STATE OF MICHIGAN
IN STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE CERTIFIED QUESTION FROM THE U.S. DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN.

Supreme Court No. 161492

USDC-WD: 1:20-cv-414

MIDWEST INSTITUTE OF HEALTH, PLLC, D/B/A GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, and JEFFREY GULICK,

Plaintiffs,

v

GOVERNOR OF MICHIGAN, MICHIGAN ATTORNEY GENERAL, and MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES DIRECTOR,

Defendants.
/

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

MOTION OF GOVERNOR AND DIRECTOR OF DEPARTMENT OF HEALTH AND HUMAN SERVICES TO PROVIDE THAT ANY PRECEDENTIAL VALUE OF THE COURT'S OCTOBER 2 DECISION DOES NOT TAKE EFFECT UNTIL OCTOBER 30

Governor Gretchen Whitmer and Director of the Department of Health and Human Services, Robert Gordon, by and through their attorneys, Deputy Solicitor General B. Eric Restuccia and Assistant Solicitor General Christopher Allen, move this Court to provide that any precedential value of the Court's October 2 decision does not take effect for 28 days – consistent with the period provided for opinions to become effective for enforcement under MCR 7.315(C)(2)(a) – and they state the following in support of this motion under MCR 7.311 and MCR 7.316:

1. On October 2, 2020, this Court issued an opinion in which a majority of the Court ruled that the Emergency Powers of the Governor Act is unconstitutional:

> [W]e conclude that the EPGA is in violation of the Constitution of our state because it purports to delegate to the executive branch the legislative powers of state government – including its plenary police powers – and to allow the exercise of such powers indefinitely. [Slip op, p 48 (Markman, J., for majority).]

2. By court rule, this opinion would appear to be governed by the same principles of any formal opinion adopted by this Court under its court rules even though issued in response to certified questions. And under the court rules, the opinion does not reach finality until "not less than 21 days or more than 28 days" unless there is an exceptional issuance of the opinion:

> (C) Orders or Judgments Pursuant to Opinions.
>
> (1) Entry. The clerk shall enter an order or judgment pursuant to an opinion as of the date the opinion is filed with the clerk.
>
> (2) Routine Issuance.
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> (a) If a motion for rehearing is not timely filed under MCR 7.311(F)(1), *the clerk shall send a certified copy of the order or judgment to the Court of Appeals with its file, and to the trial court or tribunal that tried the case with its record, not less than 21 days or more than 28 days after entry of the order or judgment.*
>
> (b) If a motion for rehearing is timely filed, the clerk shall fulfill the responsibilities under subrule (C)(2)(a) promptly after the Court denies the motion or, if the motion is granted, enter a new order or judgment after the Court's decision on rehearing.
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> (3) Exceptional Issuance. The Court may direct the clerk to dispense with the time requirement of subrule (C)(2)(a) and issue the order or judgment when its opinion is filed. An order or judgment issued under this subrule does not preclude the filing of a motion for rehearing, but the filing of a motion does not stay execution or enforcement.

> (4) Execution or Enforcement. Unless otherwise ordered by the Court, an order or judgment is effective *when it is issued under subrule (C)(2)(a) or (b) or (C)(3), and enforcement is to be obtained in the trial court*.
>
> [MCL 7.315(C) (emphasis added).]

In other words, the opinion does not become effective for enforcement by the parties until the 21-to-28 day period has run.

The Court's IOPs further confirm this point. The Court's "remittitur" is the key event for marking the finality of the opinion:

> (1) Entry.
>
> Unlike the practice of the Court of Appeals, the Supreme Court enters an order, *called a remittitur, to effectuate the holding of an opinion and to signal that the case is concluded in the Supreme Court*. Unless an opinion explicitly states that it is to have immediate effect (see "Exceptional Issuance," below), the opinion is given routine issuance. [IOP 7.315(C)(1) (emphasis added).]

And until that remittitur is issued, the case has not reached finality and the "trial court" should not act to "enforce" the judgment before then. See IOP 7.315(C)(4):

> (4) Execution or Enforcement.
>
> A party seeking enforcement of the Court's opinion must do so in the trial court *after the time period has passed for exceptional or routine issuance, whichever applies*. [Emphasis added.]

3. The Governor and Director recognize that the opinion here was released in response to certified questions from a federal judge, and not from an appeal from a state circuit court decision or from a decision of the Michigan Court of Appeals. But the federal court's request to seek guidance from this Court occurred under the Michigan Court Rules, see MCR 7.308(A)(2), and thus it would appear to follow that the federal court would also accept the additional parameters that this Court creates for the execution of its opinions, including the opportunity to seek rehearing.

4. Also, this Court's majority decision did not make an "exceptional issuance" by giving the decision "immediate effect" or state that the judgment should issue "forthwith." Cf., e.g., *Citizens Protecting Mich's Const v Sec'y of State*, 503 Mich 42, 107 (2018) ("Pursuant to MCR 7.315(C)(3), the Clerk of the Court is directed to issue the judgment forthwith."); *People v Allen*, 499 Mich 307, 327 (2016) ("Pursuant to MCR 7.315(C)(3), the Clerk is directed to issue the judgment order forthwith"). Such a statement would ordinarily appear at the end of the opinion.

5. Thus, by Michigan court rule, the Governor would have 21 days in which to seek rehearing and the plaintiffs in the *Grand Health* case would have to wait between 21 and 28 days under MCR 7.315(C)(2)(a) before they could make any effort to seek enforcement of the judgment in the "trial court," unless the parties sought rehearing.

6. Nonetheless, the precedential effect of the opinion is distinct from the timing governing when a party may enforce the judgment. See *Riley v Northland Geriatric Ctr*, 425 Mich 668, 680–681 (1986) ("This Court will not equate issuance of an order or judgment for execution or enforcement purposes . . . with the precedential effect of an opinion for guidance and authority[.]") (citation to older court rules omitted). This Court does have the authority, however, to postpone the precedential effect of an opinion. *Id.* at 681 ("If we, in granting a motion for rehearing, believe that the precedential effect of an opinion should be postponed pending rehearing, we will specifically so indicate in the order granting rehearing or by separate order.").

7. The Governor and Director ask this Court to postpone any precedential effect of the opinion for the period of time provided in MCR 7.315(C)(2)(a), i.e., for 28 days from October 2, 2020, which is October 30, 2020.[1] This would allow for an orderly transition during which some responsive measures can be placed under alternative executive authority and the Governor and Legislature can work to address many other pandemic-related matters that currently fall under executive orders.

[1] As the Governor and Director noted in their September 16 supplemental pleading, the Michigan courts have appeared to treat opinions from certified questions as binding and the federal courts have a legal obligation to follow a State Supreme Court's interpretation of state law. Strictly speaking, the answer to the question does not appear to bind the requesting court. See, e.g., *In re Certified Questions from U.S. Court of Appeals for Sixth Circuit*, 472 Mich at 1229 (2005) (Young, J., concurring) ("We have absolutely no authority to force a federal court, sister state court, or tribal court to adopt our answer to a certified question.") But the federal courts are bound to the construction of state law set by that state's highest court. *Montana v Wyoming*, 563 US 368, 377 n 5 (2011) ("The highest court of each State, of course, remains 'the final arbiter of what is state law' "), quoting *West v American Telephone & Telegraph Co*, 311 US 223, 236 (1940). See also *Grover by Grover v Eli Lilly and Co*, 33 F3d 716, 719 (CA 6, 1994) ("When a state supreme court accepts a certified question, it voluntarily undertakes a substantial burden and its resolution of the issue must not be disregarded."). And Michigan's appellate courts have apparently treated this Court's decisions in certified questions as binding, as exampled by a case in which that court did not follow it as precedent because the specific proposition was not essential to the resolution of the issue. See *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 270 (2003) ("In addition, the Supreme Court stated that mutual insurance company policyholders 'would be in a better position to assert a property interest in the surplus....' *In re Certified Question (Fun 'N Sun RV, Inc. v Michigan)*, 447 Mich 765, 791 n 34 (1994), after remand 223 Mich App 542 (1997). *However, this statement was not essential to the determination of that case and, thus, is not binding precedent*.") (emphasis added).

8. As of October 2, 2020, there were more than 30 executive orders in place issued by the Governor under the EPGA, governing a wide range of subjects.[2] While the Director retains his authority to issue emergency orders under the Public Health Code and his orders remain in place,[3] many vital questions lie outside this arena and now require action by the Legislature together with the Governor. For example, Executive Order 2020-76 ("Temporary expansions in unemployment eligibility and cost-sharing") provides critical relief to thousands of workers who now have benefits. While the Unemployment Insurance Agency is still reviewing the matter, up to 830,000 active claimants may lose their benefits when the Court's order takes effect. And while the Legislature may move with alacrity, see Legislature's Amicus, pp 7–9, such legislative actions still require time. In order to create an orderly transition from the current set of executive orders in place to the measures that will replace them, the Governor and Director ask this Court to postpone any precedential effect of the opinion for 28 days. See MCR 7.315(C)(2)(a).

As the majority of the justices noted, the Governor acted consistent with the EPGA. See slip op, p 21 (Markman, J.,) ("[W]e conclude that there is one predominant and reasonable construction of the EPGA—the construction given to it by the Governor."); (McCormack, C.J., concurring in part and dissenting in part), slip op, p 3 n 1 (concurring on this point).

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[2] See https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html (last accessed October 4, 2020).

[3] See https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-533660--,00.html (last accessed October 4, 2020).

Staying any precedential effect of the determination that the EPGA is unconstitutional would provide the Governor and Legislature time to respond to that determination in a manner consistent with the avenue this Court has identified, see *id.*, p 3 n 1, and would help forestall other courts and parties from seeking to enforce the opinion before the time period provided in the court rules has expired.

Other courts addressing important constitutional issues have still provided time for adjustment and correction even after ruling a statute unconstitutional. For example, a federal district court determined that the Michigan's Sex Offender Registry Act was unconstitutional as ex post facto punishment, requiring more than 30,000 sex offenders to be removed from the registry, but delayed the execution of the final judgment once entered for 60 days to allow the Legislature to take corrective action. See, e.g., *Doe v Snyder*, 449 F Supp 3d 719, 737 (ED Mich 2020) ("The court will include this 60-day window until the judgment becomes effective principally to allow time for the legislature to craft and enact a new statute."). Given the ongoing threat that this pandemic poses to this State and its residents, this Court should do the same.

CONCLUSION AND RELIEF REQUESTED

The Governor and the Director of the Department of Health and Human Services request that this Court provide that its October 2 opinion does not take any precedential effect until 28 days after its issuance, consistent with the enforcement date under MCR 7.315(C)(2)(a).

Respectfully submitted,

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