No. 25-

IN THE

Supreme Court of the United States

ZANTE, INC., D/B/A MARLENA'S BISTRO AND PIZZERIA,

Petitioner,

v.

MICHIGAN DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

ISSUE I.

ARE UNCONSTITUTIONAL LAWS *VOID AB INITIO* REQUIRING RETROSPECTIVE TREATMENT OF OPINIONS AFFECTING FUNDAMENTAL RIGHTS?

ISSUE II.

DO MICHIGAN COURTS HAVE AUTHORITY TO DECLARE SUBJECT-MATTER JURISDICTION "IRRELEVANT" TO CIVIL CONTEMPT SANCTIONS?

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PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioner, Zante, Inc., is a Domestic Profit Corporation, doing business as, Marlena's Bistro and Pizzeria in Allegan County, Michigan. Zante, Inc., is the Defendant below.

There is no parent or publicly held company owning 10% or more of Zante, Inc's corporate stock. Marlena Pavlos-Hackney is the sole shareholder of the corporation.

Zante, Inc's resident agent is Marlena Pavos-Hackney.

Respondent, Michigan Department of Agriculture and Rural Development, ("MDARD") is the State agency charged with food licensing of restaurants in the State of Michigan. They are Plaintiffs below, represented by the Attorney General.

RELATED PROCEEDINGS

In the matter of MDARD v ZANTE, Inc., No. 21-001401, Michigan Dept of Agric. And Rural Dev. (MOAHR), Admin Hrg, Judgment entered February. 11, 2021.

MDARD v ZANTE, Inc., Ingham County 30th Circuit Court No. 2021-000113-CZ, Judgment entered October 6, 2022.

In re Contempt of MARLENA PAVLOS HACKNEY, Michigan Court of Appeals, No. 357407, Judgment entered October 20, 2022.

MDARD v ZANTE, Inc., Michigan Court of Appeals No. 363515, Judgment entered, September 21, 2023.

MDARD v ZANTE, Inc., Michigan Supreme Court No. 166321, Judgment entered, Jan. 31, 2025, Motion for Reconsideration entered, May 22, 2025

In re Contempt of MARLENA PAVLOS-HACKNEY, Michigan Court of Appeals, No. 370227, appeal is pending oral argument, scheduled on September 4, 2025, on the issue of conversion of improper fines to costs, after remand.

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OPINIONS BELOW

The Order of the Michigan Supreme Court denying Petitioner's Motion for Reconsideration of its Order Denying Application for Leave to Appeal, is unreported and reproduced at *App.1a*.

The Michigan Supreme Court's Order Denying Application for Leave to Appeal is unreported and reproduced at *App 71a.*

The Michigan Court of Appeals opinion affirming the 30th circuit court's denial of Petitioners' motion for a declaratory judgment is reported at *MDARD v Zante, Inc., ___Mich.App.___ (COA no., 363515, 9/21/23)* and reproduced at *App.3a.*

The circuit court's opinion and order denying Petitioners' motion for declaratory judgment is unreported and reproduced at *App.16a*.

JURISDICTION

This Petition for Certiorari is timely filed, pursuant to Rule 13.1, within 90 days of the Michigan Supreme Court's order denying Petitioner's motion for reconsideration on Application for Leave to Appeal, on May 22, 2025. *App 71a-72a*

This Court has jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause to the United States Constitution provides that, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." **U.S. Const, art IV, §2**

The **First Amendment** to the United States Constitution provides that "Congress shall make no law …prohibiting…. the right of the people… to petition the Government for a redress of grievances." **U.S. Const, Am I**.

The **Fifth Amendment** to the United States Constitution provides that, "No person shall be …deprived of life, liberty or property without due process of law…" **U.S. Const, Am. 5**

The **Fourteenth Amendment** to the United States Constitution states, "(1) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." **U.S. Const, Am. 14**

Michigan Const 1963, Art III, §2, Separation of Powers Clause: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

Michigan Const 1963, Art IV, §1 "Except to the extent limited or abrogated by article IV, section 6 or article V, section 2 , the legislative power of the State of Michigan is vested in a senate and a house of representatives."

MCL 600.1701(g) "The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:"

> "(a) Disorderly, contemptuous, or insolent behavior, committed during its sitting, **in its immediate view and presence**, and directly tending to interrupt its proceedings or **impair the respect** due to its authority.
>
> "(b) Any breach of the peace, noise, or disturbance directly tending to **interrupt its proceedings**." MCL 600.1701(a)&(b), emphasis added.
>
> ***
>
> "(g) Parties to actions, attorneys, counselors, and all other persons for disobeying any lawful order, decree, or process of the court."

MCL 24.303 Petition for review; filing; contents; copy of agency decision or order.

(1) Except as provided in subsection (2), a petition for review shall be filed in the circuit court for the county where petitioner resides or has his or her principal place of business in this state, or in the circuit court for Ingham county.

18 USC 401, the Federal civil contempt statute reads:

> "A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—
>
> ***
>
> "**(3)** Disobedience or resistance to its **l<u>awful</u>** writ, process, **<u>order</u>,** rule, decree, or command." Emphasis added.

STATEMENT OF THE CASE

And David said, What have I now done? Is there not a cause?

~1 Samuel 17:29~

Marlena Pavlos-Hackney is a naturalized U.S. citizen who emigrated to the United States from communist Poland. She gained her citizenship in 1992, and is presently the resident agent of Zante, Inc., operating as Marlena's Bistro and Pizzeria, in Holland, Michigan.

During the 2020 COVID-19 pandemic, her restaurant was shuttered, just like everyone else's, in compliance with Governor Gretchen Whitmer's Executive Orders (EOs) issued under the Emergency Management Act (EMA)[1] and the Emergency Powers of the Governor Act EPGA[2]. A June 2020 article lists 108 such orders. https://www.clickondetroit.com/news/local/2020/06/03/here-are-all-108-executive-ordersissued-by-michigan-gov-whitmer-during-covid-19-pandemic/

The EMA is time-limited with the option of extension on approbation of the legislature. The first request for extension of COVID-19 emergency powers was granted. But on April 30, 2020, the Michigan Legislature refused to extend the Governor's emergency powers under the EMA for a second time. Undaunted, the Governor reissued the EOs, this time under the EPGA[2]. This led to legal challenges, including one by the Michigan House of Representatives and Senate, in state court, and another by the Midwest Institute of Health, in Federal Court for the Western District of Michigan, both seeking cessation of the COVID-19 EOs.

The federal court certified a question to the Michigan Supreme Court as to whether the Governor had constitutional authority, under Michigan's separation of powers' non-delegation clause, to continue the COVID-19 EOs without legislative approval.

On October 2, 2020, the Michigan Supreme Court issued *In re Certified Questions, 506 Mich 332; 958 N.W.2d*

1. MCL 30.401 *et seq*

2. MCL 10.31 *et seq*

1 (2020), finding the executive branch lacked constitutional authority to issue COVID-19 EOs under the EMA beyond April 30, 2020 without legislative consent, and further held that the EOs issued after that date, under the EPGA, were void; that the EPGA was an unlawful delegation of legislative powers under the separation of powers clauses of the Michigan Constitution. *In re Certified Questions, supra, 506 Mich at 337-338.*

> "Accordingly, the executive orders issued by the Governor in response to the COVID-19 pandemic **now lack any basis under Michigan law**." *In re Certified Questions, 506 Mich. 332, 337-338; 958 N.W.2d 1 (2020). Emphasis Added.*

The Opinion was published October 2, 2020.

On October 4, 2020, Attorney General (AG), Dana Nessel, duly recognizing *stare decisis*, assured the public no further enforcement of the COVID-19 EOs would be sought as a result of the ruling. "In light of the Supreme Court's decision on Friday, the Attorney General will no longer enforce the Governor's Executive Orders through criminal prosecution." This announcement was published in Marlena's local news. https://www.woodtv.com/health/coronavirus/nessel-will-no-longerprosecute-covid-19-executive-order-violations/ .

A few days later, on October 12, 2020, the Michigan Supreme Court reaffirmed its decision by ruling in favor of the Michigan Legislature's suit to end the Governor's EOs, in *House of Representatives and Senate v Governor, __Mich__; 949 N.W.2d 276 (2020).* The court reiterated the necessity of the Governor to work with the Legislature in order to continue the COVID-19 EOs. *Id.*

But the Governor did not seek renewed authority from the legislature. Instead, she reissued the EOs, this time under the authority of the Michigan Department of Health and Human Services ("MDHHS") and MCL 333.2253. However, the language of MCL 333.2253 notably possessed less legislative guidance than that found lacking in the EPGA. Nevertheless, indoor dining the social distancing, and masking restrictions resumed thereunder.

Based on the Supreme Court's decision, Marlena posted a warning on the outer door of her restaurant:

> "By law, we do not follow any of the governor's mayor's, health department's, or other government agency orders or suggestions pertaining to social distancing or mask wearing. Your health is your responsibility." App 65a.

In December 2020, both the Iron Pig Smokehouse in Otsego County and Marlena's Bistro in Ottawa County were among the many restaurants found to be operating in violation of the renewed EOs. App 54-57a. Both restaurants appealed their citations to the Michigan Office of Administrative Hearings and Rules (MOAHR), and both were held to be in violation of the EOs. App 68a.

Iron Pig Smokehouse removed their appeal of the MOAHR decision to its local 46th Circuit Court for the County of Otsego, opting against the 30th Circuit Court in Lansing. On January 13, 2022, the Otsego Circuit Court held MCL 333.2253 did not survive the restaurant's non-delegation challenge under the Michigan Constitution, and, pursuant to *In re Certified Questions*, severed MCL 333.2253 from the Health Code. *Moore Murphy Hospitality, LLC v DHHS, Otsego County Circuit Court,*

46th District, Case No. 21-018522-AE, January 15, 2022), Slip Op pp 29-30, lv den __ Mich__; 972 N.W.2d 43 (2022)

The AG, representing MDHHS, immediately sought emergency bypass leave to appeal to the Supreme Court to reinstate MDHHS' COVID-19 EO authority under MCL 333.2253.

But their by-pass application would be denied.

Marlena was unrepresented in the February 11. 2021 MOAHR appeal, and though she speaks in broken English, the record clearly reflects she, too, protested the EOs were unconstitutional, App 64a,¶56, App 66a¶62.

Zante's suspension was for violation of the COVID-19 EOs the AG entered into evidence. *App.G*, ¶¶9,11-12,14,20,26,35,41-44,47, and 64-66. The February 11, 2021 Order by the ALJ specifically held,

> "Based on the above findings of fact, the undersigned concludes that Respondent has failed to comply with COVID 19 mitigation measures required for protection of the public, contrary to MDHHS' emergency orders, the local health department staff's instructions, the local health department's warning order and cease and desist order, and the cease and desist order of Petitioner MDARD." *App 68a-69a.*

The MOAHR Order dated February 11, 2021 advised Marlena she had the right to appeal the decision within 60 days. *App.70a.*

But long before that appeal period expired, she would be arrested and brought to appear before a circuit court with the very jurisdiction to hear her appeal, the 30th Circuit Court in Ingham County. MCL 24.303(1).

On February 26, 2021 and March 1, just 14-18 days into the 60-day appellate period 2021, MDARD filed motions for contempt for her ongoing violation of the COVID-19 EOs.

On March 4, 2021, 21 days into the 60-day appeal period, a Zoom hearing was held on the contempt motions in the very court designated by statute to hear the MOAHR appeal, the Lansing Circuit Court. MCL 24.303(1).

At that time, Marlena, again, objected to the constitutional validity of the underlying license suspension. App.34a,.35a,.36a.

Marlena, appearing pro per, in broken English, presented Zante's constitutional argument to the court:

> "THE COURT: … Do you dispute that your license has been suspended as of the date the date indicated?"
>
> "MS. HACKNEY: **Unlawfully is suspended**."
>
> "THE COURT: Well, but you agree that they're suspended?"
>
> "MS. HACKNEY: **I don't agree**." App.35a

> ***
>
> "THE COURT: Ms. Hackney, are you serving food out of your establishment?"
>
> "MS. HACKNEY: I do not consent and **they are in direct violation of well-established constitutional law**." App.36a

Immediately after this exchange, the Court delivered its decision finding her in contempt. App.26a,.36a-37a. Marlena was refused an opportunity to address the court beyond that quoted above:

> "THE COURT: …you will remain incarcerated until you comply with the Order of this Court, and you comply with the Order of the Department to cease operations until you have received a valid license." "Do you have any other questions, Ms. Whipple?"
>
> "MS. WHIPPLE [Asst AG]: No, Your Honor."
>
> "MS. HACKNEY: I have a question."
>
> "THE COURT: … No counsel representing the Defendant, then this hearing is adjourned and the Court's Orders will be issued."
>
> "MS. HACKNEY: I have a question."
>
> "THE COURT: This hearing is adjourned." App.36a-37a.

Without permitting further argument, the court ignored the constitutional defense and granted MDARD a bench warrant for her arrest. App.37a.

Marlena's local sheriff and law enforcement refused to arrest her on that warrant.

On March 12, 2021, having been advised in an email that Marlena would be featured on the nationally syndicated FOX News show, Tucker Carlson, AG Nessel sent an email to a staffer stating, "*Do we know her whereabouts? We should just have her picked up before she goes on. This is outrageous.*" https://tennesseestar.com/2021/06/12/nessel-asked-if-lockdown-defying-restaurant-owner-could-be-arrested-before-appearing-on-fox-news/ . "*I hope she gets the full 93 days for this. (Is that the max for civil contempt or just criminal contempt?)*" https://dailycaller.com/2021/06/11/michigan-dana-nessel-arrest-marlena-pavlos-hackney-tucker-carlson-tonight-defy-lockdown-orders/ .

Nessel also reportedly asked whether state police had plans to find her soon or "*wait until next week.*" The staffer said she would alert police to "*this new information.*" https://dailycaller.com/2021/06/11/michigan-dana-nessel-arrest-marlena-pavlos-hackney-tucker-carlson-tonight-defy-lockdown-orders/ and https://www.michigancapitolconfidential.com/attorney-general-wanted-lockdown-defying-restaurant-owner-arrested-before-going-on-fox-news . See also Fox News coverage of the content of the emails: https://www.youtube.com/watch?v=O9i-j5iTM64

It appears the highest-ranking law enforcement officer of the State was attempting to silence an inconvenient voice.

Marlena appeared on Fox News, Tucker Carlson, on March 17, 2021.

On March 19, 2021, the Lansing branch of the Michigan State Police were dispatched to arrest Marlena in Ottawa County, located on the fringes of the state, and transport her to Lansing, in the center of the state, to reappear before the 30th Circuit Court for the County of Ingham. https://dailycaller.com/2021/06/11/michigan-dana-nessel-arrest-marlena-pavlos-hackney-tucker-carlson-tonight-defy-lockdown-orders/

This occurred just 36 days into Zante's 60-day appeal period. This is the second time she appeared before the court designated by statute to hear MOAHR Administrative Law appeals, and did hear her constitutional objection, within the time-frame, but ignored it. MCL 24.303(1).

Ingham County Circuit Court Judge Aquilina accused Marlena of seeking public notoriety by openly voicing her belief that her constitutional rights were being violated.[3]

Without a hearing or opportunity to be heard, Judge Aquilina levied *two* maximum fines totaling $15,000 and sentenced Marlena to 93 days in jail with early release upon payment of the fines in full, for *civil* contempt in failing to close her restaurant in compliance with the

3. And they were. *In re Certified Questions* and *T & V Associates*.

ALJ's suspension of her food license for violations of the COVID-19 EOs. *App.29a,.31a,.32a.* Marlena was immediately taken from the courtroom into custody, endured a cavity strip search, and spent 5 days in jail before her husband could amass the total amount of the fines.

An interlocutory appeal contesting the nature and amount of the fines was appealed to Michigan Court of Appeals and that case remains pending before that court, after remand, under docket number 357407. In the remand order, the fines were declared civil in nature and the second fine, improper, requiring remand. *In re Contempt of Pavlos-Hackney, 343 Mich.App. 642, slip op 15&18; 997 N.W.2d 511 (2022).*

While pending appeal on the fines, despite her repeated requests, no appeal of the license suspension was filed by Attorney Baker within the 60-day time frame. Nevertheless, the Ingham Circuit Court is the statutorily designated court for appellate review of the ALJ's licensing orders, MCL 24.303(1), and Marlena's verbal constitutional objection to the suspension and contempt was raised to that court within the statutory appellate period – it was just ignored.

On March 21, 2021, Attorney General Dana Nessel, published the following on her Twitter (now X) account: "*Marlena Pavlos-Hackney had countless opportunities to comply with even the most basic health and safety protocols to protect her community from the spread of Covid. She defied her local health department and court at every turn, instead choosing to taunt health inspectors, law enforcement and courts on every turn, -- going on*

Tucker Carlson and setting up a lucrative Go Fund Me account instead of making even the slightest effort to protect her customers, her workers and her community. She is no martyr and no hero. One cannot support the mantra of "Law and Order" and support the activity of Ms. Pavlos-Hackney. But if you cheered Donald Trump when he bragged about the many ways he avoided military service while others complied with their legal obligations, its no wonder you revere this woman. Making personal sacrifice for the greater good of our state and nation was once considered admirable. Not anymore." https://twitter.com/dananessel/status/1373706643129655296?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1373706643129655296%7Ctwgr%5E80e2c1e662d460ef3d1ae62780be077cd59298f3%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.theblaze.com%2Fnews%2Fmichigan-ag-restaurant-owner-tucker-carlson.

Regardless of how one believes the orders should have been kept, it is clear political angst toward Marlena was voiced in this missive.

On March 24, 2021, after 5 days in jail, her husband paid the fines in full and Marlena was released from jail.

On March 26, 2021, Fox 17 news published a letter drafted and sent by members of the Michigan Legislature to AG Nessel, "*requesting that she suspends 'her office's inconsistent, selective and seemingly politically motivated application of state law and…investigatory responsibilities*.'" https://www.fox17online.com/news/local-news/michigan/state-lawmakers-issue-formal-request-to-ag-nessel-claims-actions-against-holland-business-owner-unfair_

On May 23, 2021, Governor Gretchen Whitmer and her Chief Operating Officer, Tricia Foster, were photographed at the Landshark Bar and Grill in East Lansing, violating the mask and indoor dining EOs for which Marlena was arrested, fined and incarcerated.

https://www.detroitnews.com/story/news/politics/2021/05/23/whitmer-apologizes-after-photo-shows-her-bar-violating-own-order/5234477001/

The Landshark Bar was never cited or prosecuted. All they got was free, nationwide publicity featuring the Governor of Michigan. A subsequent complaint against the Landshark was also given a pass. https://www.nbcchicago.com/news/local/michigan-gov-gretchen-whitmers-administration-rescinds-rule-she-ignored-at-bar/2517560/

On April 1, 2022, the Supreme Court again constrained the AG and denied her request for emergency-bypass leave to appeal, allowing the Otsego Court's Order in the *Moore Murphy Hospitality* case declaring MCL 333.2253 unconstitutional and striking it from the Public Health Code, to remain in effect pending review in the Court

of Appeals. *Moore Murphy Hospitality, LLC v. Dep't of Health & Human Servs.*, ___ *Mich* ___; *972 N.W.2d 43 (2022).*

Supreme Court Justice Viviano wrote a dissent in that case specifically stating, "*Under the circuit court's ruling, the DHHS can no longer rely on MCL 333.2253." Moore Murphy, 972 N.W.2d at 45, Emphasis added.*

Oral argument on the fines in Court of Appeals number 357407 was heard on August 2, 2022.

In September 2022, Attorney Robert Baker was substituted out.

New counsel filed a motion for Declaratory Judgment in Ingham Circuit Court arguing the lack of subject-matter jurisdiction based on the unconstitutionality of the underlying EOs, citing *In re Certified Questions, House of Representatives, Moore Murphy,* MCL 600.1701(g) and *Johnson v White, 261 Mich.App. 332; 682 N.W.2d 505 (2004).*

On October 6, 2021, the motion for declaratory judgment was heard before Judge Stokes. *App.104a-109a*

> *THE COURT: So you're telling this Court that if we—if her—that since her license was taken, and it's your argument that it was invalid, and then she failed to exhaust the administrative remedies that were available to her, and because she didn't do what she needed to do, now I have to go back and say that everything was illegal? That's not how the law works, ma'am." App.105a.*

***

> *MS. BRINKMAN; "That order is invalid, void ab initio. It was based on an unconstitutional [20]executive order. It could not be enforced.." App.109a.*

Although the constitutionality of the EOs were argued, and preserved, both at the administrative hearing, and at the original March 4, 2021 hearing, Judge Stokes nevertheless refused to entertain the constitutional issue, repeatedly stating, she should have appealed and "that issue is not before the court." *App.103a-116a.* She did not concede the contempt must be based on a valid order, MCL 600.1701(g). *App.105a,.112a-115a.*

Ironically, declaratory relief was foreclosed for failing to exhaust appellate remedies, though the contempt was just 36 days into the 60-day appellate window, and the constitutional question was made to the court statutorily designated to hear it, and it was brought by declaratory motion prior to the entry of final judgment in the contempt case. MCL 24.303(1). *App.103a* Pursuant to MCL 24.306(1)(a), the court's duty was to dismiss it.

Judge Stokes, denied the motion for declaratory judgment, granted MDARD summary disposition, and entered a permanent injunction against Marlena's Bistro. *App.19a-20a.*

Marlena filed a timely appeal to the Court of Appeals, docket number, 363515, again seeking relief under *In re Certified Questions.*

In June 2023, *T & V Assocs, v DHHS, ___ Mich. App. ___ (COA No 361727, rel'd 6/29/2023)* was issued by the Michigan Court of Appeals, completely confirming Marlena's argument that MCL 333.2253 and the EOs were unconstitutional under *In re Certified Questions*. A supplemental brief, highlighting that authority, was immediately presented and argued to the Michigan Court of Appeals.

But, shockingly, the first few lines of the published opinion dismissed the constitutional issues as irrelevant:

> "Pavlos-Hackney's appellate arguments rest on the proposition that she should be relieved of the judgments of contempt and the order suspending her food license because the COVID-19-related executive orders issued by Governor Whitmer and the emergency order issued by the MDHHS in 2020 were unconstitutional. We need not address the Governor's executive orders because they have nothing to do with this case. The constitutionality of MCL 333.2253 is similarly irrelevant." *MDARD v Zante, ___Mich.App.___(COA # 363515, 9/21/2023) slip op 3.* Emphasis added.

Instead of addressing the constitutional issue, the appellate court, like the courts below, ignored *stare decisis* and subject-matter jurisdiction, and dismissed her constitutional claims, finding they were conditioned on exhausting administrative appellate remedies. It held the subject-matter jurisdiction issue was "irrelevant." *MDARD v Zante, Inc., App.7a-11a.*

The opinion rejected Marlena's argument that *Johnson v White,* required unconstitutional laws to be vacated, *void ab initio*. Instead, it employed prospective application of a decision declaring a constitutional defect, thereby depriving Marlena of her right to redress. *App.12a-15a*.

And there is no mention of the contempt statute, MCL 600.1701(g), though it was briefed to every court alleging failure to find a "lawful order" was a violation of her Due Process rights. *App.87a*.

Although Marlena's case was instigated long after *In re Certified Questions*, and her defense rested upon it, the opinion long-arms that precedent, choosing, instead, *T & V Assocs* as the defining date from which prospective application for relief can commence, depriving her the defense she recognized before the courts did. *App.7a*.

The Michigan Supreme Court denied Leave to Appeal and the Motion for Reconsideration begging that it address the subject-matter jurisdictional issue.

The case now guides judges in the Michigan Bench Book on Contempt. https://www.courts.michigan.gov/siteassets/publications/benchbooks/contempt/contemptbb.pdf?r=1

Land of the Free? Home of Marlena

REASONS FOR GRANTING THE PETITION

In sum, the clear and imperative reason for granting certiorari is this:

> "[T]here is no justification for allowing the government greater power to vindicate its nonexistent interest in enforcing an unconstitutional statute that punishes assertion of the privilege against self-incrimination than to vindicate its interest in enforcing a statute that punishes the assertion **of any other constitutional right**." *United States v. U.S. Coin & Currency, 401 U.S. 715, 728 (1971), Justice Brennan, concurring. Emphasis added.*

This case is now binding precedent. Michigan's Contempt of Court Benchbook has been updated with the opinion in this case "upholding the validity of the trial court's finding of contempt where the contemnor argued the court order she violated was unconstitutional, but she 'elected to bypass the administrative and subsequent judicial processes." Michigan now officially prescribes denial of constitutional remedies, due to "irrelevance" of subject-matter jurisdiction, despite the statutory prerequisite that contempt requires a "lawful order." MCL 600.1701(g). https://www.courts.michigan.gov/490500/siteassets/publications/benchbooks/contempt/contemptresponsivehtml5.zip/index.html#rhtocid=_5_7_6&t=Contempt%2FCh_5_Common_Forms_of_Contempt%2FViolation_of_Court_Order-.htm

Standard of Review

This Court reviews *de novo* questions of law relating to a declaratory judgment action and a lower court's ruling its judgment is not void for lack of subject-matter jurisdiction. *King Fisher Marine Service, Inc. v. 21st Phoenix Corp., 893 F.2d 1155 (10th Cir. 1990) cert. denied, 496 U.S. 912 (1990).*

ISSUE I.

UNCONSTITUTIONAL LAWS ARE *VOID AB INITIO* REQUIRING RETROSPECTIVE TREATMENT

Marlena's fully vindicated constitutional defense was ignobly dismissed in a footnote, and declared "irrelevant" because the court beat her to the appellate window. In footnote 2, the lower court applied *T&V Assocs* prospectively, denying Marlena the rightful, constitutional remedy, she claimed from the beginning. *App. 7a.*

Certiorari is necessitated to reaffirm the *relevancy* of subject-matter jurisdiction and treat unconstitutional laws as *void ab initio*. It offers the perfect template to reconcile prospectivity under *Linkletter v. Walker, 381 U.S. 618,* (1965), with *Griffith v. Kentucky, 479 U. S. 314 (1987), James Beam Distilling Co v Georgia, 501 U.S. 529 (1991), Harper v Virginnia Dept. of Taxation, 509 U.S. 86 (1993),* and Justice Brennan's opinion in *U.S. Coin and Currency, 401 U.S. 715, 724 & 726 (1971),* to resecure due process, equal protection and the right to redress of grievances under *U.S. Const, Ams 1, 5 and 14* and the Supremacy Clause, *U.S. Const. Article VI, §2.*

The Michigan decision defies these foundational concepts and culminates in "a 'rule' condon[ing] obviously inequitable treatment of similarly situated litigants and judicial injustice to individual litigants." *United States v. Johnson, 457 U.S. 537, fn 21 (1982).*

I a. Unconstitutional laws are, by definition, void *ab initio*.

The Supremacy Clause, *U.S. Const. Article VI, §2,* states "*This Constitution, and the Laws of the United States … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*"

The venerable necessity to hold an unconstitutional law *void ab initio,* void from its inception, with full retrospective application, spans the nearly 250-year history of this nation:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County, 118 U. S. 425, 442 (1886)*

"[A]n unconstitutional law must be treated as having no effect whatsoever **from the very date of its enactment**." *Chicago, I. & L.R. Co. v. Hackett, 228 U. S. 559 (1913), Emphasis added.*

Where the Court has "held that the conduct being penalized is constitutionally immune from punishment"

"[n]o circumstances call more for the invocation of a rule of complete retroactivity." *U.S. Coin, 401 U.S. at 724.*

I. b. Prospectivity violates the Supremacy Clause and federal precedent.

"Before 1965, when this Court decided *Linkletter v. Walker, 381 U.S. 618,* (1965), both the common law and our own decisions recognized a general rule of retrospective effect for the constitutional decisions of this Court . . . subject to [certain] limited exceptions." *United States v. Johnson, 457 U.S. 537, 542 (1982).*

"In *Linkletter*, however, the Court concluded 'that the Constitution neither prohibits nor requires [that] retrospective effect' be given to any 'new' constitutional rule. *Linkletter, 381 U.S., at 629*." *Id.*

Although the use of prospective application found some utility in federal precedent after *Linkletter*, it was later renounced in *Griffith v. Kentucky, 479 U. S. 314, 328 (1987*) where, in recognition of the inequity of prospective application of a new rule, it held "[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception."

That was reaffirmed in *James Beam Distilling Co v Georgia, 501 U.S. 529, 537-538 (1991),* criticizing prospectivity for its inequitable, arbitrary treatment of litigants at different stages of proceedings.

And the matter of retrospective application of federal decisions seemed to be ultimately settled in *Harper v Virginnia Dept. of Taxation, 509 U.S. 86 (1993):*

> "In accord with *Griffith v. Kentucky, 479 U.S. 314 (1987),* and *James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991)*, **we hold that this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision**." *Id., 89-90. Emphasis added.*

Prior to the instant case, Michigan's precedent also underscored the age-old tenet that unconstitutional laws are *void ab initio* and decisions so finding were to be applied retrospectively*:*

> "An unconstitutional law is no law, and in no case can it be made a justification in law for any action or non-action." *Adsit v. Secretary of State, 84 Mich 420, 429; 48 NW 31 (1891).*

> "[W]e hold that the *DeRose* decision should be **applied retroactively**. Accordingly, **we vacate** the trial court's January 10, 2001, order granting plaintiffs grandparenting time as it is ***void ab initio***." *Johnson v. White, 261 Mich. App. 332; 682 N.W.2d 505, 512 (2004). Emphasis added.*

Until now.

This decision defies the Supremacy Clause, *Griffith, Beam, Harper* and *Johnson v White.*

This case rewrites the law on retroactivity of *void ab initio* statutes in *Johnson v White,* and substitutes *Walker*

v. City of Birmingham, 388 U.S. 307 (1967), App.15a, the case involving Dr. Martin Luther King's incarceration for his good Friday civil-rights protest, and its back-of-the-hand justification for upholding Dr. King's prosecution, incarceration, and $160,000 bail (in 1963!) for contempt of a city ordinance; the need to impart "respect for judicial process" which, hypocritically, is purportedly attained by the court's own violation of their lawful limits of judicial authority:

> "But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom." *City of Birmingham, 388 U.S. at 321* and *MDARD v Zante, App.14a-15a.*

Not surprisingly, *City of Birmingham* is the archetypical illustration of how abuse of contempt power can be used to silence inconvenient political voices. Dr. King's famous "letter from the Birmingham Jail," was penned during his incarceration in that case.

> "We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed." https://letterfromjail.com/

Although *City of Birmingham* left unanswered the constitutional issues with the ordinance in Dr. King's case, there is no doubt of it in this case: *In re Certified Questions, House of Representatives, Moore Murphy* and *T&V Assocs.* The constitutional conflict with the forgoing, necessitates certiorari.

I. c. Constitutional challenges require violation of the law

The case and controversy requirement for Article III standing to challenge the constitutionality of any given law, generally requires the statute or law to be violated. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, *240* (1937).

One such miscreant, Thomas Jefferson, in a letter to James Madison, urged a place for civil disobedience in addressing government abuses:

> "Unsuccesful rebellions indeed generally establish the incroachments on the rights of the people which have produced them. An observation of this truth should render honest republican governors so mild in their punishment of rebellions, as not to discourage them too much. It is a medecine necessary for the sound health of government [sic]." https://founders.archives.gov/documents/Jefferson/01-11-02-0095

Likewise, this Court has duly recognized the "usual mode" of addressing government oppression requires first, civil disobedience:

> "In light of our frequent reiteration that the **usual mode** of challenging an unconstitutional statute is **expected to be violation of the statute** and adjudication of the constitutional challenge in a criminal proceeding, **it is difficult to see how this argument amounts to more than a flat statement that those who assert their constitutional rights before we have**

> **declared them may not do so with impunity**." Justice Brennan's concurring opinion in *U.S. Coin, 401 U.S. at 727*. Internal citations omitted. Emphasis added.

U.S. Coin denounces prospectivity where "there was a significant chance that innocent men had been wrongfully punished." *Id.* 401 *U.S.* at 724. Where "the conduct being penalized is constitutionally immune from punishment[,] [n]o circumstances call more for the invocation of a rule of complete retroactivity." *Id.*

I. d. The concurrence in *U.S. Coin*

Petitioner urges this Court to adopt the perfect logic in the concurring opinion in *U.S. Coin*:

> "The dissent seeks to explain its view of this case on the ground that, even after this Court has declared certain individual conduct beyond the power of government to prohibit, the government retains an 'interest in maintaining the rule of law and in demonstrating that those who defy the law do not do so with impunity' by punishing those persons who engaged in constitutionally protected conduct before it was so declared by this Court. *Post* at 401 U. S. 735. **This argument, of course, has nothing whatever to do with the rule of law. It exalts merely the rule of judges by approving punishment of an individual for the *lese-majeste* of asserting a constitutional right before we said he had it.** In light of our frequent reiteration that the **usual mode of**

> **challenging an unconstitutional statute is expected to be violation of the statute and adjudication of the constitutional challenge** in a criminal proceeding, it is difficult to see how this argument amounts to more than a flat statement that those who assert their constitutional rights before we have declared them may not do so with impunity." Justice Brennan's concurring opinion in *U.S. Coin, 401 U.S. at 727, internal citations omitted. Emphasis added.*
>
> "The dissent would have us hold that the Government may **continue indefinitely to enforce criminal penalties against individuals who had the temerity to engage in conduct protected by the Bill of Rights before the day that this Court held the conduct protected.** Any such holding would have no more support in reason than it does in our cases." *U.S. v U.S. Coin, 401 U.S. at 724, Justice Brennan concurring.*

This is that case. The reasons set forth should prevail to justify Marlena's stand "to engage in conduct protected by the Bill of Rights." *Id.*

I. e. Prospective application conflicts with recent opinions in *Griffith*, *Beam* & *Harper*

Prospective application of decisions affecting fundamental constitutional liberties, as employed here, violates *Griffith, Beam,* and *Harper* and "breaches the principle that litigants in similar situations should be

treated the same, a fundamental component of *stare decisis* and the rule of law generally. 'We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law.'" *James Beam, 501 U.S. at 537-8.*

Having established that an unconstitutional law must be treated as *void ab initio*, it is, *a priori,* dispositive of the issue of retrospective versus prospective application; it is void by its nature, vacuous, there is nothing there to perpetuate, or violate, or be in contempt of. Retroactivity serves the Constitution's guarantees of Due Process, Equal Protection and the Right to Redress of Grievances under the First, Fifth, and Fourteenth Amendments and comports with constitutional principles restored in *Harper, Griffith* and *Beam, supra.*

"*Griffith* cannot be confined to the criminal law. Its equality principle, that similarly situated litigants should be treated the same, carries comparable force in the civil context. Its strength is in fact greater in the latter sphere." *James Bean v Georgia, 501 U.S. 529, 540 (1991) Internal citation omitted.*

CONCLUSION

Michigan refuses to acknowledge unconstitutional laws are *void ab initio,* under the Supremacy Clause, federal and state precedent. Failure to grant certiorari will endorse and ensconce that fiat power to enact, and enforce through contempt, unconstitutional laws in Michigan's *stare decisis* and its Benchbook Guide for judges.

ISSUE II.

MICHIGAN COURTS HAVE NO AUTHORITY TO DECLARE SUBJECT-MATTER JURISDICTION "IRRELEVANT."

> "*If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men,* ***the great difficulty lies in this****: you must first enable the government to control the governed; and in the next place* ***oblige it to control itself****.*" ~ *James Madison, The Federalist 51 titled "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments. Emphasis added."*

Subject-matter jurisdiction is "the extent to which a court can rule on the conduct of persons or the status of things." *Black's Law, 9th Ed., p. 931.* The United States is a constitutional republic, which is defined as "A form of government in which officials are elected by citizens to lead them as directed by their country's constitution." https://legaldictionary.net/constitutional-republic/

Well, not anymore … not in Michigan.

The opinion below held subject-matter jurisdiction "irrelevant" to contempt sanctions imposed on an unconstitutional EO. "We need not address the Governor's executive orders because they have nothing to do with this case. The constitutionality of MCL 333.2253 is similarly irrelevant." *App.7a.*

The "relevancy" of subject-matter jurisdiction is as old as the Constitution, and famously outlined in the law school, textbook classic, *Marbury v. Madison, 5 U. S. 174, 176-177 (1803)*:

> "[T]he Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it." *Id.*

See also, *Mansfield Ry Co v Swan, 111 U.S. 379, 382 (1884).*

"The requirement that jurisdiction be established as a threshold matter is 'inflexible and without exception,'"; for "[j]urisdiction is power to declare the law," and "'[w]**ithout jurisdiction the court cannot proceed at all in any cause**,'". *Ruhrgas Ag v. Marathon Oil Co., 526 U.S. 574, 577 (1999) (Internal citations omitted).*

"Jurisdiction is power to declare the law, and when it ceases to exist, **the only function remaining to the court is that of announcing the fact and dismissing the cause**.'" *Steel Co. v. Citizens for Better Environment, 523 U.S. 83 (1998) quoting Ex parte McCardle, 7 Wall. 506, 514 (1869).*

"**An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment**.' *Ex parte Siebold, 100 U.S. 371, 376—377*." *Fay v. Noia, 372 U.S. 391, 408 (1963*).

But it *was the cause* of Marlena's unconstitutional incarceration and improper fines, [1] precisely because subject-matter jurisdiction *has* become "irrelevant."

The opinion also conflicts with the Federal Rules of Procedure that reinforce the "relevancy' of this fundamental right:

> 28 CFR Rule 12(h)(3) "**Whenever** it **appears by suggestion** of the parties or otherwise that the court lacks jurisdiction of the subject-matter, the **court shall dismiss the action**." Emphasis added.

CONCLUSION

There can be no better reason for certiorari than to reacquaint Michigan jurisprudence with the Supremacy Clause and its irrefutable *relevance* to legislative and judicial jurisdictional limits under the Constitution.

ISSUE III.

SUBJECT-MATTER JURISDICTION CANNOT BE FORFEITED OR WAIVED

The opinion below held Marlena waived the issue of subject-matter jurisdiction by failing to appeal the license suspension, even though the sanctions were ordered during the appellate period, by the designated appellate judge. *App.7a.*

To be fair, the term "jurisdiction" can be confusing: it is used in referencing procedural defects and constitutional ones. But they cannot be conflated, as it appears must have happened here:

> "Pavlos-Hackney had an opportunity to challenge the validity of the MDHHS order by pursuing an appeal from the administrative proceedings. She did not do so. Pavlos-Hackney elected to bypass the administrative and subsequent judicial processes that would have afforded her a full hearing on her constitutional claims. Instead she deliberately violated two lawful court orders. '[R]espect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.' *Walker v City of Birmingham, 388 U.S. 307, 321(1967).*" App14a-15a."

III. a. Subject-Matter Jurisdiction can never be waived

The U.S. Constitution controls over state law. *U.S. Const. Article VI, §2*. Subject-matter jurisdiction is *the* core constitutional principal "because it involves a court's power to hear a case," and, as such, **it "can never be forfeited or waived.** Consequently, defects in subject-matter jurisdiction **require correction regardless of whether the error was raised in [a lower] court**." *U.S. v Cotton, 535 U.S. at 630.* (Emphasis added).

"The rule that we first address our jurisdiction is **so fundamental that 'we are obliged to inquire *sua sponte* whenever a doubt** arises as to the existence of federal jurisdiction.' 'The general rule is that the parties cannot confer on a federal court jurisdiction that has not been vested in that court by the Constitution and Congress. **This means that the parties cannot waive lack of [subject-matter] jurisdiction by express consent, or by conduct, or even by estoppel;** the **subject-matter jurisdiction of the federal courts is too basic** a concern to the judicial system to be left to the whims and **tactical concerns** of the litigants.'" *Marathon Oil Co. v. Ruhrgas, 145 F.3d 211, 217 (5th Cir. 1998)* (Citations omitted, Emphasis added).

"Of course, a government has no legitimate interest in upholding an unconstitutional system of criminal procedure." *U.S. Coin, 401 U.S. at 726. (Brennan, concurring).*

"For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*." *Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 101-102 (1998).*

"[E]ven the war power does not remove constitutional limitations safeguarding essential liberties." *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 426 (1934).

Marlena's refusal to surrender her civil liberties under order to obey an unconstitutional law was no crime or act worthy of punishment in the State of Michigan, at least, prior to this ruling: "**As in the law of contempt, [the defendant] was free to disregard an order void for lack of jurisdiction**." *In re Hague, 412 Mich 532, 544; 315 N.W.2d 524 (1982).* Emphasis added.

III. b. Subject-matter jurisdiction can be raised at any time and requires dismissal

There is no time-bar or waiver of subject-matter jurisdiction. "A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, **even initially at the highest appellate instance**.' " *Grupo Dataflux v. Atlas Global Group, 541 U. S. 567, 576 (2004),* quoting *Kontrick v. Ryan,540 U. S. 443, 456 (2004). Emphasis added.*

The fundamental duty to immediately address a constitutional issue, whenever it is raised, and, if established, dismiss the case, is also ensconced in both Michigan and Federal Rules of Procedure:

> "MCR 2.111(F)(2) **Defenses Must Be Pleaded; Exceptions**. …. A defense not asserted in the responsive pleading or by motion as provided by these rules is waived, **except for the defenses of lack of jurisdiction over the subject-matter of the action**, …" Emphasis added. See also MCR 2.116(C)(4) and (D)(3).

> 28 CFR Rule 12(h)(3) "**Whenever** it **appears by suggestion** of the parties or otherwise that the court lacks jurisdiction of the subject-matter, the **court shall dismiss the action**." Emphasis added.

CONCLUSION

So, requiring an appeal is absurd. Judicial recognition, at any stage, that it lacks constitutional subject-matter jurisdiction, is fatal to the entirety of the proceedings. Put plainly, an unconstitutional law voids the case. No procedural statute, rule, or case, can change that. The court has no power to save it, or delay it, or perpetuate it; it is *void ab initio.*

Even now, this case should be dismissed.

ISSUE IV.

THIS CONTINUED PROSECUTION AGAINST MARLENA VIOLATES THE "CLASS-OF-ONE" EQUAL PROTECTION DOCTRINE OF VILLAGE OF WILLOWBROOK V. OLECH, 528 U.S. 562 (2000)

IV. a. "Class-of-one" equal protection violation in disparate enforcement of Executive Orders

A "class-of-one" equal protection violation is established "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Willowbrook v. Olech, 528 U.S. 562, 564 (2000).*

IV. b. Disparate Treatment

The EOs under MCL 333.2253 are unconstitutional. Continued prosecution of this case perpetuates a class-of-one equal protection violation established by 1) the government's favored treatment of the Landshark Bar, permitted to flout the EOs for its famous patron, Michigan's Governor, regardless of citizen complaints, 2) the voluntary dismissal of cases for other restaurants, 3) juxtaposed against the continued persistence in prosecuting this case, 4) in violation of ethical duties to accept the statute as stricken and unconstitutional, and 5) by requesting the excess fines, awarded on remand, convert to costs to reimburse the AG, forcing Marlena to finance her own prosecution, all culminating in unmatched evidence of targeted, inequitable, class-of-one disparate treatment under the law.

IV. c. Rational basis

MICHIGAN LEGISLATURE

March 26, 2021

Attorney General Dana Nessel
G. Mennen Williams Building
525 W. Ottawa Street
P.O. Box 30212
Lansing, MI 48909

Dear Attorney General Nessel:

We are writing to formally request that you end your office's inconsistent, selective and seemingly politically motivated application of state law and of your investigatory responsibilities.

Senate Republicans do not condone any Michigan resident violating the law. However, your office's selective enforcement of some laws and not others indicates an intent not to uphold the rule of law, but to protect political allies and punish political foes.

Mrs. Marlena Pavlos-Hackney immigrated to the United States to escape a communist regime. This week, she found herself jailed for operating her family business. Your decision to arrest Mrs. Pavlos-Hackney was met with overwhelming outrage not because Michiganders condone violating the law, but because it was evident you intentionally brought the full weight of your office down upon someone for political purposes.

The AG's personal animus was recognized and denounced by the Michigan legislature, revealed in internal emails to staffers, the X account postings comparing Marlena with Trump and those who dodge civic duties, the favorable treatment to the Landshark and Iron Pig cases, and the refusal to dismiss this case like the others.

Finally, the AG's refusal to dismiss Marlena's case after its unconstitutionality was irrefutably confirmed by the Courts of the State is alarming. That this is the last case standing, is telling.

The totality of the evidence establishes the basis was neither rational nor ethical, but likely emanates from one's innate loathing of an upstart who turns out to be right. *U.S. Coin, supra, 727.*

Certiorari is required to end this class-of-one equal protection violation.

ISSUE V.

VIOLATION OF STATUTORY DUE PROCESS IN FAILING TO FIND A "LAWFUL ORDER" BEFORE IMPOSITION OF CONTEMPT SANCTIONS

A due process claim is established on showing (1) that she suffered a deprivation of a constitutionally protected interest in 'life, liberty, or property,' and (2) that such deprivation occurred without due process of law. *Zinermon v. Burch , 494 U.S. 113, 125–126 (1990).*

Marlena was clearly deprived of her constitutionally protected interest in "liberty [and] property," when she was incarcerated and fined for violation of unconstitutional EOs.

Both Michigan and Federal statutes require contempt to be issued on a "lawful order."

MCL 600.1701(g), reads:

> "The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> ***
>
> " (g) **Parties** to actions, attorneys, counselors, and **all other persons for disobeying any lawful order**, decree, or process of the court. Emphasis added.

Section 18 USC 401, the Federal civil contempt statute reads:

> "A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—
>
> ***

> "**(3)** Disobedience or resistance to its **lawful** writ, process, **order,** rule, decree, or command." Emphasis added.

The lower courts all refused to address the statute. There is no exception to the "lawful order" requitement. And the violation of that Due Process right, resulted in the unconstitutional deprivation of Marlena's liberty and property. U.S. Const, art 1, §§ 5 & 14.

ISSUE VI.

THERE IS NO "IMPRESSIVE AUTHORITY" FOR CONTEMPT OF AN UNCONSTITUTIONAL STATUTE

VI.a. *United Mine Workers*' "impressive authority" authorizing civil contempt for violation of an unconstitutional statute

The lower court cited this Court's holding in *City of Birmingham,* and *Dudzinski* as authority to uphold the contempt on an unlawful order. *App.11a,.15a. Dudzinski* relied on *U.S. v United Mine Workers, 330 U.S. 258 (1947)* as its authority. *Dudzinski, 677 N.W.2d at 77. Birmingham* cites *Howat v. State of Kansas, 258 U.S. 181, 314 fn 5 (1922),* and what *United Mine Workers, 330 U.S. at 293-294* cited as "impressive authority" for allowing civil contempt on an unconstitutional statute. *Id., at 293.*

All these cases converge on *Howat* for support. But *Howat* was not a case lacking subject-matter jurisdiction or involving an unconstitutional law. That Court held,

> "**even if the** compulsory features of the **act**, to the constitutionality of which the plaintiff objected, **were invalid**, there still remained in the act provision for investigation and findings by the industrial relations court, in respect to which **the power of the legislature was indisputable** and in furtherance of which the machinery for compelling the attendance and testimony of witnesses was appropriate.." *Id, at 185. Emphasis added.*

Thus, it was *dicta.* But, *Howat's* alleged authority related back to *In re Debs, 158 U.S. 564 (1885). Howat, 258 U.S. at 189.* But that case, too, was well within constitutional bounds, as it involved an injunction pertaining to obstruction of interstate highways. *Debs, at* 586. The basis for the "impressive authority" is not there.

Howat's claim that the order must be obeyed, even if void, cited *Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 450 (1911). Howat, 258 U.S. at 190.* But that lengthy opinion clearly states on pages *436-437* that the underlying statute was constitutionally valid. And on 449-450, the page cited to in *Howat, Grompers* clearly states a contempt entered erroneously should be set aside.

> "If, then, this sentence for criminal contempt was erroneously entered in a proceeding which was a part of the equity cause, it would be necessary to set aside the order of imprisonment..." *Grompers 221 U.S. at 449-450.*

The next case cited for authority in *Howat,* is *Toy Toy v. Hopkins, 212 U. S. 542, 548-549 (1909).* That case involved

a dispute over whether the murder occurred on territory owned by the Indian reservation or the State of Oregon. Although it held the issue was on collateral attack, it also found there was, in fact, no constitutional jurisdictional issue. *Id.*

The final reference in *Howat,* is to *United States v. Shipp, 203 U.S. 563 (1906),* but that case was aptly distinguished in *United Mine Workers*, clarified as being inapplicable to a case involving the lack of subject-matter jurisdiction:

> "The right to remedial relief falls with an injunction which events prove was erroneously issued [footnote 61] and *a fortiori* when the injunction or restraining **order was beyond the jurisdiction of the court.** Nor does the reason underlying *United States v Shipp, supra,* compel a different result. If the Norris-LaGuardia Act were applicable in this case, the **conviction for civil contempt would be reversed in its entirety**." *United Mine Workers, 330 U.S. at 295. Internal citations omitted. Emphasis added.*

All told, there is no "impressive authority" sanctioning *civil* contempt of an unconstitutional order.

VI. b. Reliance on *Kirby*.

The court's reliance on *Kirby v Mich High Sch Athletic Ass'n, 459 Mich 23, 40; 585 N.W.2d 290 (1998)* that "A party must obey an order entered **by a court with proper jurisdiction**, even if the order is clearly incorrect, or the

party must face the risk of being held in contempt and possibly being ordered to comply with the order at a later date" is negated by the bolded caveat, "a court with proper jurisdiction." This case *is lacking* "proper jurisdiction."

VI. c. *Dudzinski, United Mine Workers,* and *Rylander* apply to criminal, not civil contempts

The lower courts fail to recognize that *United Mine Workers, 330 U. S. 297-298* and *United States v Rylander, 460 U.S. 752, 757 (1983),* address criminal contempt. *MDARD v Zante, App.11a*

So does *Dudzinski. See 677 N.W.2d at 76.* Criminal contempt is governed by a different section of Michigan's contempt statute: MCL 600.1701(a) and (b). Those sections of the contempt statute state:

> "The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> "(a) Disorderly, contemptuous, or insolent behavior, committed during its sitting, **in its immediate view and presence**, and directly tending to interrupt its proceedings or **impair the respect** due to its authority.
>
> "(b) Any breach of the peace, noise, or disturbance directly tending to **interrupt its proceedings**." MCL 600.1701(a)&(b), emphasis added.

Those two provisions do not require a "lawful order."

But MCL 600.1701(g) specifically *does:*

> "(g)Parties to actions, attorneys, counselors, and all other persons for disobeying **any lawful order, decree, or process** of the court." Emphasis added.

In stark contrast to *Dudzinski,* the contempt, in this case, is not for disruption of a court proceeding, nor criminal contempt committed in the court's presence, under MCL 600.1701(a)-(b), but according to MCL 600.1701(g) which is only applicable to "**disobeying any lawful order, decree, or process of the court**." Emphasis added.

There is no exception in the plain text of the statute. Nor, we submit, should there be.

The *Dudzinski* case cites *United Mine Workers* for the proposition that "Imprisonment for ***criminal contempt*** is appropriate where a defendant does something he was ordered not to do." *In re Contempt of Dudzinski, 257 Mich.App. 96, 108; 667 N.W.2d 68 (2003).* But, again, this is a civil contempt case. *App.6a.&.29a.*

United Mine Workers was based on a "lawful order." This case is not.

> "If the Norris-LaGuardia Act were applicable in this case, the conviction for **civil contempt would be reversed in its entirety**." *United Mine Workers, 330 U.S. at 295. Emphasis added.*

The same *dicta* in *United Mine Workers,* therefore justifies this invalid, void, unconstitutional civil contempt order should "be reversed in its entirety." *Id.*

VI. d. Misapplication of *Johnson v White*

The Court of Appeals' opinion also countermands Michigan's controlling precedent in *Johnson v White, supra. Johnson v White* was cited in the appellate opinion, but its holding and application were altered to deny relief. Rather than following *Johnson v White's void ab initio* precedent that vacated the contempt based on an underlying, unconstitutional order, the opinion below held:

> *"Johnson's* holding applies only if a statute has been declared to be unconstitutional *before* a contempt judgment is entered. That is not what happened here." *MDARD v Zante, App.14a.* Emphasis in original.

But *Johnson v White* held:

> We hold that the *DeRose* decision **should be given full retroactive effect and vacate the trial court's January 10, 2001, order granting plaintiffs grandparenting time because the order is *void ab initio*.** We also find that the **court abused its discretion in refusing to vacate the April 22, 2002, judgment of contempt because it failed to give the *DeRose* decision its proper precedential effect**. Accordingly, we reverse that order. *Johnson v White, 682 N.W.2d at 507.* Emphasis added.

The opinion ignores the retroactive effect of *void ab initio* and the precedential effect of a decision. *Id.*

VI. e. *United Mine Workers* and *Willy v Coastal Corp*

Petitioner respectfully requests this Honorable Court grant certiorari to adopt the reasoning in *Willy v Coastal Corporation, 503 U.S. 131, 139 (1992)* to clarify this issue: "Given that civil contempt is designed to coerce compliance with the court's decree, it is logical that the order itself should fall with a showing that the court was without authority to enter the decree. Accord, *United States v. United Mine Workers, supra.*"

VI. f. Respect for Court Orders

To the appellate court's argument that applying *City of Birmingham* was necessary to compel compliance with court orders, engender "respect for the judicial process,[4]" and "is a small price to pay" - we respectfully disagree. *App.15a.*

Integrity spawns respect. Ignorance of the law does not suffice in absolving the layman of his wrongs – how much more the judge whose sworn duty it is to know and uphold it?

When *City of Birmingham's* "civilizing hand of law" reaches outside the sacrosanct boundaries of the Constitution to unlawfully punish voices insisting on compliance with its limits of authority, it will only "give

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4. *MDARD V ZANTE, __Mich.App.__(COA No.363515, Sept 21, 2023) slip op 6.*

abiding meaning to," and protection of, tyranny. *Id. App.15a.*

And Marlena paid a big price: $15,000, a strip search, 5 days in jail, her humiliation broadcast on the news, with public, personal, ridicule from the highest office of law enforcement. She violated no constitutional law. She simply fought for the rights she came here to possess. She correctly understood the Michigan Supreme Court's opinion that the EOs were unconstitutional absent legislative consent, and acted in reliance. She was right. It comported with the AG's *initial* public statement and is supported by uncontroverted controlling precedent.

CONCLUSION AND PRAYER FOR CERTIORARI

The opinion below endorses the full force of contempt powers, somehow surviving, magnificently, outside the bounds of constitutional subject-matter jurisdiction, to compel obeisance to unconstitutional laws and the surrender of "unalienable" rights.

Certiorari is necessary to reestablish the "relevance" of subject-matter jurisdiction to the Supremacy Clause, *U.S. Const. Article VI, §2,* and its limitations on executive and judicial power; its exclusive sovereignty to dictate what is enforcable and what is *void ab initio;* to remove all bars or hurdles, e.g., exhaustion and prospectivity, on the duty of the government to acknowledge and enforce those rights; and to do so *sua sponte,* or immediately upon challenge to subject-matter jurisdiction.

Certiorari will simultaneously serve the Petitioner's right to redress of grievances, and the posture of this case

allows adoption of the reasoning in *Willy v Coastal Corp,* the concurrence in *U.S. Coin,* and application of *Harper* to the states:

"[T]here is no justification for allowing the government greater power to vindicate its nonexistent interest in enforcing an unconstitutional statute..." *U.S. Coin, 401 U. S. at 728.*

WHEREFORE, Petitioner respectfully requests this Honorable Court grant certiorari.

Respectfully submitted,

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AUGUST 20, 2025

APPENDIX

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APPENDIX A — ORDER OF THE MICHIGAN SUPREME COURT IN LANSING, MICHIGAN, DATED JANUARY 31, 2025

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

166321

DEPARTMENT OF AGRICULTURE
AND RURAL DEVELOPMENT,

Plaintiff-Appellee,

v.

ZANTE, INC., D/B/A MARLENA'S
BISTRO & PIZZERIA,

Defendant-Appellant.

SC: 166321
COA: 363515
Ingham CC: 2021-000113-CZ

On order of the Court, the application for leave to appeal the September 21, 2023 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Appendix A

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.

January 31, 2025 /s/Larry S. Royster
Clerk

APPENDIX B — OPINION OF THE STATE OF MICHIGAN, COURT OF APPEALS, DATED SEPTEMBER 21, 2023

STATE OF MICHIGAN
COURT OF APPEALS

No. 363515
Ingham Circuit Court
LC No. 2021-000113-CZ

DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT,

Plaintiff-Appellee,

v.

ZANTE, INC., DOING BUSINESS AS MARLENA'S BISTRO & PIZZERIA,

Defendant-Appellant.

Before: GLEICHER, C.J., and JANSEN and RICK, JJ.

GLEICHER, C.J.

During the COVID-19 pandemic, the Michigan Department of Agriculture and Rural Development (MDARD) suspended the food establishment license for Marlena's Bistro and Pizzeria. Marlena Pavlos-Hackney, the restaurant's sole owner, deliberately defied the license suspension, keeping the establishment open for

business. MDARD filed this lawsuit seeking a court order enjoining the restaurant's operation. The circuit court entered a temporary restraining order (TRO), which Pavlos-Hackney also defied. The circuit court held her in contempt and converted the TRO into a preliminary injunction. Pavlos-Hackney kept the restaurant open, and the circuit court entered a second contempt judgment and a permanent injunction.

This Court affirmed the contempt judgments in *In re Contempt of Pavlos-Hackney*, 343 Mich App 642; 997 NW2d 511, 2022 Mich. App. LEXIS 6363 (2022)) (*Pavlos-Hackney I*). The circuit court subsequently granted summary disposition to MDARD and denied Pavlos-Hackney's motion for a declaratory judgment.

Pavlos-Hackney appeals, offering a smorgasbord of challenges to the license suspension and the contempt judgments. None of Pavlos-Hackney's arguments has merit, and we affirm.

I. BACKGROUND

The 2022 opinion in *Pavlos-Hackney I* describes the facts leading to the contempt citations in considerable detail, and we need not revisit most of them here. Only a couple of facts require mention.

In November 2020, the director of the Michigan Department of Health and Human Services (MDHHS) issued an order under the authority granted by MCL 333.2253 of the Public Health Code, MCL 333.1101 *et seq.*,

prohibiting indoor dining. The Food Law of 2000, MCL 289.1101 *et seq.*, mandates that restaurants maintain a valid food license to operate, MCL 289.4101, and empowers local health departments to inspect restaurants for compliance with public health rules and regulations, MCL 289.3105. MDARD administers the Food Law.

Pavlos-Hackney disagreed with the MDHHS order prohibiting indoor dining and purposefully flouted it. In December 2020, the Allegan County Health Department warned Pavlos-Hackney that her restaurant was not in compliance with the MDHHS order, but Pavlos-Hackney disregarded the warning. Later that month MDARD ordered Marlena's to close. Pavlos-Hackney ignored this order, and the restaurant remained open. In January 2021, MDARD summarily suspended the food license for Marlena's Bistro and Pizzeria under the authority of MCL 289.4125(4) of the Food Law. After a hearing, an administrative law judge continued the suspension in a February 2021 order. Pavlos-Hackney did not appeal that order. MDARD filed this injunctive action two weeks later seeking to prevent Pavlos-Hackney from operating her restaurant without a license.[1]

The circuit court issued a TRO shutting down the restaurant, and Pavlos-Hackney was personally served with the order. Pavlos-Hackney violated the TRO, keeping the restaurant open. MDARD sought a contempt sanction

1. MDARD sued Zante, Inc., the corporation that owns Marlena's Bistro & Pizzeria, and the pizzeria. Because Pavlos-Hackney is the sole owner of both enterprises, we refer to her as the defendant.

and requested conversion of the TRO into a preliminary injunction. The court held Pavlos-Hackney in contempt, ordered her to pay $7,500, and issued a preliminary injunction. The court's order specifically warned Pavlos-Hackney that if she continued to operate the restaurant without a license, she would be arrested and incarcerated to compel her compliance. Pavlos-Hackney scorned that order, too, and was arrested. The court responded with a second contempt judgment, a second fine of $7,500, and a permanent injunction. A few days later, Pavlos-Hackney paid the $15,000 and was released from jail.

Pavlos-Hackney moved for relief from judgment in the circuit court, seeking to set aside the contempt judgments and requesting a refund of the $15,000 plus an award of costs, fees, and compensatory damages. The circuit court denied the motion but permitted Pavlos-Hackney to request a hearing that would allow her to address her ability to pay. Instead, Pavlos-Hackney filed an appeal in this Court, which affirmed the contempt judgments but remanded to the circuit court with instructions regarding refashioning the second fine "to be civil in nature." *Pavlos-Hackney I*, 343 Mich App at 678, 2022 Mich. App. LEXIS 6363, *39.

Meanwhile, MDARD sought summary disposition in the circuit court case, and Pavlos-Hackney moved for "declaratory judgment, to dismiss, vacate, void and set aside case/conviction, and award damages." The circuit court granted MDARD's motion and denied Pavlos-Hackney's motion for declaratory and other relief.

II. ANALYSIS

Pavlos-Hackney's appellate arguments rest on the proposition that she should be relieved of the judgments of contempt and the order suspending her food license because the COVID-19-related executive orders issued by Governor Whitmer and the emergency order issued by the MDHHS in 2020 were unconstitutional. We need not address the Governor's executive orders because they have nothing to do with this case. The constitutionality of MCL 333.2253 is similarly irrelevant.[2]

Because she did not appeal the administrative order upholding the food license suspension, Pavlos-Hackney may not now relitigate that decision. The merits of the administrative proceedings and license suspension were not at issue in the circuit court; the question before that court was whether an injunction closing the restaurant was warranted. Pavlos-Hackney tries mightily to convince us otherwise, citing two sections of the Administrative Procedures Act of 1969 (APA), MCL 24.201 *et seq.*, neither of which applies.

Pavlos-Hackney first points to MCL 24.264, which provides:

---

2. In an opinion issued on June 29, 2023, a two-judge majority of this Court declared MCL 333.2253 an unconstitutional delegation of legislative authority. *T & V Assocs, Inc v Dir of Health & Human Servs*, 347 Mich App 486; 15 NW3d 313, 2023 Mich. App. LEXIS 4682 (2023). That decision postdates the events underlying this case by more than two years.

Appendix B

> Unless an exclusive procedure or remedy is provided by a statute governing the agency, *the validity or applicability of a rule*, including the failure of an agency to accurately assess the impact of the rule on businesses, including small businesses, in its regulatory impact statement, may be determined *in an action for declaratory judgment* if the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. *The action shall be filed in the circuit court* of the county where the plaintiff resides or has his or her principal place of business in this state or in the circuit court for Ingham county. The agency shall be made a party to the action. *An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously.* This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted. [Emphasis added.]

First and foremost, this provision applies to challenges related to the validity or applicability of an *administrative rule*, and not to the constitutionality of a statute such as MCL 333.2253. Second, even if we were to conflate administrative rules with statutes, Pavlos-Hackney

never requested a declaratory ruling from MDARD regarding the constitutionality of MCL 333.2253 or of the MDHHS order. Moreover, Pavlos-Hackney did not bring a separate *action* in the circuit court seeking a declaratory ruling. Instead, she raised her constitutional arguments only during the permanent injunction and contempt proceedings. "As this Court has repeatedly recognized, when an administrative scheme of relief exists an individual must exhaust those remedies before a circuit court has jurisdiction." *In re Harper*, 302 Mich App 349, 356; 839 NW2d 44 (2013).

Pavlos-Hackney next invokes MCL 24.306, which provides, in relevant part:

> (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
>
> (a) In violation of the constitution or a statute.

This statute is also located within the APA, and it relates to the power of a court reviewing "a final decision or order in a contested case" before an agency after the exhaustion of "all administrative remedies available within an agency . . . ." MCL 24.301. It applies to appeals from an administrative ruling under the APA; it is not a "cut and paste" provision opening the door to collateral attacks on

an agency's decisions pursued in violation of the APA. See *Womack-Scott v Dep't of Corr*, 246 Mich App 70, 80-81; 630 NW2d 650 (2001):

> To the extent that plaintiff suggests that she is entitled to file a separate cause of action in the circuit court to address the constitutional issue over which the administrative agency had no jurisdiction, we find her claim without merit. This Court has explained that when a constitutional issue is intermingled with issues properly before an administrative agency, exhaustion of administrative remedies is not excused:
>
> > [T]he exhaustion requirement is displaced only when there are no issues in controversy other than the constitutional challenge. The mere presence of a constitutional issue is not the decisive factor in avoiding the exhaustion requirement. If there are factual issues for the agency to resolve, the presence of a constitutional issue, or the presence of an argument couched in constitutional terms, does not excuse the exhaustion requirement even if the administrative agency would not be able to provide all the relief requested. [*Mich Supervisors Union OPEIU Local 512 v State of Michigan*, 209 Mich App 573, 578; 531 NW2d 790 (citations omitted).]

Appendix B

> Constitutional issues not within the administrative agency's jurisdiction can be raised in the circuit court through the review procedure in the APA; no separate action is contemplated or allowed. [First alteration by the *Womack-Scott* Court.]

Here, the circuit court did not consider a petition seeking review of an agency's decision; it assessed the need for an injunction and whether to sanction Pavlos-Hackney for her repeated violations of court orders. Pavlos-Hackney's failure to pursue her administrative remedies foreclosed the circuit court's review of the constitutionality of an agency's actions.

Pavlos-Hackney's challenge to the validity of the contempt judgments is also out of bounds. "[T]he longstanding rule is that 'a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.'" *In re JCB*, 336 Mich App 736, 747; 971 NW2d 705 (2021), quoting *United States v Rylander*, 460 U.S. 752, 757; 103 S Ct 1548; 75 L Ed 2d 521 (1983). "'A person may not disregard a court order simply on the basis of his subjective view that the order is wrong or will be declared invalid on appeal.'" *Johnson v White*, 261 Mich App 332, 346; 682 NW2d 505 (2004), quoting *In re Contempt of Dudzinski*, 257 Mich App 96, 111; 667 NW2d 68 (2003).

Pavlos-Hackney's efforts to avoid these holdings are futile. She contends that *Dudzinski* involved criminal

rather than civil contempt, thereby distinguishing it from her case. But our Supreme Court has reiterated that the principles enunciated in *Dudzinski* apply to civil contempt. "A party must obey an order entered by a court with proper jurisdiction, *even if the order is clearly incorrect*, or the party must face the risk of being held in contempt and possibly being ordered to comply with the order at a later date." *Kirby v Mich High Sch Athletic Ass'n*, 459 Mich 23, 40; 585 NW2d 290 (1998) (emphasis added). *Kirby* was decided in the context of civil contempt five years before this Court decided *Dudzinski*. See *id.* at 32 n 8.

Pavlos-Hackney next contends that *Dudzinski* relied on federal precedent that was mere dicta, but does not explain why that undercuts the legitimacy of the case's holding. *Dudzinski*'s discussion of federal precedent reflects that the principle that a court order must be obeyed is of long standing. See, e.g., *Kirby*, 459 Mich at 40; *In re Hague*, 412 Mich 532, 544; 315 NW2d 524 (1982) (stating that "an order entered by a court with proper jurisdiction must be obeyed even if the order is clearly incorrect"). Nor does this Court's opinion in *Johnson*, 261 Mich App at 346, provide Pavlos-Hackney with a life raft.

In *Johnson*, 261 Mich App at 334, the defendant-father had violated the trial court's "order granting plaintiffs grandparenting time" by moving his children to Colorado in January 2001, and the trial court entered a contempt judgment against him. He later moved to vacate the contempt judgment based on this Court's decision in *DeRose v DeRose*, 249 Mich App 388; 643 NW2d 259 (2002), which held the grandparent-visitation statute

unconstitutional. The defendant argued "that because the grandparenting time order was void, the contempt order stemming from its violation was also void." *Johnson*, 261 Mich App at 334. The trial court disagreed, reasoning that *DeRose* "had no precedential value because, at the time, leave was pending before the Michigan Supreme Court and, therefore, the decision was not final." *Id.* On appeal, the defendant argued that the trial court should have vacated its contempt order because the grandparenting-time order was unenforceable. *Id.* at 345. This Court agreed. *Id.* at 350.

We discussed and reaffirmed in *Johnson* the general principle that a party is required to obey court orders regardless of their validity. *Id.* at 345-346. However, we noted that this principle applied only when a court had proper jurisdiction over a party. *Id.* at 346. In reversing the trial court's denial of the defendant's motion to vacate the judgment of contempt, this Court reasoned:

> In this case, defendant violated the January 10, 2001, grandparenting time order in October 2001. Three months later, on January 25, 2002, this Court issued its decision in *DeRose*, which had an immediate precedential effect. At the March 28, 2002, show cause hearing, defendant made an oral motion for relief from the grandparenting time order pursuant to MCR 2.612(C). Defendant argued that the trial court lacked subject-matter jurisdiction over the contempt proceedings because the Court of Appeals had declared the grandparenting

> time statute unconstitutional. The court denied defendant's motion and found him in contempt. Giving precedential effect to this Court's *DeRose* decision required that the trial court grant defendant's motion and the court erred in failing to do so. *Because the grandparenting time statute was declared unconstitutional before the contempt judgment was entered, the court did not have jurisdiction over the subject matter of the contempt judgment.* Thus, we find that the trial court erred in denying defendant's subsequent motion to vacate the contempt judgment. [*Johnson*, 261 Mich 349-350 (emphasis added).]

Johnson is a far narrower holding than Pavlos-Hackney claims. It does not stand for the proposition that courts lack contempt jurisdiction when an underlying law is *subsequently* declared unconstitutional. *Johnson*'s holding applies only if a statute has been declared to be unconstitutional *before* a contempt judgment is entered. That is not what happened here.

When the circuit court enjoined Pavlos-Hackney, found her in contempt, and fined and jailed her, it did so in full conformity with then-existing law. Pavlos-Hackney had an opportunity to challenge the validity of the MDHHS order by pursuing an appeal from the administrative proceedings. She did not do so. Pavlos-Hackney elected to bypass the administrative and subsequent judicial processes that would have afforded her a full hearing on her constitutional claims. Instead, she deliberately

violated two lawful court orders. "[R]espect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom." *Walker v City of Birmingham*, 388 U.S. 307, 321; 87 S Ct 1824; 18 L Ed 2d 1210 (1967).

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Kathleen Jansen
/s/ Michelle M. Rick

APPENDIX C — ORDER OF THE STATE OF MICHIGAN, CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT, INGHAM COUNTY, DATED OCTOBER 6, 2022

STATE OF MICHIGAN
CIRCUIT COURT FOR THE
30TH JUDICIAL CIRCUIT
INGHAM COUNTY

MICHIGAN DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT,

Plaintiff,

v.

ZANTE INC., D/B/A MARLENA'S BISTRO & PIZZERIA,

Defendant.

Case No. 2021-00113-CZ

HON. WANDA M. STOKES

ORDER

At a session of said Court held in the City of Mason County of Ingham, State of Michigan, on the 6 day of October 2022.

PRESENT: HONORABLE WANDA M. STOKES
Ingham County Circuit Court Judge

Appendix C

1. On February 24, 2021, Plaintiff, Michigan Department of Agriculture and Rural Development (MDARD) filed a complaint in the instant case and requested the Court issue a Temporary Restraining Order (TRO) against Defendant, Zante Inc., d/b/a Marlena's Bistro and Pizzeria (Defendant). On February 25, 2021, the Court issued a TRO. After a show cause hearing on March 4, 2021, the Court issued an order converting the TRO into a preliminary injunction prohibiting Marlena's from selling, distributing, or advertising food or beverages until further order of the Court.

2. It is undisputed that, Defendant previously held a license issued by MDARD to operate its food service establishment. There is also no question that MDARD issued a summary suspension order that suspended Marlena's food establishment license immediately pursuant to MCL 289.4125(4) and MCL 24.292. The record is clear that despite the summary suspension order, Marlena's continued to operate as a food service establishment. Marlena's continued to operate a food service establishment even after the summary suspension order was continued by an impartial Administrative Law Judge and after both a TRO and Preliminary Injunction was issued by this Court.

3. It is also undisputed that the Food Law prohibits the operation of a food establishment without a license. MCL 289.4101(1); MCL 289.5101(1).

4. The Food Law specifically allows the Department to seek a permanent injunction to prevent violations of the food law. MCL 289.5111.

5. Marlena's did not stop operating as a food service establishment until sometime on or after March 19, 2021. The Court found the repeated violations willful.

6. Despite repeated attempts, MDARD was unable to bring the establishment into compliance. It was only the significant intervention of this Court that finally resulted in the closure of the establishment. Therefore, a permanent injunction is not only proper, but necessary to prevent additional violations of the Food Law. MCL 289.5111. Additionally, I find the traditional factors to be considered in granting an injunction weigh heavily in MDARD's favor. *Wiggins v City of Burton,* 291 Mich App 532, 558-59 (2011).

7. On June 24, 2021, the MDARD Director issued an order dissolving the January 20, 2021 Emergency Summary Suspension Order. (Ex. 1.)

8. On June 25, 2021, Allegan County Health Department (ACHD) issued an order dissolving their December 15, 2021 Cease and Desist Order. (Ex. 2.)

9. On June 30, 2021, Defendant submitted to an inspection of the establishment. As a result, ACHD recommended to MDARD that the Defendant's Food Establishment License be re-issued.

10. On July 7, 2021, Defendant's Food Establishment License was reissued.

11. On September 2, 2021, the Court signed a stipulated order modifying its March 4, 2021 Order to allow Marlena's to reopen and sell, distribute, and advertise food and beverages as authorized by the Michigan Food Law, MCL 289.1101 *et seq.*

12. Having fully considered Defendant's Motion for Summary Disposition in Lieu of an Answer and Defendant's Motion for Declaratory Judgment and Dismissal, et al, and MDARD's Briefs in Opposition and response requesting dismissal pursuant to MCR 2.116(C)(l0 and I (2), Defendant's Motion for Summary Disposition and Motion to Dismiss et al, are hereby **DENIED.** However, Summary disposition is approp1·iately **GRANTED** in favor of MDARD pursuant to MCR 2.116(C)(l0) and MCR 2.116(1)(2) because there exists no genuine issue as to any material fact, and MDARD is entitled to judgment as a matter of law.

13. This Order resolves only MDARD's claims for injunctive relief and in no way limits or prevents MDARD from seeking any authorized penalty for any past or future violation of the Michigan Food Law, MCL 289.1101 *et seq.*, as appropriate.

IT IS ORDERED that this Court's March 4, 2021 preliminary injunction is dissolved.

IT IS FURTHER ORDERED that Defendant will comply with all future orders issued by MDARD or ACHD.

IT IS FURTHER ORDERED that this Court will maintain jurisdiction over this matter for purposes of enforcing this order.

IT IS FURTHER ORDERED Defendant is permanently enjoined from operating a food establishment without a valid food establishment license issued by MDARD pursuant to the Michigan Food Law, MCL 289.1101 *et seq.*

IT IS FURTHER ORDERED that this judgment be entered in favor of Plaintiff and resolves Plaintiffs remaining claims in this matter.

IT IS SO ORDERED.

THIS IS A FINAL ORDER THAT RESOLVES THE REMAINING CLAIMS AND CLOSES THIS CASE.

/s/ Wanda M. Stokes
HON. WANDA M. STOKES
Ingham County Circuit
Court Judge

Appendix C

PROOF OF SERVICE

I hereby ce1tify that I mailed a copy of the above ORDER to each attorney of record, or upon the parties, by placing the true copy in a sealed envelope, addressed to each, with full postage prepaid and placing said envelope in the United States mail at Mason, Michigan, or by electronic email communication pursuant to MCR 2.107(C)(4) on October 6, 2022.

/s/ Christina Beahan
Christina Beahan
Judicial Assistant to Hon.
Wanda M. Stokes

APPENDIX D — ORDER OF THE STATE OF MICHIGAN IN THE MICHIGAN DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT, DATED JUNE 24, 2021

STATE OF MICHIGAN

MICHIGAN DEPARTMENT OF AGRICULTURE
AND RURAL DEVELOPMENT

IN THE MATTER OF:

ZANTE, INC. D/B/A MARLENA'S
BISTRO & PIZZERIA
909 LINCOLN AVE.
HOLLAND, MICHIGAN 49423

CASE TYPE: DISSOLUTION

EMERGENCY SUMMARY SUSPENSION DISSOLUTION ORDER PURSUANT TO MCL 289.4127

GENERAL

1. The Emergency Summary Suspension Order for the food establishment license issued to Zante, Inc. d/b/a Marlena's Bistro & Pizzeria (Marlena's) at 909 Lincoln Avenue in Holland, Michigan is hereby dissolved, on the terms set forth herein. This dissolution is pursuant to the Michigan Department of Agriculture and Rural Development's (MDARD's) authority under Section 4127 of the Michigan Food Law, MCL 289.1101 *et seq.*, and in accordance with the Administrative Procedures Act, MCL 24.201 *et seq.*

Appendix D

BACKGROUND

2. Marlena's operates a food service establishment located at 909 Lincoln Avenue in Holland, Michigan. Marlena's food establishment license is issued by MDARD under recommendation from the Allegan County Health Department.

3. On December 2, 2020, the Allegan County Health Department issued Marlena's an "Warning Order Finding Imminent Danger to the Public Health and Requiring Corrective Action" (Health Department Order). The Health Department Order stated that Marlena's was "hosting customers inside" and "allowing for dine in service."

4. The Health Department Order required Marlena's to comply with all applicable public health orders and to temporarily close for 72 hours.

5. In spite of the Health Department's Order, Marlena's continued to offer indoor dining. As a result, the Allegan County Health Department issued Marlena's a "Cease and Desist Order" (Allegan Cease and Desist Order). The Allegan Cease and Desist Order found that Marlena's operations constitute an imminent and substantial danger to the public health.

6. In spite of the Allegan Cease and Desist Order, Marlena's continued to offer indoor dining, not require facial coverings, and not require social distancing.

7. On December 30, 2020, MDARD issued Marlena's an "Order to Cease and Desist Food Operations" (Cease and Desist Order). MDARD's Cease and Desist Order was delivered via UPS on December 31, 2020.

8. On multiple dates the Allegan County Health Department conducted follow-up observations at Marlena's. On each occasion the Health Department documented that the firm was operating in violation of the MDARD's Cease and Desist Order, was operating in violation of MDHHS's Gatherings and Face Mask Order, and was continuing to offer indoor dining.

9. On January 19, 2021, Allegan County, where Marlena's is located, had 6,550 confirmed and probable cases of Covid-19 and 93 deaths from Covid-19.[1]

10. Between January 5, 2021, and January 14, 2021, Allegan County, where Marlena's is located, had 295 confirmed cases and 64 probable cases of Covid- 19 and 7 deaths from Covid-19.[2] The County and Region Risk Level was identified as E, the highest risk level.

11. The Food Law provides that MDARD's Director can summarily suspend a food establishment license upon a determination that an imminent threat to the public health, safety, or welfare exists. MCL 289.4125(4).

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1. See https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html, accessed January 19, 2021.

2. See *Id.*

12. On January 20, 2021, the MDARD Director determined that Marlena's operations posed an imminent threat to the public health, safety, or welfare and summarily suspended its food establishment license. Marlena's continued to operate without a food establishment license.

13. A hearing on MDARD's summary suspension order was held on February 1, 2021 before Administrative Law Judge (ALJ) Lauren G. Van Steel.

14. On February 11, 2021, ALJ Lauren G. Van Steel issued a Decision and Order Continuing Summary Suspension. Marlena's continued to operate without a food establishment license.

15. On February 18, 2021, Marlena's was contacted by the Allegan County Health Department to set up a joint inspection with MDARD. The owner, Ms. Pavlos Hackney, refused to allow either MDARD or the Allegan County Health Department into the establishment for an inspection, which is in violation of MCL 289.2111.

16. On February 25, 2021, Michigan Circuit Court Judge Wanda M. Stokes issued a Temporary Restraining Order requiring Marlena's to cease operating a food service establishment without a valid license in violation of MCL 289.4101(1). Marlena's continued to operate without a food establishment license.

17. On March 4, 2021, Michigan Circuit Court Judge Wanda M. Stokes held a show cause hearing for a preliminary injunction and motion for contempt of the February 25, 2021 temporary restraining order.

Appendix D

18. On March 4, 2021, Michigan Circuit Court Judge Wanda M. Stokes ordered that Marlena's was in contempt of court, the February 25, 2021 temporary restraining order was converted to a preliminary injunction and prohibited Marlena's from selling, distributing, or advertising food or beverages until further order of the Court. The Court also ordered that if Marlena's continued to operate a food establishment without a license, Marlena Pavlos Hackney would be arrested and incarcerated until such time as she complied with the order of the Court. Marlena's continued to operate without a food establishment license.

19. The establishment continued to operate and on March 19, 2021, Marlena Pavlos-Hackney was arrested.

20. Marlena's stopped operating as a food service establishment at the end of the business day on March 19, 2021.

21. Despite being given multiple opportunities, the establishment failed to provide MDARD or ACHD a safe reopening plan or any documentation whatsoever that it would operate in compliance with the Food Law, and in a manner that would not continue to pose an imminent threat to the public health. As such, the Summary Suspension Order remained in effect.

22. On May 1, 2021, the food establishment license for Marlena's expired.

Appendix D

RESOLUTION OF SUMMARY SUSPENSION

23. Currently, COVID-19 infection rates across the state are falling and the hospitalization rates for Coronavirus are at the lowest levels since the fall of 2020. Specifically, on June 8, the Allegan County Risk Level decreased from E to B, for the first time since the Summary Suspension Order has been in effect.[3]

24. As a result of these changes and other factors, MDHHS lifted capacity and mask requirements outlined in the Epidemic Orders on June 22, 2021.

25. Pursuant to the Food Law MCL 289.4127, if the MDARD Director determines that the imminent threat to the public health, safety, or welfare that caused the Director issue a summary suspension order no longer exists, the Director may reinstate a suspended food establishment license.

26. At this time, considering current epidemic conditions both locally and statewide, the Director has determined that the imminent threat to the public health, safety, or welfare identified in the January 20, 2021 Summary Suspension Order no longer exists.

27. This order in no way limits or prevents MDARD from seeking any authorized penalty for any past or future violation of the Michigan Food Law, MCL 289.1101 *et seq.*, as appropriate.

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3. See https://www.mistartmap.info/compare/geographic-area last accessed June 23, 2021

28. For the foregoing reasons, pursuant to MCL 289.4127(2), MDARD's January 20, 2021 Emergency Summary Suspension Order is dissolved.

29. The March 4, 2021 preliminary injunction prohibiting Marlena's from selling, distributing, or advertising food or beverages remains in effect until further order of the Court. MDARD's request for a permanent injunction remains pending before Michigan Circuit Court Judge Wanda M. Stokes.

30. Marlena's food establishment license expired May 1, 2021. Demonstrated compliance with MCL 289.2111 is required before Marlena's food establishment license can be renewed. The firm is required to allow free access at reasonable hours to the Allegan County Health Department and/ or MDARD inspectors to perform inspections at the facility. MCL 289.2111.

/s/ Gary McDowell
Gary McDowell, Director
Michigan Department of
Agriculture & Rural
Development

Date: June 24, 2021

APPENDIX E — JUDGMENT OF CONTEMPT OF THE STATE OF MICHIGAN JUDICIAL DISTRICT, JUDICIAL CIRCUIT COUNTY PROBATE, FILED MARCH 19, 2021

STATE OF MICHIGAN
JUDICIAL DISTRICT
JUDICIAL CIRCUIT
COUNTY PROBATE

CASE NO. 21-000113-CZ-C30
HON. WANDA M. STOKES

IN THE MATTER OF ZANTE, INC. /
RA: MARLENA KARTSCH PAVLOS /
DBA MARLENAS BISTRO AND PIZZERIA,
(909 Lincoln Ave., Holland, MI 49423),

Contemnor.

Court Address 313 W. Kalamazoo, Lansing, MI 48933
Court Telelphone No. (517) 483-6500

THE COURT FINDS:

1. The contemnor was found guilty of ☒ civil ☐ criminal contempt on 03/19/2021 for the following:

   ☐ by plea ☒ by summary contempt after hearing

   ☐ failing to pay.

   ☐ failing to serve a sentence as ordered.

   ☐ failing to appear.

☐ violating a condition of a bond.

☐ failing to complete and return juror qualification questionnaire.

☐ failing to complete and return juror personal history questionnaire.

☐ failing to appear for jury service.

☐ disobeying a subpoena.

☐ refusing to testify.

☐ failing to comply with investigative subpoena.

☐ failing to obey a grand jury summons.

☐ taking improper action, as an employer, against a juror.

☐ disobeying an injunctive order against a public nuisance.

☒ failing to comply court order signed on d. 03/04/2021

☐ other: _____

2. The contemnor was ☐ represented by an attorney, ☐ advised of the right to counsel and appointed counsel and knowingly, intelligently, and voluntarily waived that right.

Appendix E

IT IS ORDERED:

3. ☐ a. The contemnor is sentenced to jail for criminal contempt as follows: Report at m.

Count	Date Sentence Begins	Sentence		Credited		To Be Served	
		Mos.	Days	Mos.	Days	Mos.	Days
C	03/19/2021		93				

Release Authorized for the Following Purpose	Release Period	
	From	To
☐ Upon payment of fine and costs ..... ☐ To work or seek work..... ☐ For attendance at school ☐ For medical treatment... ☐ Other: _____		

☐ b. The contemnor is committed to the county jail for civil contempt and may be released when:

4. The contemnor is ordered to probation for criminal contempt. (See separate order.)

5. The contemnor shall pay:

State Minimum	Crime Victim	Restitution	Court Costs
$	$	$	$

Attorney Fees	Fine	Other Costs	Total
$	$ 7500.00	$	$

The due date for payment 03/19/2021 Fine, costs, and fees not paid within 56 days of the due dated are subject to a 20% late penalty on the amount owed. Only the fine and some costs may be satisfied by serving time in jail.

☒ 6. Other: DF MAY BE RELEASED EARLY UPON FULL PAYMENT OF $15000.00 AND UPON VERIFICATION [of Restaurant closure] AND FURTHER ORDER OF THE COURT.

Date: March 19, 2021

/s/_____
Judge Wanda M. Stokes
Bar No. P44485

APPENDIX F — EXCERPTS OF HEARING FROM THE 30TH CIRCUIT COURT FOR THE COUNTY OF INGHAM, STATE OF MICHIGAN, DATED MARCH 4, 2021

STATE OF MICHIGAN
IN THE 30TH CIRCUIT COURT
FOR THE COUNTY OF INGHAM

CASE NO. 2021-113-CZ

MICHIGAN DEPARTMENT OF
AGRICULTURE AND RURAL DEVELOPMENT,

Plaintiff,

v.

ZANTE, INC., D/B/A
MARLENA'S BISTRO & PIZZERIA,

Defendant.

HEARING BEFORE THE HONORABLE WANDA M. STOKES IN THE 30TH CIRCUIT COURT FOR THE COUNTY OF INGHAM & VIA ZOOM

MASON, MICHIGAN—THURSDAY, MARCH 4, 2021

* * *

[5] THE COURT: And has he filed an appearance in this action?

MS. HACKNEY: I'm not aware of.

THE COURT: Is he an attorney?

MS. HACKNEY: He's assistance of counsel.

THE COURT: Is he an attorney ma'am?

MS. HACKNEY: He's assistance of council.

THE COURT: Is he a licensed attorney in the state of Michigan or any other state for that matter?

MS. HACKNEY: I'm not aware of.

THE COURT: OK so I take that as a no.

All right. Ma'am are you aware that your company was required to have an attorney represent them in this matter?

MS. HACKNEY: I don't understand but I am aware of that any Judge who does not comply with piece of the Constitution of the United States works against that Constitution and engage in an act in the violation of the supreme law of land, the Judge engage in act of a treason.

THE COURT: All right, ma'am. I'm going to take that as a no but you do not understand that your company has, apparently, you don't understand that your company needs to be represented by an attorney. That's the law of this land. And failing to have an attorney, then I'm going to entertain a motion through the Department with respect to

* * *

[13] not. I took him outside to show him my sign, and I reached, he gets angry, he's got the papers in his hand, he dropped them to the ground, and say, you are served and walked away. Those papers blew away. I have a customer who sees this whole thing. I had a lot of witnesses. They took pictures, but I did not receive those papers. I called the sheriff.

THE COURT: I understand what happened in that situation. My next question to you is, have you received a suspension of the license, operating license under the Food Act? You have a license to operate your establishment?

MS. HACKNEY: No.

THE COURT: Okay and I'm going to rely upon the date that the State has given me that your license was suspended. Do you dispute that your license has been suspended as of the date that the state indicated?

MS. HACKNEY: Unlawfully is suspended.

THE COURT: Well, but you agree that they're suspended.

MS. HACKNEY: I don't agree.

THE COURT: Okay alright thank you Ms. Hackney.

In cases involving a corporation the law requires that the corporation be represented by an attorney. Ms. Hackney is the owner of Zante, Inc. d/b/a/ Marlena's

* * *

[15] who tested positive for Covid-19. And while I understand Ms. Whipple, it's not possible for you to say definitively that this person contracted the virus while at the establishment, during that time the establishment should not have been operating. And so I think we can fairly draw the line from the person's illness to the conduct of this establishment and operating in violation of the law.

So the court is going to not only issue the preliminary injunction beginning today—I do have one more question for Miss Hackney.

Ms. Hackney, is your restaurant still open?

MS. HACKNEY: No comment.

THE COURT: Ms. Hackney, are you serving food out of your establishment?

MS. HACKNEY: I do not consent and that they are in direct violation of well-established constitutional law.

THE COURT: Okay, Ms. Hackney. Based on the information that I have from the Department, you continue to operate your establishment, you do not have a valid license, and therefore, I find you not only in Contempt of the Order of your license suspension, I find you in violation of this Court's Order because I issued a Temporary Restraining Order commanding that you cease operations until this hearing and you have failed to do that. Therefore, I am going to issue a fine in the amount [16] of $7,500 and I'm going to issue a Bench Warrant for your arrest today.

You've got to some point where individuals are following the law.

And so this, Ms. Whipple, I will issue the orders today. They will be e-mailed to you, they will be served upon Ms. Hackney, and the name that I have is Pavlos Hackney. It's hyphenated P–A, V as in Victor, L–O–S, hyphen, H–A–C–K–N–E–Y, and so that Order, nationwide Bench Order, is being issued today for your arrest and you will remain incarcerated until you comply with the Order of this Court, and you comply with the Order of the Department to cease operations until you have received a valid license.

Do you have any questions Ms. Whipple?

MS. WHIPPLEL No, your Honor.

THE COURT: Okay, there being no questions, and we have no . . .

MS. HACKNEY: I have a question.

THE COURT: . . . no counsel representing the Defendant, then this hearing is adjourned, and the Court's Orders will be issued.

MS. HACKNEY: I have a question.

This hearing is adjourned.

(At 1:34 p.m., proceedings concluded.)

APPENDIX G — DECISION AND ORDER OF THE STATE OF MICHIGAN IN THE MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES, ENTERED FEBRUARY 11, 2021

STATE OF MICHIGAN

MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

IN THE MATTER OF:

MICHIGAN DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT,

Petitioner,

v.

ZANTE INC., D/B/A MARLENA'S BISTRO & PIZZERIA,

Respondent.

Docket No.: 21-001401

Case No.: N/A

Agency: Agriculture

Case Type: AG Food & Dairy

Filing Type: Summary Suspension

Appendix G

Issued and entered
this 11th day of February 2021
by: Lauren G. Van Steel
Administrative Law Judge

DECISION AND ORDER
CONTINUING SUMMARY SUSPENSION

This matter concerns a summary suspension order issued by Petitioner, Michigan Department of Agriculture and Rural Development (MDARD), regarding the food establishment license of Respondent, Zante Inc., d/b/a Marlena's Bistro & Pizzeria, under Section 4125 of the Michigan Food Law, MCL 289.1101 *et seq*., and Section 92(2) of the Administrative Procedures Act (APA), MCL 24.201 *et seq*. This decision denies Respondent's petition to dissolve summary suspension and continues the summary suspension order.

On January 20, 2021, Petitioner issued an Emergency Summary Suspension Order Pursuant to MCL 289.4125 and MCL 24.292(2) and Notice of Hearing. Upon receipt of the request for hearing from MDARD, on January 21, 2021, the Michigan Office of Administrative Hearings and Rules issued a Notice of Video Conference Hearing, which scheduled a formal administrative hearing on February 1, 2021. On January 29, 2021, Assistant Attorney General Eileen C. Whipple filed a Notice of Appearance on behalf of Petitioner.

On February 1, 2021, the hearing was held as scheduled by videoconference. Assistant Attorney General

Whipple appeared on behalf of Petitioner. Marlene Pavlos Hackney, sole owner and principal of Zante, Inc., doing business as Marlena's Bistro and Pizzeria, appeared as representative for Respondent.[1] A petition to dissolve summary suspension was entered on the record by Ms. Pavlos Hackney for Respondent.

Petitioner called Rebecca Long, food program coordinator for Allegan County Health Department; Emily McGrew, inspector for Allegan County Health Department; Randy Rapp, environmental health services manager for Allegan County Health Department; Angelique Joynes, health officer for Allegan County Health Department; Kevin Halfmann, food safety supervisor for MDARD; and James Padden, food safety program manager for MDARD, as witnesses.

The following exhibits were offered by Petitioner and admitted into evidence (except those exhibits noted as withdrawn):

1. Petitioner's Exhibit No. 1 is a copy of a Michigan Department of Health and Human Services (MDHHS) Emergency Order under MCL 333.2253-Gatherings and Face Mask Order, dated November 15, 2020.

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1. At the commencement of the hearing, Respondent sought to be represented by Richard Martin of the "Constitutional Law Group. US", who upon inquiry of this tribunal did not identify himself as an attorney licensed in Michigan. Respondent's request was therefore denied, but Respondent was permitted to call Mr. Martin as a witness.

2. Petitioner's Exhibit No. 2 is a copy of a MDHHS Emergency Order under MCL 333.2253-Gatherings and Face Mask Order, dated December 7, 2020.

3. Petitioner's Exhibit No. 3 is a copy of a MDHHS Emergency Order under MCL 333.2253-Gatherings and Face Mask Order, dated December 18, 2020.

4. Petitioner's Exhibit No. 4 is a copy of a MDHHS Emergency Order under MCL 333.2253-Gatherings and Face Mask Order, dated January 13, 2021.

5. Petitioner's Exhibit No. 5 is a copy of a MDHHS Emergency Order under MCL 333.2253-Gatherings and Face Mask Order, dated January 22, 2021.

6. Petitioner's Exhibit No. 6 is a copy of an Allegan County Health Department Warning Order Finding Imminent Danger to the Public Health and Requiring Corrective Action, dated December 2, 2020.

7. Petitioner's Exhibit No. 7 is a copy of an Allegan County Health Department Cease and Desist Order, dated December 15, 2020.

8. Petitioner's Exhibit No. 8 is a copy of a Food Service Establishment Evaluation Report, dated

December 29, 2020; and Health Department Inquiry Form, dated December 28, 2020.

9. Petitioner's Exhibit No. 9 is a copy of Food Service Establishment Evaluation Report, dated December 30, 2020.

10. Petitioner's Exhibit No. 10 is a photograph of the exterior of Respondent's food establishment.

11. Petitioner's Exhibit No. 11 is a copy of a Food Establishment Evaluation Report, dated January 5, 2020 [*sic*, 2021].

12. Petitioner's Exhibit No. 12 is a copy of a Food Service Establishment Evaluation Report, dated January 6, 2021.

13. Petitioner's Exhibit No. 13 is a copy of a Food Service Establishment Evaluation Report, dated January 7, 2021.

14. Petitioner's Exhibit No. 14 is a copy of a Food Service Establishment Evaluation Report, dated January 8, 2021.

15. Petitioner's Exhibit No. 15 is a copy of a Food Service Establishment Evaluation Report, dated January 12, 2021.

16. Petitioner's Exhibit No. 16 is a copy of a Food Service Establishment Evaluation Report, dated January 13, 2021.

17. Petitioner's Exhibit No. 17 is a copy of a Food Service Establishment Evaluation, dated January 14, 2021.

18. Petitioner's Exhibit No. 18 is a copy of a Food Service Establishment Evaluation, dated January 15, 2021.

19. Petitioner's Exhibit No. 19 is a copy of a Food Service Establishment Evaluation, dated January 19, 2021.

20. Petitioner's Exhibit No. 20 is a copy of a Food Service Establishment Evaluation, dated January 20, 2021.

21. Petitioner's Exhibit No. 21 is a copy of a Food Service Establishment Evaluation, dated January 26, 2021.

22. Petitioner's Exhibit No. 22 is a copy of a Food Service Establishment Evaluation, dated January 27, 2021.

23. Petitioner's Exhibit No. 23 is a copy of a Food Service Establishment Evaluation, dated January 28, 2021.

24. Petitioner's Exhibit No. 24 is a copy of a Food Service Establishment Evaluation, dated January 29, 2021.

25. Petitioner's Exhibit No. 25 is a copy of an informational bulletin by the Allegan County Health Department on COVID-19 and mitigation strategies, dated November 18, 2020.

26. Petitioner's Exhibit No. 26 is a copy of an Allegan County Health Department COVID-19 Update, dated December 2, 2020.

27. Petitioner's Exhibit No. 27 is a copy of a COVID-19 Update by the Allegan County Health Department, dated December 16, 2020.

28. Petitioner's Exhibit No. 28 is a copy of a COVID-19 Update by the Allegan County Health Department, dated December 30, 2020.

29. Petitioner's Exhibit No. 29 is a copy of a COVID-19 Update by the Allegan County Health Department, dated January 13, 2021.

30. Petitioner's Exhibit No. 30 is a copy of a COVID-19 Update by the Allegan County Health Department, dated January 27, 2021.

31. Petitioner's Exhibit No. 31 is a copy of the MDARD Order to Cease and Desist Food Operations, dated December 30, 2020.

32. Petitioner's Exhibit No. 32 is MDARD Emergency Summary Suspension Order Pursuant to MCL 289.4125 and MCL 24.292(2) and Notice of Hearing, dated January 20, 2021.

33. Petitioner's Exhibit No. 33 is a copy of a Food Establishment Evaluation Report, dated January 21, 2021.

34. (Petitioner's Exhibit No. 34 was withdrawn.)

35. (Petitioner's Exhibit No. 35 was withdrawn.)

36. (Petitioner's Exhibit No. 36 was withdrawn.)

37. Petitioner's Exhibit No. 37 contains photographs taken by Allegan County Health Department Inspector Kassie Garrett on January 29, 2021, pertaining to service of the Emergency Summary Suspension Order on Respondent.

38. Petitioner's Exhibit No. 38 is a copy of an informational bulletin by the U.S. Department of Health and Human Services / Centers for Disease Control and Prevention (CDC) on COVID-19 pertaining to restaurants and bars.

39. Petitioner's Exhibit No. 39 is a copy of an information bulletin by the CDC on "How to Protect Yourself and Others".

40. Petitioner's Exhibit No. 40 is a copy of a study published by the CDC, "Community and Close Contact Exposures Associated with COVID-19 Among Symptomatic Adults . . . ", dated July 2020.

Ms. Pavlos Hackney testified as a witness for Respondent. In addition, Respondent called Richard Martin to testify. The following exhibits were offered by Respondent and admitted into the record:

1. Respondent's Exhibit A is a copy of a sign posted on the door of Respondent's establishment at times relevant.

2. Respondent's Exhibit B is a copy of Respondent's response to the Corrective Action Plan of the Allegan Health Department, submitted December 4, 2020.

The record was closed at the conclusion of the hearing.

ISSUES AND APPLICABLE LAW

The issue presented is whether Petitioner MDARD has properly determined that Respondent's conduct constitutes an imminent threat to the public health, safety or welfare, requiring emergency action and a continuation of the summary suspension of Respondent's food establishment license under Section 4125 of the Michigan Food Law, which provides as follows:

> Sec. 4125. (1) Before a food establishment license, bottled water registration, or shellfish dealer certificate is issued, the director shall determine if the applicant meets the minimum requirements of this act and rules.

(2) After an opportunity for a hearing pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, the director may revoke or suspend a food establishment license, a registration for bottled water, or a shellfish dealer certificate issued under this act for failure to comply with requirements of this act or a rule. A person whose food establishment license, registration for bottled water, or shellfish dealer certificate is revoked or suspended shall discontinue the sale and offering for sale of food, the bottled water, or shellfish, respectively, until he or she complies with this act and the director issues a new registration or removes the suspension.

(3) If a person's food establishment license is revoked for egregious violations under section 5101(a), (b), (c), or (k), the director may refuse to issue or reissue a license to any establishment in which that person has ownership or management interest for a period of 2 years after the revocation.

(4) Based upon facts submitted by a person familiar with those facts or upon information and belief alleging that an imminent threat to the public health, safety, or welfare exists, the director may summarily suspend a license, registration, or certificate issued under this act. A person whose license, registration, or certificate has been summarily suspended

> under this section may petition the director to dissolve the order. Upon receipt of such a petition, the director shall immediately schedule a hearing to decide whether to grant or deny the petition to dissolve. *The presiding officer shall grant the requested relief dissolving the summary suspension order unless sufficient evidence is presented that an imminent threat to the public health, safety, or welfare exists requiring emergency action and continuation of the director's summary suspension order.* MCL 289.4125. (Emphasis supplied).

Additionally, Section 4127 of the Michigan Food Law provides as follows:

> Sec. 4127. (1) After the regulatory authority receives a petition for a hearing from a license, registration, or certificate holder whose license, registration, or certificate is summarily suspended under section 4125, the proceedings shall be promptly commenced and determined as required by section 92 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.292.
>
> (2) This section does not prevent the regulatory authority's immediate reinstatement of a license, registration, or certificate when the regulatory authority determines the public health hazard or nuisance no longer exists. MCL 289.4127.

Section 92(2) of the APA sets forth the procedures for summary suspension of a license:

> Sec. 92 (2) If the agency finds that the public health, safety or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license may be ordered effective on the date specified in the order or on service of a certified copy of the order on the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined. MCL 24.292(2).

FINDINGS OF FACT

Based upon the entire record including the witness testimony and admitted exhibits, the undersigned Administrative Law Judge finds the following facts to be established by competent, material, and substantial evidence:

1. Respondent, Zante, Inc. d/b/a Marlena's Bistro and Pizzeria, operates a restaurant located at 909 Lincoln in Holland, Michigan, which is in Allegan County.

2. Marlena Pavlos Hackney is the sole owner and principal of Zante, Inc., which was incorporated in 2000 per Ms. Pavlos Hackney's testimony.

3. At times relevant to this matter, Respondent has been licensed as a food service establishment by Petitioner MDARD.

4. Respondent's food service establishment has six employees: two servers or waitstaff, two cooks and two food preparation workers. It is open to serve customers breakfast and lunch on Tuesdays through Sundays, 7:00 a.m. to 2:00 p.m.

5. Respondent's establishment is located within the jurisdiction of the Allegan County Health Department.

6. Angelique Joynes, M.P.H., R.N., is the current health officer for the Allegan County Health Department. One of the health department's responsibilities is to conduct contact tracing (pertaining to persons within six feet for 15 minutes or more of exposure) to mitigate the spread of COVID-19. Unlike facilities with a known population such as a long-term care facility or school, it is very difficult to trace a COVID-19 outbreak in a restaurant unless customer names were collected. Customers may not be able to say at the time of an outbreak investigation who was seated near them in the restaurant, per the credible testimony of Ms. Joynes.

7. Allegan County experienced a surge in COVID-19 cases in November-December 2020, with an increase in hospitalizations and deaths. Although

the number of COVID-19 cases has now fallen, the county is still considered at the highest risk category for COVID-19 requiring ongoing mitigation measures. According to the CDC, if masks are worn properly there can be a 70% reduction in transmission of COVID-19, per the credible testimony of Ms. Joynes. [Pet. Exh. 25-30, 38-40].

8. The Allegan County Health Department is charged with enforcing the Public Health Code. It is also accredited and charged by Petitioner MDARD with conducting investigations of food establishments within its jurisdiction as delegated enforcement of the Michigan Food Law, per the credible testimony of James Padden, food safety program manager with MDARD.

9. On March 10, 2020, Governor Whitmer issued Executive Order 2020-4 that declared a state of emergency based on COVID-19 cases in the state of Michigan.

10. Respondent stopped allowing indoor dining at its establishment in March 2020, but resumed indoor dining in July 2020, per the testimony of Ms. Pavlos Hackney.

11. On November 15, 2020, the MDHHS Director issued an Emergency Order, in which he concluded under the Public Health Code, MCL 333.2253, that the COVID-19 pandemic

continued to constitute an epidemic in Michigan and that control of the epidemic was necessary to protect the public health. The MDHHS Director concluded that it was necessary to restrict gatherings and establish procedures to be followed during the epidemic to ensure the continuation of essential public health services and enforcement of health laws. [Pet. Exh. 1].

12. The November 15, 2020 MDHHS Emergency Order, effective as of 12:01 a.m. on November 18, 2020, through December 9, 2020, prohibited gatherings at food service establishments such as Respondent's restaurant. Indoor dining was allowed at certain other types of facilities. The Emergency Order allowed *outdoor* dining with social distancing at food service establishments and further required that face masks to be worn at gatherings subject to certain exceptions. The MDHHS Emergency Order authorized local health departments to carry out and enforce the terms of the order. [Pet. Exh. 1].

13. On November 18, 2020, following the Allegan County Health Department's receipt of a complaint about indoor dining, Rebecca Long (food program coordinator for the health department) visited Respondent's establishment and observed customers inside drinking coffee, per Ms. Long's credible testimony.

14. Ms. Long met with Ms. Pavlos Hackney on November 18, 2020, concerning the MDHHS Emergency Order then in effect. Ms. Long's initial impression was that Ms. Pavlos Hackney had misunderstood the Emergency Order, so she reviewed the order's terms with her, including that facial coverings or masks were required to be worn in the establishment. Ms. Long requested that Ms. Pavlos Hackney put up a sign stating that the establishment was open only for take-out and that the customers who were then present needed to leave after their meal. Ms. Pavlos Hackney complied with that request on that date, per the credible testimony of Ms. Long. [Pet. Exh. 17].

15. Subsequent to November 18, 2020, however, the Allegan County Health Department received repeated complaints that Respondent's food establishment was still open for indoor dining. A majority of complaints that the health department received about businesses at the time concerned Respondent's establishment. [Pet. Exh. 7].

16. On December 2, 2020, Emily McGrew, inspector for Allegan County Health Department, issued a Warning Order to Respondent based on her observations on that day that the establishment was violating the indoor dining prohibition. Ms. McGrew left the Warning Order at the establishment and provided Respondent with an opportunity to submit a corrective action plan by December 4, 2020.

17. The Allegan County Health Department tries to eliminate barriers to compliance, such as any possible misunderstanding, confusion, or lack of personal protective equipment (PPE). That was the reason for the health department allowing Respondent an opportunity to submit a corrective action plan, per the credible testimony of Ms. Joynes.

18. In the Warning Order of December 2, 2020, the Allegan County Health Department indicated that Respondent allowing indoor dining constituted a second offense. It ordered Respondent's establishment to immediately comply with all applicable public health laws and orders, including but not limited to MDHHS Emergency Orders on gatherings and masks. It ordered that Respondent's establishment be temporarily closed for 72 hours with a site revisit prior to reopening approval. [Pet. Exh. 6].

19. On December 4, 2020, Respondent returned the corrective action plan form to the Allegan County Health Department and attached statements in protest rather than a plan for compliance with the Warning Order. [Resp. Exh. B].

20. On December 7, 2020, the MDHHS Director issued an Emergency Order that extended the prohibition against indoor dining at food service establishments as described above through December 20, 2020. [Pet. Exh. 2].

21. On December 9, 2020, the Allegan County Health Department notified Ms. Pavlos Hackney that the returned corrective action plan did not sufficiently address correction of the violation and requested that she submit a revised plan by December 10, 2020.

22. Respondent did not revise or further respond to the Allegan County Health Department regarding a corrective action plan. The health department subsequently received complaints that Respondent was still allowing indoor dining. Health department staff observed indoor dining at Respondent's establishment on December 11, 2020, and further took note of a local news article on December 13, 2020, that Respondent's food establishment was not closed to indoor dining and that it was not following any of the MDHHS Emergency Order gathering and mask requirements. [Pet. Exh. 7].

23. On December 15, 2020, Ms. Joynes, as health officer for Allegan County Health Department, issued a Cease and Desist Order to Respondent's food establishment, in which she determined that its continued operation in violation of the MDHHS Epidemic (Emergency) Order constituted an imminent and substantial danger to public health, and ordered Respondent's food establishment to cease and desist all inside dining and to comply with all applicable provisions of the Order of December 7, 2020.

24. In determining that it was necessary to issue the Cease and Desist Order, Ms. Joynes took into account information on COVID-19 published by the U.S. Department of Health and Human Services/ Centers for Disease Control and Prevention (CDC). [Pet. Exh. 7 & 38-40].

25. On December 15, 2020, Allegan County Health Department staff personally served the Cease and Desist Order on Ms. Pavlos Hackney for Respondent.

26. On December 18, 2020, the MDHHS Director issued an Emergency Order that continued the prohibition against indoor dining at food service establishments as described above, effective December 21, 2020, through January 15, 2021. [Pet. Exh. 3].

27. On December 29 and 30, 2020, Ms. Long observed from a point outside Respondent's establishment that customers were sitting inside at tables and eating. Ms. Long also took note that Respondent's parking lot was very full and concluded that the number of cars and size of the establishment would not allow for proper social distancing of customers inside. On December 30, 2020, Ms. Long further observed wait staff walking around without masks on while serving food and customers paying at the register without masks on. She also took note that she did not observe any customers exiting with food to go. [Pet. Exh. 8 & 9].

28. On December 30, 2020, MDARD issued to Respondent an Order to Cease and Desist Food Operations, which was delivered by UPS (with delivery confirmation) on December 31, 2020, per the credible testimony of James Padden, food program manager for MDARD. [Pet. Exh. 32].

29. Subsequent to the MDARD Order to Cease and Desist, however, Respondent continued to operate its food service establishment with indoor dining in violation of both the Cease and Desist Order and the MDHHS Emergency Order then in effect.

30. On January 5, 2021, Ms. Long observed 25 vehicles in Respondent's parking lot, customers not socially distanced while seated, customers walking around the dining room without masks, the waitress/owner walking around the dining room without a mask, and customers leaving without to-go containers. [Pet. Exh. 11].

31. On January 6, 2021, Ms. Long observed 30 vehicles in Respondent's parking lot, 2-4 customers in three booths (not socially distanced), customers walking into the dining room without masks and the owner/waitress serving customers without a mask on. Ms. Long credibly testified that she could see into the establishment from the outside because the blinds were open, it was dark outside, and the lights were on inside. [Pet. Exh. 12].

32. On January 7, 2021, Ms. Long observed 18 vehicles in Respondent's parking lot, booths occupied with two customers (not socially distanced), and indoor dining. [Pet. Exh. 13].

33. On January 8, 2021, Ms. Long observed 20 vehicles in Respondent's parking lot, customers not socially distanced, customers entering and walking around the dining room without masks, and the owner/waitress not wearing a mask while serving customers. [Pet. Exh. 14].

34. On January 12, 2021, Ms. Long observed 30-plus vehicles in Respondent's parking lot, indoor dining, and customers not socially distanced. [Pet. Exh. 15].

35. On January 13, 2021, the MDHHS Director issued an Emergency Order that extended the prohibition against indoor dining at food service establishments as described above, effective January 16, 2021, through January 31, 2021. [Pet. Exh. 4].

36. On January 13, 2021, Ms. Long observed 16 vehicles in Respondent's parking lot, a large round table with over six customers, and a cook without a mask standing by the register. [Pet. Exh. 16].

37. On January 14, 2021, Ms. Long observed 18 vehicles in Respondent's parking lot, two booths

with two customers each, indoor dining, and a customer at the cash register without a mask. [Pet. Exh. 17].

38. On January 15, 2021, Ms. Long observed a large table with at least six customers, indoor dining, and two waitresses clearing tables without masks on. [Pet. Exh. 18].

39. On January 19, 2021, Ms. Long observed a full dining room at Respondent's establishment with customers seated for indoor dining at numerous tables. [Pet. Exh. 19].

40. On January 20, 2021, Ms. Long observed customers seated and dining at Respondent's establishment, including two window booths with 2-3 customers seated and dining. [Pet. Exh. 20].

41. On January 20, 2021, the Director of Petitioner MDARD issued an Emergency Summary Suspension Order Pursuant to MCL 289.4125 and MCL 24.292(2) and Notice of Hearing. In the Order, which replaced MDARD's December 30, 2020, Cease and Desist Order, the MDARD Director recognized that the Public Health Code gives the MDHHS "general supervision of the interests of health and life of people of this state" and requires it to "endeavor to prevent disease, prolong life, and promote the public health." MCL 333.2221(2) and MCL 333.2221(1). The MDARD Director recognized that MDHHS may exercise

authority under the Code to safeguard the public health, prevent the spread of diseases, and issue emergency orders to address epidemics. MCL 333.2226(d) and MCL 333.2253(1). [Pet. Exh. 32].

42. The January 20, 2021, MDARD Emergency Summary Suspension Order referenced the most recent Gatherings and Face Mask Order of MDHHS that took effect on January 16, 2021, Respondent's non-compliance with the Allegan County Health Department's Warning Order of December 2, 2020, and Cease and Desist Order of December 15, 2020, and Respondent's non-compliance with the MDARD Cease and Desist Order of December 30, 2020, in that Respondent continued to offer indoor dining, not requiring facial coverings/masks or social distancing. [Pet. Exh. 32].

43. The January 20, 2021, MDARD Emergency Summary Suspension Order further referenced COVID-19 statistics in Allegan County as of January 19, 2021, of 6,550 confirmed and probable cases and 93 deaths from COVID-19, which was a marked increase from the period of January 5 - 14, 2021. [Pet. Exh. 32].

44. The MDARD Director determined in the Emergency Summary Suspension Order that Respondent's continued offering of indoor dining, failure to require social distancing and failure to require staff and customers to wear facial

coverings creates an imminent threat to the public health, safety and welfare. [Pet. Exh. 32].

45. On January 21, 2021, Randy Rapp, environmental health services manager for the Allegan County Health Department, went to Respondent's establishment to hand-deliver a copy of the Emergency Summary Suspension Order. Ms. Pavlos Hackney refused to accept the order or sign the health department's report form. Ms. Pavlos Hackney was personally informed at that time that Respondent's food establishment license was suspended, that there was upcoming hearing date scheduled, and that she would be receiving the order in the mail. [Pet. Exh. 33].

46. Mr. Rapp observed on January 21, 2021, that there was indoor dining in Respondent's establishment without social distancing and that none of the employees was wearing facial coverings, per Mr. Rapp's credible testimony.

47. On January 22, 2021, the MDHHS Director issued an Emergency Order, effective February 1-21, 2021, that allowed indoor dining at food service establishments with certain restrictions, including that the number of patrons not exceed 25% of the normal seating capacity, that groups of patrons be separated by at least six feet. [Pet. Exh. 5].

48. On January 26, 2021, Ms. Long observed about 30 cars in Respondent's parking lot, people entering the establishment and signage stating that the restaurant was open for business. [Pet. Exh. 21].

49. On January 27, 2021, Ms. Long observed 20 vehicles in Respondent's parking lot, three booths with two or three customers each (not socially distanced), and waitstaff not wearing a mask while pouring coffee to customers. [Pet. Exh. 22].

50. On January 28, 2021, Ms. Long observed 24 vehicles in Respondent's parking lot, customers entering the establishment not wearing masks, waitstaff not wearing masks, five booths with two customers and the interior of the dining room full. [Pet. Exh. 23].

51. On January 29, 2021, Ms. Long observed at Respondent's establishment a large table with at least eight customers, four booths with two or more customers each, a busboy and wait staff without masks, and customers walking in and away from tables without masks. [Pet. Exh. 24].

52. On January 29, 2021, Allegan County Health Department supervisor Kevin Halfmann and food safety inspector Kassie Garrett went to Respondent's establishment and observed that it was open for business and indoor seating. Supervisor Halfmann gave a copy of the Emergency Summary Suspension Order to Ms.

Pavlos Hackney, but she refused to accept the papers. He then placed the summary suspension papers on a table near windows where Ms. Garrett stood outside and photographed his actions. A copy of the photographs taken by Ms. Garrett are contained in Petitioner's Exhibit No. 37.

53. Respondent was properly notified by Petitioner of the Emergency Summary Suspension Order on both January 21 and 29, 2021. Although Ms. Pavlos Hackney has contended that service of the summary suspension order was not proper, the photographs in Petitioner's Exhibit No. 37 as well as Ms. Long's and Mr. Halfmann's credible testimony show that repeated reasonable attempts were made to personally serve Ms. Pavlos Hackney, owner of Respondent's establishment, with the summary suspension order.

54. Mr. Rapp observed on January 30, 2021, that Respondent was open for business with customers dining indoors. Upon cross-examination, Mr. Rapp credibly testified that the CDC has information showing that wearing masks and social distancing will cut down on the spread of COVID-19. The Allegan County Health Department relies upon information from the MDHHS, MDARD, the Department of Environment, Great Lakes and Energy (EGLE), CDC, and the National Institute of Health, per the credible testimony of Mr. Rapp.

55. Ms. Pavlos Hackney acknowledged in her testimony that Respondent establishment has continued to operate and offer indoor dining, that it does not require customers or wait staff to wear facial coverings/masks, and that it is not enforcing social distancing between groups of customers.

56. Ms. Pavlos Hackney further acknowledged in her testimony that she had submitted the response on behalf of Respondent to the Allegan County Health Department corrective action plan on December 4, 2020, as shown in Respondent's Exhibit B. Respondent's response does not contain any plan or agreement to correct the cited violation of indoor dining, but rather states a protest to the health department's authority as follows:

> "1. Is it your intention to violate your oath of office and to knowingly and willingly coerce and intimidate me into surrendering my rights under duress?
>
> "2. By what authority do you have to trespass on my rights without due process of law? Under the U.S.C. 4th amendment I have the right to be secure in my person, house, papers and effects against unreasonable searches and seizures, and this shall not be violated.

> "3. I am not answering any questions or statements because under the U.S.C. 6th amendment I have a right to have my assistance of counsel present in my defense." [Resp. Exh. B].

57. Ms. Pavlos Hackney confirmed in her testimony that at times relevant to this matter Respondent has posted signs on its doors that were prepared by Richard Martin and/or the "Constitutional Law Group". The signs state in part as follows:

> "By law, we do not follow any of the governor's mayor's, health department's, or other government agency orders or suggestions pertaining to social distancing or mask wearing. *Your health is your responsibility.*" [Resp. Exh. A].

58. The signs further give notice to "all government officials" that "[y]ou are in violation of your oath of office by trespassing unlawfully on the property of this business establishment and committing an act of domestic terrorism under Section 802 of the *Patriot Act*." [Resp. Exh. A].

59. As of the date of hearing, it is more likely than not that Respondent had not attempted in any manner to comply with the MDHHS Emergency Orders, Allegan County Health Department Warning Order and Cease and Desist Order, the MDARD Cease and Desist Order or the MDARD Emergency Summary Suspension Order.

60. Ms. Pavlos Hackney acknowledged in her testimony that Respondent establishment was open for indoor dining the day before the hearing (January 31, 2021), that the establishment was not requiring customers or employees to wear masks, and that it was not enforcing social distancing.

61. Based on Allegan County Health Department staff reports, Respondent is not complying with any capacity limits including the 25% capacity requirements of the January 22, 2021 MDHHS Emergency Order, per the credible testimony of Ms. Joynes.

62. Both Ms. Pavlos Hackney and Mr. Martin's testimony indicated their dispute of findings regarding the existence of the COVID-19 pandemic by MDHHS, Allegan County Health Department, CDC, and MDARD. They indicated in their testimony a view that the COVID-19 pandemic has not been proven to exist, that COVID-19 mitigation measures are a fraud, and that Petitioner MDARD's actions are unconstitutional. Neither witness was determined to be qualified to testify as an expert on pandemics.

63. Per the credible testimony of Mr. Padden, MDARD properly took into account the recommendations of the CDC on social distancing and mask wearing, the status of COVID-19 outbreaks, and MDHHS guidance on preventing the spread of

COVID-19. MDARD reasonably determined that Respondent's continued non-compliance with the DHHS Emergency Orders, Allegan County Health Department Warning Order, and the health department and MDARD Cease and Desist Orders constitutes an imminent danger to public health in light of the COVID-19 pandemic that is ongoing.

64. Specifically, Respondent's ongoing non-compliance with the ordered mitigation measures of face coverings/masks and social distancing (and likely any capacity limits) constitutes an imminent threat to the public health, safety, and welfare.

65. The record evidence does not show any misunderstanding or confusion on Respondent's part as to above-described order requirements, but rather knowing or intentional non-compliance.

66. Respondent did not attempt in any manner to comply with the MDHHS Emergency Order, the Allegan County Health Department Warning Order and Cease and Desist Order or the MDARD Cease and Desist Order. It has further acted contrary to the MDARD Emergency Summary Suspension Order by continuing to allow indoor dining after the date of the Order.

Appendix G

CONCLUSIONS OF LAW

Under Section 4125(4) of the Michigan Food Law, MCL 289.4125(4), *supra*, the administrative law judge as the presiding officer shall dissolve the summary suspension order unless sufficient evidence is presented that an imminent threat to the public health, safety, or welfare exists requiring emergency action and a continuation of the order. "Sufficient evidence" for purposes of summary suspension under the Section 92 of the APA has been viewed as a preponderance of the evidence. As the Michigan Supreme Court has stated, "[p]roof by a preponderance of the evidence requires that the fact finder believe that the evidence supporting the existence of the contested fact outweighs the evidence supporting its nonexistence." *Blue Cross and Blue Shield of Michigan v Milliken*, 422 Mich 1; 367 NW2d 1 (1985).

Therefore, Petitioner MDARD has the burden of proof in this matter to establish by a preponderance of evidence that the public health, safety, or welfare requires emergency action and a continued suspension of the food establishment license. See MCL 289.4125(4) and MCL 24.292(2). The undersigned concludes that Petitioner has met its burden of proof.

Based on the above findings of fact, the undersigned concludes that Respondent has failed to comply with COVID-19 mitigation measures required for the protection of the public, contrary to MDHHS' emergency orders, the local health department staff's instructions, the local health department's warning order and cease and

desist order, and the cease and desist order of Petitioner MDARD. The record evidence shows that for several months Respondent knowingly has not complied with both local and state health department requirements that were established to prevent the spread of COVID-19 to employees, customers, and the community.

The Michigan Food Law under MCL 289.4125 authorizes emergency suspension of a food establishment license based on an imminent threat to the public health, safety, or welfare. The record evidence appears clear that, in addition to the MDHHS Emergency Orders, Petitioner MDARD has made its own findings based on the local health department's detailed and ongoing investigations regarding imminent threat to the public and has acted within its own authority under the Michigan Food Law, MCL 289.4125 and MCL 289.4127. A preponderance of the record evidence shows that Petitioner has taken into account Respondent's non-compliance with the MDHHS Emergency Order, but that it is not the sole basis for the summary suspension order. Therefore, Petitioner has met its burden of proof to show sufficient evidence for the issuance and continuance of the summary suspension order.

DECISION

Based on the above findings of fact and conclusions of law, a preponderance of the evidence shows that Respondent has continued to engage in conduct that constitutes an ongoing imminent threat to the public health, safety, and welfare under section 4125 of the

Michigan Food Law, MCL 289.4125. Petitioner's summary suspension order is therefore properly continued under that statute and MCL 24.292.

ORDER

NOW THEREFORE, IT IS HEREBY ORDERED that Respondent's petition to dissolve the Emergency Summary Suspension Order issued on January 20, 2021, shall be and hereby is DENIED.

IT IS FURTHER ORDERED that under the provisions of MCL 289.4125 and MCL 289.4127 the Emergency Summary Suspension Order issued on January 20, 2021, shall be and hereby is CONTINUED.

/s/Lauren G. Van Steel
Lauren G. Van Steel
Administrative Law Judge

APPEAL RIGHTS

Pursuant to MCL 24.304, if a party seeks appeal of the above order, a petition for review shall be filed in a court of proper jurisdiction within 60 days after the date of mailing notice of the order, or if a rehearing before the agency is timely requested, within 60 days after delivery or mailing notice of the decision or order thereon. See also, Mich Admin Code, R 792.10137.

APPENDIX H — ORDER OF THE MICHIGAN SUPREME COURT, LANSING, MICHIGAN, FILED MAY 22, 2025

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

SC: 166321
COA: 363515
Ingham CC: 2021-000113-CZ

DEPARTMENT OF AGRICULTURE
AND RURAL DEVELOPMENT,

Plaintiff-Appellee,

v

ZANTE, INC., d/b/a
MARLENA'S BISTRO & PIZZERIA,

Defendant-Appellant.

Megan K. Cavanagh,
Chief Justice

Brian K. Zahra
Richard H. Bernstein
Elizabeth M. Welch
Kyra H. Bolden
Kimberly A. Thomas,
Justices

Appendix H

Filed May 22, 2025

On order of the Court, the motion for reconsideration of this Court's January 31, 2025 order is considered, and it is DENIED, because we are not persuaded that reconsideration of our previous order is warranted. MCR 7.311(G).

APPENDIX I — MOTION OF THE SUPREME COURT OF MICHIGAN, FILED FEBRUARY 21, 2025

STATE OF MICHIGAN
IN THE SUPREME COURT

MSC No. 166321
COA No. 363515
Judges Gleicher, Jansen & Rick

Ingham County Circuit Court
No. 21-000113-CZ
Judge Wanda Stokes

MICHIGAN DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT,

Plaintiff-Appellee,

vs.

ZANTE, INC., d/b/a MARLENA'S BISTRO, MARLENA PAVLOS HACKNEY, RESIDENT AGENT,

Defendant-Appellant.

Filed February 21, 2025

Submitted February 21, 2021
BY:
Helen Brinkman (P 40233)
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Appendix I

**MOTION FOR RECONSIDERATION
OF LEAVE TO APPEAL
MCR 7.311(G)**

MOTION FOR RECONSIDERATION

NOW COMES, Defendant-Appellant, Zante, Inc, d/b/a Marlena's Bistro & Pizzeria, pursuant to MCR 7.311(G), and hereby requests this Court reconsider its January 31, 2025, Order denying leave to appeal, for the reason that, pursuant to MCR 2.119(F)(3), new issues presenting "*palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.*" Reconsideration is mandated under the venerable authority of *Fox v Bd of Regents, 375 Mich. 238, 242; 134 N.W.2d 146 (1965)*, and *Reed v. Yackell, 473 Mich. 520, 540; 703 N.W.2d 1(2005),* that "all courts must upon challenge" . . . confirm that subject-matter jurisdiction exists." This core Due Process right is not waivable, conditioned on timing, nor any other action (contempt) nor inaction (exhaustion). *Id.* Likewise, under the contempt statute, subject-matter jurisdiction (lawful order) is statutorily required by MCL 600.1701(g). Determining whether MCL 333.2253 is constitutional is compulsory, because that request has yet to be granted in this case's 4-year history. Thus, Constitutional Due Process and Equal Protection, under *Fox* and *Reed* mandate this Court's review. U.S. Const, Am XIV; Const 1963, art 1, §§ 2, 17.

Appendix I

Pursuant to *City of Detroit v. Rabaut*, *389 Mich. 329, 330; 206 N.W.2d 625 (1973),* leave is also permissible where the issue "is of considerable importance and urgency" and has yet to be resolved by the courts.

I. UNDER *REED* AND *FOX V BD OF REGENTS* THIS COURT IS REQUIRED TO GRANT LEAVE ON THE ISSUE OF SUBJECT- MATTER JURISDICTION.

The January 31, 2025, Order denied leave "because we are not persuaded that the questions presented should be reviewed by this Court." However, *Reed v. Yackell*, *473 Mich. 520, 540; 703 N.W.2d 1 (2005),* states plainly, "**all courts must upon challenge**, or even *sua sponte*, confirm that subject-matter jurisdiction exists." Review is not optional. "Courts are bound to take notice of the limits of their authority." *Fox v Bd of Regents, 375 Mich. 238, 242;134 N.W.2d 146 (1965).*

"Jurisdiction does not "inhere" in a court, it is conferred upon it by the power which creates it." *City of Detroit v. Rabaut*, *389 Mich. 329, 331; 206 NW2d 625 (1973).* In the present case, the power that created the Covid-19 Executive Orders ("EOs) was MCL 333.2253. The power that created contempt authority was MCL 600.1701(g).

"Jurisdiction cannot rest upon waiver or consent." *In re Estate of Fraser*, *288 Mich. 392, 394; 285 N.W. 1 (1939).* "Lack of subject-matter jurisdiction may be **raised at any time**, and parties to an action **can neither confer** jurisdiction **by their conduct or action nor waive the**

defense by not raising it." *Paulson v Secretary of State, 154 Mich. App. 626, 630-631; 398 N.W.2d 477 (1986). Emphasis added.* Thus, review does not hinge on exhaustion of administrative or appellate remedies, contrary to the appellate court's opinion. It is not *Marlena's actions* that secure the duty to review it, it is the Court's duty to insure it. *Id.*

This Court is required to accept leave and address this subject-matter jurisdiction issue, even at this juncture. "Challenges to subject-matter jurisdiction cannot be waived, and a court **must entertain such challenges regardless of when they are raised**, or even raise such challenges *sua* sponte." *O'Connell v. Dir. of Elections, 316 Mich. App. 91, 100; 891 N.W.2d 240 (2016).*

> "Because a court is continually obliged to question *sua sponte* its own jurisdiction over a person, the subject matter of an action, or the limits of the relief it may afford, it was the trial **court's duty to take notice of its lack of subject-matter jurisdiction and dismiss** plaintiff's claim for injunctive relief pursuant to MCR 2.116(C)(4). Indeed, **want of subject-matter jurisdiction is *so serious a defect* in the proceedings that the trial court was duty-bound to dismiss plaintiff's suit** even had defendants not so requested." *Yee v. Shiawassee County Board of Commissioners, 251 Mich. App. 379, 399; 651 N.W.2d 756 (2002).* Emphasis added.

Appendix I

The venerable case of *Fox v. Board of Regents*, *supra* states:

> "**Courts are bound to take notice of the limits of their authority**, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, **recognize its lack of jurisdiction** and **act accordingly** by staying proceedings, dismissing the action, or otherwise disposing thereof, **at any stage of the proceeding."**
>
> **"**Where a court is without jurisdiction in the particular case, its acts and proceedings can be of **no force or validity, and are a mere nullity and void."**
>
> "'A court which has determined that it has no jurisdiction **should not proceed further except to dismiss the action.'"** *Fox at 375 Mich 242-3. Internal citations omitted, emphasis added.*

These core procedural cases, under MCR 2.119(F)(3), present "*palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error."* This Court was misled to believe subject-matter jurisdiction review was optional, "not **persuaded** that the questions presented ***should be reviewed*** by this Court." Instead, it's mandatory, pursuant to *Fox, Yee, O'Connell, Paulson and, Reed.* Leave must be granted to correct the error.

Wherefore, leave must be granted to address Defendant's subject-matter jurisdiction challenge to MCL 333.2253. *Fox, supra, 242.*

II. SUBJECT-MATTER JURISDICTION CANNOT BE CONDITIONED ON EXHAUSTION OF APPELLATE REMEDIES.

a. Creating an Exhaustion Requirement for Subject-Matter Jurisdictional Claims Violates the State and Federal Constitutions

Where "a facial challenge" affecting subject matter jurisdiction is made concerning the constitutionality of a statute, as is the case here, no condition, rule, statute or case can supersede review on Constitutional grounds:

> "Bruley . . . challenges the constitutionality of an ordinance **on its face**, and that, even if required to exhaust administrative remedies, **exhaustion** in this instance, where the only challenges brought **are constitutional**, **is excused**." *Bruley v. City of Birmingham, 259 Mich. App. 619, 624; 675 N.W.2d 910 (2004). (Emphasis added).*

> "'[A] plaintiff can bring a facial due process challenge that claims arbitrariness or capriciousness and **need not exhaust any administrative remedies**.'" *Bruley at 259 Mich App 626. (Emphasis added)*

> "Because this claim does not take issue with any aspect of the execution or enforcement of the ordinance, it is a **challenge of the ordinance on its face**.

> Accordingly, under *Paragon Properties*, there was **no need to exhaust any administrative remedies**." *Bruley at 259 Mich App 626 (Emphasis added).*

Marlena's defense, from the beginning, was that the EOs were unconstitutional under *In re Certified Questions*, *506 Mich 332, 337-8; 958 NW2d 1 (2020)*. (Appendix, p32, ¶ 62; pp 167, 170-174). That is a facial constitutional challenge. This Court errs in allowing the lower court to appoint an administrative gatekeeper over access to our fundamental constitutional rights.[1]

b. Exhaustion Of Appellate Remedies Is Also Irrelevant To MCL 600.1701(g)'s Statutory Mandate To Determine The Underlying Order Was "Lawful."

The contempt statute, requires a finding of a "lawful order," as a matter of Due Process. MCL 600.1701(g) states,

> "The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> * * *
>
> "(g) Parties to actions, attorneys, counselors, and all other persons for disobeying any

1. U.S. Const, Am XIV; Const 1963, art 1, §§ 2, 17

> **lawful order**, decree, or process of the court." Emphasis added.

The duty to determine the lawfulness of the underlying statute is the judge's duty. "Lawful" is the legislative's insurance the Court has subject-matter jurisdiction before punishment by contempt. Marlena was denied her Due Process and Equal Protection right to have a determination made whether the contempt was on a "lawful order." So, determining the viability of MCL 333.2253 will not only resolve whether the licensing sanction was valid, but also whether the contempt was valid.

III. DUE PROCESS VIOLATION IN FAILING TO ADDRESS THE LACK OF SUBJECT MATTER JURISDICTION UNDER SEPARATION OF POWERS CLAUSE

"It is a fundamental principle that . . . subject-matter jurisdiction may not be waived and may be raised at any time." *People v. Smith, 438 Mich. 715, 724, 475 N.W.2d 333 (1991).* "Challenges to subject-matter jurisdiction cannot be waived, and a court ***must entertain*** such challenges regardless of when they are raised, "*O'Connell, supra, 100. Emphasis added.*

"[A]ll courts **must upon challenge**, or even sua sponte, confirm that subject-matter jurisdiction exists" *Reed supra, 540. Emphasis added.*

Subject-matter jurisdiction limits "a court's power to act and its authority to hear and decide a case." *City of Riverview v Sibley Limestone, 270 Mich App 627, 636;*

716 NW2d 615 (2006). "If a court lacks subject-matter jurisdiction, its acts and proceedings are invalid." *Id.*

Failure to correct this foundational error allows deprivation of Marlena's liberty and property without Due Process of law under Const 1963, art 1, §§ 2, and 17:

> "No person shall be . . . deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed." Const 1963 art 1, § 17.
>
> "No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights . . . " Const 1963, art 1, §2.

And contravenes the 14th Amendment guarantee under the US Constitution that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or **enforce any law which shall abridge the privileges** or immunities of citizens of the United States; nor shall **any State deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the **equal protection** of the laws." Emphasis added.

See also the 5th Amendment of the US Constitution.

All that is required to prevail on a due process claim is to show (1) that she suffered a deprivation of a constitutionally protected interest in 'life, liberty, or property,' and (2) that such deprivation occurred without due process of law. *Zinermon v. Burch, 494 U.S. 113, 125–26, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990).*

The first is established in the license revocation, her arrest, excessive fines[2] and incarceration. The second is established in failing address subject-matter jurisdiction, by any court, and refusing to determine whether the underlying order was "lawful" as required by the contempt statute, MCL 600.1701(g) and *In re Certified Questions.*

Failure to grant leave on this issue, would constitute a bedrock constitutional defect under the Due Process and Equal Protection clauses of our Michigan and US Constitutions.[1]

IV. DENIAL OF EQUAL PROTECTION UNDER THE MICHIGAN AND US CONSTITUTIONS

> "[L]egislation challenged on equal protection grounds is presumed constitutional and the challenger has the burden to rebut that presumption." *Barrow v. City of Detroit Election Comm, 301 Mich.App. 404, 419; 836*

2. *In re Contempt of Pavlos-Hackney, _ Mich App _ (COA No. 357407, rel'd. 10/20/22)*

N.W.2d 498 (2013) and *State Treasurer v. Raar, 363952 (Mich. App. Mar 21, 2024).*

Here Marlena had met the burden of proving MCL 333.2253 was unconstitutional in the appellate court below, because both *In re Certified Questions* and *T&V Assocs,. v. DHHS.,* ___ *Mich App* ___ *(COA No. 361727, rel'd 6/29/23)* were *binding precedent* on that court during that time. Yet the appellate court purposefully refused to give Marlena Equal Protection under U.S. Const, Am XIV; Const 1963, art 1, §§ 2, 17, in those cases by 1) denying her the mandatory, immediate, subject- matter jurisdiction review she is entitled to under *Reed* and *Fox,* and 2) by refusing to apply *In re Certified Questions*, and *T&V Assocs,* settled constitutional precedents, to Marlena's case. Failure to cite a rational basis to deny her equal treatment under the Constitution and prevailing caselaw on the issue, violates her Due Process and Equal Protection rights.

V. "AS APPLIED" "CLASS OF ONE" EQUAL PROTECTION VIOLATION IN ENFORCEMENT OF THE EOs

An as-applied equal-protection challenge requires the party challenging the statute to "show both that (1) he 'has been intentionally treated differently from others similarly situated,' and (2) 'there is no rational basis for the difference in treatment.'" *People v. James*, 326 Mich. App. 98, 106; 931 N.W.2d 50 (2018), quoting *Village of Willowbrook v. Olech*, *528 U.S. 562, 564; 120 S.Ct. 1073; 145 L.Ed.2d 1060 (2000).*

"To be considered similarly situated, the challenger and his comparators must be prima facie identical in all relevant respects or directly comparable . . . in all material respects." *Id.*

"A 'class of one' may initiate an Equal Protection claim by alleging that he or she 'has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" *James, supra 106*. "Defendant must negate 'every conceivable reason for the government's actions' or show 'that the actions were motivated by animus or ill-will.' *Id, at 106-7.*

Marlena, uniquely, suffered arbitrary and capricious enforcement of the EOs issued under MCL 333.2253, as compared to other similarly situated restaurants in the state, due to 1)the AG's disparate enforcement, and 2) a documented personal animus, uncovered in the AG's emails and social media posts. The AG willingly allowed some restaurants to operate without restriction under EOs, while other restaurants, though similarly situated throughout the rest of the state, like Marlena, were required to comply. See *Moore Murphy Hospitality v DHHS, Otsego No. 21- 018522-AE, lv den, 972 NW2d 43 (2022) (*App, p 70). In addition, some restaurants, were openly allowed to flout the EOs, and the hypocrisy headlined across the nation, but were never charged at all.

DISPARATE ENFORCEMENT – The AG voluntarily dismissed her appeal against the Iron Pig Restaurant, in *Moore Murphy,* after the Otsego Circuit Court, rightly found the EOs under MCL 333.2253 unconstitutional,

under *In re Certified Questions, supra,* and struck the statute from the Health Code. (Appendix, p84). The AG immediately requested reversal in a by-pass application to this Court. This Court refused. *Moore Murphy v DHHS, 972 NW2d 43 (2022).* Tellingly, she *chose* not to risk affirmance, and dismissed her appeal. Obviously, she believed she would lose and chose to stave-off the decision, which eventually emerged in *T&V Assocs*. In dismissing the *Moore-Murphy* appeal, the AG conceded its unconstitutionality, giving Otsego County restaurants freedom from the EOs, while she continued its enforcement in the rest of the state, particularly against Marlena.

FAVORED RESTAURANTS NOT ENFORCED AT ALL– The evidence supporting this disparity in the AG's enforcement of the table limits, masking and social distancing EOs was the subject of national headlines, featuring the Governor and friends crowded around a table at the Landshark, unmasked, in violation of the table limits and social distancing rules. (Appendix p 74 https://www.businessinsider.com/michigan-gov-whitmer-apologized-photo-violating-covid-19-rules-restaurant-2021-5?op=1). These are the very violations for which Marlena lost her license, $15,000[2] in fines, was strip searched and incarcerated, to be released only after her husband could ransom her, three days later, the time it took to amass the $15,000. (Appendix p68). All Landshark got for its audacious violation was free publicity featuring the Governor.

The stark contrast is a textbook example of an "as applied" equal protection violation. The AG's action as it relates

to the Landshark, Iron Pig and other Otsego County restaurants, is irreconcilable with the AG's persistence in maintaining this prosecution against Marlena. Particularly when the chief law enforcement officer of the State did not voluntarily dismiss *this* appeal, *even after T&V Assocs.* held MCL 333.2253 unconstitutional! The Landshark and the restaurants in Otsego County were permitted to operate without compliance with EOs. But not Marlena, even after *T&V Assocs.*

ANIMUS ILL-WILL-

It would be hard to find a case involving more evidence of government animus or ill-will, than that presented here. The evidence strongly suggests this case was personal to the AG (See emails and social media posts about Marlena in Appendix p63). The trigger appears to be Marlena's national appearance on Tucker Carlson Show, comparing her prosecution to the socialist oppression she experienced growing up in Poland.

The AG's emails and social media posts personally attacked Marlena by name, instructed staff to immediately arrest Marlena specifically to keep her from appearing on the Tucker Carlson Fox News program. "I hope she gets the full 93days for this." (Appendix pp62-65). The personal animus is most nakedly exposed in the AG's lengthy social media post deriding and ridiculing

Marlena (Appendix p60). The State House of Representatives felt compelled to write the AG to ask her to cease and desist from her "selective enforcement" against Marlena. (Appendix, p 70).

RATIONAL BASIS-

Is there ever a rational basis to sanction special treatment for favored restaurants, like the Landshark? The AG readily acceded the EOs be stricken from the Health code as unconstitutional, for an entire Michigan County; yet this case continues against her.

It is indisputable. It overwhelmingly establishes "that the actions were motivated by "animus or ill-will" and negates all lawful, rational basis. *James, supra, 106-7.*

CONCLUSION-

This issue, standing alone, entitles Marlena to redress under the Equal Protection Clause for the Arbitrary And Capricious application of the EO licensing sanctions**.**

VI. DUE PROCESS AND THE EQUAL PROTECTION VIOLATION OF "LAWFUL ORDER" MCL 600.1701(g)

MCL 600.1701(g) limits the circuit courts' contempt powers to enforcement of "lawful" orders. It states, "The supreme court, circuit court, and all other courts of record, have **power to punish** by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases: * * * (g) Parties to actions, attorneys, counselors, and all other persons **for disobeying any lawful order, decree, or process of the court**." Emphasis added.

The circuit court had a *statutory,* Due Process and Equal Protection duty to determine a lawful order, under *In re Certified Questions,* to acquire contempt powers. It refused to do so. Accordingly, the circuit court did not have the "inherent right" to issue contempt under the statute until that subject-matter analysis took place. *Rabaut, supra, 331.* The Court of Appeals' contrary, presently precedential, opinion bypassing the Due Process and Equal Protection language of MCL 600.1701(g), must be set aside, to restore the statute's constitutional protections under the Michigan and US Constitutions.[1] *Reed, supra, 540.*

CONCLUSION AND REQUESTED RELIEF

These manifold, foundational, constitutional errors, most particularly in subject-matter jurisdiction, mandate leave in this case. *Yee, supra, 399; Fox, supra, 242-3.* Wherefore, we respectfully request that this Court reconsider and grant leave on the subject-matter jurisdiction and "lawful order" issues, pursuant to Defendant's Due Process and Equal Protections rights under our Michigan and US Constitutions.[1]

Dated: February 21, 2025

APPENDIX J — APPLICATION FOR LEAVE TO APPEAL IN THE SUPREME COURT OF THE STATE OF MICHIGAN, FILED NOVEMBER 1, 2023

IN THE SUPREME COURT
OF THE STATE OF MICHIGAN

MSC No. _____
COA No. 363515
Judges Gleicher, Jansen & Rick
Ingham County Circuit Court
No. 21-000113-CZ
Judge Wanda Stokes

MICHIGAN DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT.

Plaintiff-Appellee,

vs.

ZANTE, INC., d/b/a MARLENA'S BISTRO, MARLENA PAVLOS HACKNEY, RESIDENT AGENT,

Defendant-Appellant.

DEFENDANT-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

Appendix J

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

November 1, 2023

* * *

> tending to interrupt its proceedings or impair the respect due to its authority.
>
> "(b) Any breach of the peace, noise, or disturbance directly tending to **interrupt its proceedings**." MCL 600.1701(a) &(b), emphasis added.

Those two provisions do not require a "lawful order." But MCL 600.1701 subsection(g) specifically *does*:

> "(g)Parties to actions, attorneys, counselors, and all other persons for disobeying **any lawful order, decree, or process** of the court." Emphasis added.

Dudzinski holds that "Imprisonment for criminal contempt is appropriate where a defendant does something he was ordered not to do." *In re Contempt Dudzinski, 257 Mich App 96, 108; 667 NW2d 65 (2003).* Accordingly, we ask the Court to clarify *Dudzinski* as it relates to subject matter

jurisdiction and the plain text of MCL 600.1701(g), in this published opinion, and whether that application rationally achieves the stated, purpose of inducing respect for court orders. Defendant maintains it cannot.

The cases cited from multiple jurisdictions, like *Dudzinski* also refer to disruptive behavior in the presence of the court, not with unconstitutionally invalid law or decree. Only two opinions, cited in *Dudzinski*, address contempt and whether obedience to an unlawful order is required: *Kirby v Michigan High School, 459 Mich 23; 585 NW2d 290 (1998)* and *US v United Mine Workers, 330 US 258; 67 S Ct 677; 91 L Ed 884 (1947)*.

Kirby is based on dicta, in that it cites the proposition, but does not follow it. That case actually required reversal of the finding of contempt:

> "A party must obey an order entered by a court with, proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt and possibly being ordered to comply with the order at a later date. *In re Hague, 412 Mich. 532, 544-545, 315 NE2d 524 (1982)*. Nevertheless, we find in this close case that the MHSAA was not guilty of contempt." Kirby at 585 NW2d 290, 297.

Notably, *Hague*, cited therein, is likewise distinguishable, as it, too, was based on a constitutional order. *See Hague, 412 Mich at 544, fn 6*. This involved a judge who defied

a superintending control order requiring him to stop dismissing prostitution charges issued on ticket forms. The reference, above, was to Hague's unfounded ***belief*** it was unconstitutional. *Hague* states, plainly, "As in the law of contempt, Judge Hague was free to disregard an order void for lack of jurisdiction." *Id., at 412 Mich 544*, emphasis added. But the law was valid in his case. *Id. at fn 6.*

But here the EOs had been held invalid, by the highest court in the state, long before she was held in violation. The opinion was of great public interest, widely publicized, and the courts should have known[17]. There is the distinction.

As to *US v United Mine Workers*, it, too, is dicta. That case also noted disobedience based on the *belief* the order was unlawful, and belief, alone, is obviously insufficient to justify noncompliance. But *United Mine Workers*, too, held that the injunction, for which defendants were held in contempt, *was lawful*. They confirmed that had the injunction *not been lawful*, the contempts would have been "reversed in its entirety."

> "The District Court on November 29 **affirmatively decided** that the Norris-LaGuardia Act was of no force in this case and that **injunctive relief was therefore authorized. Orders outstanding or issued after that date were to be obeyed** until they expired or were set aside by appropriate proceedings, appellate or

17. The old maxim is ignorance of the law is no excuse. If it applies to the layman, then more so the courts.

> otherwise. Convictions for Criminal Contempt intervening before that time may stand." *United Mine Workers, 330 US at 294. Emphasis added.*
> ***
>
> **"If the Norris -LaGuardia Act were applicable in this case, the conviction for civil contempt would be reversed in its entirety.**
>
> ***
>
> **"*Assuming*, then, that the Norris-LaGuardia Act applied to this case and *prohibited injunctive relief* at the request of the United States, *we would set aside* the preliminary injunction of December 4 *and the judgment for civil contempt*; but we would**, subject to any infirmities in the contempt proceedings, or in the fines imposed **affirm the judgments for *criminal contempt* as *validly punishing* violations of an *order then outstanding and unreversed***. *United Mine Workers, 330 US at 295. Emphasis added.*

Clearly, the reference to affirming the criminal Contempt, in *United Mine Workers*, is also *dicta*. The statement is based, not on fact, but in postulating what would be done if the Norris-LaGuardia Act had actually "prohibited injunctive relief." As quoted above, the opinion states that the underlying injunction was, in fact, valid. *Id at 294*. Accordingly, *Dudzinski's* original reliance on *United Mine Workers* is based on *dicta*, in that, the contempts were founded on a validly issued injunction. *Id at 294*.

Understanding that *Dudzinski* applies to criminal contempt in disruption of court proceedings in the presence of the Court, it is inapplicable here. That case addresses only "the power of the District Court to punish violation of its order as criminal contempt." *United Mine Workers, 330 US of 292*. Notably, here, the law of the case, decided in the interlocutory appeal, is that these appear to be civil contempt orders, as they were issued in attempt to induce compliance. *In re Contempt of Pavlos-Hackney, __ Mich __ (COA No. 357407, rel'd 10/20/2022, slip op 19). Dudzinski* does not apply.

The appellate court's citation to *In re JCB, 336 Mich App 736, 747; 971 NW2d 705 (2021)* quoting *United States v Rylander, 460 US 752, 757; 103 S Ct 1548; 75 LEd 2d 521 (1983)* is likewise unavailing. *MDARD v Zante, at slip op 5*. The contempt in *JCB* was pursuant to *MCL 600.2950a*. ''Under MCL 600.2950a(23), a person who fails to comply with a PPO is subject to the criminal-contempt powers of the court." *In re JCB, 336 Mich App at 747*, That is a valid Michigan statute.

Likewise, *JCB's* citation to *federal* procedure in *Rylander*, arising out of the eastern district of California, is inapposite to Michigan's legislative mandate that requires a valid court order. *Rylander* involved appearance on subpoena. It is not based on an invalid law, nor Michigan precedent, and it countermands the more analogous holding in *Johnson v White*.

Johnson v White should be controlling. It was cited in the appellate opinion but its holding and application were misapplied to deny relief. Rather than following its

precedent that vacated the contempt and the underlying unconstitutional grandparents' rights order, the appellate Court held,

> "*Johnson* is a far narrower holding than Pavlos-Hackney claims. It does not stand for the proposition that courts lack contempt jurisdiction when an underlying law is *subsequently* declared unconstitutional. *Johnson's* holding applies only if a statute has been declared to be unconstitutional before a contempt judgment is entered. That is not what happened here." *MDARD v Zante at slip op 6*. Emphasis in original.

The court misread *Johnson v White*, which held, in conformity with fundamental jurisdictional precepts, that both the contempt and underlying order were *void ab initio* with "full retroactive" and "precedential"/ prospective effect:

> We hold that the *DeRose* decision **should be given *full retroactive* effect and vacate the trial court's January 10, 2001, order granting plaintiffs grandparenting time because the order is *void ab initio*. We also find that the court abused its discretion in refusing to vacate the April 22, 2002, judgment of contempt because it failed to give the DeRose decision its proper precedential effect.** Accordingly, we reverse that order. *Johnson v White, 682 NW2d at 507.*

* * *

APPENDIX K — APPELLANT'S BRIEF ON APPEAL IN THE STATE OF MICHIGAN IN THE COURT OF APPEALS, FILED NOVEMBER 14, 2022

STATE OF MICHIGAN
IN THE COURT OF APPEALS

Court of Appeals Case No. 363515
Ingham County Circuit Court
Case No. 21-113-CZ
Hon. Wanda Stokes

MICHIGAN DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT,

Plaintiffs-Appellees,

vs.

ZANTE, INC., d/b/a MARLENA'S BISTRO, MARLENA PAVLOS-HACKNEY, RESIDENT AGENT,

Defendant-Appellant.

Filed November 14, 2022

APPELLANT'S BRIEF ON APPEAL

**** ORAL ARGUMENT REQUESTED ****

* * *

It is, therefore, plain and indefensible error, for the lower court to declare the matter "not before this court" and refuse to hear the declaratory motion, timely filed, requesting the court find the COVID–19 EOs, invalid/unconstitutional. It leaves a definite and firm conviction that a mistake has been made. *In re Contempt of Henry, supra, 282 Mich App at 68–9*; MCL 24.301; MCL 24.306 and MCL 24.264.

Accordingly, we ask the Court to review the constitutional issue de novo, as set forth in Issue II below, following the holding in *In re Certified Questions*, void/vacate MOARH's license suspension and reverse the 30th Circuit Court's actions predicated thereon, for the reason they are void *ab initio*.

II. THE SUSPENSION OF DEFENDANT/APPELLANTS' FOOD LICENSE FOR VIOLATION OF MDHHS' COVID–19 EXECUTIVE ORDERS WAS UNCONSTITUTIONAL PURSUANT TO *IN RE CERTIFIED QUESTIONS*, RENDERING THIS CASE VOID *AB INITIO*.

"Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have

always been, and always will be, the subject of close examination under our constitutional system." Home Building Loan Ass v. Blaisdell, 290 US 398, 425-426; 54 S Ct 231; 78 L Ed. 413 (1934).

A. CONSTITUTIONAL SEPARATION OF POWERS – VALIDITY OF THE EOs

"An unconstitutional law is no law, and in no case can it be made a justification in law for any action or non-action." Adsit v. Secretary of State, 84 Mich. 420, 429; 48 N.W. 31 (1891).

The MDHHS COVID–19 EOs are invalid, void *ab initio*, a nullity from their inception, precisely because MDHHS had no power to enact, nor enforce them without Legislative approval. *In re Certified Questions, supra, 506 Mich at 337–8*. The Attorney General, the ALJ and the Circuit Court, like all the citizens of Michigan, are presumed to know the law and "the maxim that all men must presume to know the law must prevail." *Adsit, 84 Mich at 429.* Particularly where, as here, we have public declarations that they understood the EOs were unenforceable without Legislative approval (Appendix B). Defendant asks this Court to speedily set aside these bold and unrepentant actions by the chief law enforcement officer of the state pursued in defiance of both co-equal branches of government and constitutional duty and oath.

Two core pillars of our Constitution govern this case. *"It is so basic as to require no citation that the constitution is the fundamental law to which all other*

laws must confirm. Smith, 428 Mich at 640. And it is on these constitutional tenets the issue is determined. It begins and ends there.

Michigan's *Const 1963, Art 4 § 51* grants the power and sole authority, to *"pass suitable laws for the protection and promotion of the public health"* to the Michigan Legislature, *not* the Executive Branch. It is not given to the Executive Branch to create laws, and specifically, to create laws regarding health and safety. It belongs to Legislature, and it is to them without exception.

Michigan's *Const 1963, Art 3, § 2* specifically states that, *"No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Emphasis added.* Nowhere does our Constitution "expressly provide" an exception granting the executive branch control over the protection of public health.

"'Strictly speaking, there is no acceptable delegation of legislative power.'" In re Certified Questions, 506 Mich at 358 quoting Mistretta v. United States, 488 US 361, 419, 109 S Ct 647, 102 LEd2d 714 (1989). Because there is no "acceptable delegation of legislative power" and our Constitutional unambiguously confines any exceptions to those contained within the text of the Constitution itself; neither statute nor case

* * *

And whether, or not, the lower court and the AG believed there was a valid basis to pursue contempt on an act which occurred outside its presence, once it is determined that contempt was founded on an invalid order, it must be set aside. MCL 600.1701(g) controls.

Wherefore, it is abundantly clear that the EOs were unconstitutional and all actions taken to enforce the EOs, including contempt, are void *ab initio*. As much as one may disagree with the legislature's actions, it remains that the Court's *"duty to act within our constitutional grant of authority is paramount." Robinson v. City of Detroit, 462 Mich 439; 613 NW2d 307, 324 (2000).*

So in fealty to the plain language of *Const 1963, Art 3, § 2, Const 1963, Art 4, § 51* and our Supreme Court's opinions, there is no power in the Executive Branch to maintain the COVID–19 EOs in absence of legislative approval. Once that approval ended on April 30, 2020, any action, such as the one at bar, initiated months later, is null and void and must be immediately vacated. What *In re Certified Questions, 506 Mich at 338–339, House of Representatives* and *Moore Murphy Hospitality, LLC v DHHS, 46th Circuit Court no. 21-18522-AE, Jan 13, 2022, lv den __ Mich __; 972 NW2d 43 (2022)* jointly confirm, is that there is simply no remaining constitutional structure undergirding the COVID–19 mandates after April 2020. The only remedy, at that juncture, was for the Executive Branch and Legislature to work together to craft whatever mandates might have been necessary to combat COVID–19. *In re Certified Questions, 506 Mich at fn 1* and *House of Representatives, supra, 949 NW2d 276.*

But that did not happen.

Emergencies do not create power nor extinguish citizen's rights, *Home Building Loan Ass v. Blaisdell, 290 US 398, 425; 54 S Ct 231, 78 L Ed. 413, 88 ALR 1481 (1934)*, it allows citizens to make choices, based on their individual analysis of the risk/benefit, and, ultimately, perpetuates an individual's personal responsibility to their own, educated, choice; to reap the benefit or suffer the consequences thereof. We make those risk/benefit choices every time we get in an automobile

* * *

APPENDIX L — EXCERPT OF THE MICHIGAN CIRCUIT COURT FOR THE COUNTY OF INGHAM, DATED OCTOBER 6, 2022

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF INGHAM

CASE NO: 21-113-CZ

MICHIGAN DEPARTMENT OF AGRICULTURE
AND RURAL DEVELOPMENT,

Plaintiff,

vs.

ZANTE INC., d/b/a MARLENA'S BISTRO
AND PIZZERIA,

Defendant.

BEFORE THE HONORABLE WANDA M. STOKES, III, CIRCUIT JUDGE LANSING, MICHIGAN— THURSDAY, OCTOBER 6, 2022

MOTION FOR DECLARATORY JUDGMENT
MOTION FOR SUMMARY DISPOSITION

Reported by: Teresa J. Abraham, CSR tjabraham@msn.com

* * *

[10]and, *In Re: Certified Questions*. She also was requested to go on Tucker Carlson, as you know, not because of any food problem at her restaurant, but because of the executive order.

THE COURT: Aren't these all issues that were determined by the state agency?

MS. BRINKMAN: Yes.

THE COURT: And wasn't there a hearing with that state agency, and isn't there a process that if your client had issues with that order that was delivered by the ALJ, why isn't that a matter for a different case? Why are you here in front of me talking about the merits of why her license was revoked?

MS. BRINKMAN: Because, Your Honor, unlike usual Circuit Court orders, MDARD allows 60 days for appeal. Her hearing was on February 1st. She was arrested on the bench warrant on March 4th. She was still within the time to appeal. She was arrested and brought here on contempt. Her time to appeal had not expired.

When she appeared before Judge Aquilina, in your stead, she was still within her appellate time. And she then had hired, 20 minutes before that hearing, an attorney that she begged to [11]appeal. But he didn't have the document. All along she is asking to appeal. He did not. He filed his motions and his appeal to the Court of Appeals.

At this time—

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THE COURT: Well, but she could nave—he could have filed an appeal of the administrative order, and that might be in front of this Court right now.

MS. BRINKMAN: It might be.

THE COURT: But it's not.

MS. BRINKMAN: But, Your Honor, that executive order did not exist legally.

THE COURT: I'm not talking about—Ms. Brinkman, I'm talking about the issue that this Court adjudicated—

MS. BRINKMAN: Correct.

THE COURT: — which is not an appeal of the administrative order that suspended her license. That's not why she was in front of me.

MS. BRINKMAN: With all due respect, their—you cannot base a bench warrant and contempt on an illegal order. And even Judge Aquilina says, on page 15 and 16: This appears to be a valid order.

[12]You cannot proceed and make valid a contempt and a fine based on an illegal, unconstitutional order.

So, regardless of whether she appealed, that law does not exist according to the Constitution, the law upon which she was held to be in violation. It's—

THE COURT: Well, when she came to my Court, and I can't speak for what was in front of the ALJ or what was in front of the Department, but when she came to this Court, the reason why she was here was because she was operating a restaurant without a license. You cannot do that, not because of an administrative order, or not because of Covid, but because we have a law in Michigan, the Food Law that says you can't do that.

So until she has a license, she should snot have had that restaurant open, regardless of why the license was taken'. She didn't have one. Do you disagree with that?

MS. BRINKMAN: Your Honor—

THE COURT: Do you disagree that she did not have a license?

MS. BRINKMAN: Yes, I do.

THE COURT: And why?

[13]MS. BRINKMAN: Because she had a valid license. MDARD suspended it based on an illegal, unconstitutional law. You cannot take a license—

THE COURT: So you're telling this Court that if we—if her—that since her license was taken, and it's your argument that it was invalid, and then she failed to exhaust the administrative remedies that were available to her, and because she didn't do what she needed to do, now I have to go back and say that everything was illegal? That's not how the law works, ma'am.

MS. BRINKMAN: Your Honor, I believe in my brief I've cited to you cases where, unfortunately, Your Honor, you cannot base anything, once the foundation of taking her license is illegal, they had no basis to do that. It was illegal.

THE COURT: So her basis was just to ignore this Court's order?

MS. BRINKMAN: No, Your Honor.

THE COURT: That's what she did.

MS. BRINKMAN: No, Your Honor.

THE COURT: She was held in contempt because she was in violation of this Court's order.

MS. BRINKMAN: She was in violation of the MDARD order. And that's when they brought it to [14]you.

THE COURT: The Court issued—this Court issued an Order. Irrespective—well, that's not in front of this Court.

MS. BRINKMAN: Okay.

THE COURT: Go ahead. Give me your summary, Ms. Brinkman.

MS. BRINKMAN: Thank you, Your Honor.

I presented in my reply brief to you, just like when the Supreme Court decided that grandparents' rights were no longer constitutional—was not constitutional. And a person, a man was brought before the Court on contempt for failing to abide by that order, they held that he could not be held responsible.

It's fruit of the poisonous tree once you have an unconstitutional basis to take away the license, that—that—you have to void all of that. That law, as I cited in my response brief, is void. It never existed. And if it never existed, MDARD could have never taken away her license. It goes back to the beginning. And everything, based on that, is void ab initio. There is no basis to proceed.

So, therefore, Your Honor, again, the * * *

* * *

[18]five more minutes to wrap up. And I'll give equal time to the State.

MS. BRINKMAN: I appreciate it. Thank you, Your Honor.

As we have indicated, in summary this woman had 20 minutes to meet, and wanted to say that is was unconstitutional. She did not. Her counsel has not presented that. And I'm here today presenting that there is no time limit on an unconstitutional challenge. If it is illegal under our Constitution, it cannot proceed.

I understand that the Court is saying that they have the right—you have the right to punish this woman for operating without a license. Our position, Your Honor, is that the order that suspended that license was illegal. And in order for the Court to find contempt, it has to find, as I cited in my response brief, that the order that she violated was valid.

This Court's order was based on a suspension that was invalid. Once that's invalid, we cannot make it valid by further punishing citizens.

THE COURT: But I only have one question: Can you tell me how the Food Law factors [19]into all of this?

MS. BRINKMAN: Yes, Your Honor. She had a valid operating license under the Food Law. Under the—

THE COURT: According to who?

MS. BRINKMAN: According to the license, according to MDARD.

THE COURT: No. I'm talking about before.

MS. BRINKMAN: She was operating before—-

THE COURT: Before—before the Administrative Law Judge—

MS. BRINKMAN: Right.

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THE COURT:—issued their order, she had that license.

MS BRINKMAN: Yes.

THE COURT: I want to talk about after the Administrative Law Judge—

MS. BRINKMAN: Yes.

THE COURT: —issued their order suspending her license.

MS. BRINKMAN: Correct. That—

THE COURT: So under what authority did she continue to operate at that time?

MS. BRINKMAN: That order is invalid, void ab initio. It was based on an unconstitutional [20]executive order. It could not be enforced.

THE COURT: How was the Food Law—I'm not talking about the—

MS. BRINKMAN: The Food Law was the executive—based on the executive order.

THE COURT: No.

MS. BRINKMAN: Yes.

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THE COURT: Well, no. No. And this isn't rhetorical. Let me tell you what I understand the Food Law. I'm looking at MCL 289.5—initially begins with 289.1101. It says:

"This Act shall be known and may be cited as the Food Law."

Then it says, at 289.4101, of the Food Law, it says:

"Except as provided in 4102 and 4105, a person shall not operate a food establishment unless licensed by the Department as a food establishment."

Did your client have a license issued by MDARD at that time?

MS. BRINKMAN: She did.

THE COURT: Okay. All right. Go ahead. Make your record.

MS BRINKMAN: She did. Because once a [21]valid food license—

THE COURT: I understand that. You said that five times.

MS. BRINKMAN: Okay.

THE COURT: Go ahead. Wrap up, please.

MS. BRINKMAN: Right. I will, Your Honor.

They have to have a constitutional basis to revoke that license under the Food Law.

THE COURT: Okay.

MS. BRINKMAN: So, Your Honor, I stand here, as counsel is representing a person who did not violate the law, period, did not violate a constitutionally valid law, nothing after that is valid. It cannot be. And, therefore, we're asking the Court to dismiss this case.

I stand here praying for the justice that she came to this country to receive under our Constitution. I stand here because my physical father in heaven brought us here to this land of freedom, and my spiritual father. And I'm asking this Court to follow the Constitution that God gave us. Thank you.

THE COURT: You're welcome. Thank you, Ms. Brinkman.

Go ahead, Ms. LaMore.

[22]MS. LAMORE: Good morning, Your Honor.

THE COURT: Good morning.

MS. LAMORE: MDARD's primary goal in bringing the original action was in compliance with the Food Law, and subsequently this Court's orders.

Here, there is no genuine issue of material fact before this Court.

MDARD's briefing sets forth our arguments for resolution of this case. And this Court issued a final order requiring the Defendant to comply with the law.

THE COURT: Well, Ms. LaMore, I want you to address Ms. Brinkman's constitutional argument. How does that even factor into what is IN front of this Court?

MS. LAMORE: What is in front of the Court today was MDARD's original action for a permanent injunction. The constitutional arguments that the Defendant is making don't have any merits on the orders of this Court, both the temporary restraining order and preliminary injunction that it issued.

The unconstitutional arguments are based on the administrative proceedings, which have not been appealed, and are not before this Court.

[23]THE COURT: And how is it that—what about the relationship between the executive order and why you filed your claim here with this Court?

MS. LAMORE: The executive orders are referenced in MDARD's summary suspension, and were discussed in the hearing before the Administrative Law Judge. I believe that the MDARD summary suspension order referenced not complying with the executive orders and not complying with the local health cease and desist order.

And that MDARD also issued its own cease and desist order. But those were separate proceedings.

After the Administrative Law Judge issued the order continuing the license suspension, the Defendant continued to not comply and cease operations. That's why MDARD brought the action before this Court to intervene to have Marlena's Bistro comply with the law.

THE COURT: And at the time that MDARD took their action, did Marlena's Bistro—excuse me. Zante, Inc d/b/a Marlena's Bistro, cease—did they have a valid license from the State of Michigan?

MS. LAMORE: They did not have a valid license from the State of Michigan.

* * *

[29]be shut down. She was not shut down for any rule under the Food Law. They cannot provide the Court with any valid rule authorizing the government to remove her license. Without that, nothing can proceed. It is unconstitutional.

I agree, if she had violated the Food Law, she has absolutely no defense. But she did not violate a Food Law because the Supreme Court said the Food Law didn't exist.

THE COURT: No. They didn't say the Food Law didn't exist.

MS. BRINKMAN: Well, I am sorry. They said that the Food Law under which her license was suspended does not exist.

THE COURT: No. That's not what the Supreme Court said. Okay.

MS. BRINKMAN: Your Honor, in order to—

THE COURT: All right. I have heard your arguments. Unless you have something else that's substantive to the argument. You're rebutting the argument that was made by MDARD.

MS. BRINKMAN: All right. I just have one question, then, Your Honor. Under what violation in the Food Law was her license suspended?

THE COURT: That goes to the merits of what [30] happened in a case that is not before this Court. And you have got accept that. Whether you do or not, it's up to you.

Unless you have something more?

MS. BRINKMAN: No, Your Honor.

THE COURT: Thank you.

I do have a proposed order from the State, which I believe adequately addresses the issues here.

I'm just troubled that at some level there seems to be a misunderstanding of why this matter was pending

before this particular Court. This Court was not asked to review the merits of the licensing revocation. This Court was asked to look at the reasons why we have a license that is—a person who has had their license revoked, and why they continue to operate without a license. That's the issue that was in front of this Court.

Now, when you have a situation where a party violates an order of a state agency, and they seek to have that order complied with, they have every opportunity to bring a separate action. And that's what MDARD did in this case.

MDARD brought this action under the Food [31]Law, MCL 289.1101, and all of its progenies. They sought to seek a permanent injunction pursuant to MCL 289.5111 to prevent the Defendant from unlicensed sale of food in violation of the Food Law. That's why this action was brought to this Court.

This Court is not addressing what happened at the administrative level. It's not addressing what could have happened or should have happened. That's the matter that was in front of this Court.

It's this Court's understanding, and based upon the information that was provided during the proceedings that were held with respect to the injunction, that MDARD did not utilize the public health code or the Governor's executive orders in bringing this action. It's brought pursuant to the food law.

And all—for all of the value that the Defendant places, and the weight she places on those arguments about the about the unconstitutionality of the executive orders, the fact still remains that those issues were not in front of this

Court. They're not relevant because MDARD's authority was under the Food Law.

The merits on what happened, with respect [32]to that license being revoked, were not and have never been before this Court.

An administrative Law Judge upheld MDARD's decision to summarily suspend the Defendant's license in this case. That was all done pursuant to the Administrative Procedures Act and relevant rules, and it was done appropriately.

Based upon the authority of this Court and the issues that it has already decided in this case with respect to the preliminary injunction, all appropriate factors were weighed. Defendant's motion for declaratory judgment and to dismiss is denied.

And this Court is going to grant summary disposition pursuant to MCR 2.116(c)(10), and MCR 2.116(I)(2) for the Plaintiff in this case, because there is no genuine issue as to any material fact regarding the proceedings in this case. And the Plaintiff is entitled to judgment, as a matter of law.

The claims for damages that you are—that you're seeking, pursuant to MCL 600.6419, those must be addressed by the Court of Claims. So they're not valid for determination by this Court.

This is the final order of the Court that I

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APPENDIX M — BRIEF OF THE STATE OF MICHIGAN IN THE 30TH CIRCUIT COURT FOR THE COUNTY OF INGHAM, FILED SEPTEMBER 26, 2022

STATE OF MICHIGAN
IN THE 30TH CIRCUIT COURT
FOR THE COUNTY OF INGHAM

Ingham County Circuit
Hon. Wanda M. Stokes
Case No. 2021-113-CZ

MICHIGAN DEPARTMENT OF AGRICULTURE
AND RURAL DEVELOPMENT,

Plaintiff,

-v-

ZANTE, INC., d/b/a
MARLENA'S BISTRO & PIZZERIA,

Defendant.

Filed September 26, 2022

BRIEF IN SUPPORT MOTION FOR DECLARATORY JUDGMENT AND DISMISSAL

INTRODUCTION

"And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people

> *that these liberties are the gift of God? That they are not to be violated but with His wrath? Indeed I tremble for my country when I reflect that God is just: that his justice cannot sleep forever. . . .*" Thomas Jefferson, etched on the Jefferson Memorial, northeast portico. From Notes on the State of Virginia ed. Peden, 163. Manuscript available at Massachusetts Historical Society.
>
> *"It is when a people forget God, that tyrants form their chains.*"~Patrick Herry

* * *

These rights are concomitantly guaranteed by the 14th Amendment to the US Constitution, which states,

> *"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.* ***No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States****; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction* ***the equal protection of the laws.***" *Emphasis added.*

42 USC §1983, provides federal remedies for unlawful constraint of these liberties by the state courts.

Appendix M

Two pivotal sections of our Constitution control the case. Michigan's *Const 1963, Art 4 § 51* grants the power and *sole* authority, to "*pass suitable laws for the protection and promotion of the public health*" to the Michigan Legislature, *not* the Executive Branch.

Michigan's *Const 1963, Art 3, § 2* specifically states that, "*No person exercising powers of one branch shall exercise powers properly belonging to another branch* ***except*** *as* ***expressly provided in this constitution****.*" *Emphasis added.* The Constitution does not provide an exception relevant here.

Our Supreme Court confirms, there is no "acceptable delegation of legislative power." *In re Certified Questions, 506 Mich at 358*. The only exception is where it is "*expressly provided in the Constitution.*" No such power is "*expressly provided in the Constitution*" to the Executive Branch. Mich *Const 1963, Art 3, § 2*. So stated, unambiguously confining any exceptions to those contained within the text of the Constitution itself; neither statute nor case law or sheer will of the Executive Branch, can breach that wall of separation. *Id.*

This fundamental conclusion is central to understanding *In re Certified Questions*, *supra, at 337–8*. The Legislature's decision to deny the request to extend COVID–19 EOs beyond April 30, 2020, is constitutionally insurmountable. There is nothing "*expressly provided in this constitution*" granting power to continue the EOs in

* * *

Appendix M

"'Strictly speaking, there is no acceptable delegation of legislative power.'" In re Certified Questions, 506 Mich at 358 quoting Mistretta v. United States, 488 U.S. 361, 419, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989).

"'[T]he principal function of the separation of powers . . . is to . . . protect individual liberty[.]' Clinton v. City of New York, 524 U.S. 417, 482, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998) (Breyer, J., dissenting). '[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, 141, 719 N.W.2d 553 (2006), quoting The Federalist No. 47 (Madison) (Rossiter ed., 1961), p. 301. And as Montesquieu explained, '[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; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.' Baron de Montesquieu, The Spirit of the Laws (London: J, Nourse and P. Vaillant, 1758), Book XI, ch. 6, p. 216." In re Certified Questions 506 Mich at 357.

The highest Court of this State has held that "***the Governor did not possess the authority*** *under the Emergency Management Act of 1976 (the EMA), MCL 30.401 et seq., to declare a "state of emergency" or "state of disaster" based on the COVID–19 pandemic* ***after April 30, 2020****." In re Certified Questions, 506 Mich at 337–8. Emphasis added. "Accordingly, the executive orders*

issued by the Governor in response to the COVID–19 pandemic ***now lack any basis under Michigan law****." In re Certified Questions, 506 Mich at 337–8. Emphasis added.* We emphasize the holding is all encompassing: we believe a thorough reading of the decisions proves the words "any basis under Michigan law" is intentional and binding.

We note the opinion is not vague and was interpreted to mean exactly that as evidenced by the Governor and Attorney General's references to working with the legislature in their subsequent public statements. (Appendix F).

* * *

permissible under *MCL 333.2253*. Can they, then, in the same breath, argue the statute has constitutionally defined boundaries?

"Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system." Home Building Loan Ass v. Blaisdell, 290 U.S. at 398, 425–426; 54 S.Ct. 231; 78 L.Ed. 413 (1934).

Appendix M

Where there are no restrictions to the breath, scope or duration of delegated power, it entirely abdicates the Legislature's duty to enact laws regarding health and safety during an "epidemic" to a single, unelected, administrative individual in the Executive Branch, without quarter. It delivers totalitarian control over every aspect of life affecting every person, whether healthy or sick, in Michigan. The only precursor to obtaining ultimate dictatorial power over the population is the singular and subjective decision to decree an "epidemic" and thereby declare cessation of our civil rights "necessary." It is enticingly ripe for authoritarian and political abuse.

In truth, the language of *MCL 333,2253*, like the EPGA in *In re Certified Questions*, is *"so broad as to leave the people unprotected from uncontrolled, arbitrary power in the hands of administrative officials.'" In re Certified Questions, 506 Mich at 359, citing Dep't of Natural Resources v. Seaman, 396 Mich. 299, 308–309, 240 N.W.2d 206 (1976).*

As the lower court in *Moore Murphy* so aptly noted, there is no definition of an "epidemic" in the statute. *Moore Murphy Hospitality v MDHHS, 46th Circuit Court no. 21–18522-AE, Jan 13, 2022, Slip Op at pp 14 & 17.* While Plaintiff will argue it is limited to an epidemic, Judge Hunter reminds us that MDHHS has declared an epidemic on teenage vaping in the past. *Id., Slip op at p 18.* A cursory internet search reveals the term

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