STATE OF MICHIGAN
46TH CIRCUIT TRIAL COURT
OTSEGO COUNTY

IN THE MATTER OF:

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

Petitioner-Plaintiff,

v

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan

Respondent-Defendant,

Circuit Court Case No: 21-18522-AE

MOAHR Docket No.: 20-007763

Honorable Colin G. Hunter

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PETITIONER'S BRIEF RE:
CONSTITUTIONALITY
NONDELEGATION DOCTRINE

LIBERTY AND TYRANNY

" [T]he 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 justly be pronounced the very definition of tyranny.' " *46th Circuit Trial Court v Crawford Co,* 476 Mich 131 (2002), "[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. Baron de Montesquieu, *The Spirit of the Laws*

FIRST IMPRESSION

To date no Michigan Appellate Court has ruled on the constitutionality of MCL 333.2253, which provides in pertinent part:

> (1) If the director that determines 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 service and enforcement of health laws. Emergency procedures shall not be limited to this code. (emphasis supplied)

Thus, this is an important public question of first impression.

EXECUTIVE POWER

This action, at its most basic level, is simple. The Governor has two kinds of power: those given to her in the Constitution, and those given to her by the Legislature under statute. The emergency powers of the Governor are not inherent. They are not listed in the powers given to the Governor in the Constitution but were given to the Governor by the legislature. Any power the Legislature gives to the other branches of government, it can freely rescind, modify, or

limit. The Legislature makes the laws. The Governor and the Courts follow them.

In response to the COVID-19 pandemic, the Governor issued several executive orders and agencies issued emergency regulations.

A FEDERAL QUESTION

In 2020, Judge Paul L. Maloney United States District Judge, Western District of Michigan Southern Division certified the following question to the Michigan Supreme Court:

> Whether the Emergency Powers of the Governor Act and/or the Emergency Management Act violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution. *Midwest Institute v Whitmer,* United States District Court Western District of Michigan Southern Division No. 1:20-cv-414

The executive power were challenged in 2020 in what ultimately became *In re Certified Questions,* Docket No. 1691492 Decided October 2, 2020, in the Michigan Supreme Court.

The Michigan Supreme Court Held:

> The governor did not posses the authority to exercise emergency power under the EPGA [Emergency Powers of the Governor Act of 1945] because the act unlawfully delegates legislative power to the executive branch in violation of the Michigan Constitution.
>
> The Court concluded that the EPGA violated the Michigan Constitution because it delegated to the executive branch the legislative powers of state government and allowed the executive branch to exercise those powers indefinitely.
>
> As the scope of the powers conferred upon the Governor by the Legislature becomes increasingly broad, in regard to both the subject matter and their duration, the standards imposed upon the Governor's discretion by the Legislature must correspondingly become more detailed and precise. MCL 10.31(1) of the EPGA delegated broad powers to the Governor to enter orders "to protect life and property or to bring the emergency situation within the

affected area under control," and under MCL 10.31(2),m th Governor could exercise those powers until a "declaration by the governor that the emergency no longer exists."

Thus, the Governor's emergency powers were of indefinite duration, and the only standards governing the Governor's exercise of emergency powers were the works "reasonable and necessary," neither of which supplied genuine guidance to the Governor as to how to exercise the delegated authority nor constrained the Governor's actions in any meaningful manner. Accordingly, the EPGA constituted an unlawful delegation of legislative power to the executive and was unconstitutional under Const 1963, art 3, § 2, which prohibits exercise of the legislative power by the executive branch.

However, Chief Justice McCormack dissented from the majority's constitutional ruling striking down the EPGA. The United States Supreme Court and the Michigan Supreme Court have struck down statutes under the nondelegation doctrine only when the statues contain no standards to guide the decision-maker's discretion, and the delegation in the EPGA had standards—for the Governor to invoke the EPGA, her actions must be "reasonable" and necessary," the must "protect life and property" or "bring the emergency situation…under control," and they may be taken only at a time of "public emergency" or "reasonable apprehension of immediate danger" when "public safety is imperiled." Those standards were as reasonably precise as the statute's subject matter permitted. Accordingly, the delegation in the EPGA did not violate the nondelegation doctrine.

The conclusion of Justice Markman's opinion, which seems to capture the view of the majority, is clear: "[T]he executive orders issued by the Governor in response to COVID-19 pandemic now lack any basis under Michigan law." (The opinion adds, though, "Our decision leaves open many avenues for the Governor and legislature to work together to address this challenge and we hope that this will take place.")

THE HEALTH DEPARTMENT ORDERS

On November 15, 2020, Governor Whitmer, upon information and belief, advised the now-resigned Director Robert Gordon of MDHHS to issue an emergency order purportedly pursuant to MCL 333.2253 restricting gatherings and requiring that face masks be worn in public. This order provided the following restrictions with respect to restaurants, bars, and banquet halls:

> Food service establishments must prohibit gatherings in all the following circumstances:
>
> (a) In indoor common areas in which people can congregate, dance, or otherwise mingle;
>
> (b) If there is less than six fee of distance between each party;
>
> (c) If they exceed 50% of normal seating capacity;
>
> (d) Anywhere alcoholic beverages are sold for consumption onsite, unless parties are seated and separated from one another by at least six feet, and do on intermingle.
>
> (e) If they involve any persons not seated at a table or at the bar top (customers must wait outside the food service establishment if table or bar top seating is unavailable.

MDHHS continued to issue orders until July 1, 2021.

MICHIGAN STATE BOARD OF HEALTH

As far back as 1873, the Legislature had created the State Board of Health, which was given "general supervision of the interests of the health and life of the citizens of this State". 1873 PA 81, The Board was to "make sanitary investigations and inquiries respecting the causes of disease, and especially of epidemics.

In 1883, the Legislature authorized minimal health offices to order isolation of the sick.

The Legislature granted similar powers to the State Board of Health allowing it to isolate individuals suspected of having communicable diseases. 1893 PA 47.

The statutory structure in place in 1945 took shape in the wake of the influenza epidemic of 1918. In the midst of that epidemic, the Governor banned by order various public meetings. *State Closing is "Flu" Order,* Lansing State Journal (October 19, 1918. The order did not cite any authority allowing the Governor to take such action, but the closures lasted only a few weeks. *Id. Governor Lifts "Flu" Ban,* The Sebewaing Blade (November 7, 1918).

In case of an epidemic the state health commission may forbid the holdings of public meetings. Such action shall not be taken without the consent and approval of the Advisory Council of Heath and if applicable to the entire state, be countersigned by the Governor 1919 PA 1946. 1948 CL 325.9.

The Governor's interpretation makes nonsense out of the current body of statutes. Many laws similar to those above remain on the books. Moist notable, the 1919 law passed in the wake of the influenza epidemic and the Governor's actions is still the law, albeit in slightly modified form. See MCL 333.2253 (allowing the director of the health department to "prohibit the gathering of people for any purpose and [to] establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws"). But this law is redundant alongside the EPGA. As if to proive this, the Director of the Dep0artment of Health and Human Services (DHHS) has issued a series of orders under MCL 333.2253 simply 'reinforcing" key executive orders on COVID-19, such as those mandating

masks and instituting the Safe Start Program, which itself contains the Governor's overarching regulatory response to COVID-19 (e.g., remote-work requirements, public-accommodation restrictions, and prohibitions on large gatherings).

In other words, nearly everything the Governor has done under the EPGA, she has also purported to do, via the DHHS Director, under MCL 333.2253. *In re Certified Question Justice Viviano Concurring*

In *In re Certified Question,* the plaintiffs sought a declaration prohibiting the defendants from enforcing Department of Health and Human Services orders issued by defendant Director Robert Gordon. Those orders proclaim to draw their authority not from the EMA or EPGA but from MCL 333.2253. The federal district court did not certify to this Court any question regarding the validity of those orders, and this Court does not offer any opinion on the validity of continued enforcement of those orders. *(McCormack dissenting)*

ANOTHER FEDERAL QUESTION

In 2020, Judge Maloney issued an order considering certifying the following question to the Michigan Supreme Court:

1. Is M.C.L. §333.2253(1) an impermissible delegation of legislative authority such that it violates the non-delegation clause of the Michigan Constitution?
2. If M.C.L § 333.2253(1) is a permissible delegation of legislative authority, does Michigan Department of Health and Human Services Director Robert Gordon possess the authority under that statute to develop am promulgate a comprehensive regulatory scheme, such as the November 15 Emergency Order?

The parties stipulated to dismissal prior to certification.

WISCONSIN PUBLIC HEALTH EMERGENCY POWERS

On March 31, 2021, the Wisconsin Supreme Court struck down Gov. Tony Evers' statewide mask mandate.

"The question in this case is not whether the governor acted wisely; it is whether he acted lawfully. We conclude he did not," Justice Brian Hagedorn wrote for the majority.

On April 14, 2021, the Wisconsin Supreme Court further whittle away state government's public health emergency powers, ruling Gov. Tony Evers' administration overstepped its authority last year when it tried to restrict bar and restaurant capacity to slow the spread of COVID-19.

It is the third time the court has ruled against the Evers administration's efforts to address the coronavirus pandemic and the second time in just the past month.

Former state Department of Health Services Secretary Andrea Palm issued the restrictions in question on Oct. 6, citing a surge in COVID-19 cases. While the order included myriad exemptions, it limited business like bars and restaurants to 25 percent of their usual indoor capacity.

While Palm's order was far more limited than the "Safer at Home" order the state Supreme Court struck down in May 2020, it relied on the same set of laws. In its ruling handed down, the court's majority said that meant the order needed to be advanced as an "emergency rule," meaning it needed the Legislature's approval.

NONDELEGATION DOCTINE

Const 1963, art 3, § 2 summarizes the separation-of-powers principle in Michigan as follows:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising power of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

A. Adequacy of Standards

[C]hallenges of unconstitutional delegation of legislative power are generally framed in terms of the adequacy of the standards fashioned by the Legislature to channel the agency's or individual's exercise of the delegated power. *Blue Cross & Blue Shield of Mich v Milliken,* 422 Mich 1, (1985).

"[T]he constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion." *Gundy v United States,* 139 S Ct 2116 (2019).

When broad power is delegated with few or no constraints, the risk of an unconstitutional delegation is at its peak. Therefore, whether a delegation is unconstitutional depends on two factors—the amount of discretion and the scope of authority.

Furthermore, [t]he area of permissible indefiniteness narrows…when the regulation invokes criminal sanctions and potentially affects fundamental rights…. *United States v Robel,* 389 US 258 (1967).

Finally, the durational scope of the delegated power also has some relevant bearing, on whether the statute violates the nondelegation doctrine.

Of course, an unconstitutional delegation is no less unconstitutional because it last for only two days. But it is also true, as common sense would suggest, that the conferral of indefinite authority accords a greater accumulation of power than does the grant of temporary authority.

B. Scope of Delegated Power

The police power is legislative in nature. *Bolden v Grand Rapids Operating Corp,* 239 Mich 318 (1927). The power we allude to is rather the police power, the power vested in the Legislature by the Constitution, to make, ordain and establish all manner of wholesome and reasonable laws. "The invocation of a curfew or restriction on the right to assemble or prohibiting the right to carry on business licensed by the State of Michigan involves the suspension of constitutional liberties of the people."

C. Duration of Delegated Power

Under the EPGA, the powers maybe exercised until a declaration by the Governor that the emergency no longer exists. Thus, the Governor's emergency powers are of an indefinite duration.

Under MCL 333.253 the health director, to control an epidemic by emergency order may prohibit the gathering of people for any purpose.

The director's emergency powers are of an indefinite duration.

ANALYSIS

MCL 333.253 provides no standards. The statute provides no intelligible principles to guide the director's use of discretion.

Moreover, MCL 333.253 invokes criminal sanctions and involves the suspension of constitutional liberties of the people.

The EPGA provides for reasonable orders, necessary to protect life and liberty. However, the court determined these standards neither supplies genuine guidance as to how to exercise authority delegated nor constrains actions in any meaningful manner.

The director has issued the following emergency orders:

- Close indoor dining
- Prohibit indoor gatherings anywhere alcoholic beverages are sold
- Indoor sports no concessions are sold
- organized sports athletes wear a face covering
- Permit indoor gatherings up to 10 persons at a residence
- Outdoor gatherings of up to 100 persons occurring at a residence
- Venues with fixed seating occupancy must not exceed 20%
- Food service venues patrons are separated by at least 6 feet
- Food service establishments must close at 10pm
- Retail store must establish lines to regulate entry and checkout
- Businesses must obtain names of patrons, contact information and date and time of entry

- Prohibit indoor sports

The consequences of such illusory "non-standard" standards in this case is that the director possesses free rein to exercise a substantial part of our state and local legislative authority—including police powers—for an indefinite period of time.

These facets of MCL 333.253—its expansiveness, its indefinite durations, and its inadequate standards—are simply insufficient to sustain *this* delegation.

Accordingly, that the delegation of power to the Director to "prohibit the gathering of people for any purpose", constitutes an unlawful delegation of legislative power to an executive agency and is therefore unconstitutional under Const 1963, art 3, § 2, which prohibits exercise of the legislative power by the executive branch.

The above language is severable from the Michigan Public Health Code as provided in MCL 8.5.

EXECUTIVE AND AGENCY LEGISLATIVE AUTHORITY

The Health Department will argue that striking down a portion of MCL 333.2253 will defeat the states ability to regulate the health of its citizen. This is erroneous.

The Emergency Management Act MCL 30.403 affords the governor the power to declare a state of emergency for an epidemic with an extension approved by resolution of both houses of the legislature.

MCL 333.2251 affords the director the power to issue an order in cases of imminent danger to any individual. The order may prohibit the presence of individuals.

MCL 333.2251 affords the local director the power to issue an order in cases of imminent danger to any individual. The order may prohibit the presence of individuals.

Further, local municipalities, are authorized to establish rules and regulation and adopt ordinances and resolutions. County Board of Commissioners Act 156 of 1851; Township Ordinances Act 246 of 1945; Cities and Villages Article 7 Section 22 of the Michigan Constitution; 1909 PA 278 The Home Rule City Act and 1909 PA 278, The Home Rule Village Act.

On June 30, 2020 a civil emergency ordinance was introduced in the City of East Lansing under the Code of the City of East Lansing. The Ordinance was adopted on the same date June 30, 2020. The Ordinance, in part, limited the size and location of gatherings on public property. The orders shall not be continued or renewed for a period in excess of 7 days except with the consent of the City Council.

On September 14, 2020 and March 4, 2021 the Ingham County Health Department issued emergency orders pursuant to the above reference MCL 333.2453.

The orders provided for quarantine of people and the limitation of gatherings.

CONCLUSION

Recently, in Tiger Lily v HUD United States District Court Western District of Tennessee No 2:20-CV-02692 decided March 29, 2021, the Centers for Disease Control (CDC) issued an order temporarily halting residential eviction for any tenants for failure to pay rent (The Halt Order).

The court ruled:

The Supreme Court has recognized that "the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches." "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power'"

Congress is vested with the sole authority to legislate. Under the non-delegation doctrine, "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is vested." However, the non-delegation doctrine does not keep "Congress from obtaining the assistance of its coordinate Branches." Upholding the Halt Order under these circumstances, particularly where criminal sanctions are ultimately ordered by the CDC, goes too far. It would amount an impermissible delegation by Congress authorizing the CDC to make law.

Stay-at-home orders issued pursuant to a state emergency management act with proper limitations seem acceptable under the nondelegation doctrine. Orders issued by administrative can be on shakier grounds, especially if they attempt to bypass the rulemaking process. Acceptable limitations can be time-limits that require legislative approval to extend, such as the time limits imposed by the Wisconsin emergency management statute or Michigan's EMA. A state of emergency that can be terminated anytime by concurrent resolution of the legislature may also pass muster, as in the case in California, New York, Pennsylvania. As long as the legislature is given the opportunity to override the state of emergency, it appears, so far, that the

emergency management act and the accompanying executive orders will be upheld. *Government Authority to Respond to COVID-19, the Nondelegation Doctrine, and The Legislature vs Governors Harvard Law, January 28, 2021.*

WHEREFORE, Petitioner respectfully requests this Court determine MCL 333.2253 constitutes an unlawful delegation of legislative power to an executive agency under Const 1963 art 3 section 2 which prohibits exercise of the legislative power by the executive branch.

Dated: October 15, 2021

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