had been invoked (without challenge) to deal with a range of emergencies:

- statewide coal shortages (App'x H);
- the wake of a tornado (App'x I);
- heavy holiday traffic that may generate increased car accidents (App'x J);
- and civil unrest (App'x K).

Of course, § 2253 could not have been invoked in any of those circumstances, showing the limitations of its scope.

Moreover, by its language, § 2253 authorizes the Director to issue emergency orders that take two discrete forms of action in response to epidemics: (1) restricting gatherings, and (2) establishing procedures to ensure the continuation of essential public health services and enforcement of health laws. While significant (and life-saving), these authorizations are not carte blanche. They are linked and responsive to the Legislature's specific concern: epidemics. While the EPGA permitted *any* "reasonable" and "necessary" action directed to safeguard people and property during an array of

different public emergencies, the § 2253 authority is circumscribed to two categories of regulation that are available in only one type of emergency circumstance.

Second, the duration of the authority vested in the Director is limited to the end it seeks to combat—the epidemic. While epidemics may last for many months, the Legislature's grant was not open ended. The Director's authority under § 2253 may be invoked only so long as an epidemic persists—and furthermore, only so long as control of the epidemic through the invoked authority is necessary to protect the public health. These express requirements limit the duration of the delegated authority in a manner suitable to the subject of the delegation; epidemics do not follow uniform, predetermined time limits, and the Legislature's decision to tailor the duration of its delegation accordingly is both constitutional and sensible. Meanwhile, these statutory limits provide a clear path for those affected by the Director's orders raise a legal challenge, should the epidemic come to an end but the orders remain in place.

Third, the governing standards in § 2253 are not unduly broad. The Director is limited to the two categories of action mentioned above—restricting gatherings and establishing procedures to "insure continuation of essential public health services and enforcement of health laws"—and only when the Director determines such action is "necessary to protect the public health" of Michiganders. MCL 333.2253(1). This kind of necessity standard is a common legislative design, and it has withstood the test of time in Michigan, particularly when coupled with other standards as § 2253 provides. See, e.g., *Mich State Hwy Comm v Vanderkloot*, 392

Mich 159 (1974) (upholding "necessity" as a standard for the exercise of Department of Transportation's authority to take property under eminent domain); *GF Redmond & Co v Michigan Sec Comm'n*, 222 Mich 1, 7 (1923) ("good cause" was sufficient for licensing); cf *Certified Questions*, 506 Mich at 369 n 20, 371 (recognizing that, while the term "necessary" was not "by itself a sufficient standard . . . in the context of the remarkably broad powers conferred by the EPGA," it "might be sufficient" in other contexts). And the nature of the circumstances to which these standards apply—the single and unique context of epidemics, which are both complex and constantly changing events—only further confirms the standards' adequacy and propriety. See *State Conservation Dep't v Seaman*, 396 Mich 199, 210 (1976) ("The preciseness of the standard will vary with the complexity and/or the degree to which subject regulated will require constantly changing regulation."); *Hill*, 224 Mich at 399 ("There must be some elasticity, in order to effectually meet varying conditions, and the Legislature has seen fit to fix the ultimate purpose of the regulations to be the 'common safety' and to leave the details necessary to work out that purpose to an administrative board.").

In sum, the Legislature granted public health experts targeted tools, to be utilized only when "necessary to protect the public health" and only during the exigency of an epidemic. This wise delegation to a nimble, expert agency is not only constitutional under Michigan's nondelegation jurisprudence, including *In re Certified Questions*, but necessary to protect the public health during the spread of a deadly, contagious, ever-agile, and mutating virus. The preceding two years have

well illustrated that epidemics are both complex and constantly changing events, with the scientific understanding of both the disease and mitigation measures developing over time.

The need for nimbleness and flexibility in responding to such circumstances is self-evident and paramount. Thankfully, Michigan's nondelegation doctrine, including under *In re Certified Questions*, does not disturb the Director's authority.

B. The circuit court's opinion suffers from several analytic flaws, stretching the nondelegation doctrine well beyond its proper bounds, including under *In re Certified Questions*.

Given the principles of Michigan law on the nondelegation doctrine and the general principles of jurisprudence for public health officials to address epidemics and infectious communicable diseases, the circuit court's mistakes below are manifold. As detailed above, a long line of authority unmistakably confirms the propriety of MCL 333.2253's grant of authority to the Director to take the actions specified in the statute when necessary to control the spread of an epidemic and protect the public health. The circuit court's decision is at odds with this settled precedent, and while the court leaned heavily on *In re Certified Questions*, that decision, as discussed, does not provide a viable path to a different outcome. The following errors in the court's analysis particularly stand out:

First, in discussing the "scope of the power vested in the Director," the circuit court neglected a review of the statutory language, but instead pointed to the regulations in the relevant Director's order issued under § 2253 as all-but dispositive. (App'x G, Op at 12–16, referencing 11/15/2020 Dir Order.) While the

terms of the order are perhaps *relevant* to "illustrate" the authority available to the Director, see *In re Certified Questions*, 506 Mich at 364, the nondelegation doctrine concerns the scope—and thereby the language—of the challenged statute itself, see *id.* at 363–364.[24] The circuit court below made no attempt to evaluate the statute's language and limitations, as discussed above, Section II.A.4. This deficiency likewise pervades the court's consideration of § 2253's standards, which treats "epidemic" and "necessary" as the only guideposts for or limitations on the statute's delegation of authority while ignoring the statute's further delineation of two discrete categories of action the Director can take when control of an epidemic is necessary.

Second, the little attention the circuit court did pay to § 2253's plain language was itself flawed. The court brushed aside the statutory term "necessary" as an "airy" and meaningless standard, but as discussed above, ample Michigan jurisprudence, including *In re Certified Questions*, belies that characterization here. Furthermore, in reviewing the durational limit of § 2253, the circuit court noted that "epidemic" is not specifically defined by the statute (which is true), but is "solely up to the determination of the Director" (which is not true). (*Id.* at 18.) Because of this alleged elasticity, the circuit court speculated that the Director's

[24] Indeed, if a litigant wishes to challenge the executive's exercise of authority, it has ample paths to do so—through claims challenging the exercise as beyond the scope of the statute's terms, for instance, or as violative of its individual rights. The nondelegation doctrine does not provide a catchall means for a litigant to air, or a court to consider, every grievance there might be with how the executive is exercising a grant of authority.

§ 2253 power contained virtually unlimited authority ("unexercised, but available"): suggesting that the Director "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.' " (*Id.* at 19.) This point is unfounded and lacks a basis in law or fact. Indeed, it ignores one of the crucial principles of Michigan's nondelegation doctrine: that "the act must be read as a whole." *BCBSM*, 422 Mich at 51; see also *In re Certified Questions*, 506 Mich at 381 (approvingly citing *Fed Radio Comm v Nelson Bros Bond & Mortgage Co*, 289 US 266, 285 (1933) and its consideration of the statutory "context").

Notably, MCL 333.2221(1), which is contained in the same Part of the Public Health Code as § 2253, sets forth the Department's charge to "continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including . . . prevention and control of diseases." As part of this charge, the Department "shall" "[m]ake investigations and inquiries as to . . . *[t]he causes of disease* ***and especially of epidemics***." MCL 333.2221(2)(d)(i) (emphasis added). Thus, the broader statute, which the circuit court failed to consider, shows that "epidemic" is not quite so elastic after all. This understanding—of an "epidemic" concerning "disease"—reflects the common understanding and dictionary definitions of the word "epidemic." See, e.g., Merriam-Webster.com, definition of "epidemic" ((2) "an outbreak of disease that spreads quickly and affects many individuals at the same time"); Dictionary.com, definition of "epidemic" (*noun*: "a temporary prevalence of a disease").

In short, the word "epidemic" in the Public Health Code in general and § 2253 in particular is not a concept ripe for the Director to willy-nilly expand into oblivion. This error reflects the circuit court's failure to follow this Court's precedent that the nondelegation doctrine requires looking at the challenged act as a whole. It also, for that matter, ignores the conventional and proper role that courts play in interpreting statutory terms. Words have meaning, and no court would countenance any executive actor stretching a word like "epidemic" beyond recognition, durationally or otherwise—the Director's determination that an epidemic exists is subject to great deference, but it is not beyond judicial review. See *Straus v Governor*, 459 Mich 526, 533 (1999).

Third, in what it described as an act of "judicial restraint," the circuit court purported to sever all of MCL 333.2253. (App'x G, Op at 29.) As detailed below, this act of "restraint" was in fact one of overreach: the circuit court was sitting in an appellate capacity in reviewing an agency determination, with the sole province to determine whether it should "hold unlawful and set aside a decision or order of an agency"—namely, the $5,000 fine imposed on Iron Pig. MCL 24.306(1). The circuit court lacked equitable authority in its appellate posture, *Huron Behavioral Health v Dep't of Comm Health*, 293 Mich App 491, 497–498 (2011), and failed to respect its limited judicial role here. See Issue III. Indeed, not even Iron Pig had sought this extent of relief.[25]

[25] One wonders what the circuit court may have severed if left unrestrained. As a clue, the circuit court identified several provisions of the public health code that were not at issue in this case, including those regarding the emergency authorities

The unnecessarily broad swipe the circuit court took at MCL 333.2253 not only went well beyond the proper bounds of the administrative appeal before the court, but also purported to obliterate the recent effort of the Legislature, through its bi-partisan passage of Enrolled Senate Bill 759 of 2021, to alleviate the well-publicized staffing shortages hospitals and nursing homes are experiencing right now in this epidemic. See MCL 333.16171(d) (making the Director's exercise of authority under § 2253 a prerequisite to the allowance of health professionals to practice under the relaxed licensing standards).

These problems with the circuit court's opinion highlight the danger of an imbalanced nondelegation review. Even with its flaws, *In re Certified Questions* recognized the powerful and rarely used nondelegation doctrine does not authorize courts to strike down laws that are not only presumed constitutional, but are necessary to the health and safety of Michiganders. It is "an extraordinary doctrine, not routinely to be invoked," 506 Mich at 372 n 21, and it most certainly does not authorize a court to disregard the proper scope of its jurisdiction and of the actual dispute before it.

The circuit court acted beyond its authority in striking down a law that it may think should have been drafted or executed differently. But that is not the role of the

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of local health departments, MCL 333.2453, the authority of the Department and LHDs to abate public health nuisances, MCL 333.2455, and the entire chapter governing "hazardous communicable diseases," MCL 333.5201 *et seq*. (App'x G, Op at 28–29, n 6.) The circuit court made a point to note "that 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." (App'x G, Op at 28–29.)

judiciary, and the court erred in assuming it here. Michigan's collected jurisprudence, including *In re Certified Questions*, points in one direction: the $5,000 fine that the Department imposed on Iron Pig Smokehouse restaurant here was properly levied, and this Court should grant the bypass application and affirm the Director's authority in the Public Health Code under § 2253.

III. The circuit court acted outside of its authority in purporting to issue declaratory relief in an appeal from an administrative decision.

The arguments above really answer all of the questions necessary to resolve this appeal. That is, the Legislature's grant of certain authority to the Director as chief health officer for the State to protect the public health from disease and epidemics in § 2253 is constitutional.

In ruling to the contrary, the circuit court exceeded its authority by misusing the nondelegation doctrine as a tool to judicially override the policy judgment of the Legislature. See *Calovecchi v State*, 461 Mich 616, 624 (2000) ("policy questions are properly directed toward the Legislature"). But the circuit court then compounded this error by purporting to provide equitable relief, beyond just the issue whether Iron Pig was responsible for the $5,000 fine imposed here.

To repeat, this matter came to the circuit court as an administrative appeal. Thus, the sole province of the circuit court was to determine whether it should "hold unlawful and set aside a decision or order of an agency," namely, the $5,000 fine imposed on Iron Pig. MCL 24.306(1). The circuit court had no equitable authority in this appellate context. *Huron Behavioral Health*, 293 Mich App at 497–498

(ruling that the circuit "erred" in relying on "equity to reverse the administrative decision" because "[a]dministrative tribunals do 'not have equitable jurisdiction' unless expressly authorized by statute."). While it is true that the circuit court could grant relief after reviewing the constitutionality of the agency action, see MCL 24.306(1)(a), the nature of the relief itself is still limited by law.

In other words, those wishing to bring actions seeking equitable relief from allegedly unconstitutional statutes against the Department or other State agencies must seek such relief in the Court of Claims. MCL 600.6419.[26] The questions of authority of the court regarding the grant of relief are secondary to the first-order question of the constitutionality of § 2253, but these constraints on authority are the touchstone of our democracy.

The error underlies not just the grant of a remedy outside the authority of the court, but its decision in the first instance to purport to strike down a constitutional law that reflects longstanding authority of public health officials in Michigan.

[26] Furthermore, even a declaratory judgment properly sought in that forum would only bind the Department in its relationship to Iron Pig here. See *Associated Builders & Contractors v Dir of Consumer & Indus. Servs Dir*, 472 Mich 117, 124 (2010) ("A declaratory judgment is a binding adjudication of the rights and status of litigants which is conclusive in a subsequent action between the parties as to the matters declared[.]") (cleaned up), overruled on other grounds by *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349 (2010). See also *State of Florida v United States Department of Health and Human Services*, 780 F Supp 2d 1307, 1316 (ND Fl, 2011) ("A declaratory judgment establishes and declares 'the rights and other legal relations' between the parties before the court . . . .").

CONCLUSION AND RELIEF REQUESTED

This Court should grant the bypass application, affirm the authority of the Director of the Department of Health and Human Services to act under MCL 333.2253 to protect the public health from epidemics, and disavow *In re Certified Questions*' expansive approach to the nondelegation doctrine to ensure the destabilizing errors that have plagued this case do not recur.

Dana Nessel
Attorney General

Fadwa A. Hammoud
Solicitor General

B. Eric Restuccia (P49550)
Deputy Solicitor General

Christopher M. Allen (P75329)
Assistant Solicitor General

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

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