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November 5, 2021

Otsego County Circuit Court Clerk
225 W. Main Street
Gaylord, MI 49735

Re: Moore Murphy Hospitality, LLC d/b/a Iron Pig Smokehouse v Michigan Department of Health and Human Services
Case No. 21-18522-AE; Hon. Colin G. Hunter

Dear Clerk:

Enclosed for filing, please find the Response Brief of Appellee-Michigan Department of Health and Human Services with the respective Poof of Service in relation to the above-referenced matter.

Thank you for your attention in this matter.

Sincerely,

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DF/aeb

STATE OF MICHIGAN
IN THE 46th JUDICIAL CIRCUIT COURT FOR OTSEGO COUNTY

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

Petitioner-Appellant,

v

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent-Appellee.
_____/

Case No.: 2021-18522-AE

HON. COLIN G. HUNTER

RESPONSE BRIEF OF APPELLEE-MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES

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INTRODUCTION

Iron Pig opens its brief with a section entitled "Liberty and Tyranny"[1] featuring a quote from Montesquieu that has been oft-cited, and frequently misunderstood, within the context of this pandemic. The affinity those disagreeing with COVID-19 restrictions have had for this Montesquieu quote is understandable. It blends a superficially purest view of the separation of powers principle with the evocative concept of tyranny. But omitted from Iron Pig's presentation of the Montesquieu discussion from *46th Cir Trial Court v Crawford Co*, 476 Mich 131 (2002), is the role of Federalist Paper number 47 as the source authority. A review of that document, authored by James Madison, shows the same Montesquieu quote was being offered as part of a criticism to the United States Constitution at the time this now-cherished document was merely a proposal being debated:

> "One of the principal objections inculcated by the more respectable adversaries to the constitution, is its supposed violation of the political maxim, that the legislative, executive and judiciary departments ought to be separate and distinct.
>
> No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may

[1] Though no citation is supplied, it appears Iron Pig copied that paragraph's text from the majority opinion of *In re Certified Questions*, 506 Mich 332, 357 (2020). Other passages in Iron Pig's brief are likewise copied from the *Certified Questions* decision, though without appropriate citation (or much if anything in the way of context or analysis). For example, the section titled "Michigan State Board of Health" is found at *Certified Questions*, 506 Mich at 397-398, 405 (VIVIANO, J., concurring in part and dissenting in part), and portions of the "Nondelegation Doctrine" and "Analysis" section can be found in *Certified Questions*, *supra* at 359, 361-362, 364-366, 371.

> justly be pronounced the very definition of tyranny. Were the federal constitution therefore really chargeable with this accumulation of power or with a mixture of powers having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself however, that it will be made apparent to everyone, that the charge cannot be supported, and that the maxim on which it relies, has been totally misconceived and misapplied."[2]

Madison went on to use the balance of Federalist 47 to make clear Montesquieu's meaning was one very different from the concept of blended government found both in the proposed Constitution and that which already existed in various States:

> "From these facts by which Montesquieu was guided it may clearly be inferred, that in saying 'there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,' or, 'or if the power of judging be not separated from the legislative and executive powers,' he did not mean that these departments ought to have no partial agency in, or no controul over the acts of each other. His meaning, as his own words import, and still more conclusively illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted."[3]

In other words, Montesquieu and our Founding Fathers were concerned about the tyranny resulting from the total accumulation of power in a single person or branch of government, such as when a King alone makes laws and controls the courts punishing those violating his commands. Having thus used Federalist 47 to

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[2] The Federalist No. 47 (Madison), available at: https://guides.loc.gov/federalist-papers/text-41-50#s-lg-box-wrapper-25493412.

[3] *Id.*

bring clarity to the separation of powers concept as envisioned by Montesquieu, Madison then went on in that publication to elaborate how the sharing of various powers among the branches of government is both inevitable and expedient. On the strength of such arguments, the Constitution was adopted, and the concept of shared powers has become an engrained part of our system of government and, with it, non-delegation caselaw. See, e.g., *Certified Questions*, *supra* at 358 (quoting Justice Scalia for the idea that ""[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action."" *Mistretta v United States*, 488 US 361, 417 (1989) (SCALIA, J., dissenting)).

This appeal implicates the exercise of discretion pursuant to statutory authority and standards by an Executive branch official appointed by a Governor chosen by the People through state-wide election. The statute at issue in this case was enacted by Michigan's independently elected Legislature, which retains the ability to amend or repeal that law—as do the people of Michigan themselves, for that matter, through their constitutionally enshrined initiative and referendum powers. See Const 1963, art 2, § 9.[4] And the action the Director of the Michigan Department of Health and Human Services (MDHHS) took under that law is ultimately reviewable by this and other courts fulfilling their independent role under Michigan's Constitution. There is nothing unusual, let alone

[4] Indeed, one group has undertaken to exercise that power as to MCL 333.2253. See https://www.michigan.gov/documents/sos/Announcement_-_Unlock_II_Petition_Summary_728605_7.pdf.

unconstitutional, about this status quo, and the concept of tyranny is, at best, irrelevant to the present dispute.

At its core, the present appeal implicates a disagreement over the COVID-19 restriction against indoor dining that existed a year ago—at a time when there was elevated transmission of, and no widely-available vaccine for, that novel, highly contagious, and potentially fatal virus. Iron Pig defied that restriction repeatedly and MDHHS imposed a civil fine of $5,000. Iron Pig now advances this appeal on the legal theories that the non-delegation doctrine, and Michigan's Administrative Procedures Act, have been violated. These are weighty claims; they go to the heart of MDHHS's ability to discharge its institutional duty to protect the public health of this state, particularly in times of emergency, and they carry implications that reach well beyond this case and even this pandemic. Iron Pig brandishes these sweeping contentions as means to avoid its $5,000 civil citation, but it has offered nothing to meaningfully substantiate them. And as MDHHS has already briefed at length, in these contentions, Iron Pig is wrong.

ARGUMENT

I. Iron Pig's arguments do not align with the case and relief at issue.

In its Brief on Appeal regarding the non-delegation issue, Iron Pig enumerates several aspects of the now-rescinded epidemic order that it apparently takes issue with, from the masking of athletes to the collection of information by businesses for contact-tracing purposes. (Iron Pig Brief re: Constitutionality, p 11). But the only restriction in the Director's November 15, 2020, order that Iron Pig was alleged to have violated in relation to the challenged fine was the restriction against indoor dining. (Exhibit D.)

Given that its violation of that restriction was willful and undisputed, it is no surprise that Iron Pig would be eager to focus this Court's attention elsewhere. This Court should not indulge that effort. Under the concept of judicial restraint, a court does not undertake to decide constitutional issues unnecessary to resolution of the case before it. *People v Riley*, 465 Mich 442, 447 (2001). Nor, for that matter, is it to undertake to decide hypothetical questions, but instead present, actual legal controversies between the particular parties before it. *League of Women Voters v Sec'y of State*, 506 Mich 561, 586 (2020). And Iron Pig cannot use whatever disagreements it may have with the State's response to the COVID-19 pandemic writ large to effectively pursue equitable relief in this appeal from an agency decision. *Huron Behavioral Health v Dep't of Community Health*, 293 Mich App 491, 497-498 (2011).

Indeed, to the extent broader considerations have any relevance here, it is in how they illuminate the mismatch between the discrete, retrospective relief at issue in this appeal and the expansive, forward-reaching arguments Iron Pig seeks to advance to achieve it. A determination that MCL 333.2253 violates the non-delegation doctrine, and/or that its emergency orders are subject to the formal rulemaking requirements of the APA, would potentially imperil the protections provided by numerous such orders that are currently still in place and that have nothing to do with the long-since-rescinded limitation on gatherings for indoor dining that is at issue here.[5] And of course, on an even broader and more fundamental level, such a ruling would threaten to severely cripple MDHHS's ability to quickly and effectively respond to future epidemics, no matter how fast-moving and dangerous they might be. Simply put, Iron Pig's contentions on appeal are not only meritless, as demonstrated previously and below, but they are a poor fit in scope and effect with the relief they are offered for here.

II. MCL 333.2253 does not violate the non-delegation doctrine.

Iron Pig's brief on the non-delegation argument consists primarily of summaries of court opinions such as *Certified Questions*, *supra*, and *Wis Legislature*

[5] This includes, for instance, the Director's January 13, 2021 order requiring clinical laboratories to prioritize COVID testing and providing standards for COVID reporting by hospitals; the Director's June 25, 2021 order providing for COVID testing and transmission-prevention protocols for prison staff and inmates, and the Director's October 12, 2021 order providing for COVID testing within nursing homes, homes for the aged, and other residential care facilities. For these and other orders still in effect, see https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-533660--,00.html.

v Palm, 391 Wis 2d 497 (2020). Significantly, though, Iron Pig's brief contains only a few conclusory statements about the text of MCL 333.2253, and absolutely no contextual analysis. (Iron Pig Brief re: Constitutionality, pp 11-12).

As Justice Markman observed in *Certified Questions*, "[a] nondelegation inquiry always begins (and often almost ends) with statutory interpretation." *Certified Questions*, supra at 379 (quoting *Gundy v United States,* 139 S Ct 2116, 2123 (2019)). Thus, and as the Michigan Supreme Court took pains to make clear, *Certified Questions*' invalidation of the Emergency Powers of the Governor Act under the non-delegation doctrine was a determination specific to that particular statute.[6] Correspondingly, to the extent that ruling has any potential value in this case, it is only in the general insights it may offer on the analytical framework that should be brought to bear on MCL 333.2253. Although reciting some of those concepts, Iron Pig applies none of them.[7] "It is not enough for an appellant in his

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[6] See *Certified Questions*, *supra* at 372 n 21, 384 (describing its ruling as the result of 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, and observing 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"); see also *id.* at 405 (VIVIANO, J., concurring in part and dissenting in part) (observing that MCL 333.2253 is "still the law"), 432 (MCCORMACK, C.J., concurring in part and dissenting in part) (noting the Court's ruling did not purport to reach MCL 333.2253 or any orders issued pursuant to it).

[7] To the contrary, as noted, Iron Pig largely just pulls chunks of language from *Certified Questions* and conclusorily plugs itself and MCL 333.2253 in as it sees fit. As also noted above, however, and has MDHHS has already explained, the Michigan Supreme Court anticipated efforts such as this to graft its *Certified Questions* ruling onto other statutes, particularly MCL 333.2253, and made clear such efforts should be rejected.

brief simply to announce a position or assert an error and then leave it up to [the] [c]ourt to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v City of Detroit*, 355 Mich 182, 202-203 (1959).

Within its Brief on Appeal, MDHHS provides a non-delegation analysis of MCL 333.2253 with an eye toward each of the three considerations the Michigan Supreme Court has long recognized as guiding that constitutional inquiry. (MDHHS Brief on Appeal, pp 10-17). Those arguments will not be repeated. But MDHHS here emphasizes that the subject matter of MCL 333.2253 is the existence of an epidemic in which there is a need to protect the health of Michiganders; it is only in that single context in which the authority it vests in MDHHS is activated. And, as previously argued, MCL 333.2253 contains, among other limitations on that authority, a well-recognized necessity standard for the control of such an epidemic. (MDHHS' Brief on Appeal, pp 16-17). Lastly, Iron Pig is wrong in asserting this authority is of unlimited duration. The mechanism the Legislature prescribed for the exercise of that authority is an "emergency order." MCL 333.2253(1). Correspondingly, the duration of the discretion granted is tied to the duration of the epidemic emergency and the need to protect the public health as a result thereof.

The authority to prohibit gatherings under MCL 333.2253 is inarguably substantial. But that power is limited in important ways, and its scope and standards are as reasonably precise as the circumstances of an epidemic dictate.

(See MDHHS' Brief on Appeal, p 16). And Iron Pig offers no contrary argument, analysis, or case law.

III. There is no rule promulgation requirement for Emergency Orders to prohibit gatherings during an epidemic.

The MDHHS again relies upon its prior briefing and will not repeat those arguments. (MDHHS' Brief on Appeal, pp 18-24). Only two points from Iron Pig's brief on appeal related to its rule promulgation argument merit response.

First, Iron Pig's reliance on *Wis Legislature v Palm* is misplaced. The *Palm* decision is inapposite. Structurally, the Wisconsin public health statute at issue in that case, Wisconsin Stat. 252.02, is nothing like MCL 333.2253. And there is no discussion in that opinion of an exception to Wisconsin's Administrative Procedures Act like that found in MCL 24.207(j).

Second, Iron Pig's statement that MCL 333.2253 does not provide express or implicit authority for the action taken here is as confusing as it is conclusory. (Iron Pig's Brief re: Rule Promulgation, pp 2-3). Iron Pig offers nothing in support of it,[8] and MCL 333.2253, by its plain language, authorizes the Director to prohibit gatherings for any purpose when doing so is necessary to protect the public health against the spread of an epidemic disease. MDHHS' Director issued the November 15, 2020, order to temporarily prohibit gatherings for the purpose of indoor dining as a means of protecting the health of Michiganders against the scourge of COVID-

[8] Nor, for that matter, does the stipulated and ordered scope of this appeal include, as an identified issue, whether the temporary prohibition on gatherings for the purpose of indoor dining fell within the scope of MCL 333.2253's terms.

19. The action taken was thus well within the express contemplation of the statute, and, for the reasons already briefed (and as two appellate judges sitting on the Court of Claims have already concluded), it fully comported with the APA; simply asserting otherwise does not change that reality.

CONCLUSION AND RELIEF REQUESTED

Iron Pig violated the MDHHS' Director's order prohibiting indoor dining at the end of last year as a means of mitigating the spread of Covid-19. It was properly fined $5,000. Iron Pig's contentions that MCL 333.2253 violates the non-delegation doctrine and the APA are without merit and should be rejected.

Through its actions and public statements last year, and now in this appeal, Iron Pig makes clear its disagreement with the indoor dining restrictions and other COVID-19 mitigation measures. For much of this pandemic, there has been disagreement among Michiganders about the principles and measures that should guide the balance between controlling the spread of disease and the pursuit of the life we knew before COVID-19's emergence. As we are fortunate to live in a free society welcoming the expression of all voices on these topics, the public debate will undoubtedly continue. Such will be in keeping with the entirety of American history. As President Thomas Jefferson said in his second inaugural address, though, we will all do well to remember that we share core values transcending our disagreements over the best means of achieving them: that, be it "our doubting brethren" or "the mass of their fellow citizens, with whom they cannot yet resolve to act, as to principles and measures, [we] think as they think; that our wish, as well as theirs, is, that the public efforts may be directed honestly to the public good, that peace be cultivated, civil and religious liberty unassailed, law and order preserved;

equality of rights maintained, and that state of property, equal or unequal, which results to every man from his own industry, or that of his fathers."[9]

Undeniably, this pandemic has been challenging for Michigan's residents and businesses, including food service establishments such as the Iron Pig. Iron Pig has made clear its frustrations, but it has fallen far short of carrying its burden on the legal arguments advanced in this appeal. Thus, for the reasons stated above and previously, the ALJ's decision should be affirmed.

Respectfully submitted,

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Dated: November 5, 2021

[9] Thomas Jefferson Second Inaugural Address, https://avalon.law.yale.edu/19th_century/jefinau2.asp.

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Case No. 2021-18522-AE

HON. COLIN G. HUNTER

PROOF OF SERVICE

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The undersigned certifies that a copy of the Response Brief of Appellee-Michigan Department of Health and Services was served upon the above attorney of record by first class mail to their respective addresses thereon, on the 5th day of November, 2021.

/s/ Alexis E. Bittner
Alexis E. Bittner, Legal Secretary
Corporate Oversight Division
Michigan Dep't of Attorney General