Order

Michigan Supreme Court
Lansing, Michigan

June 30, 2020

161492 & (5)

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

In re CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

SC: 161492
USDC-WD: 1:20-cv-414

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MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, and JEFFERY GULICK,
Plaintiffs,

v

GOVERNOR OF MICHIGAN, MICHIGAN ATTORNEY GENERAL, and MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES DIRECTOR,
Defendants.
_____/

On order of the Court, the questions certified by the United States District Court for the Western District of Michigan are considered. We direct the Clerk to schedule oral argument on the questions on Wednesday, September 2, 2020, at 9:30 a.m. The parties to the underlying proceeding shall submit briefs in conformity with MCR 7.312 and in accordance with the following briefing schedule: the brief and appendixes of the plaintiffs are due within 21 days after the date of this order; the brief and appendixes of the defendants are due within 14 days after service of the plaintiffs' brief; and a reply is due within 14 days after service of the last timely filed defendants' brief. The motion to bifurcate briefing is DENIED, but nothing in this order precludes briefing and argument on whether the Court should exercise its discretion to answer the certified questions.

The Michigan House of Representatives and the Michigan Senate are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the certified questions may move the Court for permission to file briefs amicus curiae.

ZAHRA, J. (*concurring*).

The United States District Court for the Western District of Michigan has asked this Court to answer two certified questions concerning the Governor's "authority . . . to issue or renew any executive orders related to the COVID-19 pandemic" and whether the emergency powers of the governor act, MCL 10.31 *et seq.*, or the Emergency

Management Act, MCL 30.401 *et seq*., or both, violate "the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution." In light of the action taken by the federal court, the Michigan Legislature filed a motion for reconsideration of this Court's denial of the application to bypass the Court of Appeals in *House of Representatives v Governor*, ___ Mich ___; 943 NW2d 365 (2020).[1] The order denying the application to bypass was decided by the narrowest of margins by this seven-member Court, with vigorous dissents filed by Justice MARKMAN, Justice VIVIANO, and myself. It suffices to say that the dissenting justices concluded that in this unprecedented time amid a global pandemic, it is the duty of this Court to expeditiously decide the extent to which the Governor can exercise certain statutory powers, as well as integral constitutional questions relating to whether the Governor's thus-far largely unreviewed assertion of these powers violates our Constitution's core commitment to the separation of powers.

I concur in the order establishing an expedited briefing schedule and setting oral arguments for September 2, 2020, in response to the federal district court's request that this Court answer its certified questions.[2] I also concur in the Court's denial of the motion for reconsideration of this Court's denial of the application to bypass the Court of Appeals, while directing that court to issue its decision by August 21st. But my concurrence in the Court's actions of today should in no way be taken as a retreat from my dissenting statement to the order denying the application for bypass. I believed then and continue to believe today that "[b]ecause each resident's personal liberty is at stake, it is emphatically our duty to decide [these weighty constitutional issues]." *Id*. at ___; 943 NW2d at 371 (ZAHRA, J., dissenting). I also continue to share the concerns expressed by Justice MARKMAN and Justice VIVIANO in their dissenting statements to the order denying the application for bypass. As Justice VIVIANO expressed, the issues at stake "and how we decide them[] will have a direct impact on the constitutional liberties of every person who lives or owns property in, or simply visits, our state while the [Governor's] restrictions are in place." *Id*. at ___; 943 NW2d at 378 (VIVIANO, J., dissenting).

Yet, I decline to join Justice MARKMAN's dissent to the instant order. I do not take issue with the way Justice MARKMAN has framed the urgency or importance of the matters before us. If writing on a blank slate, I most assuredly would hear and decide

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[1] The issues presented in *House of Representatives* are for all intents and purposes identical to the issues presented in *In re Certified Questions*.

[2] MCR 7.308(A)(3) provides that should the Court decide to answer certified questions, briefs are to be filed following the briefing schedule for calendar cases (which would take 112 days). The instant order has reduced that period by more than half, allowing just 49 days for the filing of all briefs. The notice setting oral arguments is also expedited, with arguments being conducted just days after the briefs are submitted.

both *In re Certified Questions* and *House of Representatives* more expeditiously than provided in the instant order and would do so without review by the Court of Appeals. But this matter is not presented to us on a blank slate.

Notwithstanding the vigorous dissents of three justices from the denial of the application for bypass, a majority of this Court concluded that further review by this Court should not occur without the benefit of review and an opinion from the Court of Appeals. I also took specific exception to this Court's failure to order the Court of Appeals to hear and decide the issues presented in *House of Representatives* on an expedited basis and by a date certain.[3] Notwithstanding the lack of direction from this Court, the Court of Appeals decided to expedite these proceedings. And now with the certified questions presented to us by the federal court, the order issued by this Court today requires the Court of Appeals to release its opinion no later than August 21, 2020, leaving time for the Governor, the Legislature or both to file applications for leave to appeal in this Court before we hear arguments in the certified-questions case on September 2, 2020. I believe the instant briefing and argument schedule is as expeditious as possible under the circumstances presented. Without doubt, the people of this state are far better served by the majority's instant order than by the Court's previous order denying the application for bypass.

Finally, while I do not join Justice MARKMAN's dissenting statement, I share his concern that there is "no certainty that this Court will ever actually *answer* the certified questions, and, if we do choose to do so, such a decision will likely be issued sometime in October, November, or December, perhaps." Admittedly, it remains entirely possible that after briefing and argument a majority of the Court will decline to answer the certified questions or will resolve them in an opinion of the Court delivered many months later. But I am only one of seven justices on the Court and can only endeavor to impress upon my colleagues my views on the law and how it should be applied to the matters that come before this Court. I accept my responsibility as an elected member of the Supreme Court and pledge to the people of Michigan that I have and will continue to endeavor to resolve these important questions as expeditiously as the Court and present circumstances allow.

VIVIANO, J., joins the statement of ZAHRA, J.

CAVANAGH, J. (*concurring*).

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[3] *House of Representatives*, ___ Mich at ___; 943 NW2d at 373 (ZAHRA, J., dissenting) ("And yet, beyond declining to grant the Legislature's application, the Court's majority also fails to order the Court of Appeals to hear and resolve these issues on an expedited basis. I make no attempt to explicate this failure.").

I agree with Justice MARKMAN that "the underlying issues in these cases pertain to an 'emergency' of the most compelling and undisputed character" and that "ensuring a *timely* judicial response to the issues posed" is critically important. It is equally as critical in my opinion, however, that the judicial response to this emergency be thoughtfully and thoroughly considered. I also agree with Justice MARKMAN that "responding to this inquiry through a considered and thoughtful assessment of the requirements of our law and Constitution" is a high priority. It is such a high priority in my opinion that this Court should and has taken great pains to ensure that we have the benefit of full briefing from the parties in *In re Certified Questions* and the Court of Appeals' considered decision in *House of Representatives v Governor*. Those benefits are particularly valuable here because these cases will require resolution of important constitutional questions of first impression—perhaps the most imposing exercise we must undertake as the state's highest court.

I disagree with Justice MARKMAN that we have not sufficiently expedited the process in these cases. Any casual observer of the appellate process in Michigan would recognize that these cases are, in fact, receiving significantly expedited review. For example, it typically takes on average between 13 and 14 *months* for the Court of Appeals to dispose of a case by opinion.[4] In contrast, the timeline from the date that the *House of Representatives* claim of appeal was filed in the Court of Appeals (May 28, 2020) until the day that a decision will be issued by the panel (August 21, 2020) is just over 12 *weeks*. Unlike Justice MARKMAN, who seemingly views the Court of Appeals as a roadblock to this Court's consideration of cases, I find immense value in the meaningful analysis and perspective offered by our intermediate appellate court. To expedite the *House of Representatives* appeal any further would be to risk sacrificing the substantive contribution of the Court of Appeals. Moreover, a typical briefing schedule applied to certified questions, see MCR 7.308(A)(3), takes 84 days with oral argument, if granted, ordered sometime after. In regard to the instant *Certified Questions* case, today's order cuts the briefing schedule almost in half to 49 days and schedules oral argument only two weeks after that. Put simply, these cases are receiving substantially expedited consideration while still allowing the parties to fully present argument on the complex issues presented.

I also disagree with Justice MARKMAN'S statement that this Court resolved the constitutional rights of "one Michigan barber" but is refusing to resolve the constitutional rights of other Michigan citizens through its orders in these cases. This is simply not true. In *Dep't of Health & Human Servs v Manke*, ___ Mich ___; 943 NW2d 397 (2020), this Court unanimously remanded "the barber's" claims to the Court of Appeals for full

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[4] Michigan Court of Appeals, *2018 Annual Report*, p 6, available at <https://courts.michigan.gov/Courts/COA/aboutthecourt/Documents/AnnualReport2018.pdf> (accessed June 30, 2020) [https://perma.cc/44RA-6642].

consideration by that court. For the reasons already stated, our orders today ensure that every citizen will be given the very same consideration.

Finally, although Justice MARKMAN forecasts that, as a consequence of this Court's orders ensuring that these cases receive complete and adequate consideration, this Court may never "issue[] a meaningful decision" and is unlikely to "ever decisively resolve the present dispute," I, again, must disagree. As Justice CLEMENT aptly noted in her earlier concurring statement attached to this Court's order denying bypass in *House of Representatives v Governor*, ___ Mich ___, ___; 943 NW2d 365, 369 (2020), "[u]ntil a vaccine for COVID-19 is invented, our society will be living with the risk of the spread of this disease and the argued necessity of emergency measures to mitigate that spread." Since the time Justice CLEMENT made this observation, there have unfortunately been no advances in science or public health to eradicate this virus and, therefore, I continue to join her in believing that there is "little prospect of these disputes being rendered moot . . . ." *Id.*

In sum, I believe that the orders issued today in these related cases best balance the need for a timely judicial response with the equally important need for a thoughtful and thorough resolution. The judicial response of this Court should and will be guided by the deliberate consideration of our intermediate appellate court in *House of Representatives* and informed by full briefing by the parties in *In re Certified Questions.* I am confident that each and every one of my colleagues accepts their responsibility as elected members of this Court to honestly endeavor to resolve these important questions as expeditiously, thoroughly, and thoughtfully as possible.

MARKMAN, J. (*dissenting*).

On June 18th, the United States District Court for the Western District of Michigan certified two questions to this Court, requesting our opinion concerning (a) whether the Governor possesses "the authority after April 30, 2020, to issue or renew any executive orders related to the COVID-19 pandemic," and (b) whether the emergency powers of the governor act, MCL 10.31 *et seq*., or the Emergency Management Act, MCL 30.401 *et seq*., or both, violate "the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution." In that case, the Court now schedules oral argument for September 2nd. And in a separate but related case, the Court denies the Legislature's motion for reconsideration of our earlier decision to deny its application to bypass the Court of Appeals, while directing that court to issue its decision by August 21st.

This Court possesses the authority to expedite its own deliberations or not; to expedite the deliberations of the Court of Appeals or not; and to bypass entirely the deliberations of the Court of Appeals or not. Therefore, where, as here, matters of expedition come before the Court, the determinative question is less one of legal

authority than of judgment and purpose. In other words, what would be the *purpose* in a given case for expediting its resolution or not, for bypassing the Court of Appeals or not? What would or would not be accomplished by such expedition? Here, the Court has chosen nominally to expedite the deliberations of the Court of Appeals in the Legislature's case and the deliberations of this Court in the "certified questions" case, while reaffirming its recent decision not to bypass the Court of Appeals and thereby to expedite the work of this Court in the Legislature's case. All to what purpose?

One obvious "purpose" that might inform our consideration of matters of expedition would be this: what extent of reasonable expedition will most likely ensure that our ultimate decision will be rendered in a sufficiently timely manner to enable that decision to govern the *present* dispute, the dispute arising from the *present* emergency, the dispute prompting the *present* lawsuit? That, of course, is the entire point of both the lawsuit and the certified questions before this Court; these cases do not pose academic exercises and they are not addressed to the next pandemic, but their common purpose is to more clearly define the legal and constitutional relationship between the Legislature and the Governor in the context of the *present* emergency. And in this regard, the Court's "expedition" of these two cases today seems to me entirely unfocused. While it is indeed an "expedition" of sorts, it is an "expedition" unsuited to what must be its principal purpose, to facilitate the adoption of rules that are faithful to the law and the Constitution and that will govern the interactions between the Legislature and the Governor during the COVID-19 emergency of the year 2020.

It has now been 39 days since expedited treatment was first sought by the Legislature in its lawsuit. And as a result of today's orders, there will be 52 additional days before even an intermediate decision from the Court of Appeals will be required and, of course, there is no certainty that this Court will ever hear an appeal from that decision. And in the "certified questions" case, the Court provides for a 49-day briefing schedule, with oral arguments to be held 65 days from now, again, of course, with no certainty that this Court will ever actually *answer* the certified questions, and, if we do choose to do so, such a decision will likely be issued sometime in October, November, or December, perhaps.

I have no greater insight than do my colleagues, or than does the public generally, as to the future course and duration of the present emergency. But I do know this: the underlying issues in these cases pertain to an "emergency" of the most compelling and undisputed character, and ensuring a *timely* judicial response to the issues posed is what should determine the extent of this Court's expedition. While there may be little we can do concerning the public health consequences of the present crisis, there is a great deal we can do in assessing the legal and constitutional propriety of our state's response to the emergency. Through which *institutions* and by which *procedures* and by an understanding of which *laws* should Michigan's response be formulated under a Constitution in which even emergencies are subject to the rule of law?

Both houses of our Legislature in their representation of the "we the people" believe that the Governor has exceeded her lawful authority in certain curtailments of the rights of the people, and the Governor in her representation of "we the people" believes that she has exercised her executive powers in a manner faithful to the law and Constitution. And although I have not counted heads, just as the two great institutions of our system of self-government have divergent positions as to the state's emergency response, so too do millions of citizens, a good number of whom believe they have suffered specific personal harm and injury as a result of this response. This Court, as the third great institution of our constitutional system, has now been requested by the Legislature in a case aptly named *House of Representatives & Senate v Governor* to resolve the present dispute-- a resolution presumably to be grounded upon "neither Force nor Will, but merely judgment," Federalist No. 78, as this is derived from the "judicial power" of this state. Both the Legislature and the Governor previously sought from this Court, but did not receive, expedited treatment through a bypass of the Court of Appeals.

But these cases not only pose a separation-of-powers dispute of immense consequence, but the certified questions posed by the federal court implicate a significant issue of federalism as well. The certified questions in this case pertain to medical procedures in Michigan delayed by emergency executive order; in another recent federal court case, the issues pertained to gyms and fitness facilities closed by emergency executive order; and similar lawsuits have been filed in still other federal cases. It is a highly concerning matter that lawsuits of this nature, each implicating the respective authorities of the legislative and executive branches of this state, would increasingly be filed in federal court. And yet, when the federal district court in the present case demonstrates genuine federal-state comity in seeking out the perspectives of this Court on the requirements of Michigan law-- while interrupting its own litigation in the process-- the unhurried nature of our response is disconcerting.

Rather than engaging in further "expediting," I would *resolve* the present cases and I would do so in a manner affording *timely* guidance concerning our state's legal and constitutional response to the COVID-19 emergency. To put it differently, rather than addressing the rights of one Michigan barber in one well-publicized case over the course of the past four months, I would address more encompassingly, and more consistently, the rights of *all* Michigan citizens by answering the common inquiry in the present cases: where do the respective authorities of the Legislature and the Governor begin and end during a time of emergency? In my view, there is nothing that constitutes a higher priority on this Court's agenda than clearly responding to this inquiry through a considered and thoughtful assessment of the requirements of our law and Constitution.

I remarked in my dissenting statement a month ago, when this Court initially rejected bypass of the Court of Appeals, that "the consequence of our decision today will be to ensure that this Court never issues a meaningful decision concerning the nature and

required procedures of the emergency authority of this state. . . . By today's action, it is unlikely that this Court will ever decisively resolve the present dispute and thus that whatever errors or excesses may have been made in the course of the present emergency will never be pronounced or remedied but left only to be repeated on the occasion of what inevitably will arise some day as our next emergency." I see nothing in today's orders to cause me to alter this perspective. The responsibility of this Court is not to "expedite," but it is to *sufficiently* expedite, to treat the present disputes with the requisite sense of urgency, so that the issues raised are resolved in a manner that has a practical impact on the rule of law in our state during the pendency of the ongoing crisis. Regrettably, that is not what is being achieved by today's orders.

Accordingly, I dissent from each order because each, in my judgment, fails to expedite this Court's consideration to a sufficient extent. In *In re Certified Questions*, I would answer both questions and do so on a considerably more expedited basis. And in *House of Representatives & Senate v Governor*, I would grant the Legislature's motion for reconsideration and order the case to be heard in conjunction with *In re Certified Questions*, thereby also deciding this case on a considerably more expedited basis.

RESPONSE TO CONCURRENCE OF JUSTICE CAVANAGH

Justice CAVANAGH writes in her concurring statement that "[u]nlike Justice MARKMAN, who seemingly views the Court of Appeals as a roadblock to this Court's consideration of cases, I find immense value in the meaningful analysis and perspective offered by our intermediate appellate court." Having sat on the Court of Appeals for four years, I too have enormous regard for the institution and for its individual judges. More to the point, however, having *not* sought to bypass the Court of Appeals in approximately 99.99% of the cases within our state's appellate system, I believe my support of a bypass in *this* case is less indicative of the view that the Court of Appeals constitutes a "roadblock" than it is of the view that this case pertains to an *emergency* and is *singular* in terms of its potential impact in resolving competing legal and constitutional claims of our Legislature and Governor, as well as in its implications for the public health and economic welfare of our state and its people. For these reasons, this case warrants exceptional treatment and meaningful expedition.

SEAL OF THE MICHIGAN SUPREME COURT · LANSING ·

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 30, 2020

Clerk

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