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. 164039 Court of Appeals No. 360175 Otesgo County Circuit Court No. 21-18522-AE **This appeal involves a ruling that a provision of the constitution, a statute, rule, or regulation or other state governmental action is invalid.**

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THE MICHIGAN SENATE'S AND MICHIGAN HOUSE OF REPRESENTATIVES' MOTION TO FILE AN AMICUS BRIEF IN OPPOSITION TO THE MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES' BYPASS APPLICATION FOR LEAVE TO APPEAL

Pursuant to MCR 7.212(H), the Michigan Senate and Michigan House of Representatives (the "Legislature"), not parties to this action, file this motion seeking leave to file a brief *amicus curiae* regarding this matter. In support, the Legislature states the following:

1. The Michigan Department of Health and Human Services has filed a bypass application for leave to appeal an order of the Otesgo County Circuit Court in an Administrative Procedures Act appeal of a decision of the Department imposing a $5,000 fine on the Petitioner-Appellee.

2. The Department asks the Court to use this case as a vehicle to overturn its recent precedent, *In re Certified Questions*, 506 Mich 332; 958 NW2d 1 (2020), which involved the nondelegation doctrine.

3. The Legislature believes that the Department's bypass application improperly seeks to have this Court reverse recent and thoroughly briefed precedent that touches the scope of the Legislature's exclusive power to legislate—all through procedural shortcuts without adequate briefing or development below.

4. The proposed *amici* submit the attached brief to address these issues.

5. The proposed brief is being filed contemporaneously with this motion.

CONCLUSION

The proposed *amici* respectfully request that this Court grant this motion and accept for filing the proposed brief *amicus curiae* being tendered with this motion.

Respectfully submitted,

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Exhibit A

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THE MICHIGAN SENATE'S AND MICHIGAN HOUSE OF REPRESENTATIVES' AMICUS BRIEF OPPOSING THE MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES' BYPASS APPLICATION FOR LEAVE TO APPEAL

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AMICI STATEMENT OF INTEREST[1]

The Michigan House of Representatives and the Michigan Senate together comprise the sole lawmaking body for the State of Michigan. Const 1963, art 4, § 1. Among other things, the Michigan Constitution charges the Legislature with "pass[ing] suitable laws for the protection and promotion of the public health." Const 1963, art 4, § 51. This proceeding raises issues of vital importance to that exclusive power to legislate. And no party is more interested in these issues than Michigan's first branch of government, the Legislature.

[1] Pursuant to MCR 7.312(h)(4), amici state that no counsel for a party authored this brief in whole or in part and no person other than the amicus curiae, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

The Court should deny the Michigan Department of Health and Human Services' extraordinary application for bypass review filed under MCR 7.305(C)(1), where—for the first time in this entire case—the Department directly challenges and asks the Court to abrogate its recent decision in *In re Certified Questions*, 506 Mich 332; 958 NW2d 1 (2020).

The Department's bypass application should be denied for three reasons: (1) granting the Department's bypass application here would be extremely unorthodox, when no circumstances warrant diverging from MCR 7.305(C)(2)'s standard review procedure, see *House of Representatives v Governor*, 943 NW2d 365 (Mich 2020), and accepting review would short-circuit necessary and potentially dispositive intermediate appellate review; (2) the Department has not preserved the issue of whether *In re Certified Questions* should be overruled; and (3) the Court risks institutional harm by overruling itself less than two years after deciding *In re Certified Questions* and shortly after a change in the Court's composition.

ARGUMENT

I. The Court of Appeals should review this case first.

In its bypass application, the Department asks the Court to "disavow" a decision the Court issued just 16 months ago. App. at 10–20; see also *In re Certified Questions*, 506 Mich 332. The Department's reason? The Court got *In re Certified Questions* wrong. But that isn't enough to circumvent this Court's normal review procedure under MCR 7.305(C)(2). "Further appellate review and development of the arguments will only assist this Court" if it decides to revisit *In re Certified Questions*.

Representatives, 943 NW2d at 368 (CLEMENT, J., concurring, joined by MCCORMACK, C.J. and CAVANAGH, J.); see also *id.* at 365 (Justice Bernstein joining in denying bypass review because "a case this important deserves full and thorough appellate consideration"). Prudence counsels in favor of letting the Court of Appeals offer its opinion first, in the ordinary course. See *In re Certified Questions*, 944 NW2d 911, 914 (Mich 2020) ("I find immense value in the meaningful analysis and perspective offered by our intermediate appellate court.") (CAVANAGH, J., concurring); see also *League of Women Voters v Sec'y of State*, 505 Mich 931; 935 NW2d 888 (2019) (denying bypass application).

Prudence is especially warranted here, as the Court may not need to reach the question of whether *In re Certified Questions* was rightly decided. After all, the Department argues at length in its application that it should have prevailed even under *In re Certified Questions*. App. at 21–29. And the Department also contends that the lower court acted outside the bounds of its authority. App. at 39–40. If the Court of Appeals agrees with either position, there will be no need for this Court to revisit *In re Certified Questions,* predictability and consistency being the "preferred course." *Robinson v City of Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000) ("Stare decisis is generally the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."), quoting *Holder v Hall*, 512 US 874, 944; 114 S Ct 2581; 129 L Ed 2d 687 (1994) (quotation marks omitted).

Here, no extraordinary circumstances warrant expedited review. The Department's contrary arguments rely on conjectural fears. The Department says that "[s]o long as this Court leaves [its precedent] be, the more harm [that precedent] will do . . . the more courts that will . . . be misled by it, and the more dysfunction that it will create for our democracy and its institutions." App. at 2. Yet these ills will not materialize just because the Court follows MCR 7.305(C)(2)'s normal review procedure. The lower court's opinion lacks precedential effect. *Representatives*, 943 NW2d at 368 ("[I]t is only opinions issued by the Supreme Court and published opinions of the Court of Appeals that have precedential effect under the rule of stare decisis.") (CLEMENT, J., concurring), quoting *City of Detroit v Qualls*, 434 Mich 340, 360 n 35; 454 NW2d 374 (1990). Other trial courts faced with similar questions will therefore be free to rule as they see fit. App. at 2 n 2 (listing cases). And, again, intermediate appellate review may break in the Department's favor. This is how Michigan's court system is supposed to work: the state's trial courts apply this Court's broad holdings to the specific facts of a case; the Court of Appeals reviews those decisions in the first instance; this Court accepts review, where necessary, on fully developed records.

Indeed, there is far less reason here than in *Representatives* to grant expedited review. There, the Governor and the Legislature simultaneously filed bypass applications to review the scope of the Governor's emergency powers, and the COVID-19 pandemic was in its infancy. The Governor was pushing the limits of her emergency authority in a fast changing, volatile environment. Yet the Court still

thought it better to follow the standard review procedure rather than immediately review the questions presented. *Representatives*, 943 NW2d at 365.

Today, Michigan is better equipped to face the pandemic. Vaccines are widely available. And with the worst of the Omicron variant passing, COVID cases, hospitalizations, and deaths, are all sharply down. Many of the Department's emergency COVID rules have been rescinded.[2] The Department *has not even asked the Court of Appeals to stay the effect of the Circuit Court's decision*, which undercuts its argument that immediate bypass is necessary to prevent the Department's authority from being undermined. If prudence were the better course of action in *Representatives*, more so here. Reviewing the Department's challenge to *In re Certified Questions* does not need to be expedited. The Department's bypass application should be denied for this reason alone.

II. The Department has not preserved the central issue it wants the Court to review.

In its Circuit Court brief, the Department stated in a footnote that there was "no need for" the Circuit Court "to consider" whether *In re* "*Certified Questions* was rightly decided . . . ." Resp. Tr. Ct. Br. at 10 n 12. The Department noted *In re Certified Questions* was wrongly decided for nothing more than "preservation purposes." *Id.*

[2] See *MDHHS Updates Mask Guidance as State Enters a Post-Surge Recovery Phase in the COVID-19 Pandemic* <https://www.michigan.gov/coronavirus/0,9753,7-406-98158-577554--,00.html> (accessed February 21, 2022) (MDHHS withdraws mask guidance "as cases continue to decline in the state" and "decreases in cases and hospitalizations and increased access to vaccines, testing and treatment indicates that Michigan is entering a post-surge, recovery phase of the cycle.").

The Department's argument was devoted to explaining how this case is distinguishable from and wholly consistent with *In re Certified Questions*.

As a matter of well-settled Michigan appellate procedure, referring to an issue in a footnote without making a substantive argument in the body of a brief does not preserve an issue for appeal. *Petersen Fin, LLC v City of Kentwood*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 350208); slip op at 5. "Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention." *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008). After all, "[t]he purposes of preservation requirements include encouraging parties to give the trial tribunal the opportunity to make the correct decision." *In re ITC Application*, 304 Mich App 561, 567; 847 NW2d 684 (2014).

Here, the Department gave the Circuit Court and its opponent no such opportunity. And, having failed to do so, it should not compound that error by seeking to cut the Court of Appeals out of the loop too.

III. It is inappropriate for the Department to use a change in this Court's composition as a ground to change the outcome of a case.

While only 16 months have passed since this Court issued *In re Certified Questions*, several members of the Court have changed. It is possible that in filing this extraordinary bypass application, the Department hopes that this change in the Court's composition offers an opportunity to undermine the earlier decision.

The Court should firmly close the door on that invitation. Nearly 150 years ago, this Court unanimously admonished that a hearing should not be ordered "on the ground merely that a change of members of the bench has either taken place, or

is about to occur." *People v Evening News Ass'n*, 51 Mich 11, 21; 16 NW 185 (1883). In more recent years, this Court has consistently reiterated that principle. See, e.g., *Boertmann v Cincinnati Ins Co*, 493 Mich 963; 828 NW2d 675 (2013); *Charter Twp of Lyon v McDonald's USA*, LLC, 493 Mich 963; 828 NW2d 676 (2013). There is good reason to stick with it:

> [I]t would be mischievous in a high degree to permit the re-opening of controversies every time a new judge takes his place in the court, thereby encouraging speculation as to the probable effect of such changes upon principles previously declared and enforced in decided cases. . . . If the court itself desires a reargument it is to be presumed it will be ordered when the occasion presents itself, but unless that is done a deliberate decision should not be regarded as open to controversy. [*McCutcheon v Common Council of Homer*, 43 Mich 483, 487; 5 NW 668 (1880).]

As explained in Section I and II, above, the Department's bypass application does not come close to warranting expedited review. Granting the Department's bypass application solely to relitigate the questions presented in *In re Certified Questions*—an issue that neither the Circuit Court nor the Court of Appeals has been able to consider—would no doubt cause many Michiganders to wonder what other "principles previously declared and enforced in decided cases" are now open for reconsideration. *McCutcheon*, 43 Mich at 487. That reality, standing alone, counsels strongly against granting the Department's application.

CONCLUSION

There is no compelling reason to circumvent the typical process of allowing the Court of Appeals to consider the issues presented in the ordinary course. To the contrary, the Department's failure to preserve the issue presented below, the fact that no lower court has weighed in on that issue, and the Department's apparent

last-minute decision to bet on this Court's recent change in composition for a change in result all counsel the opposite. The Department's bypass application should be denied.

February 22, 2022 Respectfully submitted,

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