

**STATE OF MICHIGAN  
46<sup>TH</sup> 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,

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**IRON PIG'S RESPONSE TO MDHHS' MOTION FOR STAY OF PRECEDENTIAL  
EFFECT AND CONFUSION OF LEGAL EFFECT OF COURT'S OPINION**

## PRECEDENTIAL EFFECT

This is not the first time the executive branch has requested a stay of a ruling of the judicial branch finding an unlawful delegation of the legislative branch to the executive branch in violation of the nondelegation clause of the Michigan Constitution.

In *In re Certified* the Michigan Supreme ordered the “motion to stay the precedential effect of the October 2, 2020 opinion is considered and DENIED”

Justice McCormack, who dissented in *In re Certified*, concurred ruling “there simply is no ‘precedential effect’ for this court to stay”. Justice Bernstein noted the executive branch was arguing there would be “confusion” regarding the court’s opinion.

The Michigan Department of Health and Human Services (MDHHS) makes the same argument in this case.

In *House of Representatives v Governor* SC: 161917, addressing the nondelegation violation, the Michigan Supreme court ordered “immediate entry” of an order granting declaratory relief.

On October 5, 2020, three days after the *In re Certified* decision, the executive branch issued an emergency order under MCL 333.2253 closing in-door dining.

On January 11, 2021, within three months of the emergency order, the Court of Claims issued a decision interpreting MCL 333.2253 as allowing the mask mandate. However the court, *sua sponte*, tipped its hat “It is important to point out what is not at issue in this motion. Plaintiffs are not challenging the constitutionality of MCL 333.2253...” *Semlow v Whitmer* Court of Claims January 21, 2021 opinion Case No. 20-

000206-MZ.

MDHHS was aware then that MCL 333.2253 may violate the nondelegation clause of the Michigan constitution.

### **PRECEDENT**

MDHHS stipulated that the 46<sup>th</sup> Circuit Court would decide whether MCL 333.2253 violates the nondelegation clause of the Michigan Constitution and whether the MDHHS orders are a “rule” under the Administrative Procedures Act MCL 24.201. No more, no less

The parties did not stipulate that once the court decided the issues the decision would be stayed indefinitely until all appeals were exhausted.

If the City of Gaylord had filed an action against the Iron Pig for violating the Michigan Public Health Code and the court ruled the Health Code was unconstitutional, the ruling would not be binding precedent on MDHHS for the reason MDHHS is not a party to the action.

In the 46<sup>th</sup> Circuit Court case, MDHHS a state agency, is a party to the action. MDHHS initiated the action against the Iron Pig.

Direct review by the Otsego County Circuit Court is premised in the **Michigan Constitution**.

MDHHS is an **executive** branch agency.

Article IV section 51 of the Michigan Constitution of 1963 provides the **legislature** shall pass suitable laws for the protection of public health.

Article VI section 28 provides that all orders of any agency existing under the constitution or by law shall be subject to **direct** review by the courts.

The Michigan legislature enacted the Administrative Procedures Act of 1969 (APA). The APA defines an “agency” as a state department created by the constitution, statute or agency action.

As provided in the constitution, the APA provides that the order of an agency shall be subject to direct review by the courts.

The APA provides the review shall be filed in the circuit court for the county where the petitioner has his principal place of business in Michigan.

The Michigan court of claims act provides the circuit court shall have **exclusive** jurisdiction over appeals from administrative agencies MCL 600.6419.

The APA provides the court shall hold unlawful an order of an agency because the order is in violation of the constitution.

The Iron Pig and MDHHS stipulated in writing that the court decide whether MCL 333.2253 violates the nondelegation clause of the Michigan Constitution.

The circuit court ruled this court must invoke its **judicial** review as a co-equal branch of government.

The court ruled MCL 333.2253 is clearly an unconstitutional delegation of power from the Legislative to the Executive branch, MCL 333.2253 is hereby severed from Michigan’s Public Health Code.

The ruling is binding precedent on the Michigan Department of Health and Human Services.

## **STAY**

MDHHS asserts that “a stay cannot work any harm to Iron Pig or the status quo, because there would be no effort to collect the \$5000 from the Iron Pig while the appeal is pending”

When the Iron Pig did not obey the MCL 333.2253 order closing in-door dining, the Michigan Liquor Control Commission (MLCC) suspended the liquor license of the Iron Pig. The Michigan Department of Agriculture and Rural Development (MDARD) suspended the food license of the Iron Pig. The MLCC and MDARD levied fines against the Iron Pig.

MDARD then sued the Iron Pig in the Ingham County Circuit Court. The owner of the Iron Pig was held in contempt of court and issued a substantial fine.

The court of claims has exclusive jurisdiction to hear any claim for monetary relief against the state MCL 600.6419. A notice of intention to file a claim against the state must be filed within one year after the claims accrues.

A stay delays indefinitely the claims of the Iron Pig against any state agency.

## **EXECUTIVE AND AGENCY AUTHORITY**

MDHHS argues that the striking down MCL 333.2453 defeats the ability to regulate the health of the citizens. This is erroneous.

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

The “decision in *In re Certified Questions*, leaves open many avenues for our Governor and Legislature to work together in a cooperative spirit and constitutional manner to respond to the COVID-19 pandemic” *House*.

**WHEREFORE**, Petitioner respectfully requests this Court deny the motion for stay of precedential effect.

Dated: January 31, 2022

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