

No. 26-

IN THE
Supreme Court of the United States

ZANTE, INC., DBA MARLENA'S BISTRO &
PIZZERIA AND MARLENA PAVLOS-HACKNEY,

Petitioners,

v.

MICHIGAN DEPARTMENT OF
AGRICULTURE AND RURAL DEVELOPMENT,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether Michigan has authority, under *Marbury v Madison*, to declare subject-matter jurisdiction “irrelevant” to a civil contempt order issued after the date its underlying statute was declared unconstitutional and within that decision’s prospective application as controlling stare decisis.

II.

Whether a Court is permitted to perpetuate clearly erroneous law-of-the-case doctrine to hold subject-matter jurisdiction can be waived and rendered “irrelevant” to a civil contempt case.

**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 and Zante, Inc. does not have a stock ticker symbol.

Marlena Pavlos-Hackney is the sole shareholder and resident agent of the corporation.

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 I, 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.

MDARD v ZANTE, Inc., U.S. Supreme Court No. 25-258, Order Denying Certiorari, entered October 14, 2025.

In re Contempt of MARLENA PAVLOS-HACKNEY II, Michigan Court of Appeals, No. 370227, Judgment entered, October 6, 2025, Motion for Reconsideration entered, November 13, 2025.

In re Contempt of MARLENA PAVLOS-HACKNEY II, Michigan Supreme Court No. 169458, Order Judgment entered April 10, 2026, Motion for Reconsideration entered June 18, 2026.

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT	ii
RELATED PROCEEDINGS	iii
TABLE OF CONTENTS.....	iv
TABLE OF APPENDICES	vii
TABLE OF CITED AUTHORITIES	x
OPINIONS BELOW.....	1
JURISDICTION OF THE COURT.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE	5
LAW AND ARGUMENT	19
I. WHETHER MICHIGAN HAS AUTHORITY, UNDER <i>MARBURY</i> <i>V MADISON</i> , TO DECLARE SUBJECT-MATTER JURISDICTION “IRRELEVANT” TO A CIVIL CONTEMPT ORDER ISSUED <i>AFTER</i>	

Table of Contents

	<i>Page</i>
THE DATE ITS UNDERLYING STATUTE WAS DECLARED UNCONSTITUTIONAL AND <i>WITHIN</i> THAT DECISION’S PROSPECTIVE APPLICATION AS CONTROLLING <i>STARE DECISIS</i>	19
a. Constitutional Subject-Matter Jurisdiction can never be “waived” or rendered “irrelevant” in a Civil Contempt Case	21
b. Civil Contempt Must Be Predicated on A “Lawful Order.”	27
c. The Courts’ Unconditional Duty to Review Subject-Matter Jurisdiction Upon Challenge, or Even <i>Sua</i> <i>Sponte</i>	30
d. Violation of Subject-Matter Jurisdiction Denies Access to the Entirety of the Constitution’s Protections	32
e. The “Usual Mode” of Acquiring Standing Requires Civil Disobedience	32
f. Civil Contempt cases issued on an unconstitutional order are <i>void</i> and must	

Table of Contents

	<i>Page</i>
be dismissed in its entirety	35
II. WHETHER A COURT IS PERMITTED TO PERPETUATE CLEARLY ERRONEOUS LAW-OF-THE-CASE DOCTRINE TO HOLD SUBJECT- MATTER JURISDICTION CAN BE WAIVED AND RENDERED “IRRELEVANT” TO A CIVIL CONTEMPT CASE.....	39
CONCLUSION AND REQUEST FOR RELIEF ...	43

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — ORDER OF THE SUPREME COURT OF MICHIGAN, DATED APRIL 10, 2026.....	1a
APPENDIX B — OPINION OF THE COURT OF APPEALS OF MICHIGAN, DATED OCTOBER 6, 2025	3a
APPENDIX C — ORDER OF THE MICHIGAN SUPREME COURT IN LANSING, MICHIGAN, DATED JANUARY 31, 2025	17a
APPENDIX D — ORDER DENYING RECONSIDERATION AND GRANTING CLARIFICATION OF THE 30TH JUDICIAL CIRCUIT FOR THE STATE OF MICHIGAN, INGHAM COUNTY, DATED MARCH 14, 2024	19a
APPENDIX E — ORDER GRANTING COSTS OF THE 30TH JUDICIAL CIRCUIT FOR THE STATE OF MICHIGAN, INGHAM COUNTY, DATED NOVEMBER 28, 2023	24a
APPENDIX F — OPINION OF THE STATE OF MICHIGAN, COURT OF APPEALS, DATED SEPTEMBER 21, 2023	28a
APPENDIX G — OPINION OF THE COURT OF APPEALS OF MICHIGAN, DATED OCTOBER 20, 2022	41a

Table of Appendices

	<i>Page</i>
APPENDIX H — ORDER OF THE STATE OF MICHIGAN, CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT, INGHAM COUNTY, DATED OCTOBER 6, 2022.....	85a
APPENDIX I — EXCERPT OF THE MICHIGAN CIRCUIT COURT FOR THE COUNTY OF INGHAM, DATED OCTOBER 6, 2022	91a
APPENDIX J — DECISION AND ORDER OF THE STATE OF MICHIGAN IN THE MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES, ENTERED FEBRUARY 11, 2021.....	106a
APPENDIX K — ORDER OF THE SUPREME COURT OF MICHIGAN, DATED JUNE 18, 2026	139a
APPENDIX L — ORDER OF THE COURT OF APPEALS OF MICHIGAN, DATED NOVEMBER 13, 2025	141a
APPENDIX M — ORDER OF THE MICHIGAN SUPREME COURT, LANSING, MICHIGAN, FILED MAY 22, 2025	142a
APPENDIX N — EXCERPTS OF MOTION FOR RECONSIDERATION OF THE SUPREME COURT FOR THE STATE OF MICHIGAN, DATED APRIL 30, 2026.....	144a

Table of Appendices

	<i>Page</i>
APPENDIX O — EXCERPTS OF THE DEFENDANT-PETITIONER’S APPLICA- TION FOR LEAVE OF THE SUPREME COURT OF MICHIGAN, DATED DECEMBER 25, 2025	157a
APPENDIX P — EXCERPTS OF DEFENDANT- APPELLANT’S BRIEF ON APPEAL OF THE COURT OF APPEALS OF MICHIGAN, DATED APRIL 17, 2024	189a
APPENDIX Q — APPELLANT’S BRIEF ON APPEAL IN THE STATE OF MICHIGAN IN THE COURT OF APPEALS, FILED NOVEMBER 14, 2022	201a
APPENDIX R — EXCERPTS OF BRIEF IN SUPPORT OF MOTION OF THE STATE OF MICHIGAN, DATED SEPTEMBER 26, 2022 ...	207a

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>Arizona v. California</i> , 460 U.S. 605 (1983).....	40
<i>Christianson v. Colt Industries Operating Corp</i> , 486 U.S. 800 (1988).....	41
<i>Ex parte McCardle</i> , 7 Wall. 506 (1869)	36
<i>Ex parte Siebold</i> , 100 U.S. 371.....	36
<i>Fay v. Noia</i> , 372 U.S. 391 (1963).....	36
<i>Fox v. Bd of Regents</i> , 375 Mich. 238; 134 N.W.2d 146 (1965)	30
<i>Grupo Dataflux v. Atlas Global Group</i> , 541 U.S. 567 (2004).....	10, 13, 17, 18, 26, 27, 30, 31
<i>Gundy v. U.S.</i> , 588 U.S. __ (2019).....	16
<i>Home Bldg. & Loan Assn. v. Blaisdell</i> , 290 U.S. 398 (1934).....	6, 7, 12
<i>House of Representatives and Senate v. Governor</i> , __ Mich __; 949 N.W.2d 276 (2020)	8

Cited Authorities

	<i>Page</i>
<i>In re Certified Questions</i> , 506 Mich. 332; 958 N.W.2d 1 (2020)	7, 9, 11-13
<i>In re Contempt of Pavlos-Hackney I</i> , 343 Mich.App. 642; 997 N.W.2d 511 (2022)	1, 12, 27, 28, 37
<i>In re Contempt of Pavlos-Hackney II</i> , __ Mich App __ (COA No. 370227, <i>rel'd</i> Oct 6, 2025).	16, 18, 27, 29, 39, 41
<i>In re Estate of Fraser</i> , 288 Mich. 392; 285 N.W. 1 (1939)	30
<i>Insurance Corp. of Ireland v. Compagnie des Bauxites</i> , 456 U.S. 694 (1982).	24
<i>Kontrick v. Ryan</i> , 540 U.S. 443 (2004)	26
<i>Locricchio v. Evening News Ass'n</i> , 438 Mich. 84; 476 N.W.2d 112 (1991)	40
<i>Mansfield, C. & L. M. R. Co. v. Swan</i> , 111 U. S. 379 (1884)	25, 26
<i>Marathon Oil Co. v. Ruhrgas</i> , 145 F.3d 211 (5th Cir. 1998), <i>overruled on other</i> <i>grds</i> , 526 U.S. 574 (1999)	17, 24, 25, 31

Cited Authorities

	<i>Page</i>
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803)	5, 6, 9, 16-23, 26, 27, 29, 30, 35, 41-43
<i>Messenger v. Anderson</i> , 225 U.S. (1912)	17, 40
<i>Moore Murphy Hospitality v. DHHS</i> , 48th Cir. Ct. Case No, 21-18522-AE, <i>lv den</i> __ Mich __ 990.N.W2d 357 (5/31/2023) . . .	12, 13, 32, 37, 38
<i>Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle</i> , 429 U.S. 274 (1977)	24
<i>O’Connell v. Dir of Elections</i> , 316 Mich.App. 91; 891 N.W.2d 240 (2016)	31, 39
<i>Reed v. Yackell</i> , 473 Mich. 520; 703 N.W.2d 1 (2005)	30
<i>Rott v. Rott</i> , 508 Mich. 274; 972 N.W.2d 789 (2021)	40
<i>Ruhrgas Ag V. Marathon Oil Co., et al.</i> , 526 U.S. 574 (1999)	24, 31
<i>Steel Co. v. Citizens for Better Environment</i> , 523 U.S. 83 (1998)	25, 26, 38
<i>T&V Assocs v. DHHS</i> , __ Mich. __; 972 N.W.2d 594 (2024)	38

Cited Authorities

	<i>Page</i>
<i>T&V Assoc v. DHHS</i> , 347 Mich.App. 486; 15 N.W.3d 313 (2023)	14-16, 31, 32, 37
<i>U.S. v. Cotton</i> , 535 U.S. 625 (2002).	23, 31
<i>U.S. v. U.S. Coin</i> , 401 U.S. 715 (1971)	17, 32-37
<i>U.S. v. United Mine Workers</i> , 330 U.S. 258 (1947).	9, 12, 17, 28, 35, 36, 38
<i>United Mine Workers</i> , 30 U.S. 297	28
<i>Walker v. City of Birmingham</i> , 388 U.S. 307 (1967).	17
<i>Willy v. Coastal Corporation</i> , 503 U.S. 131 (1992).	17, 36, 38

Statutes and Other Authorities

U.S. Const. amend. I	3, 32
U.S. Const. amend. V	3, 32
U.S. Const. amend. XIV	3, 6, 9, 14, 21, 27, 32, 42

Cited Authorities

	<i>Page</i>
U.S. Const. art. IV, cl. 2	3, 21
U.S. Const. art. VI	9, 18, 20, 21, 26, 27, 42
Michigan Const. 1963, art. III, §2	3
Michigan Const. 1963, art. IV, §1	4
18 U.S.C. § 401	4
18 U.S.C. § 401(3)	5, 28, 29
28 U.S.C. § 1257(a)	2
<i>Black’s Law Dictionary, 9th Ed</i>	6
Constitution Annotated, ArtVI.C2.1 Overview of Supremacy Clause, https://constitution.congress. gov/browse/essay/artVI-C2-1/ALDE_00013395/	5
Decision, <i>Moore Murphy v DHHS</i> , __Mich App__ (COA No. 360175, rel’d 12/12/2022)	13, 38
Fed. R. Civ. P. 12(h)(3)	5, 26, 37, 38
<i>Alexander Hamilton</i> . Federalist 28, 1787, https://founders.archives.gov/documents/ Hamilton/01-04-02-0185	20
https://founders.archives.gov/documents/ Jefferson/01-11-02-0095	33

Cited Authorities

	<i>Page</i>
https://www.woodtv.com/health/coronavirus/nessel-will-no-longer-prosecute-covid-19-executive-order-violations/	8
<i>Andrew Jackson</i> , Annual Messages, 1835	19, 20, 42
“ <i>Jefferson: Political Writings</i> ,” p.235, Joyce Appleby, Terence Ball Cambridge University Press (1999) . .	20
MCL 10.31	7
MCL 24.303(1)	10, 13
MCL 24.306(1)(a)	37
MCL 30.401	7
MCL 333.2253	8-10, 12-18, 37, 38
MCL 600.1701(g)	4, 9, 10, 13, 29
MCR 2.111(F)(2).	5, 26
MCR 2.116(C)(4).	26
MCR 2.116(D)(3)	5, 26
MCR 2.401	5, 27

Cited Authorities

	<i>Page</i>
Michigan Contempt of Court Bench Book, https://www.courts.michigan.gov/siteassets/ publications/benchbooks/contempt/contemptbb. pdf?r=1	4, 15, 43
Rule 13.1	2

OPINIONS BELOW

The Order of the Michigan Supreme Court denying Petitioner's Motion for Reconsideration of its Order Denying Application for Leave to Appeal in *In Re Contempt of Pavlos-Hackney II*, is unpublished and reproduced at App.139a.

The Order of the Michigan Supreme Court denying Petitioner's Application for Leave to Appeal in *In Re Contempt of Pavlos-Hackney II*, is unpublished and reproduced at App.1a.

The Order of the Michigan Court of Appeals Denying Petitioner's Motion for Reconsideration, in *In Re Contempt of Pavlos-Hackney II*, is unpublished and reproduced at App.141a.

The Opinion of the Michigan Court of Appeals in *In Re Contempt of Pavlos-Hackney II*, affirming the Ingham County Circuit Court's denial of Petitioners' Motion for Reconsideration and Granting Clarification is unpublished and reproduced at App.3a.

The Opinion of the Ingham County Circuit Court Denying Petitioner's Motion for Reconsideration and Granting Clarification is unpublished and reproduced at App.19a.

The Opinion of the Ingham County Circuit Court Granting Costs is unpublished and reproduced at App.24a.

The Opinion of the Michigan Court of Appeals in *In re Contempt of Pavlos-Hackney I* remanding the excessive fine, is unpublished and reproduced at 41a.

The Opinion of the Michigan Supreme Court Denying Petitioner’s Motion for Reconsideration in *MDARD v Zante, Inc.*, __Mich.App.__(COA no., 363515, dated May 22, 2025) is unpublished and reproduced at App.142a.

The Opinion of the Michigan Supreme Court Denying Leave to Appeal in *MDARD v Zante, Inc.* __Mich.App.__(COA no., 363515, dated January 31, 2025) is unpublished and reproduced at App.17a.

The Opinion of the Michigan Court of Appeals in *MDARD v Zante, Inc.*, __Mich.App.__(COA no., 363515, dated September 21, 2023) is published and reproduced at App.28a.

The October 6, 2022 Opinion of the Ingham County Circuit Court denying Petitioner’s Motion for Declaratory Judgment and Dismissal is unpublished and reproduced at App.85a.

JURISDICTION OF THE COURT

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, entered on June 18, 2026. App 133a.

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.”

“(g) Parties to actions, attorneys, counselors, and all other persons for disobeying any lawful order, decree, or process of the court.”

18 USC 401 “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.

Fed. R. Civ. P. 12(h)(3): “Lack of Subject-Matter Jurisdiction. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”

“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”

MCR 2.116(D)(3) “ The grounds listed in subrule (C)(4) [lack of subject-matter jurisdiction] and the ground of governmental immunity may be raised at any time, regardless of whether the motion is filed after the expiration of the period in which to file dispositive motions under a scheduling order entered pursuant to MCR 2.401.”

STATEMENT OF THE CASE

“A Republic, ... if you can keep it-”

~ *Benjamin Franklin, Sept. 18, 1787.*

In 1776 they wrote the Articles of Confederation. In 1788, the Supremacy Clause was ratified.¹ In 1803, *Marbury v Madison*, 5 *U.S.* 137 (1803) the seminal case

1. https://constitution.congress.gov/browse/essay/artVI-C2-1/ALDE_00013395/

every first-year law student was to master in Con-Law 101, formally pronounced the procedure by which we “keep it.” After the civil war, the 14th Amendment fortified it, ...

...and on June 18, 2026, Michigan’s Supreme Court gave the nod and a wink to its demise.

Subject-matter jurisdiction is the constitutional power upon which all judicial authority depends. It constrains the courts’ authority to act within the limits of the Constitution. 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*. First set forth in *Marbury v Madison*, 5 U.S. 137, 177 (1803), its axiomatic, unbroken imperative, that the limits of a Court’s power is constrained by the Constitution, and that those limits can *never* be “waived’ or rendered “irrelevant,” has secured our fragile freedoms from governmental overreach for over two centuries. *Marbury* has remained revered and unchallenged... until now. Michigan is the first to cast-aside *Marbury’s* duty to esteem the Supremacy Clause, applicable to the States through its own language and the 14th Amendment, and render it conditional to compliance with other laws - a legal impossibility under *Marbury* – a posture contrary to all State and Federal jurisprudence. App. 32a,fn2,21a-22a,17a,142a,1a,,43afn1,4afn1,139a,165afn5.

That this case involves the Covid-19 pandemic, a state of world-wide emergency, is not a factor that should render this case unworthy of review. As this Court noted in *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934), emergency does not suspend the Constitution. “[E]mergency does not create power, or increase

granted power, or remove or diminish restrictions upon power granted or reserved.” *Id.*, at 426. Cited below, (App.203a,206a,209a,210a).

“[T]he war power of the federal government is not created by the emergency of war, ... even the war power does not remove constitutional limitations safeguarding essential liberties.” *Blaisdell*, 290 U.S. at 426.

After over a year of lockdowns, the Michigan Supreme Court decided a Certified Question from the U.S. District Court for the Western District of Michigan, Southern Division, asking for guidance as to whether the Covid-19 Executive Orders (EOs) issued by the Governor were proper delegations of legislative authority under Michigan Constitution’s Non-delegation Clause. On October 2, 2020, the Michigan Supreme Court answered in the affirmative and struck down the Covid-19 EOs. The Court found the EOs issued under the Emergency Management Act, MCL 30.401 *et seq.*, unsustainable once the statutory time limit expired in April 2020, and the subsequent statute, the Emergency Powers of the Governor Act, MCL 10.31 *et seq.*, was determined to be unconstitutional, in violation of the Non-delegation Clause of the Michigan Constitution. *In re Certified Questions*, 506 Mich. 332, 337-338; 958 N.W.2d 1 (2020). Michigan’s Supreme Court concluded that, absent the assent of the Michigan Legislature, the EOs “now lack any basis under Michigan law.” *Id.* at 338.

On October 4, 2020, the news of the Supreme Court’s decision ending the lockdowns was heralded across Michigan and the news was accompanied by the Attorney General (AG)’s assurance the EOs would no longer be

enforced. <https://www.woodtv.com/health/coronavirus/nessel-will-no-longer-prosecute-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 again emphasized the necessity of the Governor to work with the Legislature in order to continue the COVID-19 EOs. *Id.*

Petitioner, Marlena Pavlos-Hackney, the resident agent, owner and operator of Zante, Inc, d/b/a Marlena’s Bistro, is a naturalized U.S. citizen who fled Communist Poland as a young girl, worked odd jobs in other countries, saving all she could with the intent to eventually emigrate to the U.S., where she established Marlena’s Bistro in Holland, Michigan, a favorite of tourists and a gathering place for Hope College students.

Marlena welcomed the opportunity to fully open her restaurant again, and posted a warning on the exterior door that social distancing and masking under the Covid EOs were no longer in force. App.133a.

Shortly thereafter, however, those EOs were reissued, *without* legislative approbation, under a different statute, MCL 333.2253 of the Michigan Health Code, App.5a & 108a-109a,119a,127a-128a.

Marlena’s Bistro did not comply with the new indoor dining, masking and social distancing restrictions in the EOs issued under MCL 333.2253, based on her reading of

the Supreme Court’s decision requiring the approbation of the Michigan Legislature for any future EOs to attain the force of law. Petitioner saw MCL 333.2253 to be as constitutionally vapid as the statute the Michigan Supreme Court had previously struck down in *In re Certified Questions*. And, indeed, time would prove her constitutional assessment valid.

But her attempts to get the courts to acknowledge, much less review, her challenge to the constitutionality of those EOs as the basis for imposition of civil contempt sanctions, remains obstinately denied: first by the Ingham County Circuit Court who originally entered the *civil contempt* order for fines and incarceration, and later, entered an order exacting costs *after* MCL 333.2253 was *twice* declared unconstitutional and during the appellate decision’s period of prospective application. And thereafter, by every appellate Court that affirmed the decision that constitutional subject-matter jurisdiction is “irrelevant” to a *civil contempt case*, in contravention of *Marbury, U.S. v. United Mine Workers, 330 U.S. 258 (1947)*, Article VI and the 14th Amendment of the U.S. Constitution and Michigan’s civil contempt statute, MCL 600.1701(g). App 139a,141a,148a,150a,155a,156a,157a,161a,162a,164a-166a,167a,170a,171a,172a-173a,174a,176a,179a,194a.

Because the claimed basis for declaring the issue of constitutional subject-matter jurisdiction “irrelevant” in this case, is the alleged failure to exhaust appellate remedies, this Petition will document her repeated challenges to the EOs’ constitutionality, made at every stage of these proceedings. The claim it was “waived” is unsustainable on the record. However, as will be established, it would not matter if Petitioner had waited until the

present appeal to make this claim – subject-matter jurisdiction can be raised for the first time, “even at the highest appellate instance.” *Grupo Dataflux v. Atlas Global Group*, 541 U.S. 567, 576 (2004). Cited below at App.147a-148a,150a,163a,165a,169a,171a.

The Administrative Law Judge (ALJ) suspending her food license for violation of the EOs issued under MCL 333.2253, documented Petitioner’s constitutional challenge in her February 11, 2021 Order, but never addressed it. App.132a,134a¶62.

Petitioner had a 60-day window in which to appeal that order, but just three weeks later, on March 4, 2021, the AG sought and obtained an Order to Show Cause, which was heard in the Ingham County Circuit Court, the very court designated by statute to hear appeals from the licensing division. MCL 24.303(1). Petitioner again challenged the constitutionality of the EOs at the show cause hearing on March 4, 2021 and the subsequent civil contempt hearing on March 19, 2021. Thus, what would become the claimed basis for the alleged “waiver” of her right to raise constitutional subject-matter jurisdiction -her failure to appeal her food license suspension- ironically was both challenged in, and the “waiver” pronounced by, the very appellate court who was required by law to hear that appeal, and *actually did hear* Petitioner’s constitutional challenge to the ALJ’s license suspension within just 21 days of her 60-day appellate window. App 47a-48a.

The Ingham Circuit Court is also a court of general jurisdiction and was required to first determine whether the license suspension was a “lawful order” before imposing a civil contempt penalty. MCL 600.1701(g).

At that March 4th hearing, Petitioner, appearing pro per, presented her constitutional argument to that Court, in broken English:

“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.”

“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.47a,48a.

This being the court charged with enforcement of those EOs and, therefore, most certainly aware of the decision in *In re Certified Questions*, ignored Petitioner’s challenge to the constitutional subject-matter jurisdiction of the suspension. Petitioner was, instead, held in contempt and fined \$7500 and a bench warrant was issued for her arrest. Petitioner was arrested on March 19, 2021, 36 days into the 60-day window, and brought again before the Ingham County Circuit Court, but was not permitted to speak at her arraignment. Her attorney, Mr. Baker,

had just been hired and made no defense. Marlena was held in *civil* contempt for a second time, for operating her restaurant in violation of that suspension, fined another \$7500, for a total of \$15,000 in fines, and was sentenced to 93 days in jail, remanded, strip and cavity searched and remained 5 days before her husband could amass payment in full of the fines and prove the restaurant was closed. App 6a.

An interlocutory appeal *sub nom In re Contempt of Pavlos-Hackney I*, 343 Mich.App. 642; 997 N.W.2d 511 (2022), was taken to determine the nature of the fines, whether they were civil or criminal in nature, in order to clarify what obligations and remedies were available should her constitutional challenge be successful. A civil contempt case forgives the civil disobedience required for standing to challenge a statute's subject-matter jurisdiction and requires dismissal of the case "in its entirety" upon a finding the statute is unconstitutional. *U.S. v. United Mine Workers*, 330 U.S. 258, 295 (1947). Cited to the Courts below at App 154a,163a,170a,171a,172a,177a,-179a,and 200a. None of those options are available if the two contempts were criminal in nature. *Id.*

During the hiatus pending that interlocutory appeal, a Motion for Declaratory Judgment and Dismissal was filed in the Ingham Circuit Court challenging the court's subject-matter jurisdiction under *In re Certified Questions*, and *Blaisdell*. App 203a. The Motion was prompted by the decision in *Moore Murphy Hospitality v DHHS*, 48th.Cir. Ct.Case No, 21-18522-AE, lv den __Mich__ 990.N.W2d 357 (5/31/2023), the case first affirming Petitioner's claim MCL 333.2253 was, indeed, unconstitutional under *In re Certified Questions*.

Moore Murphy originated in the 48th Circuit Court and held MCL 333.2253 unconstitutional under Michigan’s Non-delegation Clause pursuant to *In re Certified Questions*, and struck it from the Health Code. When the AG sought the statute’s restoration in an emergency bypass appeal, the Michigan Supreme Court refused to set aside that decision, leaving the AG to pursue its appeal through the lower appellate court. *Moore Murphy*, __Mich__, *lv den* 990.N.W2d 357 (2023). The AG took the hint and abandoned its appeal, allowing the decision striking MCL 333.2253 from the Health Code to stand. *Moore Murphy*, __Mich App__, (COA No. 360175, rel’d 12/12/2022).

But, despite this authority, the Ingham County Circuit Court denied the Motion for Declaratory Judgment challenging the constitutionality of the EOs issued under MCL 333.2253, claiming subject-matter jurisdiction, was “not before this court,” because Petitioner failed to exhaust administrative appellate remedies. App 94a,98a,103a.

Thus, the record refutes any “waiver.” Petitioner registered her challenge to the EOs’ constitutionality to both the ALJ and the Ingham County Circuit Court, which was the Court both statutorily charged to hear appeals of the license suspension, MCL 24.303(1), and the Court entering the civil contempt orders for violation thereof, without first assessing whether the EOs’ were “lawful orders” under Michigan’s contempt statute. MCL 600.1701(g). But, even if she had not raised it below, it does not preclude the issue on subsequent appeal. *Grupo v. Atlas Global*, 541 U. S. 567, 576 (2004).

Petitioner timely appealed the Order Denying the Motion for Declaratory Judgment and Dismissal to the

Michigan Court of Appeals, *sub nom*, *MDARD. v. Zante*, 348 Mich.App. 293; 18 N.W.3d 62 (2023), now supplemented with a subsequent decision by the Court of Appeals also finding MCL 333.2253 was, indeed, an unconstitutional delegation of Legislative authority, *T&V Assoc v DHHS.*, 347 Mich. App 486; 15 N.W.3d 313 (2023). Though the sole issue before the Court of Appeals was the constitutionality of MCL 333.2253, the *Zante* Court also declined to address subject-matter jurisdiction and affirmed the lower court’s decision declaring it “irrelevant,” waived for failure to appeal the ALJ’s decision and declaring *T&V* limited to prospective application, therefore inapplicable to Petitioner’s case., (App 199a), *Zante*, *fn 2*, *App.32a*.

“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**.

“Because she did not appeal the administrative order upholding the food license suspension, Pavlos-Hackney may not now relitigate that decision.” *Zante*, 18 NW3d at 67, *Emphasis added*.

This opinion is now featured in the *Michigan Contempt of Court Bench Book* as standard protocol for the State

of Michigan. <https://www.courts.michigan.gov/siteassets/publications/benchbooks/contempt/contemptbb.pdf?r=1>

In the meantime, the interlocutory appeal remanded the case to the Ingham County Circuit Court, officially finding both contempts were civil in nature, but that the second \$7500 fine was excessive in light of Petitioner’s prompt response in closing her restaurant and payment in full of the \$15,000 in fines. The second fine of \$7500 was therefore remanded with the options to apply it to unpaid fines, costs or refund to Petitioner. App.72a,78a-79a.

This is where this leg of the appeal requesting Certiorari rises. In response to the remand, the Ingham County Circuit Court requested a cost accounting from the AG and the State Police in anticipation of entering an order applying the \$7500 as compensatory damages.

Petitioner filed a Motion for Reconsideration challenging the Court’s subject-matter jurisdiction to enter any order, other than dismissal, because *T&V Assocs* June 2023 decision was controlling *stare decisis* and any order for costs would be entered well-within the prospective application of its holding that MCL 333.2253 is unconstitutional, App 8a,21-22a. But the Circuit Court held “The Court need not consider these arguments as they are not relevant to the Order the Defendant seeks reconsideration of and these arguments have already been addressed by the Michigan Court of Appeals,” citing *Zante*. (App 21a-23a). The order adding costs in the amount of \$9,795.60 *was* entered on November 28, 2023, and the clarified order reducing that amount to \$7500 in costs was entered on March 14, 2024. App 19a&20a. Both *civil contempt* orders were entered within the

controlling *stare decisis* and prospective application of *T&V Assocs* June 2023's decision holding MCL 333.2253 unconstitutional.

An appeal from that order was taken *sub nom In re Contempt of Pavlos-Hackney II*, __Mich App__ (COA No. 370227, rel'd Oct 6, 2025). The appeal challenged the Court's lack of subject-matter jurisdiction to enter a civil contempt order *after* the underlying statute was found unconstitutional. App.9a,194a-200a, citing *Gundy v U.S.*, 588 U.S.__(2019). App.194a.

The Court of Appeals, in *Pavlos-Hackney II*, admitted that the order was entered while MCL 333.2253 was unconstitutional under *T&V Assocs* and also cited Michigan authority, mirroring *Marbury*, that subject-matter jurisdiction *cannot* be “waived” or rendered “irrelevant:

“Subject-matter jurisdiction cannot be waived, and courts are required to hear challenges to subject-matter jurisdiction ‘regardless of when they are raised, or even raise such challenges *sua sponte*.’” (App.12a)

But the *Pavlos-Hackney II* Court dodged their cited duty to address the constitutional question, by alleging *Zante*'s waiver of subject-matter jurisdiction controls under law-of-the-case. App 13a. So, the appellate Court, in *Pavlos-Hackney II*, chose to pass on their own duty to assess subject-matter jurisdiction claiming a higher authority to follow what was clearly erroneous law-of-the-case on a constitutional question affecting substantial rights. App.12a-14a. The opinion, thereby, extended

Zante's decision declaring subject-matter jurisdiction is “irrelevant” to situations where the underlying statute has already been determined to be unconstitutional, and the order entered within its prospective application. A Motion for Reconsideration was denied by that Court on November 13, 2025. App.141a.

An appeal to the Michigan Supreme Court renewed Petitioner’s constitutional challenge to subject-matter jurisdiction citing *Marbury* (App 162a,167a-168a,173a,180a); *Messenger v Anderson*, 225 U.S. 426 (1912)(App.166a,180a); *U.S. v. United Mine Workers*, 330 U.S. 258, 293 (1947).(App.163a,179a); *Walker v. City of Birmingham*, 388 U.S. 307, 320-321, (1967) (App.163a-164a); *Willy v Coastal Corporation*, 503 U.S. 131, 139 (1992) (App.171a,179a), *U.S. v U.S. Coin*, 401 US 715, 727 (1971), (App.164a,167a,177a,179a,184a,188a), *Grupo v. Atlas Global*, 541 U. S. 567, 576 (2004) (App.163a,165a,169a,171a), and Fed. R. Civ. P. 12(h)(3) (App.176a), emphasizing the duty to resolve a challenge to subject-matter jurisdiction is timely even if it were first made at the highest level of appellate review, under *Grupo*. (App 142a,144a). But, the Michigan Supreme Court declined Petitioner’s application for leave to appeal. App.2a.

The Motion for Reconsideration citing *Marbury*, (App.145a-147a,154a,156a), *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 217 (5th Cir. 1998), (App.150a), *Messenger*, (App.152a) and *United Mine Workers* (App.154a), and urging Michigan’s Supreme Court’s recognition of *Marbury’s* authority that there is no “waiver” of subject-matter jurisdiction, and arguing denial of leave was a violation of *Grupo*, did not move the State’s highest arbiter of the Constitution to oblige. (App.147a,148a,150a).

In all, every Michigan Court refused to acknowledge their solemn duty and oath to uphold the Constitution and address the issue of subject-matter jurisdiction in a *civil* contempt case entered *after* the statute's unconstitutionality was undeniably controlling *stare decisis*.

Sadly, this Court also denied Certiorari in *Zante*. However, because this case encompasses both *Zante*'s erroneous decision rendering subject-matter jurisdiction "irrelevant," and *Pavlos-Hackney II*'s application of erroneous law-of-the-case to perpetuate it, this Court's grant of Certiorari will bring Michigan back within the umbrella of the U.S. Constitution and its duties under the 14th Amendment to hold the Constitution as the supreme law of the land, *unwaivable* and always *relevant*. *U.S. Const., Art VI*. By granting certiorari and overturning *Zante* through its sequel, *In re Contempt of Pavlos-Hackney II*, this Court can politely reacquaint the Michigan judiciary to their duty to assess their own subject-matter jurisdiction under Article VI, and return *Marbury*'s procedural safeguard against government overreach affecting substantive rights to its citizenry.

Certiorari is not requested to determine whether Petitioner accurately concluded MCL 333.2253 was unconstitutional – that was the State Courts' duty. Certiorari *is* requested to reinstate the Michigan Courts' *obligation* to decide that challenge to subject-matter jurisdiction, regardless of when it is made, in a *civil* contempt case. *Marbury* and *Grupo*. That never happened here.

As Andrew Jackson warned, a Constitution without the ability to enforce it is “worth nothing.”² Michigan is the first to declare constitutional subject-matter jurisdiction under the Supremacy Clause and *Marbury* “irrelevant,” but it won’t be the last. Query: If this Petition is denied, what keeps the other 49 States from denouncing *Marbury*’s limitations of powers under the Supremacy Clause and the 14th Amendment? This case, therefore, also presents a real and eminent threat to national unity.

Accordingly, this Petition fervently echoes the urgency to “keep it,” expressed by Franklin at our nation’s inception. *This Court was created and exists to “keep it,” and this Petition is a prayer that you do.*

LAW AND ARGUMENT

I. WHETHER MICHIGAN HAS AUTHORITY, UNDER *MARBURY V MADISON*, TO DECLARE SUBJECT-MATTER JURISDICTION “IRRELEVANT” TO A CIVIL CONTEMPT ORDER ISSUED *AFTER* THE DATE ITS UNDERLYING STATUTE WAS DECLARED UNCONSTITUTIONAL AND *WITHIN* THAT DECISION’S PROSPECTIVE APPLICATION AS CONTROLLING *STARE DECISIS*

The Founders spoke to it:

“Experience hath shewn, that even under the best forms of government those entrusted with power have, in time, and by slow operations,

2. *Andrew Jackson*, Annual Messages, 1835, p. 179.

perverted it into tyranny.” ~Thomas Jefferson, “*Jefferson: Political Writings*”, p.235, Joyce Appleby, Terence Ball Cambridge University Press (1999).

“[T]he General Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the General Government. ... If their rights are invaded by either, they can make use of the other, as the instrument of redress. How wise will it be in them by cherishing the Union to preserve to themselves an advantage which can never be too highly prized!^[sic]” ~*Alexander Hamilton*. Federalist 28, 1787. *Emphasis added*.³

“All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary.” ~*Andrew Jackson*, Annual Messages, 1835, p. 179.

The Constitution was drafted with the method by which its freedoms would be protected - Article VI of the Constitution. The decision in *Marbury* was that “independent and virtuous Judiciary’s” guarantee of it. We are asking that same Court to renew it to Michigan today.

3. <https://founders.archives.gov/documents/Hamilton/01-04-02-0185>

a. Constitutional Subject-Matter Jurisdiction can never be “waived” or rendered “irrelevant” in a Civil Contempt Case.

Subject-matter jurisdiction is not a procedural nicety – it is the foundational prerequisite to judicial authority. It cannot be waived, forfeited or avoided, nor may it be subordinated to prudential doctrines such as law -of-the-case, as was done below. The Supremacy Clause, Article VI, clause 2 of the U.S. Constitution reads:

“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, anything in the Constitution or laws of any State to the contrary notwithstanding.” *U.S. Constitution, Art VI, cl 2*. Emphasis added.

This was applicable to the States even before the 14th Amendment.

Under the language of Article VI, the States and Michigan’s judiciary are *unconditionally* “bound thereby,” as are the administrative “departments.” *Id.*

Marbury v. Madison, 5 U. S. 137, 176-177 (1803) was the seminal case reinforcing Article VI’s procedural safeguard:

“[T]he particular phraseology of the Constitution of the United States confirms ...

that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument.” *Marbury v Madison*, 5 U.S. 137, 180 (1803). *Emphasis added.*

The rights therein rest on the Courts’ reverence of these two pillars. When, as here, all three levels of judicial review agree to flout these core tenets, the U.S. Supreme Court is to step in and realign their priorities.

Defiance to it was foreseen and “expressly forbidden” under *Marbury*. In it, Justice Marshall prophetically wrote to expose the irrationality of the posture, adopted here, that subject-matter jurisdiction could be rendered “irrelevant” for any reason. It declared that an act which is unconstitutional “is entirely void,” and that any notion it should be made “completely obligatory,” “in practice” is “expressly forbidden.”

“This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at

pleasure.” *Marbury v Madison*, 5 U.S. 137, 178 (1803). *Emphasis added.*

The admonition in *Marbury* highlights the gravamen of the issue herein presented and the necessity for this Court to address it:

“The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the 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.” *Marbury v Madison*, 5 U.S. at 176-177. *Emphasis added.*

Waiver does not apply. The following are just a few of the cases illustrating the point:

Subject-matter jurisdiction is the core of the Supremacy Clause “because it involves a court’s power to hear a case,” therefore, it “can never be forfeited or waived.” *U.S. v Cotton*, 535 US 625, 630 (2002). “Consequently, defects in subject-matter jurisdiction *require correction* regardless of whether the error was raised in [a lower] court.” *Id.*

Subject-matter jurisdiction is “nonwaivable.” *Ruhrgas Ag V. Marathon Oil Co. et al.*, 526 U.S. 574, 583 (1999).

“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. et al.*, 526 U.S. 574, 577 (1999), *Internal citations omitted*.

“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.’” *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211 (5th Cir. 1998) citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278, (1977) (citations omitted).

“[N]o action of the parties can confer subject matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject matter jurisdiction on its own motion.” *Insurance Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 702 (1982). *Emphasis added*.

“[T]he rule, springing from the nature and limits of the judicial power of the United States,

is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record.” *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382 (1884). *Emphasis added*.

“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*), *overruled on other grds*, 526 U.S. 574, (1999).

“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).

Accordingly, the duty of a court to address its subject-matter jurisdiction has no expiration date, no bar or time constraint. In fact, as this Court duly recognized, it can be raised for the first time, even at this late stage of appellate review:

“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 v. Atlas Global*, 54. U.S. 567, 576 (2004), quoting *Kontrick v. Ryan*, 540 U.S. 443 (2004).

See also *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382 (1884).

In addition to Article VI, and the case law universally aligning with *Marbury*, the State and Federal Rules of Procedure are in accord and also defy any notion subject-matter jurisdiction can be waived at any time or rendered irrelevant:

Fed. R. Civ. P. 12(h)(3): “Lack of Subject-Matter Jurisdiction. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” *Emphasis added.*

“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).

MCR 2.116(D)(3) “ The grounds listed in subrule (C)(4) [lack of subject-matter jurisdiction] and the ground of governmental immunity may be raised at any time, regardless of whether the motion is filed after the expiration of the period in which to file dispositive motions

under a scheduling order entered pursuant to MCR 2.401.” *Emphasis added.*

The foregoing establish there is no waiver of subject-matter jurisdiction. The alleged failure to “appeal” the suspension to the 30th Circuit Court, (the Court in which she was held in contempt and raised the constitutional question repeatedly), does not preclude raising the issue in a higher court, “even initially at the highest appellate instance” *Grupo, 54. U.S. at 576*

CONCLUSION:

In re Contempt of Pavlos-Hackney II’s adoption of erroneous law-of-the-case, in *Zante*, declaring subject-matter jurisdiction “waived” and “irrelevant,” under law-of-the-case doctrine, for failure to exhaust appellate remedies, is in contravention of the Court’s duty under *Marbury*, Article VI, and the 14th Amendment, to “keep it.”

b. Civil Contempt Must Be Predicated on A “Lawful Order.”

Civil and criminal contempt have different purposes, elements and remedies. Criminal contempt is meant to be punitive, usually for disrespect of the Court in its presence.

Civil contempt is one which seeks to coerce compliance with a court order, by conditioning the amount or duration of the punishment on how quickly the contemnor complies. *In re Contempt of Pavlos-Hackney I*, 343 Mich.App. 642; 997 N.W.2d 511 (2022). Criminal contempt requires

obedience to its order regardless of whether the underlying order is later determined to be unlawful/unconstitutional. *United Mine Workers, supra*, 30 U.S. 297-298.

But this is a *civil* contempt case, as was determined in the interlocutory appeal *In re Contempt of Pavlos-Hackney I*, slip op 15.

Because civil contempt is designed to coerce compliance, a *civil contempt* case must be based on a “lawful order” of the court, as *United Mine Workers* and the State and Federal statutes make clear:

“It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order. The right to remedial relief falls with an injunction which events prove was erroneously issued, 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 294-295, *Emphasis added, internal citations omitted.*

See 18 U.S.C. § 401(3):

“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.

See also Michigan’s 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:

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

So, the adoption of the erroneous law-of-the-case in *Zante*, that subject-matter jurisdiction can be “waived” and is “irrelevant” in a *civil* contempt case issued on an *unconstitutional statute*, is, as bluntly stated in *Marbury*, a legal “absurdity too gross to be insisted on.” *Marbury*, 5 *U.S. at 177*. And its sequel, *In re Contempt of Pavlos-Hackney II*’s holding that that unconstitutional “absurdity” should nevertheless be perpetuated by

prioritizing *erroneous* law-of-the-case doctrine over *Marbury* and the Supremacy Clause, is beyond any rational justification.

“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.**” *Id* *Emphasis added.*

In conclusion, there is no authority supporting *Zante’s* waiver. Accordingly, the case must be taken up, if for no other reason than to send it back down with a gentle reminder that subject-matter jurisdiction is not subject to “waiver” nor can it be ignored as “irrelevant,” and civil contempt must be based on a “lawful order.” The requirement of the Courts to assess the issue applies at every stage of the proceedings, even the highest Court of the land has an unconditional duty to decide the issue of subject-matter jurisdiction. *Grupo 54. U.S. at 576.*

c. The Courts’ Unconditional Duty to Review Subject-Matter Jurisdiction Upon Challenge, or Even *Sua Sponte*

Michigan law is unequivocal: “[A]ll courts must upon challenge, or even *sua sponte*, confirm that subject-matter jurisdiction exists.” *Reed v. Yackell*, 473 Mich. 520; 703 N.W.2d 1, 12 (2005); *Fox v Bd of Regents*, 375 Mich. 238; 134 NW2d 146, 148 (1965); *In re Estate of Fraser*, 288 Mich. 392, 394; 285 N.W. 1, 1 (1939). “[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....” All courts ‘must upon challenge, or

even *sua sponte*, confirm that subject-matter jurisdiction exists.”” *O’Connell v Dir of Elections*, 316.Mich.App.91, 100; 891.NW2d.240 (2016), emphasis added, internal citations omitted.

Federal law is in accord. “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.’ *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 217 (5th Cir. 1998). Therefore, “defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court.” *U.S. v Cotton*, 535 U.S. 625, 630 (2002). “The requirement that jurisdiction be established as a threshold matter is ‘inflexible and without exception’” *Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999) (*Internal citations omitted*).

Review of a Court’s subject-matter jurisdiction is so pivotal to the preservation of this Constitutional Republic that this Court has declared its own duty to address a challenge to subject-matter jurisdiction, even when raised at this late stage of appellate review. *Grupo, supra*, 541 U.S. at 576.

CONCLUSION: This Court should be alarmed at the entry of the order imposing civil contempt costs without first addressing her *valid* challenge to its constitutional subject-matter jurisdiction, entered in defiance of *T&V*’s then-controlling *stare decisis* and within its prospective application. That the Courts all snubbed that minimal obligation to her is cruel. She was right. They didn’t care. They took the excessive fine of \$7500 and mockingly gave it to the government agencies as reimbursement for

unlawfully prosecuting her, despite her challenge having been vindicated in *Moore Murphy* and *T&V's* cases, and the fact that the order for costs was clearly entered within the prospective application of *T&V Assoc.*

The minimal duty required under the Constitution she came to this Country to cherish, is all we ask here.

d. Violation of Subject-Matter Jurisdiction Denies Access to the Entirety of the Constitution's Protections

When review of constitutional subject-matter jurisdiction is denied, it simultaneously touches the other pillars of constitutional protections like due process, equal protection and the Petitioner's right to redress of grievances against the government. *U.S. Const, Ams 1, 5, and 14*. Michigan's adoption of a waiver rendering subject-matter jurisdiction "irrelevant" concurrently deprived Petitioner of all of the above.

e. The "Usual Mode" of Acquiring Standing Requires Civil Disobedience.

The tenacity of the State in pursuit of this case may logically be driven by the need to make an example of this outspoken, freedom-loving firebrand, who stood in defense of her rights as one who once lived without them. Petitioner has twice been vindicated in her stance on the constitutional issue. Yet they still seek to punish Petitioner for having "the temerity to engage in conduct protected by the Bill of Rights before the day that this Court held the conduct protected." *U.S. Coin, 401 U.S. at 724*.

“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. 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.” *US v U.S. Coin & Currency*, 401 U.S. 715, 727 (1971) *Brennan concurring, Emphasis added.*

Another such miscreant, one of the original rebels to the English Crown, Thomas Jefferson, in a letter to James Madison concerning the Shays Rebellion, urged a place for civil disobedience in addressing government abuses:

“It is a medicine [sic] necessary for the sound health of government.” <https://founders.archives.gov/documents/Jefferson/01-11-02-0095>

But most compelling is the simple fact that 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 *US Coin*, 401 U.S. at 727. *Internal citations omitted. Emphasis added.*

As Justice Brennan explained to his dissenting colleagues in *U.S. Coin*, the compulsion to punish the disobedient upstart must be suppressed:

“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. *United States v. United States Coin & Currency* 401 U.S. 715, 724 (1971) *Emphasis added.*

Certainly, “the government has no legitimate interest in upholding an unconstitutional system” of justice. *U.S. Coin*, 401 U.S. at 726, (Brennan, concurring). “[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... than to vindicate its interest in enforcing a statute that punishes the assertion of any other constitutional right.” *Id.*, 401 U.S. at 728. *Emphasis added.*

It is no answer to say that a citizen who stands on a constitutional right, before the time an appellate court acknowledges it, “acts at her peril.” Our history has more often reserved its honor for those, like Rosa Parks, whose resistance first allowed those rights to be made visible and ultimately enforceable, by means of the “usual mode” by which standing is secured to challenge it. *U.S. Coin*, 401 U.S. at 727.

f. Civil Contempt cases issued on an unconstitutional order are *void* and must be dismissed in its entirety.

“[A]n act of the Legislature repugnant to the Constitution is void.” *Marbury*, 5 U.S. at 177.

Unlike the law of criminal contempt, when a civil contempt case is issued on an unconstitutional/unlawful order, it lacks subject-matter jurisdiction, is *void*, and must be “dismissed in its entirety.” This Court set forth the distinction between remedies in criminal and civil contempt in *United Mine Workers*, 330 U.S.258 at 294-295 (1947):

“It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order.

“The right to remedial relief falls with an injunction which events prove was erroneously

issued and *a fortiori* when the injunction or restraining order was beyond the jurisdiction of the court. ... 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 294-295. *Internal citations omitted. Emphasis added.* Cited to the Courts below at App 154a, 163a, 170a, 171a, 172a, 177a, 178-200a.

The reason is simple: “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. *Willy v Coastal Corporation*, 503 U.S. 131, 139 (1992). (Cited below at 165a and 173a.)

“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). *Emphasis added.*

“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 McCordle*, 7 Wall. 506, 514 (1869). *Emphasis added.*

Likewise, *U.S. v U.S. Coin & Currency*, 401 U.S. 715, 724 (1971) holds an unconstitutional statute should be held

void ab initio, especially where “there was a significant chance that innocent men had been wrongfully punished.” *Id.* 401 U.S. at 724.

As cited above, this result is also mandated in Fed. R. Civ. P. 12(h)(3), requiring the Court “must dismiss the action” “[i]f the court determines at any time that it lacks subject-matter jurisdiction” *Emphasis added*. Cited to the Court below at 176a.

And even the Administrative Code they prized over the supremacy of the Constitution required the circuit court to dismiss the case at the time of the Declaratory Motion:

MCL 24.306(1)(a) “ (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.” *Emphasis added*.

The interlocutory appeal declared both these contempt actions were *civil* not criminal in nature. *In re Contempt of Pavlos-Hackney I*, slip op 15. The EOs in these civil contempt orders were issued under MCL 333.2253. That statute was held unconstitutional and stricken from the Health Code as a violation of the Non-delegation Clause of the Michigan Constitution in *Moore Murphy* and later affirmed in *T&V Assocs*. An amended statute now appears

in its place. *T&V Assocs v DHHS*, __Mich__; 972 NW2d 594, 597 (2024). The AG prosecuting the *Moore Murphy*, *T&V Assocs*, and this case, voluntarily dismissed its appeal of the finding MCL 333.2253 was unconstitutional, allowing the decision in *Moore Murphy* to stand.⁴ *Moore Murphy v DHHS*, __Mich App__ (COA No. 360175, rel'd 12/12/2022). *T&V Assocs* was controlling *stare decisis* at the time the civil contempt order for costs was entered, in this civil contempt case.⁴ Therefore, the case is *void ab initio* and must be dismissed “in its entirety,” as was requested from the first Motion for Declaratory Judgment and throughout these bifurcated appeals. (App.12a,31a,36a-39a,,98a,147a,155a-156a,163a,166a,172a,175a,176a,179a,196a-199a,202a,203a,205a).

Accordingly, the Court lacked subject-matter jurisdiction and “without jurisdiction the court cannot proceed at all in any cause... when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Steele Co. 523 U.S. at 94*.

Therefore, this case should be dismissed “in its entirety,” as lacking subject-matter jurisdiction, not just as it relates to the compensatory damages order. *United Mine Workers, 330 U.S. at 295 and Willy v Coastal Corp, 503 U.S. at 139*; Fed. R. Civ. P. 12(h)(3).

4. Though *T&V Assocs* was later determined to lack standing, the Michigan Supreme Court was careful not to reverse the portion of the decision finding MCL 333.2253 was unconstitutional. It simply vacated it for lack of a case and controversy, the case having been brought in a declaratory judgment action. However, the decision in *Moore Murphy* finding MCL 333.2253 unconstitutional has not been reversed, that statute remains stricken, and was replaced with additions to its language.

CONCLUSION: This civil contempt case, issued on an unlawful/unconstitutional order is *void ab initio*, and, even now, must be “dismissed in its entirety.”

II. WHETHER A COURT IS PERMITTED TO PERPETUATE CLEARLY ERRONEOUS LAW-OF-THE-CASE DOCTRINE TO HOLD SUBJECT-MATTER JURISDICTION CAN BE WAIVED AND RENDERED “IRRELEVANT” TO A CIVIL CONTEMPT CASE

Of all the decisions demanding this Court’s attention, this one should chill the reader. That all three judges, in *Contempt of Pavlos-Hackney II*, chose injustice over justice, administrative code over the Supremacy Clause, and prioritizing the perpetuation of constitutional error over upholding “unalienable” rights, is beyond biased and cruel. It certainly wasn’t their ignorance of their duty or the law that motivated their decision; they rightly quoted their obligations before denying it to her:

“Subject-matter jurisdiction cannot be waived, and courts are required to hear challenges to subject-matter jurisdiction ‘regardless of when they are raised, or even raise such challenges *sua sponte*.’ *In re Pavlos-Hackney*), __Mich App__ (COA No. 370227 10/6/2025), slip [op 5, citing *O’Connell v Dir of Elections*, 316 Mich.App. 91, 100; 891 N.W.2d 240 (2016) .

Yet the Court proceeded to do precisely what the cited case forbids:

“Appellants have continuously sought to litigate the merits of the contempt orders, i.e., the food license suspension, but such matters were outside the circuit court proceedings and are similarly outside the appeals to this Court. See *Rott v Rott*, 508 Mich. 274, 286; 972 N.W.2d 789 (2021) (explaining the law-of-the-case doctrine,)” *Slip Op*, 6.

And even *Rott* noted “that the law-of-the-case doctrine does ‘not apply to claims that were not decided on the merits’” *Rott*, 508 Mich at 287. *Zante* was not decided on the merits – review on the merits was “waived” in error of law.

Law-of-the-case doctrine cannot, rationally, be applied to *erroneous* decisions or issues of constitutional dimensions. Law-of-the-case doctrine “directs a court’s discretion, it does not limit the tribunal’s power.” *Arizona v. California*, 460 U.S. 605, 618 (1983), citing *Messenger v. Anderson*, 225 U.S. 436, 444, (1912). As such, there is no duty, nor should there be, that a court follow clearly erroneous decisions on constitutional issues, thereby working manifest injustice on substantive rights, rationalized solely on the fact it was issued by a co-equal panel of the Court. That decision makes a mockery of the Supremacy Clause and violates settled authority on the issue:

“[T]he law-of-the-case doctrine must yield to a competing doctrine: the requirement of independent review of constitutional facts.” *Locricchio v. Evening News Ass’n*, 438 Mich. 84, 109-110, & fn 13; 476 N.W.2d 112 (1991) citing *Messenger*, 225 U.S. at 444.

“[T]he law-of-the-case doctrine ‘merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.’ A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe [sic] to do so in the absence of extraordinary circumstances such as where the initial decision was ‘clearly erroneous and would work a manifest injustice.’ Thus, even if the Seventh Circuit’s decision was law of the case, the Federal Circuit did not exceed its power in revisiting the jurisdictional issue, and once it concluded that the prior decision was ‘clearly wrong’ it was obliged to decline jurisdiction. *Christianson v. Colt Industries Operating Corp*, 486 U.S. 800, 817 (1988). Citations omitted. *Emphasis added.*

Christianson rationally supports revisiting the jurisdictional issue over adoption of law-of-the-case and requires *Pavlos-Hackney II*’s application of the *clearly erroneous* decision on subject-matter jurisdiction to be independently assessed under the Supremacy Clause and *Marbury*. *Christianson*, 486 U.S. at 817. This Court should be “loathe” to permit a State to convert judicial error into judicial duty—least of all where the error makes the ancient and indispensable requirement of subject-matter jurisdiction “irrelevant.” *Id.*

CONCLUSION

“If you can keep it.”

It is not hyperbole to say this is *the* constitutional crisis for Michigan, and by extension, the nation - an invitation to the other 49 States to follow suit.

In the end, it was not Petitioner who violated the law. It was the *Courts* - the ALJ, Ingham County Circuit, Michigan’s Court of Appeals and Michigan’s Supreme Court, that flouted the Constitution, not the citizen who rightfully invoked it. The need to scrap the Constitution and adopt plain error so as to punish Petitioner for validly standing on her rights, is out of order here.

If the People’s power to check government abuses under *Marbury* and the Supremacy Clause is allowed to become “waivable” and “irrelevant,” and our fragile freedoms discarded by judicial fiat and erroneous law-of-the-case, the Constitution, as *Andrew Jackson* once warned, becomes worthless.

This Petition stands in the breach. Acquiescence to Michigan’s defection from *Marbury* is the unthinkable end Franklin pondered. The decision here will determine whether a rule of administration, and still less, a pretextual duty to perpetuate error and injustice, under the law-of-the-case doctrine, effectively annuls Article VI of the Constitution, *Marbury* and the 14th Amendment that precludes it.

CONCLUSION AND REQUEST FOR RELIEF

The danger is no longer abstract: this case has already been marked in the *Michigan Contempt of Court Bench Book* as the course by which contempt power may proceed outside the bounds of the Courts' constitutional authority.

The decision whether to grant or deny this Petition will turn history. Will the Supremacy Clause under *Marbury's* protocol be restored to the State of Michigan, or will it become a mere historical maxim – one granted by local grace rather than a sovereign and “unalienable” right? Let it not be on this watch.

The *mandatory* protocol established in *Marbury v Madison*, must be restored to the citizens of Michigan as a governing command whereby we retain the only mechanism by which the Supremacy Clause of the U.S. Constitution can be sustained, and the People's rights preserved.

Certiorari will decide if Michigan “can keep it.”

Respectfully submitted,

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September 16, 2026

APPENDIX

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — ORDER OF THE SUPREME COURT OF MICHIGAN, DATED APRIL 10, 2026.....	1a
APPENDIX B — OPINION OF THE COURT OF APPEALS OF MICHIGAN, DATED OCTOBER 6, 2025	3a
APPENDIX C — ORDER OF THE MICHIGAN SUPREME COURT IN LANSING, MICHIGAN, DATED JANUARY 31, 2025	17a
APPENDIX D — ORDER DENYING RECONSIDERATION AND GRANTING CLARIFICATION OF THE 30TH JUDICIAL CIRCUIT FOR THE STATE OF MICHIGAN, INGHAM COUNTY, DATED MARCH 14, 2024	19a
APPENDIX E — ORDER GRANTING COSTS OF THE 30TH JUDICIAL CIRCUIT FOR THE STATE OF MICHIGAN, INGHAM COUNTY, DATED NOVEMBER 28, 2023	24a
APPENDIX F — OPINION OF THE STATE OF MICHIGAN, COURT OF APPEALS, DATED SEPTEMBER 21, 2023	28a
APPENDIX G — OPINION OF THE COURT OF APPEALS OF MICHIGAN, DATED OCTOBER 20, 2022	41a

Cited Authorities

	<i>Page</i>
APPENDIX H — ORDER OF THE STATE OF MICHIGAN, CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT, INGHAM COUNTY, DATED OCTOBER 6, 2022.....	85a
APPENDIX I — EXCERPT OF THE MICHIGAN CIRCUIT COURT FOR THE COUNTY OF INGHAM, DATED OCTOBER 6, 2022	91a
APPENDIX J — DECISION AND ORDER OF THE STATE OF MICHIGAN IN THE MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES, ENTERED FEBRUARY 11, 2021.....	106a
APPENDIX K — ORDER OF THE SUPREME COURT OF MICHIGAN, DATED JUNE 18, 2026	139a
APPENDIX L — ORDER OF THE COURT OF APPEALS OF MICHIGAN, DATED NOVEMBER 13, 2025	141a
APPENDIX M — ORDER OF THE MICHIGAN SUPREME COURT, LANSING, MICHIGAN, FILED MAY 22, 2025	142a
APPENDIX N — EXCERPTS OF MOTION FOR RECONSIDERATION OF THE SUPREME COURT FOR THE STATE OF MICHIGAN, DATED APRIL 30, 2026.....	144a

Cited Authorities

	<i>Page</i>
APPENDIX O — EXCERPTS OF THE DEFENDANT-PETITIONER’S APPLICA- TION FOR LEAVE OF THE SUPREME COURT OF MICHIGAN, DATED DECEMBER 25, 2025	157a
APPENDIX P — EXCERPTS OF DEFENDANT- APPELLANT’S BRIEF ON APPEAL OF THE COURT OF APPEALS OF MICHIGAN, DATED APRIL 17, 2024	189a
APPENDIX Q — APPELLANT’S BRIEF ON APPEAL IN THE STATE OF MICHIGAN IN THE COURT OF APPEALS, FILED NOVEMBER 14, 2022	201a
APPENDIX R — EXCERPTS OF BRIEF IN SUPPORT OF MOTION OF THE STATE OF MICHIGAN, DATED SEPTEMBER 26, 2022 ...	207a

1a

**APPENDIX A — ORDER OF THE SUPREME
COURT OF MICHIGAN, DATED APRIL 10, 2026**

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

169458
SC: 169458
COA: 370227
Ingham CC: 21-000113-CZ

IN RE CONTEMPT OF
MARLENA PAVLOS-HACKNEY.

DEPARTMENT OF AGRICULTURE AND
RURAL DEVELOPMENT,

Plaintiff-Appellee,

v.

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

Defendant-Appellant,

and

MARLENA PAVLOS-HACKNEY,

Appellant.

April 10, 2026

2a

Appendix A

On order of the Court, the application for leave to appeal the October 6, 2025 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.

I, Elizabeth Kingston-Miller, 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.

April 10, 2026 /s/ Elizabeth Kingston-Miller
Clerk

3a

**APPENDIX B — OPINION OF THE COURT OF
APPEALS OF MICHIGAN, DATED OCTOBER 6, 2025**

COURT OF APPEALS OF MICHIGAN

No. 370227

Ingham Circuit Court LC No. 21-000113-CZ

IN RE CONTEMPT OF MARLENA PAVLOS-
HACKNEY.

DEPARTMENT OF AGRICULTURE AND
RURAL DEVELOPMENT,

Plaintiff-Appellee,

v.

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

Defendant-Appellant,

and

MARLENA PAVLOS-HACKNEY,

Appellant.

October 6, 2025

Before: WALLACE, P.J., and RIORDAN and
REDFORD, JJ.

Appendix B

PER CURIAM.

During the COVID-19 pandemic, the Michigan Department of Agriculture and Rural Development (MDARD) suspended the food license for Marlena’s Bistro and Pizzeria restaurant (Marlena’s). Appellant Marlena Pavlos-Hackney, the owner of Marlena’s, chose to keep the restaurant open despite the license suspension, which led to MDARD initiating the present action and multiple Ingham Circuit Court orders that Pavlos-Hackney publicly defied. This culminated with the circuit court entering two contempt orders against Pavlos-Hackney in which she was jailed and fined twice. This Court affirmed the contempt judgments but remanded to the circuit court for the sole purpose of refashioning the second contempt fine to be civil in nature as applied under the circumstances. *In re Contempt of Pavlos-Hackney*, 343 Mich.App. 642, 678-679; 997 N.W.2d 511 (2022).

Appellants appeal as of right the circuit court’s order on remand denying their motion for reconsideration and granting MDARD’s request for clarification of the circuit court’s prior order granting costs to MDARD. We affirm.¹

1. As explained *infra*, the merits of the contempt judgments are not before us in this appeal because previous panels of this Court have already decided that question. Thus, to the extent that appellants’ brief on appeal suggests that the state engaged in selective or politically based enforcement of COVID-19 regulations because, for example, the restaurant at which the Governor was photographed violating these regulations in May 2021 “was never cited or prosecuted, though their violation was broadcast nationwide,” we do not address that argument in our opinion today.

*Appendix B***I. FACTS AND PROCEDURAL HISTORY**

In addition to *Contempt of Pavlos-Hackney*, these parties have come before us in another appeal. See *Dep't of Agriculture & Rural Development v Zante, Inc*, 348 Mich.App. 293, 296; 18 NW3d 62 (2023). For purposes of the present appeal, the facts are not in dispute, and we rely on the factual background set forth in *Zante*:

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 Marlina's to close. Pavlos-Hackney ignored this order, and the restaurant remained open. In January 2021,

Appendix B

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.

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 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

Appendix B

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 [i.e., *Contempt of Pavlos-Hackney*], which affirmed the contempt judgments but remanded to the circuit court with instructions regarding refashioning the second fine “to be civil in nature.” [*Zante*, 348 Mich.App. at 296-298 (citation and footnote omitted).]

In that first appeal, we remanded to the circuit court to further address the second \$7,500 fine because we determined that “it is not clear what condition the contemnors failed to satisfy, and the trial court did not direct any portion of the fine to be paid to MDARD,” which meant “the ultimate effect of the second fine is more criminal than civil in nature, even if that was not the trial court’s intent.” *Contempt of Pavlos-Hackney*, 343 Mich.App. at 678. We gave the circuit court three options from which to choose on remand: “(1) determine whether MDARD is entitled to reimbursement; (2) determine whether the contemnors sufficiently complied with the trial court’s orders to be returned the second fine, in whole or in part; or (3) some combination of (1) and (2).” *Id.* If the circuit court chose the first option, this would “require a factual determination of MDARD’s expenditures as part of these enforcement proceedings.” *Id.* at 678-679.

Appendix B

On remand, the circuit court entered an order refashioning the second contempt fine to compensate MDARD for Pavlos-Hackney's contempt. The circuit court highlighted Pavlos-Hackney's defiance of court orders and found that this caused MDARD, the Allegan County Health Department, and the Michigan State Police to expend money and resources. Citing MCL 600.1701(g) and MCL 600.1721,² the circuit court ordered MDARD to provide a bill of costs for its expenditures so that the court could properly distribute the second contempt fine to MDARD. Appellants moved for reconsideration, arguing in pertinent part that the contempt orders were based on unconstitutional executive orders (EOs) and other unconstitutional administrative orders and that, without a lawful order to disobey, no costs could be assessed under MCL 600.1701(g). The circuit court denied the motion. It rejected appellants' constitutional arguments because of the limited nature of this Court's remand order. The circuit court reasoned that it was not called upon to adjudicate the constitutionality of any EOs related to COVID-19. Moreover, the circuit court reasoned that the second contempt order related to operating a restaurant without a food license and not to any COVID-19 mandate, which brought the case under MCL 600.1701(g).

MDARD subsequently submitted a bill of costs totaling \$9,795.60, which included \$8,580.95 for attorney fees, \$1,071.61 for the costs of MDARD, and \$143.04 for the costs of the Michigan State Police. The circuit court found

2. MCL 600.1701(g) allows courts to punish parties for disobeying a lawful order. MCL 600.1721 requires courts to reimburse parties for the misconduct of other parties.

Appendix B

that such costs were reasonable and assessed such costs to MDARD. The circuit court ordered appellants to pay these costs within 14 days of the court's order. Appellants again moved for reconsideration, reiterating their argument that the basis for the contempt orders was unconstitutional. Appellants contended that MCL 333.2253 was declared by this Court to be unconstitutional and that any new contempt orders could not be based on this statute.³ According to appellants, the refashioned contempt penalty on remand was invalid because it was entered after this Court held that MCL 333.2253 was unconstitutional, thereby depriving the circuit court of subject-matter jurisdiction. The implication from appellants' position was that the assessment of costs was premised on the unconstitutional statute. Appellants also reiterated their prior argument that without a lawful order, costs could not be assessed under MCL 600.1701(g). Moreover, given that this Court had recognized the unconstitutionality of MCL 333.2253 in *Zante*, appellants maintained that

3. After our Supreme Court held that certain EOs related to the COVID-19 pandemic were invalid and that the Emergency Powers of the Governor Act was unconstitutional, see *In re Certified Questions From United States Dist Court*, 506 Mich. 332, 337-338; 958 N.W.2d 1 (2020), the Governor through DHHS continued to issue orders under MCL 333.2253 that essentially mirrored the prior EOs, *T & V Assoc, Inc v Dir of Health & Human Servs*, 347 Mich.App. 486, 491; 15 NW3d 313 (2023) (*T & V Assoc I*), rev'd and vacated in part ___ Mich. ___, 12 NW3d 594 (2024). This Court held that MCL 333.2253 was an unconstitutional delegation of legislative authority, *id.* at 514-515, but our Supreme Court vacated that holding, *T & V Assoc, Inc v Dir of Dep't of Health & Human Servs*, ___ Mich. ___, ___; 12 NW3d 594 (2024); slip op at 1 (*T & V Assoc II*).

Appendix B

the law of the case from *Zante* applied and precluded the circuit court's order on remand.

MDARD in turn moved for clarification of the circuit court's assessment of costs. It appeared that the circuit court had ordered appellants to pay the \$9,795.60 in full, but MDARD believed its compensation would be limited to \$7,500, which was the amount of the second contempt fine and was already paid in full on March 22, 2021. MDARD accordingly sought clarification on this point. The circuit court denied appellants' motion for reconsideration and granted MDARD's motion for clarification. Regarding appellants' constitutional and subjectmatter jurisdiction arguments, the circuit court determined that it need not consider these arguments because they were irrelevant to the remand proceedings, had already been rejected in the prior motion for reconsideration, and had similarly been rejected in *Zante*. Regarding MDARD's request for clarification, the circuit court amended its prior order to reflect that MDARD should only be compensated by the \$7,500 that was already paid by appellants. Appellants now appeal, raising many of the same constitutional arguments as in the circuit court.

II. ANALYSIS

A. STANDARD OF REVIEW

“The decision to award attorney fees as compensation for losses incurred because of the contempt and the determination of the reasonable amount of the fees are

Appendix B

reviewed for an abuse of discretion.” *In re Contempt of Henry*, 282 Mich.App. 656, 685; 765 N.W.2d 44 (2009). An abuse of discretion occurs when the decision is outside the range of principled outcomes. *Id.* “A trial court necessarily abuses its discretion when it makes an error of law.” *Pirgu v United Servs Auto Ass’n*, 499 Mich. 269, 274; 884 N.W.2d 257 (2016). This Court reviews the circuit court’s findings of fact for clear error, *Contempt of Henry*, 282 Mich.App. at 685, which occurs when this Court is “left with a definite and firm conviction that a mistake has been made,” *Elahham v Al-Jabban*, 319 Mich.App. 112, 120-121; 899 N.W.2d 768 (2017) (quotation marks and citation omitted). “To the extent that this Court must examine questions of law related to the trial court’s contempt decision, our review is de novo.” *In re Moroun*, 295 Mich.App. 312, 336; 814 N.W.2d 319 (2012). “The decision to award attorney fees, and the determination of the reasonableness of the fees requested, is within the discretion of the trial court.” *Windemere Commons I Ass’n v O’Brien*, 269 Mich.App. 681, 682; 713 N.W.2d 814 (2006).

This Court reviews de novo the interpretation of statutes, *McQueer v Perfect Fence Co*, 502 Mich. 276, 285-286; 917 N.W.2d 584 (2018), constitutional questions, *Bailey v Antrim Co*, 341 Mich.App. 411, 420; 990 N.W.2d 372 (2022), and determinations on subject-matter jurisdiction when the facts are uncontested, *Zelasko v Charter Twp of Bloomfield*, 347 Mich.App. 141, 155; 14 NW3d 441 (2023).

*Appendix B***B. DISCUSSION**

Appellants argue that the that the invalidation of MCL 333.2253 deprived the circuit court of subject-matter jurisdiction and prohibited it from entering the refashioned contempt penalty on remand. For the reasons discussed below, we disagree.

“Generally, subject-matter jurisdiction is defined as a court’s power to hear and determine a cause or matter,” not the specific case before it. *O’Connell v Dir of Elections*, 316 Mich.App. 91, 100; 891 N.W.2d 240 (2016) (quotation marks and citation omitted). Subject-matter jurisdiction cannot be waived, and courts are required to hear challenges to subject-matter jurisdiction “regardless of when they are raised, or even raise such challenges sua sponte.” *Id.* If a circuit court enters a contempt order premised on a statute that is declared unconstitutional before the contempt order is entered, the circuit court lacks subject-matter jurisdiction, and its order is void from the outset. See *Johnson v White*, 261 Mich.App. 332, 349-350; 682 N.W.2d 505 (2004).

Here, this Court remanded to the circuit court for a limited purpose: to determine whether MDARD was entitled to compensation for Pavlos-Hackney’s contempt. *Contempt of Pavlos-Hackney*, 343 Mich.App. at 678-679. This Court did not remand for the circuit court to address any of the merits, including the constitutionality, of Pavlos-Hackney’s contempt. Therefore, as the circuit court properly determined, appellants’ attempts to relitigate such issues were improper, and such issues

Appendix B

are similarly improperly raised in this appeal. In this regard, this Court has already addressed and rejected appellants' constitutional arguments and its conclusions are the law of this case. In *Zante*, 348 Mich.App. at 298, this Court held that such constitutional arguments were "irrelevant" because Pavlos-Hackney failed to appeal the administrative law judge's decision that upheld the suspension of the food license. "The 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." *Id.* at 301 (cleaned up). See also *Contempt of Pavlos-Hackney*, 343 Mich.App. at 648. Additionally, "[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." *Zante*, 348 Mich.App. at 301 (quotation marks and citations omitted). Instead, "the general principle [is] that a party is required to obey court orders regardless of their validity." *Id.* at 303. Appellants once again rely on *Johnson*, but this Court already addressed and rejected appellants' application of *Johnson*. See *Zante*, 348 Mich.App. at 302-304. Appellants have continuously sought to litigate the merits of the contempt orders, i.e., the food license suspension, but such matters were outside the circuit court proceedings and are similarly outside the appeals to this Court. See *Rott v Rott*, 508 Mich. 274, 286; 972 N.W.2d 789 (2021) (explaining that under the law-of-the-case doctrine, "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where

Appendix B

the facts remain materially the same”) (quotation marks and citations omitted).

Appellants contend that our decision in *T &V Assoc, Inc v Dir of Dep’t of Health & Human Servs*, 347 Mich. App. 486, 491; 15 NW3d 313 (2023) (*T &V Assoc I*), which invalidated MCL 333.2253, applies to the circuit court’s order on remand because the order was entered after *T &V Assoc I*. However, after appellants initiated this appeal, our Supreme Court reversed and vacated *T &V Assoc I* because the constitutionality of MCL 333.2253 was moot. *T &V Assoc, Inc v Dir of Dep’t of Health & Human Servs*, ___ Mich. ___, ___; 12 NW3d 594 (2024); slip op at 1 (*T &V Assoc II*). Specifically, the Court reversed *T &V Assoc I*’s holding that the constitutional issue was not moot, and vacated the *T &V Assoc I* merits holding that MCL 333.2253 was unconstitutional. *Id.* Accordingly, because *T &V Assoc I*’s holding regarding the constitutionality of MCL 333.2253 was vacated, it is no longer in effect. Therefore, in light of *T &V Assoc II*, appellants’ legal foundation no longer is tenable. Appellants also misunderstand the nature of the remand proceedings. The circuit court did not enter a new contempt order. Rather, it refashioned an existing contempt order, namely the second contempt order entered in March 2021, in accordance with this Court’s instructions. See *Zante*, 348 Mich.App. at 678-679. The circuit court was not deprived of subject-matter jurisdiction.⁴

4. Appellants contend that without a lawful order, the circuit court could not assess costs under MCL 600.1701(g). However, this is merely an extension of their constitutional arguments.

Appendix B

Finally, appellants argue that MDARD did not suffer any “actual loss or injury,” thereby preventing application of MCL 600.1721. We disagree.

MCL 600.1721 provides that

[i]f the alleged misconduct has caused *an actual loss* or injury to *any person* the court shall order the defendant to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the defendant. The payment and acceptance of this sum is an absolute bar to any action by the aggrieved party to recover damages for the loss or injury. [Emphasis added.]

In other words, this provision “requires a showing of contemptuous misconduct that caused the person seeking indemnification to suffer a loss or injury and, if these elements are established, requires the court to order the contemnor to pay ‘a sufficient sum to indemnify’ the person for the loss.” *In re Bradley Estate*, 494 Mich. 367, 391; 835 N.W.2d 545 (2013). This provision applies to both criminal and civil cases, and it also allows for the recovery of attorney fees. See *Contempt of Henry*, 282 Mich.App. at 684-686.

Appellants argue that MDARD did not suffer any actual loss because MDARD was represented by the office of the Attorney General, whose staff are paid salaries by taxpayers. However, the plain language of MCL 600.1721 does not limit its application to whether the party seeking indemnification is a state administrative

Appendix B

agency represented by the office of Attorney General. The provision simply mandates that the circuit court must indemnify a party for the contempt of the other party if that contempt caused actual loss or injury. See MCL 600.1721. There are no other limitations besides contemptuous conduct causing actual loss or injury. See *Bradley Estate*, 494 Mich. at 391.

In fact, the provision has been applied to governmental entities. See, e.g., *In re Contempt of McRipley*, 204 Mich. App. 298, 301-302; 514 N.W.2d 219 (1994) (applying MCL 600.1721 for costs that the county sustained). This comports with the meaning of “person,” which is left undefined by MCL 600.1721. A “person” includes public bodies in addition to individuals. See MCL 8.3*l*. As a public body, MDARD and the office of the Attorney General were covered by MCL 600.1721. MDARD produced evidence of its actual costs incurred as a result of appellants’ contemptuous conduct, and appellants have never challenged such evidence. Accordingly, there was evidence that Pavlos-Hackney’s contemptuous misconduct caused MDARD to suffer an actual loss, thereby requiring the circuit court to order appellants to reimburse MDARD for those losses pursuant to MCL 600.1721. Appellants have failed to demonstrate any abuse of discretion or erroneous interpretation of statutory law.

III. CONCLUSION

The circuit court correctly followed our remand instructions, and appellants have not shown error. Therefore, we affirm.

17a

**APPENDIX C — 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.

18a

Appendix C

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 D — ORDER DENYING
RECONSIDERATION AND GRANTING
CLARIFICATION OF THE 30TH JUDICIAL
CIRCUIT FOR THE STATE OF MICHIGAN,
INGHAM COUNTY, DATED MARCH 14, 2024**

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

CASE NO. 21-113-CZ

MICHIGAN DEPARTMENT OF AGRICULTURE
AND RURAL DEVELOPMENT,

Plaintiff,

v.

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

Defendant.

**ORDER DENYING RECONSIDERATION AND
GRANTING CLARIFICATION**

HON. WANDA M. STOKES

At a session of said Court held in the city of Mason,
county of Ingham, this 14 day of March, 2024.
PRESENT: HON. WANDA M. STOKES

Appendix D

This matter comes before the Court on the Defendant's Motion for Reconsideration of this Court's November 28, 2023 Order Granting Costs and Plaintiffs' Motion for Clarification of the same Order. This Order found that the costs incurred by the Michigan Department of Agriculture and Rural Development (MDARD) in bringing the Defendant in compliance with this Court's Orders were reasonable and allowed the Contempt fines issued in this case to be used to compensate MDARD. The Court having been apprised of the facts and otherwise being fully informed regarding the issues, now **DENIES** Defendant's motion and **GRANTS** Plaintiff's motions.

STANDARD OF REVIEW

Under MCR 2.119(F), a motion for reconsideration may be granted when the moving party demonstrates palpable error that misleads the court and the parties, and that a different disposition of the case would result but for the error. A motion for reconsideration that "merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." MCR 2.119(F)(3).

Whether to grant a motion for reconsideration is within the discretion of the trial court, and is reviewed for abuse of discretion. *Cole v Ladbroke Racing Mich, Inc.*, 241 Mich App 1, 8; 614 NW2d 169 (2000); *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d

Appendix D

472 (2008). MCR 2.119(F) allows the court “considerable discretion” to grant reconsideration in order to correct mistakes, preserve judicial economy, and minimize the costs to the parties. *Kokx v. Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000).

ANALYSIS

On October 22, 2022, the Court of Appeals remanded this case to this Court to refashion the contempt order to be Civil in nature, as “applied under the circumstances.” This Court was to choose from the following: (1) Determine whether MDARD is entitled to reimbursement; (2) determine whether the contemnors sufficiently complied with the trial court’s orders to be returned the second fine, in whole or in part; or, (3) Some combination of (1) and (2). Under this instruction, this Court determined that MDARD is entitled to reimbursement. MCL 600.1701(g) provides this Court discretion under a civil contempt order to compensate an aggrieved party. This Court asked that a bill of costs incurred due to the Defendant’s contemptuous behavior be submitted. MDARD submitted their bill of costs and this Court entered an Order allowing the contempt fines to be used to compensate the Plaintiff after determining that their incurred costs were reasonable.

Defendant’s Motion first presents the idea that the contempt fines in this case were used to enforce the Plaintiff’s unconstitutional orders and therefore this Court does not have jurisdiction to order the payment of costs related to acts that defied the Plaintiff’s orders. The Court need not consider these arguments as they are not

Appendix D

relevant to the Order the Defendant seeks reconsideration of and these arguments have already been addressed by the Michigan Court of Appeals. *Dept of Agric & Rural Dev v Zante, Inc*, No. 363515, 2023 WL 6164995, at *2 (Mich Ct App, September 21, 2023). Defendant also challenges the Courts' conversion of fines into an award of costs. Defendant provides no legal support to overcome that fact that this Court has already rejected these arguments in its June 27, 23 Order, or the fact that converting the contempt fine into an award of costs was specially authorized by the Court of Appeals in the Remand Order in this case. Accordingly these arguments also need not be considered.

Defendants motion does not properly address the Court's November 28, 2023 Order and instead challenges the underlying January 23, 2023 Order on Remand and the underlying Contempt Order using arguments that have already been addressed by this Court or the Michigan Court of Appeals. The Defendants Motion merely presents issues that have already been addressed and therefore Reconsideration will not be granted.

Finally, Plaintiff's Motion for Clarification seeks to amend the language in this Court's November 28, 2023 Order to more accurately reflect the procedural history of the case, the process by which the Plaintiff is to receive compensation, and the current status of the case. This Court agrees that the Plaintiff's proposed amendments would more accurately reflect the Court's intent given the procedural history of this case.

Appendix D

THEREFORE, IT IS ORDERED that the Defendant's Motion for Reconsideration of Order Appropriating Costs from Reimbursement of Fines is **DENIED** and the Plaintiff's Motion for Clarification is **GRANTED**.

IT IS FURTHER ORDERED that this Court's November 28, 2023 Order shall be amended to reflect that the Plaintiff's action was filed to prevent the Defendant from operating as a food establishment without a valid food establishment license.

IT IS FURTHER ORDERED that this Court's November 28, 2023 Order shall be amended to reflect that it intended to compensate the Plaintiff from the \$7500.00 contempt fine in this case and that amount shall be paid to the Plaintiff.

IT IS FURTHER ORDERED that this Court's November 28, 2023 Order shall be amended to reflect that it resolved the last remaining issue remanded from the Court of Appeals.

SO ORDERED.

In accordance with MCR 2.602(A)(3), this Order disposes of the last pending claim, and the case remains closed.

Date

/s/ Wanda M. Stokes
Hon. Wanda M. Stokes
Circuit Court Judge

24a

**APPENDIX E — ORDER GRANTING COSTS
OF THE 30TH JUDICIAL CIRCUIT FOR THE
STATE OF MICHIGAN, INGHAM COUNTY,
DATED NOVEMBER 28, 2023**

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

CASE NO. 21-113-CZ

MICHIGAN DEPARTMENT OF AGRICULTURE
AND RURAL DEVELOPMENT,

Plaintiff,

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

Defendant.

ORDER GRANTING COSTS

HON. WANDA M. STOKES

At a session of said Court held in the City of Mason,
County of Ingham, this 28th day of November 2023

PRESENT: HON. WANDA M. STOKES

This matter comes before the Court on Plaintiff's
Bill of Costs submitted following an Order finding the
Defendants in Contempt of Court and issuing a fine

Appendix E

against the Defendants. The fine issued with this Court's Order was designed to compensate the Plaintiff for the costs they incurred as a result of the Defendant's contemptuous behavior. Plaintiff's Bill of Costs includes \$8,580.95 in attorney fees, \$1,071.61 in costs incurred by the Michigan Department of Agriculture and Rural Development (MDARD), and \$143.04 in costs incurred by the Michigan State Police.

Plaintiffs have supported their Bill of Costs with Affidavits from Assistant Attorney Generals Danielle Allison-Yokom and Laura LaMore, and MDARD Food and Dairy Division Director Tim Lewinski. Ms. Allison-Yokom's affidavit details the work she performed for this case while representing MDARD alongside her co-counsel, Eileen C. Whipple. This case involves challenges to restrictions imposed by Executive Orders to food safety laws due to COVID-19. Ms. Allison-Yokom billed 17.5 hours at a rate of \$105.30 an hour as a result of the Defendant's contempt, and Ms. Whipple billed 95 hours at a rate of \$86.12 an hour as a result of the Defendants contempt. Ms. LaMore's affidavit details the work she performed as a result of the Defendants contempt and states that she billed 27.5 hours at a rate of \$56.08 an hour in order to bring the Defendants in compliance with this Court's Orders. Ms. LaMore also confirms that a State Police Sergeant and a State Police Trooper spent 1.85 hours at rates of \$42.16 an hour and \$35.16 an hour respectively on transporting Ms. Pavlos-Hackney from Holland, Michigan to the Ingham County Jail, a transport required due to the Defendant's contemptuous behavior. Mr. Slawinski's affidavit details the work he performed

Appendix E

supervising MDARD staff, James Padden and Kassie Garret, in bringing the Defendants in compliance with this Court's Orders. Mr. Slawinski states that he spent 2.5 hours at a rate of \$98.01 an hour on this matter, Mr. Padden spent 4.5 hours at a rate of \$86.84 an hour, and Ms. Garret spent 10 hours at a rate of \$45.38 an hour.

When a Court reviews a request for attorney fees, the Michigan Supreme Court has stated that:

“when determining the reasonableness of attorney fees . . . a trial court must begin its analysis by determining the reasonable hourly rate customarily charged in the locality for similar services [, and] multiply that rate by the reasonable number of hours expended in the case to arrive at a baseline figure. Thereafter, the trial court must consider all of the remaining *Wood* and MRPC 1.5(a) factors to determine whether an up or down adjustment is appropriate.” *Pirgu v United Services Auto Ass’n*, 499 Mich 269, 281; 884 NW2d 257, 264 (2016).

The Court of Appeals has also observed that trial courts may rely on “surveys such as the Economics of the Law Practice Surveys that are published by the State Bar of Michigan” to arrive at a reasonable hourly rate. *Smith v. Khouri*, 481 Mich 519, 528-30; 751 NW2d 472, 478-79 (2008).

According to the State Bar of Michigan 2020 and current 2023 Economics of Law Practice Attorney Income and Billing Rate Summary Report, the billing rates of the

Appendix E

Plaintiffs counsel, are all well below the 25th percentile rate of \$200 and \$225 per hour respectively for general civil work and well below the 25th percentile rate of \$217 and \$225 per hour respectively for attorney's in the Lansing area. When considering this and the experience of Plaintiff's counsel, the nature of the case and work performed, the time spent and other relevant factors, this Court finds that \$105.30 per hour, \$86.12 per hour, and \$56.08 per hour are already below an appropriate baseline, and reflect reasonable hourly rates for the respective attorneys in this matter. Further, when considering the nature of the services performed and time spent by MDARD's counsel and the Michigan State Police, this Court finds that expenditures of \$1,071.61 and \$143.04 respectively are reasonable.

Accordingly, this Court finds that \$9,795.60 is a reasonable value for the services provided by Plaintiff's counsel and agency employees in order to bring the Defendant into compliance with this Court's Orders. This amount to be paid within 14 days of the date of this Order.

SO ORDERED.

In compliance with MCR 2.602(A)(3), this resolves the last pending claim and closes this case.

NOV 28 2023
Date

/s/ Wanda M. Stokes
Hon. Wanda M. Stokes
Circuit Court Judge

**APPENDIX F — 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

Appendix F

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.*,

Appendix F

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 Marlana's to close. Pavlos-Hackney ignored this order, and the restaurant remained open. In January 2021, MDARD summarily suspended the food license for Marlana'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 Marlana's Bistro & Pizzeria, and the pizzeria. Because Pavlos-Hackney is the sole owner of both enterprises, we refer to her as the defendant.

Appendix F

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.

*Appendix F***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 F

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

Appendix F

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

Appendix F

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 F

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

Appendix F

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

Appendix F

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

Appendix F

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

Appendix F

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**

41a

**APPENDIX G — OPINION OF THE COURT OF
APPEALS OF MICHIGAN, DATED OCTOBER 20, 2022**

COURT OF APPEALS OF MICHIGAN

No. 357407

IN RE CONTEMPT OF PAVLOS-HACKNEY.

DEPARTMENT OF AGRICULTURE AND
RURAL DEVELOPMENT,

Plaintiff-Appellee,

v.

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

Defendant-Appellant,

and

MARLENA PAVLOS-HACKNEY,

Appellant.

October 20, 2022

Ingham Circuit Court LC No. 21-000113-CZ

Before: SWARTZLE, P.J., and RONAYNE KRAUSE
and GARRETT, JJ.

Appendix G

RONAYNE KRAUSE, J.

The contemnors, Marlana Pavlos-Hackney (Ms. Pavlos-Hackney) and her business, Zante, Inc., d/b/a/ Marlana's Bistro and Pizzeria (Marlena's), appeal by right following two judgments of contempt entered against them by the trial court. The contempts were for Ms. Pavlos-Hackney's continued operation of Marlana's in willful defiance of the trial court's orders to cease operation. In turn, the orders to cease operation arose out of plaintiff, the Michigan Department of Agriculture and Rural Development (MDARD), suspending the food establishment license for Marlana's, following Ms. Pavlos-Hackney's willful defiance of public health and safety orders related to the COVID-19 pandemic. We affirm the contempts, but we remand for the trial court to refashion the second of the two contempt fines.

I. MATTERS AT ISSUE

Although the contemnors argue that the orders to cease operation were improper for various reasons, they have never seriously disputed that they violated those orders-and given the publicity surrounding Ms. Pavlos-Hackney's vows to continue operating her restaurant despite those orders, no such dispute would be plausible. The propriety of the orders that Ms. Pavlos-Hackney disobeyed is not before us: "the 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

Appendix G

N.W.2d 705 (2021), quoting *United States v Rylander*, 460 U.S. 752, 757; 103 S.Ct. 1548; 75 L.Ed.2d 521 (1983) (alterations made by the *In re JCB* Court). It has long been established that even if a court’s order is incorrect,¹ persons subject to the order must still comply with the order, and their remedy is to appeal the order or seek a stay. See *In re Contempt of Dudzinski*, 257 Mich.App. 96, 110-112; 667 N.W.2d 68 (2003). Indeed, even where a person is subjected to a “transparently unconstitutional” order, that person must still challenge the order through a proper appellate challenge (or at least a good-faith effort to do so) rather than simply disregard the order. *ARM v KJL*, __ Mich. App __, __; __ N.W.2d __ (2022) (Docket Nos. 357120, 358858, 358859), slip op at 7. Ms. Pavlos-Hackney knowingly, and very publicly, chose instead simply to disregard the orders. Nevertheless, all persons are entitled to due process. The issue before us is whether the contemnors received the due process to which they were entitled when the trial court imposed the contempts for violating the orders.

II. BACKGROUND

Following the COVID-19 pandemic in 2020, Marlana’s was subject to various administrative orders requiring the restaurant to comply with certain hygiene, social distancing, and masking requirements, including

1. We neither hold nor imply that any of the orders regarding COVID-19 precautions were improper in any way. Rather, we hold that it would be entirely irrelevant *even if* they were improper. Violation of a court order on the basis of sincerely-held beliefs is still a violation of a court order.

Appendix G

a prohibition against dine-in service. Throughout December of 2020 and January of 2021, the Allegan County Health Department and MDARD investigated Marlana's and determined that Marlana's was knowingly violating those requirements. Several administrative orders were issued, which Marlana's knowingly ignored. Finally, On January 20, 2021, MDARD entered an emergency summary suspension order that immediately suspended the food establishment license for Marlana's. On February 1, 2021, an administrative hearing was held regarding that suspension. Ms. Pavlos-Hackney "appeared as representative for" Marlana's. Ms. Pavlos-Hackney "sought to be represented by Richard Martin" but the request was denied because Martin "did not identify himself as an attorney licensed in Michigan." Nevertheless, she was permitted to call Martin as a witness. Following the hearing, it was determined that Marlana's was open for regular business in knowing and willful violation of the administrative orders. By Ms. Pavlos-Hackney's own testimony, she was fully aware of the orders and understood them. The suspension of the food establishment license for Marlana's was continued. The administrative decision explained that Marlana's had a right to seek appeal by filing a petition in a court within 60 days. There is no indication that Marlana's made any effort to do so.

On February 24, 2021, approximately two weeks after the administrative decision, MDARD commenced this action by filing a complaint in the Ingham County Circuit Court. MDARD simultaneously filed an ex parte motion for a temporary restraining order. In both

Appendix G

documents, MDARD largely recited the history of the dispute and the fact that Marlana's was continuing to operate its restaurant at great danger to public health, despite knowing of the orders and of its lack of a valid license. In its complaint, MDARD sought a permanent injunction against Marlana's selling food without a license. In its motion for a temporary restraining order, MDARD argued that an injunction was necessary to prevent irreparable harm to itself and to the public, it was likely to succeed on the merits because there was no serious dispute Marlana's was operating in violation of the law, and the potential harm to itself and to the public greatly outweighed the potential harm to Marlana's. The next day, the trial court entered a temporary restraining order under which Marlana's was "hereby ordered to cease operating a food service establishment and cease selling, distributing, or advertising food or beverages effective immediately." The order set a hearing date for March 4, 2021, via Zoom. The temporary restraining order was personally served "on Marlana Pavlos" the next day, February 26, 2021, at 6:37 a.m.

On March 1, 2021, MDARD moved to hold Marlana's in contempt, noting that the temporary restraining order had been immediately emailed to Ms. Pavlos-Hackney in addition to being personally served on her. However, MDARD had determined that Marlana's was violating the order, which MDARD confirmed by having one of its employees actually purchase food from Marlana's. That employee observed employees and patrons not wearing masks, even when not seated at tables. Another MDARD employee observed that Marlana's had made a post on

Appendix G

Facebook recounting the restraining order and vowing neither to close nor to pay any fines or otherwise “comply with ANYTHING that violates my rights as an American citizen.” MDARD further noted that Marlina’s had “unilaterally ignored the temporary restraining order, just as it ignored MDARD’s emergency suspension of its food establishment license,” and Marlina’s had not made any effort to appeal the suspension or the temporary restraining order. MDARD sought to have Marlina’s held in contempt and subjected to a fine of \$7,500 plus attorney fees in the “hope that a sanction less than imprisonment for civil contempt is sufficient to obtain compliance with [the] Court’s order and the Food Law.” MDARD also expressed the belief that the temporary restraining order “should be continued and converted into a preliminary injunction.” Marlina’s was served with a copy of the motion on March 2, 2021.

A hearing was held via Zoom on March 4, 2021. Ms. Pavlos-Hackney was present, and she confirmed that she was the owner of Marlina’s. Ms. Pavlos-Hackney stated that she had retained Richard Martin as “assistance of counsel,” and after repeated inquiries from the trial court whether Martin was an attorney, she admitted that she was not aware of whether Martin was licensed in Michigan or in any other state. She also indicated that she was not aware that a corporation was required to be represented by an actual attorney,² instead asserting that

2. Although corporate entities are technically entitled to represent themselves, they may only do so through agents who are otherwise licensed to practice law. *Detroit Bar Ass’n v Union Guardian Trust Co*, 282 Mich. 707, 711-712; 281 N.W. 432 (1938);

Appendix G

it was an act of treason for a judge to fail to comply with the Constitution.³ The trial court suggested adjourning the hearing so that Ms. Pavlos-Hackney could obtain counsel,

Fraser Trebilcock Davis & Dunlap PC v Boyce Trust 2350, 497 Mich. 265, 276-277; 870 N.W.2d 494 (2015). Any individual may represent himself *in propria persona*, but only lawyers may represent another person or entity. *Shenkman v Bragman*, 261 Mich.App. 412, 416; 682 N.W.2d 516 (2004).

3. “While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation.” *Charles River Bridge v Warren Bridge*, 36 U.S. 420, 548; 11 Ped 420; 9 L.Ed. 773 (1837). The police power of the states “extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights.” *Patterson v Kentucky*, 97 U.S. (7 Otto) 501, 504; 24 L.Ed. 1115 (1878). Furthermore, “[t]hat a license may be revoked for failure to obey the provisions of the statute or ordinance under which such license is granted is too firmly established to be open to question.” *Johnson v Figy*, 314 Mich. 548, 565; 22 N.W.2d 893 (1946). It may, of course, be proper to challenge whether a particular implementation detail is arbitrary or unreasonable. See *Village of Euclid, Ohio v Ambler Realty Co.*, 272 U.S. 365, 395; 47 S.Ct. 114; 71 L.Ed. 303 (1926). However, as noted, the contemnors made no effort to do so. Otherwise, it is well established that state governments do not abuse their power purely because they require their citizens to curtail some preferred conduct or suffer some hardship in the interest of the public health, safety, and welfare. See *Nebbia v People of New York*, 291 U.S. 502, 524-525; 54 S.Ct. 505; 78 L.Ed. 940 (1934). In Michigan, it has been established that although there is a general “right to engage in any business not harmful to the public . . . any business or business practice may be regulated if such regulation is necessary to the public welfare, health, morals and safety.” *People v Victor*, 287 Mich. 506, 512; 283 N.W. 666 (1939).

Appendix G

but when the trial court asked whether Ms. Pavlos-Hackney intended to retain counsel or “to rely upon the statement that you made earlier,” Ms. Pavlos-Hackney replied “no comment.” The trial court therefore chose to proceed. MDARD presented essentially a summary of the argument it made in its motion.

Ms. Pavlos-Hackney admitted that she did not have a license to operate Marlana’s. The trial court asked Ms. Pavlos-Hackney whether Marlana’s was still open, to which she replied “no comment” and “I do not consent and that they are in direct violation of well-established constitutional law.” The trial court concluded that based on the evidence available and on the failure of Marlana’s to obtain counsel, Ms. Pavlos-Hackney was aware that the license for Marlana’s had been suspended and that she was willfully in violation of the court’s order and of MDARD’s order. The trial court entered an order holding Marlana’s in contempt, ordering that Marlana’s must pay \$7,500, converting the temporary restraining order into a preliminary injunction, and ordering that “if [Marlana’s] continues to operate a food establishment without a license, Marlana Pavlos Hackney shall be arrested and incarcerated until such time as she complies with the order of this Court.” The trial court also issued a bench warrant for Ms. Pavlos-Hackney’s arrest. The next day, MDARD confirmed that Marlana’s was still open for business, based on a vow to remain open posted on Facebook and a telephone call to Marlana’s, which stated that it was open to take food orders. Ms. Pavlos-Hackney was arrested “in the early morning hours of March 19, 2021.”

Appendix G

The trial court, before an alternate trial judge because the assigned judge was unavailable that day, held an arraignment beginning at 1:35 p.m. Earlier that day, Martin filed an appearance as “assistance of counsel” on behalf of Ms. Pavlos-Hackney. At the commencement of the hearing, the trial court placed Martin under oath to confirm whether he had filed that appearance. Martin, who admitted that he was not licensed to practice law in Michigan or any other state, cited the Sixth Amendment and “*Sims v Aherns*”⁴ for the proposition that persons had

4. This was presumably a reference to *Sims v Ahrens*, 167 Ark 557; 271 SW 720 (1925), a case in which the Arkansas Supreme Court addressed the propriety of Arkansas imposing an “occupation tax,” which was in that case “an occupation tax and an income tax, because income derived from all pursuits or callings are taxed” and “no attempt is made to distinguish between occupations which are of common right and those which might be designated as privileges.” *Id.*, 167 Ark at 562; 271 SW at 721. The Arkansas constitution had a peculiar restriction on the state’s power to impose taxes: Arkansas could not “tax occupations which are of common right for State purposes,” but it could tax “those callings or pursuits which might be classed as privileges.” *Id.*, 167 Ark at 565; 271 SW at 722. The initial majority opinion concluded that the tax at issue violated the Arkansas constitution because it was not within the power of the Arkansas legislature “to declare and tax as privileges, for State revenue, pursuits and occupations which are matters of common right.” *Id.*, 167 Ark at 572; 271 SW at 725. On rehearing, a new majority recanted in part, and it concluded that “an income tax is neither a property tax nor a tax on occupations of common right, and that such a tax is not inhibited by the provisions of [the Arkansas constitution].” *Id.*, 167 Ark and 586; 271 SW at 730. However, it noted that an occupation tax was distinct from an income tax, because an occupation tax was a specific tax on the right to pursue a particular occupation irrespective of the income

Appendix G

a “right to assistance of counsel and that’s anyone of your choice and that could be a bean picker that’s learned at the law.” The trial court correctly informed Martin that he was wrong. The trial court held Martin in contempt, ordered him immediately arrested, and ordered him to pay \$7,500.00. The trial court nevertheless advised Martin that he had a right to a hearing.⁵

derived from that occupation, and the Arkansas constitution still prohibited taxes upon pursuits or occupations that are “matters of common right.” *Id.*, 167 Ark at 594-595; 271 SW at 733. Nowhere in the opinion is there any mention of attorneys or lawyers or the practice of law, and the only occupations specifically mentioned at issue were the manager of an insurance company, a landlord, a locomotive engineer, and a business merchant. *Id.*, 167 Ark at 561; 271 SW at 721. Nevertheless, we are aware that some misguided individuals cite *Sims* for the erroneous claim that persons who are not licensed to practice law are nevertheless entitled to represent others—a proposition not found in *Sims*. The context of *Sims* suggests that any such proposition would be nonsensical: *Sims* was fundamentally a taxation case, and even if there was some kind of “privilege of common right” to engage in the practice of law as an occupation, that would have no impact on whether that occupation may be otherwise regulated or conditioned upon licensure. See *Engel v O’Malley*, 219 U.S. 128, 137; 31 S.Ct. 190; 55 L.Ed. 128 (1911). Finally, as an Arkansas case, *Sims* has no precedential value outside of Arkansas and is not binding on Michigan courts.

5. Later that day, the trial court entered a judgment of contempt against Martin for the unlawful practice of law without a license, stating that he must serve the full 93-day jail term and pay \$7,500. At the ensuing hearing regarding Martin’s contempt, the trial court was respectful and considerate despite its entirely-warranted ire. Ultimately, Martin was released from jail after 35 days and ordered to pay a mere \$167.81, partly on the basis of his inability to pay the entire fine, in exchange for his acknowledgement that he had improperly held himself out as an

Appendix G

Following Martin's arrest, Ms. Pavlos-Hackney attempted to address the court, saying "May I request to have the –," at which point the trial court cut her off, saying "I will address you. If you would like to go out of order, we'll start this 93 days from now." Following MDARD's attorney's appearance, the following exchange then occurred:⁶

The Court. Ma'am, please raise your right hand. Do you swear or affirm the testimony you're about to provide will be the truth –

Ms. Pavlos-Hackney. I would like to call –

The Court. – the whole truth and nothing but the truth under penalty of perjury?

Ms. Pavlos-Hackney. I would like to call –

The Court. Ma'am, ma'am, stop. I know you want to control this room, but this isn't Burger King. When the sign changes to Burger King, you can have it your way. Right now this is my courtroom, and you will answer my questions.

attorney and a promise that he would never again try to practice law in Michigan or try to represent people in court. The trial court graciously took Martin at his word.

6. As will be discussed below, the contemnors challenge the accuracy of the transcript from this hearing. We are referring to the amended version of the transcript.

Appendix G

Ms. Pavlos-Hackney. Under my 5th –

The Court. Ma’am, stop. Do you promise to tell the truth, the whole truth and nothing but the truth under penalty of perjury? Yes or no. Are you going to tell the truth?

All right, I’ll take that as silence. I understand her attorney is on here. Where is her attorney?

Ms. Pavlos-Hackney. He’s in the jail back room.

The Court. Again, say anything again without telling me you’re going to tell the truth, and I will hold you in contempt of court for 93 days. Now contempt carries with it 93 days and/or \$7,500. You will not act disrespectful in this Court. Do you understand, ma’am?

You certainly may remain silent. Where is your attorney?

Mr. Baker. Your Honor, I’m on up here.⁷

The Court. Do we have the attorney on Zoom? Sir?

7. “Up here” appears to be a reference to the fact that Baker appeared by Zoom, and the display screen for Zoom participants was mounted on a wall behind and above Ms. Pavlos-Hackney. We note that Baker *is* an attorney, and following his involvement as Ms. Pavlos-Hackney’s legal counsel, the proceedings became more reasonable and orderly.

Appendix G

Mr. Baker. We do, Your Honor. Yes.

The Court. Okay. Please state and spell your name for the record just so we know because you're on Zoom.

Mr. Baker. Robert Baker. *The Court.* Sir.

Mr. Baker. Ah, B – B-A-K-E-R, P-57964.

The Court. All right. Thank you.

So your client has elected to not be able to make a statement because she's not taking the oath. Do you wish to proceed or would you like to speak with her before we proceed?

Attorney Baker requested five minutes, which the trial court granted. The court went off the record for 25 minutes.

When the hearing resumed, the trial court confirmed that it had received Baker's appearance, and it also seemingly accepted Baker's explanation that Ms. Pavlos-Hackney did not previously understand the process and had been disconcerted. The trial court also noted for the record that two attorneys were present to serve as backup or advisory counsel, "because we were not sure that Defendant was going to have counsel." The trial court placed Ms. Pavlos-Hackney under oath, and Ms.

Appendix G

Pavlos-Hackney stated that she had enough time to speak with her attorney. The hearing then proceeded as follows:

The Court. All right. So I have a Bench Warrant here, and it states, as I alluded to earlier but you hadn't been sworn so I'm going to reread it, Judge Stokes,⁸ who you've been in front of who is actually is [*sic*] assigned to this case, I'm filling in because she is in judicial training and not available to be here today, she did sign this Bench Warrant on March 4th, 2021, and she asked that a Bench Warrant be issued and Ms. Marlena Pavlos-Hackney be held in contempt for the following reasons:

"Failing to abide by this Court's preliminary injunction. Ms. Marlena Pavlos-Hackney, shall be incarcerated until such time as she abides by this Court's Order."

I want to remind you, I do have it here, on March 4th, Judge Stokes signed an order, and it "prohibited Marlena's Bistro and Pizzeria from operating a food service establishment or selling, distributing or advertising food or beverage."

And she ordered that "You be held in Contempt of the February 25, 2021 Temporary Restraining

8. Judge Wanda Stokes was assigned to the case, but this hearing was held before Judge Rosemarie Aquilina.

Appendix G

Order and that you pay \$7,500 because of that contempt.”

She also ordered that the “February 25, 2021 Temporary Restraining Order is converted to a Preliminary Injunction which remains in effect and that Marlana’s Bistro and Pizzeria is prohibited from selling, distributing or advertising food or beverages until further order of this Court.”

Further, that “Marlena Pavlos-Hackney, as owner of Zante, Inc., doing business as Marlana’s Bistro and Pizzeria was properly served with notice of Plaintiff MDARD’s Summary Suspension Order, this Court’s February 25, 2021 Temporary Restraining Order and Plaintiff MDARD’s March 1st, 2021 Motion for Contempt.

She further ordered that if “Defendant Zante, Inc., doing business as Marlana’s Bistro and Pizzeria continues to operate a food establishment without a license, Marlana Pavlos-Hackney shall be arrested and incarcerated until such time as she complies with the Order of this Court.”

Do you understand what I just read? *Ms. Pavlos-Hackney*. I am aware. *The Court*. Counsel, are you waiving further arraignment?

Appendix G

Mr. Baker. I am, Your Honor. *The Court.* Are we proceeding with a plea or the [sic] with a hearing?

Mr. Baker. I would like time, Your Honor. I just got on this case a little while ago. I'd like to meet with my client properly. She has agreed to comply with the Court Order until we have a contested hearing, if possible.

The Court. Response on behalf of the People? [sic]

Ms. Allison-Yokom [counsel for MDARD]. Thank you, Your Honor. As of this morning, it is our – based on information and belief of the Department, Marlena's continues to be open and serving customers and even after the point that she was arrested today. So we do have concerns that there would be continued noncompliance. There has been continued noncompliance now for several months. The summary suspension was effective January 20th, 2021. Today is March 18th(sic). At no point during that time has she complied.

The Court. I do have attached to what the People [sic] filed, an affidavit of support as well as a number of different pictures that do indicate that she has been operational.

Appendix G

So, sir, your client is entitled to a hearing. However, I am holding her at this time in contempt pending a hearing. She is going to be in lockup for 93 days and/or \$7,500 [*sic*] and closing of the establishment. So once she closes her establishment, which will be checked on frequently by the Attorney General, and she pays \$7,500, she can be released from jail. You can then prepare whatever it is you want for a hearing, for appeal, for what have you, but right now she is – based on the documentation that I have, she has violated the Orders of Judge Stokes, clearly violated them, and she has put the community at risk. We are in the middle of a pandemic. She's not followed the Orders of the Court which is a valid Court Order. There is nothing here and no challenge to it having not been valid. It's not been filed as a Motion for Reconsideration or any other tool that we have in the system where you can say it was an invalid Order. So until it's removed, it's valid.

I've looked at the documentation. I think Judge Stokes more than was patient and followed all of the steps, and I do find by clear and convincing evidence that she is in violation and the violation, by clear and convincing – I think there is some debate, pursuant to the case law, whether it's preponderance or clear and convincing. But I have to say for this record I am clearly convinced that right now, today, this

Appendix G

has remained open, and she has no intention of complying with the law.

The valid Court Order was meant to compel your client, you, ma'am, to follow the law and partner with society to protect yourself, to protect others, to protect the community, to protect those persons who work in your restaurant. We are in the midst of a pandemic. You have selfishly not followed the Orders. You've not followed them for your own financial gain and apparently for the publicity that comes with this.

* * *

We do not violate the law. I have no reason to believe that you are in compliance in any way, shape or form. And until that's proven at a hearing, you will be behind bars. You can assist your attorney after you close your restaurant and you pay the \$7,500.

Should the restaurant open up again, there will be another Bench warrant issued immediately, another pickup order, 93 days and \$7,500. I don't know how long you want to do this, ma'am, but we can keep doing it all year long. You must abide by the law.

Being a good citizen means that you act in accordance with the rights, duties, privileges

Appendix G

and constitution that we all follow as American citizens. You have chosen to unilaterally violate those.

I'm continuing the Contempt Order. Counsel, you can certainly prepare with your client after she is released from jail, whether that be in 93 days or after she pays and closes the restaurant.

Baker then asked the trial court what would constitute adequate proof that the restaurant was closed, and the trial court explained that "As soon as the Attorney General is satisfied, the Court will be satisfied." At the conclusion of the hearing, the trial court released the attorneys present to be standby counsel, but noted that they would be reappointed if necessary because "I think clearly she needs counsel at every stage."

The trial court entered a judgment of contempt against "Zante, Inc / RA: Marlana Kartsch Pavlos / DBA Marlenas [*sic*] Bistro and Pizzeria" for failing to comply with the March 4, 2021, order. The latter contempt judgment specified that "DF MAY BE RELEASED EARLY UPON FULL PAYMENT OF \$15000.00 AND UPON VERIFICATION of restaurant closure [*sic*, handwritten] AND FURTHER ORDER OF THE COURT." This judgment of contempt had a check-mark indicating that it was a civil contempt. A few days later, the originally assigned judge also entered an order holding that Marlana's was in contempt of the March 4, 2021, order, requiring Marlana's to pay \$7,500 for that contempt and \$7,500 for the original contempt, and ordering

Appendix G

that Ms. Pavlos-Hackney was to remain incarcerated until it was proved that Marlana's was in compliance. Contemporaneously, the trial court entered another order holding that the entire \$15,000 had been paid, and it had been determined that Marlana's was closed, so the contempt was purged and Ms. Pavlos-Hackney was to be released from confinement.

The contemnors then moved for relief from judgment, seeking to set aside the contempts entered following the March 19, 2021, hearing and for a refund of the \$15,000. Their arguments are difficult to follow, but they generally alleged that the trial judge was abusive and violated the contemnors' constitutional rights, that the transcript from the hearing was erroneous for no specified reason, that defense counsel had been denied access to recordings of the hearing, that the trial court lacked personal jurisdiction over Ms. Pavlos-Hackney, and that the \$15,000 sanction exceeded the statutory limit of \$7,500. The contemnors separately filed a motion seeking access to recordings of the March 19, 2021, hearing, citing YouTube videos demonstrating three verifiable transcription errors. They did not identify any other errors and instead argued generally that they had a right to a correct copy of the record. They sought access to recordings of the hearing and to correct the transcript. Two of the identified errors were in fact corrected in an amended transcript filed with the trial court shortly after the contemnors' motions. The other alleged error is that when the trial court asked "where is her attorney," Ms. Pavlos-Hackney supposedly identified attorney Baker by name instead of saying "he's in the back jail room."

Appendix G

The trial court agreed that any errors in the transcript should be corrected, but that the contemnors would need to identify those errors with specificity. Regarding access to an electronic recording of the hearing, the trial court pointed out that prior to the pandemic, hearings were not necessarily electronically recorded at all. Furthermore, the court recorder was a shorthand recorder who “transcribes from what she hears during” a hearing and then “operates from a written transcript; not from a video[,] [s]o she’s not going back after the hearing and reviewing the video and then transcribing.” Therefore, the amended transcript did not mean the court recorder had access to an electronic recording. Further, “before we even had the pandemic, we were transcribing hearings, you know, all day long, all week long, and they were accurate.” Nevertheless, the trial court granted counsel time to identify specific substantive errors. Ultimately, the contemnors identified 37 errors that had been corrected in the amended transcript, and they claimed that “four⁹ major errors remain[ed] uncorrected.” The trial court asked how the contemnors had been prejudiced. Counsel’s response was somewhat incoherent, but he argued that Ms. Pavlos-Hackney did not have a meaningful opportunity to prepare and mount a defense, and the contempt order was implemented without a hearing. The contemnors further argued that the fine should be refunded if the contempt had been civil, and they would have been entitled to greater protections if the contempt had been criminal.

9. We can only find three errors that the contemnors actually identified, apparently consisting of efforts to invoke the 5th or 6th Amendments and to identify attorney Baker.

Appendix G

In a thorough bench ruling, the trial court denied the contemnors' request for access to any electronic recordings the court might have of the March 19, 2021, hearing. The trial court had a local administrative order that specifically denied access to recordings. Furthermore, the trial court explained that transcripts are presumed to be accurate, and a party challenging that accuracy was required to identify any inaccuracies with specificity and explain how the inaccuracy was prejudicial. It explained that minor inaccuracies that were readily apparent from context were insufficient. The trial court also explained that most of the corrections to the amended transcript were typographical errors, and it was normal to "clean up the transcript afterwards because they're taking shorthand during the proceedings." The court noted that to the extent Ms. Pavlos-Hackney and the trial judge were speaking at the same time, it was Ms. Pavlos-Hackney's own fault that her words were lost, because the reporter would focus on the primary speaker. Finally, the trial court concluded that counsel had still not precisely identified the four allegedly outstanding major errors, although one of them had clearly been corrected. In any event, no showing had been made that any inaccuracies affected the contemnors' rights, as would be required by MCR 2.611(A)(1)(a), so the motion for access to video recordings or further changes to the transcript was denied.

Regarding the motion for relief from judgment, the trial court emphasized that the merits of suspending the food establishment license for Marlana's was not before it; the issue was the violation of an order to cease operations. Regarding personal jurisdiction, the key

Appendix G

decisionmaker of a company may be held personally liable for the contempt of the company, irrespective of whether the decisionmaker was a party to the litigation or named in an order. Therefore, Ms. Pavlos-Hackney was subject to contempt sanctions for violations by Marlana's of a court order. The trial court found it clear that Ms. Pavlos-Hackney was aware of the orders, and she knowingly and willfully refused to comply with them, even announcing publicly that she would refuse to comply; "contempt is a consequence . . . plain and simple." Baker could have objected that he was not able to defend his clients, but he made no such objection and even affirmed that he had enough time to talk to Ms. Pavlos-Hackney. The substitute trial judge had clearly been concerned about ensuring that Ms. Pavlos-Hackney had legal representation, and it had not engaged in any improper questioning of Ms. Pavlos-Hackney. Furthermore, Ms. Pavlos-Hackney remained entitled to a hearing regarding the violations of the court orders. Finally, the contemnors had failed to clearly specify any alleged due process violations, and for the most part their "very generalized and conclusory" objections did not provide a basis for granting the motion.

The trial court went on to clarify the amount of the fine, explaining that \$7,500 was imposed for the initial noncompliance with the court's order, and another \$7,500 was imposed because Marlana's was still not in compliance on the date of the hearing: until Marlana's resolved the licensure issue, operating the restaurant was a violation of the court's order and punishable by contempt. The trial court also noted that counsel had made an argument about the contempt order being inappropriate because of how

Appendix G

it was signed and filed, but if the court had followed “the 7-Day Rule,” Ms. Pavlos-Hackney would have had to sit in jail for seven days, whereas she was actually released much sooner. The trial court therefore denied the motion for relief from judgment, other than preserving the right of Marlana’s and Ms. Pavlos-Hackney to request a hearing. The contemnors filed a difficult to follow, although largely repetitive, motion for reconsideration, which the trial court denied. The underlying litigation was ultimately resolved by stipulation, and the contemnors never did request a hearing regarding their contempts. This appeal followed.

III. STANDARD OF REVIEW

This Court reviews “for abuse of discretion a trial court’s decision to hold a party or individual in contempt.” *In re Contempt of Auto Club Ins Ass’n*, 243 Mich.App. 697, 714; 624 N.W.2d 443 (2000). In both criminal and civil proceedings, the default abuse of discretion standard recognizes that there may not be a single correct outcome, and if the trial court selects a “reasonable and principled outcome,” this Court must “defer to the trial court’s judgment.” *Maldonado v Ford Motor Co*, 476 Mich. 372, 388; 719 N.W.2d 809 (2006) (internal quotations omitted). “A trial court’s findings in a contempt proceeding are reviewed for clear error and must be affirmed on appeal if there is competent evidence to support them.” *In re Contempt of Henry*, 282 Mich.App. 656, 668, 765 N.W.2d 44 (2009). This Court “may not weigh the evidence or the credibility of the witnesses” and may find clear error only if it “is left with the definite and firm conviction that a mistake was made.” *Id.* at 668-669. “Whether a party

Appendix G

has been afforded due process is a question of law, subject to review de novo.” *Id.* at 668. This Court also reviews de novo whether a contempt was civil or criminal, and it further reviews de novo the permissibility of the sanctions imposed. *In re Contempt of ACIA*, 243 Mich.App. at 714-716. It is irrelevant whether the trial court labels the contempt as civil or criminal. *Id.*

A criminal defendant’s ability to obtain a complete transcript is generally considered a matter of due process. *People v Craig*, __ Mich. App __, __; __ N.W.2d __ (2022) (Docket No. 357896), slip op at p 5 n 6. By implication, we think that a contemnor’s ability to obtain an accurate transcript should likewise be considered a matter of due process. The correct application of the correct standard of evidentiary proof is also a due process concern. *Varran v Granneman*, 312 Mich.App. 591, 609-610; 880 N.W.2d 242 (2015). “Whether due process has been afforded is a constitutional issue that is reviewed de novo.” *Elba Twp v Gratiot Co Drain Comm’r*, 493 Mich. 265, 277; 831 N.W.2d 204 (2013). Only structural due process errors mandate automatic reversal; otherwise, due process errors are reviewed for harmlessness. See *People v Toma*, 462 Mich. 281, 301 n 15; 613 N.W.2d 694 (2000). This Court reviews de novo whether the trial court has subjectmatter jurisdiction, *Atchison v Atchison*, 256 Mich.App. 531, 534; 664 N.W.2d 249 (2003), and whether the trial court has personal jurisdiction, *Oberlies v Searchmont Resort, Inc*, 246 Mich.App. 424, 426; 633 N.W.2d 408 (2001). This Court likewise reviews de novo the interpretation of venue statutes and whether venue was properly laid in a particular trial court. *People v McBurrows*, 504 Mich. 308, 312-313; 934 N.W.2d 748 (2019).

*Appendix G***IV. JURISDICTION**

The contemnors argue that the trial court lacked subject-matter jurisdiction. However, the argument the contemnors actually present has nothing to do with subject-matter jurisdiction. The contemnors' argument is that the underlying action should have been commenced in Allegan County instead of Ingham County. Subject-matter jurisdiction refers to the power of a particular court to try a kind of case, generally without regard to the specific details of a particular case then pending; in contrast, venue refers to a geographic location deemed most convenient in which to hold a proceeding. *Grebner v Oakland Co Clerk*, 220 Mich.App. 513, 516; 560 N.W.2d 351 (1996). Thus, the contemnors present only a venue argument. Unlike subject-matter jurisdiction, a defect in venue may be waived and constitutes at most a mistake in the exercise of jurisdiction, rather than a lack of jurisdiction. *Edwards v Meinberg*, 334 Mich. 355, 359; 54 N.W.2d 684 (1952). An objection to venue is waived if venue is not challenged by the time a defendant files an answer. MCR 2.221; MCL 600.1651; *Ovavez v Patrons' Mut Fire Ins Co*, 233 Mich. 305, 308; 206 N.W. 503 (1925); *Bursley v Fuksa*, 164 Mich.App. 772, 776-779; 417 N.W.2d 602 (1987). We have not found any hint in the lower court record that a timely venue challenge was ever made, so it is not grounds for relief on appeal.

Regarding personal jurisdiction, it was never disputed that the trial court had personal jurisdiction over Marlana's; in fact, Marlana's explicitly conceded that it was subject to the trial court's personal jurisdiction. No

Appendix G

challenge to the trial court's personal jurisdiction over Marlana's may now be made. See *Chapdelaine v Sochocki*, 247 Mich.App. 167, 177; 635 N.W.2d 339 (2001). Although "a corporation is a separate entity from its individual shareholders, officers, and directors . . . a corporation can only act through its officers and agents." *In re Moroun*, 295 Mich.App. 312, 332; 814 N.W.2d 319 (2012). Therefore,

[w]hen a court acquires jurisdiction over a corporation as a party, it obtains jurisdiction over the official conduct of the corporate officers so far as the conduct may be involved in the remedy against the corporation which the court is called upon to enforce. Courts will also disregard the separate existence of corporate entities when it is used to defeat public convenience, justify wrong, protect fraud, or defend crime. Because individuals who are officially responsible for the conduct of a corporation's affairs are required to obey a court order directed at the corporation, these same individuals may be sanctioned if they fail to take appropriate action within their power to ensure that the corporation complies with the court order. [*Id.* (quotation marks, citations, ellipses, and paragraph break omitted).]

The evidence unambiguously shows that Ms. Pavlos-Hackney was the owner of Marlana's and the person in charge of making decisions on behalf of Marlana's. Therefore, the trial court had personal jurisdiction to issue contempt orders against Ms. Pavlos-Hackney,

Appendix G

personally, on the basis of any failure by Marlena's to comply with the court's orders. The contempts against Ms. Pavlos-Hackney were not void for lack of jurisdiction.

V. DUE PROCESS FOR THE CONTEMPTS

The primary issue on appeal is whether the contemnors received all of the due process to which they were entitled when the trial court imposed the contempts. Although we conclude that the trial court erred in failing to specify that MDARD should be the recipient of the money sanctions, we conclude that the contemnors received all of the due process to which they would be entitled even if the contempts were criminal in nature.

A. CIVIL OR CRIMINAL CONTEMPTS

Contempt is a "willful act, omission, or statement that tends to impede the functioning of a court," and "the primary purpose of the contempt power is to preserve the effectiveness and sustain the power of the courts." *In re Contempt of ACIA*, 243 Mich.App. at 708 (quotation, footnotes, and ellipsis omitted). Persons are required to obey orders of the court, even if those orders are clearly wrong and even if those orders are later determined to have been invalid. *In re Contempt of Dudzinski*, 257 Mich. App. at 110-112. "[C]ourts have two different forms of the contempt power at their disposal," either for coercion or for punishment, each of which has its own set of procedural requirements. *In re Contempt of ACIA*, 243 Mich.App. at 711. Either form of contempt may result in the contemnor being imprisoned, so both forms of contempt entitles

Appendix G

the contemnor to some degree of due process; however, civil contempt requires fewer protections than criminal contempt. *Porter v Porter*, 285 Mich.App. 450, 456-457; 776 N.W.2d 377 (2009).

Civil contempt is generally imposed for the purpose of compelling the contemnor to comply with a court's order, and the contemnor has the ability to cure the contempt with that compliance. *In re Contempt of ACIA*, 243 Mich.App. at 711-712. Civil contempt may also serve the purpose of reimbursing a complainant who incurred costs because of the contempt; and, because it is considered avoidable and nonpunitive, civil contemnors are only entitled to "rudimentary" due process protections consisting of notice and an opportunity to present a defense. *In re Moroun*, 295 Mich.App. at 331-332. In civil contempt proceedings, "the party seeking enforcement of the court's order bears the burden of proving by a preponderance of the evidence that the order was violated." *Porter*, 285 Mich.App. at 457. The violation may be merely neglectful rather than necessarily willful. *In re Contempt of United Stationers Supply Co*, 239 Mich.App. 496, 501; 608 N.W.2d 105 (2000). Although civil contempt may entail imprisonment, the contemnor must be able to avoid or end the imprisonment by complying with the original order. *In re Moroun*, 295 Mich.App. at 336. "[A] civil contempt proceeding may have a punitive, as well as remedial effect," but any imprisonment must be conditional until the contemnor complies with an order rather than for a specified term. *In re Contempt of Dougherty*, 429 Mich. 81, 93-96; 413 N.W.2d 392 (1987).

Appendix G

In contrast, a criminal contempt serves to punish a contemnor for past misconduct, so it cannot be purged by any future conduct by the contemnor. *In re Contempt of ACIA*, 243 Mich.App. at 713. “[A] criminal contempt proceeding requires some, but not all, of the due process safeguards of an ordinary criminal trial.” *In re Contempt of Dougherty*, 429 Mich. at 91. In particular, a criminal contemnor is entitled to the presumption of innocence, protection from compelled self-incrimination, an adequate opportunity to prepare and present a defense, and a right to have the contempt proved beyond a reasonable doubt. *In re Contempt of ACIA*, 243 Mich.App. at 713- 714. In contrast with a civil contempt proceeding, “a willful disregard or disobedience of a court order must be clearly and unequivocally shown and must be proven beyond a reasonable doubt.” *DeGeorge v Warheit*, 276 Mich.App. 587, 592; 741 N.W.2d 384 (2007). “A defendant charged with contempt is entitled to be informed not only whether the contempt proceedings are civil or criminal, but also the specific offenses with which he or she is charged.” *Id.*

The contempts in this matter stated on their face that they were civil. However, this is not dispositive. *In re Contempt of ACIA*, 243 Mich.App. at 714-716. The contempts have some punitive effect insofar as the contemnors were not issued a refund upon determining that Marlana’s was truly closed. However, this is also not dispositive, especially because Ms. Pavlos-Hackney’s imprisonment was explicitly conditional rather than for a fixed length of time. *In re Contempt of Dougherty*, 429 Mich. at 93-96. The contemnors argue that the contempts were necessarily criminal because she was imprisoned

Appendix G

only after she pledged to close the restaurant, and her release was conditioned upon MDARD verifying that the restaurant was closed, thereby depriving her of the “keys to her cell.” The contemnors misapprehend the situation.

The first contempt order explicitly stated that Ms. Pavlos-Hackney would be fined immediately, arrested, and imprisoned until she complied with the court’s order. She did not comply, and was not actually imprisoned at that time, nor did she pay the fine at that time. The second contempt order merely continued the previous sanction. Ms. Pavlos-Hackney was undisputedly still operating her restaurant at the time she was arrested, as she in fact admitted on the record.¹⁰ She seemingly argues that she was in compliance with the court’s order at the time she was incarcerated after the March 19, 2021, hearing, because the hearing ended at 2:38 p.m., and she claimed the restaurant closed at 2:00 p.m. However, the trial court reasonably interpreted Ms. Pavlos-Hackney’s statement as explaining that the restaurant normally closed at 2:00 p.m., so its closure at its normal closing time was not evidence of compliance with the court’s order.

Before imposing coercive sanctions, trial courts must consider the probable efficacy of other possible sanctions, as well as the likely harm from continued disobedience. *In re Moroun*, 295 Mich.App. at 337. In light of Ms. Pavlos-Hackney’s extensive history of vowing to disobey the court’s orders, the trial court properly refused to

10. Ms. Pavlos-Hackney argues that her statement that the restaurant closed at 2:00 was taken out of context. However, in making that argument, she relies on facts not in the record.

Appendix G

accept Ms. Pavlos-Hackney's promise not to reopen. It was neither clearly erroneous nor an abuse of discretion for the trial court to find that Ms. Pavlos-Hackney could not be considered in compliance with the court's orders until it was conclusively shown that the restaurant would not reopen-and Ms. Pavlos-Hackney's own history of vowing to continue defying orders made her promise not to reopen worthless under the circumstances. We reject the contemnors' argument that the "keys to her cell" were handed over to MDARD merely because MDARD was charged with confirming that Marlena's had not reopened: the decision whether to reopen remained vested in Ms. Pavlos-Hackney. Furthermore, at least the first \$7,500 fine had already been imposed in a clear effort to coerce Ms. Pavlos-Hackney into closing the restaurant; unlike incarceration, we are not persuaded that it is significant whether she actually *paid* the first fine when it was imposed. Under the circumstances, again keeping in mind Ms. Pavlos-Hackney's history of vowing to continue defying orders, the second fine also appears intended to be coercive. Therefore, we conclude that the contempts appear to have been civil in nature, as they stated on their faces and as *everyone* present clearly believed at the time.¹¹

11. We therefore need not consider whether the contemnors received the due process to which she would be entitled for a criminal contempt. We note briefly, however, that there is absolutely no doubt the first contempt proceeding was civil, but to the extent there was any doubt about the second, the trial court's citation to the clear-and-convincing evidence standard, rather than the beyond-a-reasonable-doubt standard, would have been erroneous. Instructing a *jury* in a criminal trial as to an improperly

*Appendix G***B. ADEQUACY OF DUE PROCESS**

Having concluded that the contempts were civil in nature, the contemnors were nevertheless entitled to “rudimentary” due process, which, as noted, consists of notice and an opportunity to present a defense. *In re Moroun*, 295 Mich.App. at 331-332. Under that standard, the contemnors were undisputedly afforded adequate due process.

Notably, the fact that Ms. Pavlos-Hackney was not *actually* prepared to present a defense does not establish a due process violation. *DeGeorge*, 276 Mich.App. at 593-594. Ms. Pavlos-Hackney was amply aware of the nature of the charges against her: that she was operating Marlena’s contrary to orders to cease operation. She was aware of the nature of the charges long before any of the hearings. She had ample opportunity to retain

low evidentiary standard is considered a structural due process error. *Sullivan v Louisiana*, 508 U.S. 275, 276-282; 113 S.Ct. 2078; 124 L.Ed.2d 182 (1993). It is somewhat less obvious to us whether a trial judge’s citation to an improperly low standard at a criminal contempt proceeding where the evidence is overwhelming could be reviewed for harmlessness. Trial judges are presumed to know the law, *People v Lanzo Constr Co*, 272 Mich.App. 470, 484; 726 N.W.2d 746 (2006), and the typical remedy where a trial court applies an incorrect legal standard is to remand for articulation of the correct standard, *In re Portus*, 325 Mich.App. 374, 397; 926 N.W.2d 33 (2018). Even if we found the contempts to have been criminal in nature, which we do not, we believe the proper remedy would not be to reverse the contempts or order the return the money, but to remand for the kind of hearing to which the trial court repeatedly told Ms. Pavlos-Hackney she was entitled.

Appendix G

counsel, as shown by the fact that she successfully retained Martin, who was not even from Michigan. She was made aware at the administrative hearing—well before commencement of this action—that Martin was not authorized to practice law, and she had adequate time to secure real counsel in the meantime. As of the date of either the March 4 or March 19, 2021, hearings, Ms. Pavlos-Hackney was fully aware of the nature of the charges, she had ample time to prepare a defense and retain an attorney, and she simply chose instead to retain Martin and double-down on public defiance. Her arguments that she had little time to consult with Baker are nothing but a “red herring,” especially because on the record, Baker affirmatively stated that he did have enough time to speak with his client. As the trial court observed, Baker could have objected, but he did not. Due process guarantees only an opportunity, and it is Ms. Pavlos-Hackney’s own fault if she intentionally failed to avail herself of that opportunity.

We also question what legitimate defense the contemnors could possibly have raised. The contemnors would have needed to show that they were not in violation of the court’s order, that it was impossible to comply with the court’s order, or that a violation of the court’s order had not been adequately established by the requisite quantum of proof. Even on appeal, Ms. Pavlos-Hackney never argues that she was in compliance with the court’s order, and the evidence overwhelmingly shows that she was willfully and flagrantly violating the court’s order all the way up to the point at which she was finally incarcerated. Even on appeal, the contemnors do not articulate what

Appendix G

other kind of legitimate defense they might have raised given the opportunity to do so. Indeed, it appears that they did raise the only defense imaginable: immediate payment of the fine and a promise that the restaurant would not reopen the next day. Considering the nature of the contemptuous conduct and the surrounding context, it appears that the contemnors had adequate time and opportunity under the circumstances to prepare what defense they could.

Although the March 19, 2021, hearing was labeled an “arraignment,” it is simply not possible for Ms. Pavlos-Hackney to have been ignorant of why she had been arrested and brought to court. The contemnors’ argument that the case was not formally called is similarly meritless: according to the videos the contemnors provided, Ms. Pavlos-Hackney was already seated at the table marked “defendant.” There was no plausible confusion about the nature or identity of the case being heard before the trial court. Despite repeated entreaties from the trial court, Ms. Pavlos-Hackney has utterly failed to explain how these issues had any possible prejudicial effect upon her. The record does not show that Ms. Pavlos-Hackney was compelled to testify against herself; indeed, the trial court repeatedly emphasized that she had a right to remain silent.¹² The evidence before the trial court was more than adequate for each trial judge to independently conclude by a preponderance

12. The substitute trial judge only chastised Ms. Pavlos-Hackney for speaking out of turn and for her contemptuous conduct itself.

Appendix G

of the evidence that the contemnors violated orders of the court. *Porter*, 285 Mich.App. at 457.¹³

C. PROPRIETY OF FINES

Having concluded that the contemnors received in full the due process to which they were entitled, we finally address the nature of the fines imposed by the trial court.

The contemnors argue that a \$7,500 fine, let alone two such fines, would be an insurmountable hardship to many people. We agree. However, we note that when the trial court held a hearing regarding Martin's contempt, it reduced his fine on the basis of Martin's lack of actual ability to pay. Had Ms. Pavlos-Hackney ever requested a hearing, we fully trust the trial court would have similarly determined her ability to pay. Furthermore, in light of the courtesy and respect the trial court showed to Martin at his hearing, we have no doubt the trial court would have treated Ms. Pavlos-Hackney with similar courtesy and respect, especially as represented by an attorney. In any event, we find this argument disingenuous under the circumstances. Not only did the contemnors never seek any kind of hearing, the contemnors also tendered

13. Indeed, although we need not reach the question, it appears improbable that the trial judges would have erred had they found that the violations were willful and had been proven beyond a reasonable doubt.

Appendix G

the full amount of the fine immediately. Accordingly, any argument about their ability to pay the fine is moot.¹⁴

Nevertheless, fines for civil contempts should, unless they are intended to compensate a complainant, be avoidable by the contemnor by complying with the court's order. See *Hicks on Behalf of Feiock v Feiock*, 485 U.S. 624, 631-632; 108 S.Ct. 1423; 99 L.Ed.2d 721 (1988). As noted, we find no particular significance to the date upon which the fine was actually paid.

Therefore, the first fine of \$7,500 is clearly not refundable, given the contemnors' subsequent willful and open continued defiance of the trial court's order.

The second \$7,500 fine is a different matter. As discussed, the trial court unambiguously had no reason to trust Ms. Pavlos-Hackney. Therefore, it was certainly not erroneous for the trial court to incarcerate Ms. Pavlos-Hackney until the trial court could be certain Marlena's would not be reopened. Furthermore, we do not think it was improper for the trial court to have imposed the second fine as part of its efforts to compel the contemnors

14. We agree with our dissenting colleague that financial liquidity alone is not dispositive. However, we think it is important to consider the context: the contemnors *never even tried* to obtain a hearing regarding either of the contempts, even though they were invited to do so and clearly could have done so. By paying the fines and declining to raise an ability-to-pay challenge below, we doubt the "legal equity" (as our dissenting colleague puts it) of considering, at least in the context of this particular case, how much of a hardship the contemnors really suffered.

Appendix G

to comply with the court's orders. Nevertheless, it appears that Marlana's *was*, in fact, reasonably promptly closed thereafter. The trial court could not have known, at the time it imposed the second fine, that the contemnors would finally choose to comply. However, because the contemnors *did* finally choose to comply, it is unclear what more they could have done to avoid the second fine. Put another way, a civil contempt fine should generally be conditional or compensatory, but it is not clear what condition the contemnors failed to satisfy and the trial court did not direct any portion of the fine to be paid to MDARD. Rather, the ultimate effect of the second fine is more criminal than civil in nature, even if that was not the trial court's intent.

We conclude that the second fine must be remanded for the trial court to refashion it to be civil in nature, as applied under the circumstances.¹⁵ We conclude that in so

15. We respectfully do not understand why our dissenting colleague concludes that it is "blinkered" to individually analyze the propriety of the two distinct contempts. The first contempt was unambiguously intended to be coercive, and the contemnors nevertheless continued willfully defying the trial court's orders. Therefore, the first contempt fine was not compensatory in nature, and as such, there would be no need to consider MDARD's expenditures regarding that fine. In contrast, the contemnors reasonably promptly chose to comply with the trial court's orders following the second contempt, calling into question the extent to which the effect of the second fine ultimately proved more punitive than coercive. Therefore, regarding the *second* fine, it is necessary to consider how much of it should be reimbursed for the contemnors' compliance and whether some portion of it would still be properly imposed for compensatory purposes. We do not think it is "blinkered" to consider context.

Appendix G

doing, the trial court must choose one of three options: (1) determine whether MDARD is entitled to reimbursement; (2) determine whether the contemnors sufficiently complied with the trial court's orders to be returned the second fine, in whole or in part; or (3) some combination of (1) and (2). The first option would, of course, require a factual determination of MDARD's expenditures as part of these enforcement proceedings.

VI. ACCESS TO RECORDINGS AND ACCURACY OF TRANSCRIPT

Ms. Pavlos-Hackney generally contends that an accurate transcript is necessary to preserve her appellate and other postjudgment rights. All other things being equal, this is broadly true: "[w]here a defendant is able to make a colorable showing that inaccuracies in transcription have adversely affected the ability to secure postconviction relief, and such matters have seasonably been brought to the trial court's attention, the defendant is entitled to a remedy." *People v Abdella*, 200 Mich.App. 473, 475-476; 505 N.W.2d 18 (1993). Nevertheless, transcripts are presumed to be accurate. *Id.* at 475. To obtain relief on the ground that a transcript is inaccurate, a person must:

- (1) seasonably seek relief; (2) assert with specificity the alleged inaccuracy; (3) provide some independent corroboration of the asserted inaccuracy; (4) describe how the claimed inaccuracy in transcription has adversely affected the ability to secure postconviction relief pursuant to subchapters 7.200 and

Appendix G

7.300 of our court rules. [*Id.* at 476 (footnotes omitted).]

Furthermore, inaccuracies in the record are irrelevant “if the surviving record is sufficient to allow evaluation of the issues on appeal,” and “[w]hether the record is sufficient depends upon the question asked of it.” *Elazier v Detroit Non-Profit Housing Corp*, 158 Mich.App. 247, 249-250; 404 N.W.2d 233 (1987).

We need not address the first three elements, because the contemnors simply fail to articulate how they have been prejudiced. The contemnors only identify two remaining alleged errors, both of which pertain to Ms. Pavlos-Hackney’s supposed efforts to identify Baker before Baker identified himself. Presuming, without deciding, that those alleged errors are real, it is not apparent how the contemnors were prejudiced by any such error: either way, the trial court was uninterested in what Ms. Pavlos-Hackney had to say until her attorney had been identified, and Baker did identify himself moments later.

Otherwise, the contemnors only provide vague concerns that their appellate rights might be impeded or that other errors might still be present in the transcript. Regarding the former, the contemnors’ failure to articulate how they have been deprived of post-appellate relief, especially in light of our actual consideration of the matter, precludes further relief. See *Mitcham v City of Detroit*, 355 Mich. 182, 203; 94 N.W.2d 388 (1959). Regarding the latter, the transcript is presumed to be accurate, and if the contemnors or their attorney (who participated by Zoom

Appendix G

and could have recorded the hearing) believed any specific errors were present, they could corroborate those errors by providing affidavits of witnesses or by showing that the transcript as written makes no sense. See *Abdella*, 200 Mich.App. at 476 n 2. It is insufficient to make a bare assertion that there *might* be an error. See *Craig*, __ Mich.App. at __, slip op at p 7. In other words, the contemnors are not entitled to a “fishing expedition,” which is all the contemnors have articulated. As discussed, captioning the transcript as an “arraignment” is irrelevant. The contemnors argue that the amended transcript “lacked a proper or updated certification,” which is obviously disproved by simply looking at the certifications found at the ends of both the original and the amended transcripts. In short, the contemnors have not shown that any non-trivial inaccuracies existed or that there was any basis for granting them access to an electronic recording of the hearing, if such a recording even existed.

We remand for the trial court to refashion the second civil-contempt fine of \$7,500 consistent with this opinion. In all other respects, we affirm. We do not retain jurisdiction. Because neither party has prevailed in full, we direct that the parties shall bear their own costs on appeal. MCR 7.219(A).

SWARTZLE, P.J. (concurring in part and dissenting in part).

With respect, I cannot concur with the majority’s blinkered resolution of this appeal. Specifically, while I agree with the majority’s decision to remand the second

Appendix G

\$7,500 fine for further fact finding and deliberation by the trial court, I disagree with the majority's decision to narrow the considerations on remand with respect to the second fine, as well as with its outright refusal to remand any aspect of the first \$7,500 fine.

As I read the record below, there is no question that everyone-the Michigan Department of Agriculture and Rural Development (MDARD), appellants, and, most importantly, the trial court-operated on the understanding that the contempt proceedings were civil in nature, not criminal. Most critically, the trial court, in its written order, explicitly applied the preponderance-of-the-evidence standard to the proceedings. (A substitute judge applied, out of an abundance of caution, the clear-andconvincing standard during one of the hearings, but this is still a lower standard than that applied in criminal-contempt proceedings, i.e., beyond a reasonable doubt. See *In re Elliott*, 218 Mich.App. 196, 209; 554 N.W.2d 32 (1996).) By applying the preponderance-of-the-evidence standard, the trial court made clear that it intended to impose civil-contempt fines, not criminal ones.

Although it intended to impose civil-contempt fines, the trial court erred by not fashioning the fines in accordance with civil-contempt principles. Specifically, in a civil-contempt proceeding, a fine (as with jail time) is intended to compel compliance with a court order. See *Hicks on Behalf of Feiock v Feiock*, 485 U.S. 624, 631-632; 108 S.Ct. 1423; 99 L.Ed.2d 721 (1988). Importantly, to compel compliance, the civil fine must be avoidable in part or full if the person or entity held in contempt timely

Appendix G

complies with the court's order. *Id.* at 632. In addition to a compliance component, a civil-contempt fine can also serve the purpose of reimbursing a complainant who incurred costs because of the contempt. *Id.*; *In re Moroun*, 295 Mich.App. 312, 331; 814 N.W.2d 319 (2012). And, as the trial court did here with non-lawyer "assistance of counsel" Richard Martin, a trial court can also take into account any hardship that can be shown, and modify or lessen the fine in light of that hardship.

Given this, I agree with the majority that the matter of the second fine should be returned to the trial court, but I would not limit the remand only to the second fine and would instead remand both fines. The trial court should be permitted to consider, for example, whether MDARD is entitled to any reimbursement out of the first \$7,500 fine. As it stands under the majority's remand order, the trial court must retain the first \$7,500 fine without considering MDARD's expenses in bringing the action. The majority makes a "category mistake" when it concludes that, because the first contempt was "intended to be coercive," that contempt "was not compensatory in nature." Maj op at . A civil contempt can be *both* coercive (i.e., intended to make a party comply) *and* compensatory (i.e., intended to reimburse the other party for expenses incurred in pursuing the matter). Call this the coercion-compensation duality of civil contempt fines, if you will.

Moreover, compounding its already too-narrow remand order, the majority restricts the trial court on remand to considerations of reimbursement and compliance, but not hardship. The trial court should be

Appendix G

permitted to consider whether appellants face any undue hardship with respect to either or both fines, regardless of whether they could (as they did) obtain the funds at the time. One can obtain funds necessary to pay a fine and still face a hardship in being ordered to pay the fine-the former is a matter of financial liquidity, while the latter is a matter of legal equity. So, for example, whether one can obtain funds from a high-interest credit card or check-cashing store to pay a particular fine does not answer the question whether that fine would be a hardship. Fashioning the appropriate civil-contempt remedy in this case would require fact finding and careful deliberation by the trial court based on the totality of the facts and circumstances, not a narrow, artificial subset of those facts and circumstances as ordered by the majority on remand.

Accordingly, for these reasons, I concur only in Part IV (“JURISDICTION”) and Part VI (“ACCESS TO RECORDINGS AND ACCURACY OF TRANSCRIPT”), and I otherwise respectfully dissent from the rest of the majority’s opinion and remand order.

85a

**APPENDIX H — 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 H

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 Marlana'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 Marlana'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 Marlana'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, Marlana's continued to operate as a food service establishment. Marlana'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.

Appendix H

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.

Appendix H

11. On September 2, 2021, the Court signed a stipulated order modifying its March 4, 2021 Order to allow Marlina'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)(10 and I (2), Defendant's Motion for Summary Disposition and Motion to Dismiss et al, are hereby **DENIED**. However, Summary disposition is appropriately **GRANTED** in favor of MDARD pursuant to MCR 2.116(C)(10) 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.

89a

Appendix H

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

90a

Appendix H

PROOF OF SERVICE

I hereby certify 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

91a

**APPENDIX I — 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

* * *

Appendix I

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—

Appendix I

THE COURT: Well, but she could have—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—

Appendix I

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 not 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.

Appendix I

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.

Appendix I

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.

Appendix I

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.

Appendix I

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.

Appendix I

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.

Appendix I

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.

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.

Appendix I

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

Appendix I

MDARD brought the action before this Court to intervene to have Marlana's Bistro comply with the law.

THE COURT: And at the time that MDARD took their action, did Marlana's Bistro—excuse me. Zante, Inc d/b/a Marlana'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.

Appendix I

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

Appendix I

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.

Appendix I

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.

* * * *

106a

**APPENDIX J — 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

107a

Appendix J

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

Appendix J

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.

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.

Appendix J

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

Appendix J

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.

Appendix J

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.

Appendix J

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.

Appendix J

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.

Appendix J

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.

Appendix J

(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

Appendix J

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.

Appendix J

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 Marlana's Bistro and Pizzeria, operates a restaurant located at 909 Lincoln in Holland, Michigan, which is in Allegan County.
2. Marlana Pavlos Hackney is the sole owner and principal of Zante, Inc., which was incorporated in 2000 per Ms. Pavlos Hackney's testimony.

Appendix J

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

Appendix J

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

Appendix J

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.

Appendix J

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.

Appendix J

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].

Appendix J

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.

Appendix J

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].

Appendix J

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].

Appendix J

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

Appendix J

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

Appendix J

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

Appendix J

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].

Appendix J

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.

Appendix J

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.

Appendix J

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.

Appendix J

“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.

Appendix J

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

Appendix J

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 J***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

Appendix J

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

Appendix J

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.

139a

**APPENDIX K — ORDER OF THE SUPREME
COURT OF MICHIGAN, DATED JUNE 18, 2026**

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

SC: 169458 (49)
COA: 370227
Ingham CC: 21-000113-CZ

IN RE CONTEMPT OF
MARLENA PAVLOS-HACKNEY.

DEPARTMENT OF AGRICULTURE AND
RURAL DEVELOPMENT,

Plaintiff-Appellee,

v.

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

Defendant-Appellant,

and

MARLENA PAVLOS-HACKNEY,

Appellant.

June 18, 2026

140a

Appendix K

On order of the Court, the motion for reconsideration of this Court's April 10, 2026 order is considered, and it is DENIED, because we are not persuaded that reconsideration of our previous order is warranted. MCR 7.311(G).

I, Elizabeth Kingston-Miller, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 18, 2026 /s/ Elizabeth Kingston-Miller
Clerk

141a

**APPENDIX L — ORDER OF THE COURT OF
APPEALS OF MICHIGAN, DATED NOVEMBER 13, 2025**

COURT OF APPEALS OF MICHIGAN

No. 370227
LC No. 21-000113-CZ

IN RE CONTEMPT OF
MARLENA PAVLOS-HACKNEY

November 13, 2025

Michael J. Riordan, James Robert Redford Judges.

ORDER

RANDY J. WALLACE PRESIDING JUDGE.

The motion for reconsideration is DENIED.

142a

**APPENDIX M — 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

143a

Appendix M

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 N — EXCERPTS OF MOTION FOR
RECONSIDERATION OF THE SUPREME COURT FOR
THE STATE OF MICHIGAN, DATED APRIL 30, 2026**

IN THE SUPREME COURT
OF THE STATE OF MICHIGAN

SUPREME COURT NO. 169458
COA No. 370227
Judges Wallace, Riordan, & Redford
Ingham Co. Circuit Ct
No. 21-000113-CZ
Judge Wanda Stokes 30th Circuit Court

IN RE CONTEMPT OF PAVLOS-HACKNEY,

MICHIGAN DEPARTMENT OF AGRICULTURE
AND RURAL DEVELOPMENT,

Plaintiff-Appellee,

vs.

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

Defendant-Petitioner.

**DEFENDANT-PETITIONER'S MOTION FOR
RECONSIDERATION AND REMAND AND
AFFIDAVIT OF FACTS IN SUPPORT**

145a

Appendix N

ORAL ARGUMENT REQUESTED IF AUTHORIZED

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

SUBMITTED ON APRIL 30, 2026

BY:

Helen Brinkman (P 40233)
Attorney for Defendant-Appellant
P.O. Box 150494
Grand Rapids, Michigan 49515
616 862 9405
Helen.Brinkman@protonmail.com

Appellant respectfully submits this Court is bound, as a matter of law, to review the first case in American history to authorize a “waiver” of constitutional subject-matter jurisdiction – breaking from all universally held state and federal precedent to the contrary – and dating back to *Marbury v Madison*, 5 US 137 (1803), the case we were all required to master in Con Law 101.

This is a monumental alteration of constitutional law and statutory requirement to determine whether the civil contempt is founded on a “lawful” order. MCL 600.1701(g).

Appendix N

This historical break from foundational, procedural constitutional protocol is compounded by the application of a most novel, and disturbing, use of the law-of-the-case doctrine to require perpetuation of a clearly erroneous opinion on a constitutional question.

[Page 1]

It is hard to imagine a case more worthy of this Court's reconsideration under MCR 7.311(G).

Chief Justice John Marshall's contemplation sums up the gravamen of this issue and the necessity for this Court to address it, as is required under the law of subject-matter jurisdiction:

“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.”

“This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles

Appendix N

and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual.” *Marbury v Madison*, 5 US 137, 176-177 (1803). Emphasis added.

That is precisely the case before the Court. The failure to reconsider this case truly subverts the very foundation of Michigan’s Constitution. Without the mandate to the Courts to decide the clash between statute and constitution, completely flouted here, “the theory of our government is entirely void.” *Id.* This case logically and legally DEMANDS reconsideration.

[Page 2]

1. THE COURTS’ DUTY TO ADDRESS SUBJECT-MATTER JURISDICTION

Subject-matter jurisdiction is not a procedural nicety – it is a constitutional prerequisite to judicial action. It cannot be waived, forfeited or avoided, nor may it be subordinated to prudential doctrines such as law -of-the-case, as was done below. *Grupo v. Atlas Global*, 54. U.S. 567, at 576 (2004); *O’Connell v Dir of Elections*, 316 Mich.App. 91, 100; 891 NW2d 240 (2016); *Fox v Bd of Regents*, 375 Mich 238; 134 NW2d 146, 148 (1965) and *Marbury v Madison*, 5 US 137 (1803).

Appendix N

Michigan law is unequivocal: “[A]ll courts must upon challenge, or even *sua sponte*, confirm that subject-matter jurisdiction exists.” *Reed v. Yackell*, 473 Mich. 520; 703 N.W.2d 1, 12 (2005); *Fox*, 375 Mich. at 242-243; *In re Estate of Fraser*, 288 Mich. 392, 394; 285 N.W. 1, 1 (1939).

“[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. . . .’ ‘All courts ‘must upon challenge, or even sua sponte, confirm that subject-matter jurisdiction exists.’” *O’Connell* 316 Mich.App. at 100, *emphasis added, internal citations omitted*.

“All courts must” especially includes this Supreme Court, the guardian against the breach. Even at the “highest appellate instance” this Court has a constitutional duty to review a challenge to subject-matter jurisdiction where the lower Courts refused to do so. *Grupo*, 541 U.S. at 576.

This Court’s duty is certain; it “must entertain” the question, even at this late-stage of the proceedings. *Grupo*, 541 US at 576.

““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.” *Id.*

The only exception to reconsideration is where the constitutional issue has been previously determined. *Reed*,

Appendix N

703 NW2d at 12. But here, no court, to date, has deigned to address the issue; they either declared it “waived,” – which ***is an absolute***, legal impossibility – or utterly ignored it. (See Part 2, below and the Affidavit of Facts in Support of Reconsideration, attached hereto as Exhibit IV).

Not one of the Courts below felt obliged to adjudicate this fundamental issue (Affidavit of Facts, Exhibit IV). That should concern this Court.

“Jurisdiction of the subject matter of a judicial proceeding is an absolute requirement. It cannot be conferred by consent, by conduct or by waiver” or “by estoppel.” Subject-matter jurisdiction is so critical to a court’s authority that a court has an independent obligation to take notice when it lacks such jurisdiction, even when the parties do not raise the issue.” *In re AMB*, 248 Mich App 144 ; 640 N.W.2d 262, 276 (2002). *Emphasis added*.

Because this Court must oblige its own “absolute requirement” to address this issue, an order granting reconsideration and immediately remanding the constitutional question to the lower Court permits efficient resolution: this Court’s duty is met and its docket is cleared, and the lower Court is forced to attend to *their own duty* in this regard.

The issue should never reach this level without review of the jurisdictional issue in the first instance.

Appendix N

2. THERE IS NO “WAIVER” OF SUBJECT-MATTER JURISDICTION

The next, and equally palpable error, under MCR 2.119(F)(3), is the finding, below, that Appellant “waived” her right to challenge to subject-matter jurisdiction by failing to exhaust administrative appellate remedies. *MDARD v Zante*, 348 MichApp. 293; 18 N.W.3d 62 (2023) (Exhibit I, attached hereto) and *In re Contempt of Pavlos-Hackney II*, __ Mich App __ (COA No. 370227, rel’d 10/6/2025) (Attached as Exhibit II, hereto). Leave denied, without reconsideration, ratifies a legal fiction; there is no supporting authority that a party can “waive” subject-matter jurisdiction.

“Challenges to subject-matter jurisdiction cannot be waived...” *O’Connell, supra*, 316 MichApp.at 100 and *Fox, supra*; 134 N.W.2d at 148.

“...even initially at the highest appellate instance.” *Grupo*, at 541 U.S. at 576, quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

“..the parties cannot waive lack of [subject-matter] jurisdiction by express consent, or by conduct, or even by estoppel. *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 217 (5th Cir. 1998). *Emphasis added*.

Challenges to Subject-matter jurisdiction can even be raised on collateral attack; “[I]ts proceedings may be

Appendix N

questioned collaterally as well as directly. They are of no more value than as though they did not exist.” *Jackson City Bank v Fredrick*, 271 Mich 538, 544; 260 NW 908 (1938).

Simply put: there is no “waiver” of constitutional subject-matter jurisdiction.

Running the query through the Supreme Court’s Learned Hand AI, will not show a single case that supports that “waiver,” EXCEPT these casualties of logic that are prior decisions of *this* case, *i.e.*, *Contempt II*, *slip op 5* and *Zante*, *at slip op 3*, attached as Exhibits II, & III.).

It is shameful – a stain on the Michigan Bench at large – that this case reached this level of review without one Court recognizing its sacrosanct duty to adjudicate the challenge to subject-matter jurisdiction in this case. They either utterly ignored the defense, or erroneously declared it “waived,” despite these undisputed authorities having been presented to every court below. (Affidavit, Exhibit IV). And even this Court’s commissioners missed the mark and failed the Constitutional IQ test by denying leave. The present reader will not.

Though the lower Court’s opinion both cited, and quoted, *O’Connell’s* clear directive that subject-matter jurisdiction *cannot be waived*, in the next breath, as though by sudden amnesia, it held Appellant had “*waived*” subject-matter jurisdiction, *Contempt II*, *Exhibit II*, *slip op 5*. But they achieved that result by inverting their highest duty to adjudicate the constitutional question, with the ignoble

Appendix N

dodge of announcing a *higher duty*, under the law-of-the-case doctrine, to perpetuate what their cited and quoted case told them was a clearly erroneous constitutional opinion, and applied it anyway.

3. LAW OF THE CASE DOCTRINE IS INAPPLICABLE TO “ISSUES THAT ADDRESS THEIR CONSTITUTIONAL POWER AND/OR THAT ARE CLEARLY ERRONEOUS

What manner of “logic” was applied below? Certainly, *that* was not *intentionally* granted a pass by this Court!? That outrageous contention alone, demands reconsideration and remand for explanation.

Like the “waiver” of subject-matter jurisdiction, this most-absurd application of law-of-the-case doctrine is contrary to controlling authority, and logically so:

“[T]he law-of-the-case doctrine must yield to a competing doctrine: the requirement of independent review of constitutional facts.” *Locricchio v. Evening News Ass’n*, 438 Mich. 84, 109-110, & fn 13; 476 N.W.2d 112 (1991) citing *Messenger v. Anderson*, 225 U.S. 436, 444; 32 S.Ct. 739; 56 L.Ed. 1152 (1912), *Safir v. Dole*, 231 U.S.App.D.C. 63, 718 F.2d 475 (1983).

“‘[L]aw of the case’ doctrine is discretionary and does not preclude courts from reexamining issues that address their constitutional power.” *Locricchio*, fn 13.

Appendix N

“‘[T]he doctrine is not inflexible and need not be applied to create an injustice or where a prior decision is clearly erroneous. 21 C.J.S. § 195b, pp. 333-334; 5 Am.Jur.2d, Appeal & Error, § 750, p. 193; 132 A.L.R. 15, p. 69.” *People v Wells*, 103 Mich App 455, 463; 303 NW2d 226 (1981).

This Court’s affirmance, by leave denied, perpetuates this gross perversion of law-of-the-case and constitutional doctrines, assuring injustices and disregard for these fundamental constitutional issues will continue. Clearly, this result was not intended by the Court in denying leave.

[Page 7]

Appellant seeks only the minimal reverence due our Constitution, in granting reconsideration and remand, to require the lower Court to clarify, with authority, the adoption of this unprecedented “waiver” of subject-matter jurisdiction, and avoid the casualties of logic, liberty, and the conflation of civil and criminal contempt law, from being ensconced in *stare decisis* featured prominently in the *Michigan Contempt Bench Book*, sec.15:5-6.

5. LEGAL ERROR IN CONFLATION OF CIVIL AND CRIMINAL CONTEMPT AND DUTY TO OBEY AN UNCONSTITUTIONAL ORDER

There is a major distinction between civil and criminal contempt law that is lost on many jurists: there is no duty to obey a *civil* contempt order lacking subject-matter

Appendix N

jurisdiction, but there certainly is a duty to obey an order issued for *criminal* contempt, which is disrespect to Court in its presence. Compare *In re Duclzinski*, 257 Mich. App. 96;667 N.W.2d 68,77(2003) and *Matter of Hague*, 412 Mich. 532, 545; 315 N.W.2d 524 (1982). This case involves civil contempt.¹ As in the law of contempt, Judge Hague was free to disregard an order void for lack of jurisdiction. Cf. *United States v. United Mine Workers of America*, 330 U.S. 258, 293, 67 S.Ct. 677, 696, 91 L.Ed..884 (1947); *Walker v. City of Birmingham*, 388 U.S. 307, 320-321, 87 S.Ct. 1824, 1831-32, 18 L.Ed.2d 1210 (1967).” *Matter of Hague*, 412 Mich. at 545.

6. SUCH FOUNDATIONAL ALTERATIONS TO
CONSTITUTIONAL SUBJECT-MATTER
JURISDICTION, LAW-OF-THE-CASE, AND THE
BLURRING OF CIVIL AND CRIMINAL CONTEMPT
LAW SHOULD ONLY COME FROM A REASONED
REVIEW BY THIS COURT

There is no escaping the need for reconsideration, even if this Court *did* intend to deny leave and abolish *Marbury*’s centuries-old rule concerning constitutional supremacy and “waiver” of subject-matter jurisdiction. If the Court remains undisturbed by the attendant wreckage strewn upon the legal landscape, making government overreach “waivable,” rendering compliance with the contempt statute optional, blurring civil and criminal contempt law and condoning intentional injustices under law-of-the-case

1. *In re Contempt of Pavlos-Hackney I*, __Mich App __ (COA no 357407, rel’d 10/20/2022), slip op 15, *Exhibit III*, attached hereto.

Appendix N

doctrine; if this is all intentional and not mere oversight, such monumental shifts in constitutional foundations should also warrant reconsideration: the opinion should only come from the reasoned pronouncement from this Court, not the judicial fiat of a circuit or Appellate Court judge.

But, if these palpable errors were not the intent of the Court, then, under MCR 2.119(F)(3), the Court was misled to believe leave denied was appropriate for this new “waiver” of subject-matter jurisdiction, the conflation of civil and criminal contempts and the application of law-of-the-case doctrine to perpetuate erroneous results.

And because there is no legal authority undergirding these holdings, the correction of those errors will necessarily alter the lower Court’s decision, thus warranting reconsideration under MCR 2.119(F)(3).

In addition, there is a real chance this case lacks subject-matter jurisdiction under *In re Certified Questions*, 506 Mich.332; 958.NW2d.1 (2020), *Moore Murphy Hospitality v DHHS*, 48th.Cir.Ct.Case No, 21-18522-AE, lv den __Mich__; 990.N.W2d 357 (2023) and *T&V Assocs v DHHS*, 347.Mich.App..486; 12.N.W.3d 313,.332 (2023), lv gtd, af’d in part, and vac’d in part, __Mich__;12.NW3d .594,.595 (2024).

If this case lacks subject-matter jurisdiction, as these cases strongly indicate, this case is “a mere nullity and void,” and the case must be dismissed. *Fox*, 375 Mich at 242. “An order entered by a court without jurisdiction ‘is absolutely void,’” *In re Hague*, 412.Mich at 544-5.

Appendix N

The second prong of MCR 2.119(F)(3) requiring a “different disposition of the motion must result from correction of the error” is met.

Certainly, the crippling of this historically heralded and formerly immutable protocol, defending our constitutional liberties, warrants review by its ultimate arbiter, this Supreme Court.

If that were not sufficient (and it must be!) just the list of collateral damage and corrupted caselaw flowing from this opinion, alone, warrants reconsideration under MCR 7.311(G) and MCR 2.119(F)(3). This case is that which Justice Marshal warned would mark “the subversion” of our Constitution and “theories of our government” by “declar[ing] that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory.” *Marbury v Madison*, 5 *US at 176-177*. Let it not be on this watch.

WHEREFORE, for the multitude of palpable errors set forth above, the standards for Reconsideration under MCR 2.119(F)(3) having been met, and the case being of a magnitude and legal posture that demands Supreme Court attention, it is hard to imagine a case more worthy of this Court’s intervention.

157a

**APPENDIX O — EXCERPTS OF THE
DEFENDANT-PETITIONER'S APPLICATION
FOR LEAVE OF THE SUPREME COURT OF
MICHIGAN, DATED DECEMBER 25, 2025**

IN THE SUPREME COURT
OF THE STATE OF MICHIGAN

SUPREME COURT NO. _____

COA. No 370227
Judges Wallace, Riordan, and Redford

Ingham Co. Circuit Ct
No. 21-000113-CZ
Judge Wanda Stokes
30th Circuit Court

IN RE CONTEMPT OF PAVLOS-HACKNEY,
MICHIGAN DEPARTMENT OF AGRICULTURE
AND RURAL DEVELOPMENT,

Plaintiff-Appellee,

vs.

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

Defendant-Petitioner.

158a

Appendix O

**DEFENDANT-PETITIONER'S APPLICATION
FOR LEAVE**

ORAL ARGUMENT REQUESTED

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

SUBMITTED ON DECEMBER 25, 2025

BY:
Helen Brinkman (P 40233)
Attorney for Defendant-Appellant
P.O. Box 150494
Grand Rapids, Michigan 49515
616 862 9405
Helen.Brinkman@protonmail.com

[TABLE INTENTIONALLY OMITTED]

STATEMENT OF QUESTIONS PRESENTED

I.

**DID THE LOWER COURTS ERR IN HOLDING
CONSTITUTIONAL SUBJECT- MATTER
JURISDICTION CAN BE WAIVED OR FORFEITED
BY PETITIONER'S ACTION OR INACTION; AS
BY FAILURE. TO EXHAUST ADMINISTRATIVE.
REMEDIES?**

159a

Appendix O

Petitioner-Appellant Answers: Yes.
Plaintiff-Appellee Answered: No.
The Circuit Court Answered: No.
The Court of Appeals Answered: No.

II.

**WAS THE PETITIONER REQUIRED TO COMPLY
WITH AN UNCONSTITUTIONAL CIVIL CONTEMPT
COURT ORDER?**

Petitioner-Appellant Answers: No.
Plaintiff-Appellee Answered: Yes.
The Circuit Court Answered: Yes.
The Court of Appeals Answered: Yes.

III.

**WAS MCL 333.2253 AN UNLAWFUL DELEGATION
OF LEGISLATIVE POWERS UNDER *IN RE
CERTIFIED QUESTIONS, MOORE MURPHY* AND
T&V ASSOCS I, AT THE TIME THE COSTS PENALTY
WAS ORDERED?**

Petitioner-Appellant Answers: Yes.
Plaintiff-Appellee Answered: No.
The Circuit Court Answered: No.
The Court of Appeals Answered: No.

160a

Appendix O

IV.

**DO THE OPINIONS BELOW CONFLICT WITH
CORE TENETS OF THE LAW-OF-THE-CASE
DOCTRINE PRECLUDING ITS APPLICATION
ON CONSTITUTIONAL SUBJECT-MATTER
JURISDICTION OR IN PERPETUATING A PRIOR
COURT'S ERRONEOUS DECISION?**

Petitioner-Appellant Answers: Yes.
Plaintiff-Appellee Answered: No.
The Circuit Court Answered: N/A
The Court of Appeals Answered: No.

V.

**DO THE OPINIONS BELOW CREATE A "CATCH-22"
WHEREIN THE CITIZEN THAT OBEYS THE
UNCONSTITUTIONAL LAW AND THE ONE
ENGAGING IN CIVIL DISOBEDIENCE, BOTH
FORFEIT THEIR RIGHT TO CONTEST THE
CONSTITUTIONALITY OF AN UNLAWFUL
STATUTE, AS DEMONSTRATED IN *T&V ASSOCS I*
AND THE DECISIONS BELOW?**

Petitioner-Appellant Answers: Yes.
Plaintiff-Appellee Answered: N/A.
The Circuit Court Answered: N/A.
The Court of Appeals Answered: No.

Appendix O

VI.

DOES THE LOWER COURTS’ REFUSAL TO GRANT PETITIONER SUBJECT-MATTER JURISDICTIONAL REVIEW AFFORDED OTHER RESTAURANTS/BUSINESSES UNDER IN RE CERTIFIED QUESTIONS, CREATE AN EQUAL PROTECTION AND DUE PROCESS VIOLATION UNDER THE FOURTEENTH AMENDMENT?

Petitioner-Appellant Answers: Yes.
Plaintiff-Appellee Answered: N/A.
The Circuit Court Answered: N/A.
The Court of Appeals Answered: N/A.

INTRODUCTION

As noted on the title page, this case seeks review not only of the constitutional validity of MCL 333.2253 and the COVID-19 Executive Orders (EOs) issued thereunder, but the institution of a heretofore impermissible “waiver” of constitutional subject-matter jurisdiction in a civil contempt case. The decisions, below, set aside the universally held mandate that constitutional “challenges to subject-matter jurisdiction cannot be waived,”¹ creating a complete break from core, Constitutional foundations,

1. “Challenges to subject master 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) and *Fox v Bd of Regents*, 375 Mich. 238; 134 N.W.2d 146, 148 (1965).

Appendix O

dating back to 1803's *Marbury v Madison*, 5 US 137, 138 (1803), the case we were to master in Con-Law 101: that constitutional subject-matter jurisdiction controls the courts; the courts do not control subject-matter jurisdiction.

“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.” *Id.*, at 176-177.

“This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual.” *Marbury*, 5 US at 177.

[Page 1]

The decisions below declare *In re Certified Questions*, 506 Mich 332; 958 NW2d 1 (2020), *T&V Assocs v DHHS I*, 347 Mich.App. 486, 491; 15 NW3d 313 (2023), and MCL

Appendix O

600.1701(g), “irrelevant” to Petitioner’s challenge to the EOs’ subject-matter jurisdiction, because Petitioner had not exhausted her appellate remedies, *MDARD v Zante, Inc.*, 348 Mich.App. 293; 18 N.W.3d 62, 66 (2023) and *In re Contempt of Pavlos-Hackney II*, ___Mich App___ (COA no. 370227, rel’d 10/6/2025), contrary to the venerable unbroken chain of authority holding subject-matter jurisdiction cannot be “waived” by any such inaction of the party, and can be collaterally attacked. *O’Connell v Dir of Elections*, 316 Mich App 91, 100; 891 NW2d 240 (2016) and *Jackson City Bank v Fredrick*, 271 Mich 538, 544; 260 NW 908 (1938).

Though the appellate panel acknowledged, at oral argument, that MCL 333.2253 was held unconstitutional,² they applied law-of-the case doctrine, from *Zante*, to hold subject-matter jurisdiction was “waived,” *Contempt of Pavlos-Hackney II*, slip op 5, contravening all State and Federal precedent requiring every court to address subject-matter jurisdiction “regardless of when they are raised”, “even at the highest level of appeal.” *O’Connell*, 316 Mich 91, 100; 891 N.W.2d 240 (2016); *Grupo v. Atlas Global*, 541 U.S. 567, at 576 (2004).

[Page 2]

As in the law of contempt, Judge Hague was free to disregard an order void for lack of jurisdiction. Cf. *United States v. United Mine Workers of America*, 330 U.S. 258, 293, 67 S.Ct. 677, 696, 91 L.Ed. 884 (1947); *Walker v. City of Birmingham*, 388 U.S. 307, 320-321,

Appendix O

87 S.Ct. 1824, 1831-32, 18 L.Ed.2d 1210 (1967). In contrast, an order **entered by a court with proper jurisdiction** must be obeyed even if the order is clearly incorrect. *State Bar of Michigan v. Cramer*, 399 Mich. 116, 125, 249 N.W.2d 1 (1976), and cases cited therein. See also *City of Troy v. Holcomb*, 362 Mich. 163, 106 N.W.2d 762 (1961); *Lester v. Sheriff of Oakland County*, 84 Mich.App. 689, 697-698, 270 N.W.2d 493 (1978). *Matter of Hague*, 412 Mich. 532, 545; 315 N.W.2d 524 (1982). Emphasis added.

Likewise, see the succinct repudiation of this attempt to “exalt the rule of judges” over the rule of law by approving punishment of an individual for the *lese-majeste* of asserting a constitutional right before we said he had it” by Justice Brennan in *US v US*

⁴ “Therefore, we conclude that the contempts appear to have been civil in nature, as they stated on their faces and as everyone present clearly believed at the time.” *Contempt of Pavlos-Hackney, I, slip op 15, Appendix Q*

Coin and Currency, 401 US 715, 727 (1971). Certainly, this conflicts with venerable authority, is error of the highest magnitude, and results in material injustice.

Also under MCR 7.305(B)(3)&(5), and just as integral to maintaining the unwaivable right to challenge constitutional subject-matter jurisdiction, is reestablishing the concomitant requirement that *every Court* has a *continuing* duty to address subject-matter jurisdiction, whenever it is raised, even at the highest level of appeal:

Appendix O

“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 v. Atlas Global*, 541 U. S. 567, 576 (2004), quoting *Kontrick v. Ryan*, 540 U. S. 443, 456 (2004). Emphasis added.

This case overrules that mandate by affirming the Courts’ repeated refusal to do so, in these bifurcated appeals. As noted above, even if Petitioner had not preserved the subject-matter jurisdictional issue at every encounter with the departments and courts, she would still have the right, even at this juncture, to have this Court review it “at the highest level of appeal”, even at this late stage of the proceedings. *Id.* Prior

⁵ See Slip op. p.5 In this regard. this Court has already addressed and rejected appellants’ constitutional arguments and its conclusions are the law of this cast. In *Zante*, 348 Mich.App. at 298, this Court held that such constitutional arguments were ‘irrelevant’ because Pavlos-Hackney failed to appeal the administrative law judge’s decision that upheld the suspension of the food license.”

[Pages 6-7]

Also under MCR 7.305(B)(3)&(5), the opinion below also alters and conflicts with US and Michigan Supreme Court law-of-the-case doctrine which hold the “law of the case’ doctrine is discretionary and does not preclude courts from reexamining issues that address

Appendix O

their constitutional power.” *Locricchio v. Evening News Ass’n*, 438 Mich. 84, fn 13; 476 N.W.2d 112 (1991) citing *Messenger v. Anderson*, 225 U.S. 436, 444; 32 S.Ct. 739; 56 L.Ed. 1152 (1912); *Safir v. Dole*, 231 U.S.App.D.C. 63, 718 F.2d 475 (1983). “[T]he doctrine is not inflexible and need not be applied to create **an injustice or where a prior decision is clearly erroneous**. 21 C.J.S. § 195b, pp. 333-334; 5 Am.Jur.2d, Appeal & Error, § 750, p. 193; 132 A.L.R. 15, p. 69.” *People v Wells*, 103 Mich App 455, 463; 303 NW2d 226 (1981). Nor is it applicable in situations where the law and/or the facts have changed. “The law-of-the-case doctrine is ‘not applied rigidly where doing so would **create an injustice**,’ and is inapplicable if the **facts or law presented in the subsequent appeal are not substantially and materially the same** as those addressed in the previous appellate decision. *Id.*, 103 Mich App at 463; *People v Phillips*, 227 Mich.App. 28, 33-34; 575 N.W.2d 784 (1997), *Emphasis added*. Nor where “there had been an intervening change in the law.” *Id.*, 227 Mich App 34. All of these exceptions are present here.

[Page 8]

As stated, that conflicts with the long line of authority holding that an unconstitutional statute is *void ab initio*, and, therefore, the Courts lack any authority to do anything except dismiss the case. *Fox v Bd of Regents*, 375

Appendix O

Mich 238, 242; 134 NW2d 146 (1965), O’Connell v Dir. of Elections, 316 Mich.App. 91; 891 N.W.2d 240 (2016); US v US Coin and Currency, 401 U.S. at 724; Norton v. Shelby County, 118 U. S. 425, 442 (1886), Chicago, I. & L.R. Co. v. Hackett, 228 U. S. 559 (1913), Harper v Virginia Dept. of Taxation, 509 U.S. 86, 89-90 (1993), and Johnson v White, 261 Mich App at 334-5.

WHEREFORE, under Const 1963, Art VI, §5, and MCR 7.305(B)(1)-(3) and (5), as the ultimate arbiter of conflicts of law, and constitutional protections, Petitioner respectfully and urgently requests this Court grant leave to review these complete departures from venerable constitutional authority, and reaffirm that “subject-matter jurisdiction cannot be waived” nor the citizen punished for recognizing their rights before the court said they could. *O’Connell, 316 Mich App at 100* and *US Coin, 401 U.S. at 724*. Petitioner asks that this Court finally address the constitutionality of MCL 333.2253.

On the eve of the 250th anniversary of that which *Marbury* deemed “the greatest improvement on political institutions” – our Nation’s Constitution – Petitioner hereby respectfully prays this Court’s leave, pursuant to MCR 7.305(B)(1)-(5), to repair these foundational errors “reducing to nothing” our own Constitutional protections from government overreach, by reversing the institution of a “waiver” and finally deciding whether MCL 333.2253 granted subject-matter jurisdiction under *In re Certified Questions*, and, if lacking, dismiss this case.

Appendix O

[Pages 9-10]

LAW AND ARGUMENT

“If courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.” Marbury v Madison, 5 US 138, at 138 (1803).

[Pages 19-20]

In the next paragraph, it, instead cites law-of-the-case in *Zante*, overturning the venerable, unbroken line of precedent reaching back to 1803, and that venerable case we were all to master in Con-law – *Marbury v Madison*, *supra*:

“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, or that the Legislature may alter the Constitution by an ordinary act.” *Id.*, at 176-177.

Appendix O

“The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation **if the laws furnish no remedy for the violation of a vested legal right.**” *Id.* at 163. *Emphasis added.*

[Pages 21-22]

This case involves civil contempts which cannot be waived where the order it seeks to enforce is beyond the court’s power to decree. *Jackson City*, 260 N.W. at 909. Thus, subject-matter jurisdiction *was required* to be reviewed, and that duty continues at every juncture of the proceedings, even at the highest level of appeal. *Grupo*, at 541 U.S. at 576.

[Page 23]

U.S. v Cotton, 535 U.S. 625, 630 (2002):

“This latter concept of **subject-matter jurisdiction**, because it involves a court’s power to hear a case, **can never be forfeited or waived**. Consequently, **defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court.**” *Emphasis added.*

[Page 24]

Appendix O

Though somewhat hard to follow, the landmark case of *US v United Mine Workers*, 330 US 258, 294-5 (1947), cited in *Dudzinski*, held that while *criminal* contempt penalties remain enforceable when the underlying order is later set aside as unlawful, “the **conviction** for *civil contempt* would be **reversed in its entirety**.” *Id.*, at 295. *Emphasis added*. This emphasizes the extreme difference between civil and criminal contempt remedies.

“It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order. The right to remedial relief falls with an injunction which events prove was erroneously issued, 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.**

“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

Appendix O

for civil contempt; but we would, subject to any infirmities in the contempt proceedings or in thy fines imposed, **affirm the judgments for criminal contempt as validly punishing violations of an order then outstanding and unreversed.** *United Mine Workers, 330 U.S. at 294-5.. Emphasis added, internal citations omitted.*

Willy v Coastal Corporation, 503 U.S. 131, 139 (1992) is in accord:

*“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.**”*

The right to challenge civil contempt subject-matter jurisdiction is so critical to the administration of justice that it can be raised even, initially at the last stage of appeal:⁹

*“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.*

Appendix O

So, there is no refuge in the lower Courts' label that this is a collateral attack of the licensing action, nor resort in holding the constitutional defense was forfeited for failure to appeal the ALJ's suspension. Both the circuit court and Appellate panels in *Contempt of Pavlos-Hackney II, and Zante*, misapprehended their duty here: "any action with respect to such a cause, other than to dismiss it, is absolutely void." *Fox, supra*, 243.

[Pages 26-27]

B. Misapplication of Criminal Contempt to Civil Contempt Laws

Although *civil* contempt subject-matter jurisdiction **can** be collaterally attacked, that is **not true** in *criminal* contempts. *In re JCB*, 336 Mich.App. 736, 747; 971 N.W.2d 705 (2021), quoting *United States v Rylander*, 460 U.S. 752, 757; 103 S.Ct. 1548; 75 L.Ed.2d 521 (1983), and *In re Contempt of Dudzinski*, 257 Mich.App. 96, 111; 667 N.W.2d 68 (2003).

A review of the opinions below establish the sole authority alleged to justify the "waiver" are citations to *criminal* contempt cases, specifically *In re JCB*, 336 Mich.App. 736, 747; 971 N.W.2d 705 (2021), quoting *Rylander*, and *Dudzinski*, citing *United Mine Workers*, 330 U.S. at 294-5. The circuit court, in *Zante*, at 301, and *Contempt of Pavlos-Hackney II*'s reference, at *slip op*, p5, to *Zante* at 301, all rely on *Dudzinski* as their source of authority.

Appendix O

And *Zante*'s citation to *Walker v Birmingham*, 330 US 307 (1967), was not a case where subject-matter jurisdiction was at issue, as it was from the outset here. *Birmingham* clearly stated “**Without question, the state court that issued the injunction had, as a court of equity, jurisdiction over the petitioners and over the subject matter of the controversy.** And this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity.” *Id.* at 316.

[Pages 29-30]

The writers of *Marbury v Madison* should echo to this bench. There is no improvement on their exposition of the matter:

“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection.” *Id.* at 163.

“The Government of the United States has been emphatically termed a government of laws, and not of men. **It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.**” *Id.* at 163.

“That the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce

Appendix O

to their own happiness is the basis on which the whole American fabric has been erected. ... The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed, is supreme, and can seldom act, they are designed to be permanent.” *Id. of 176*.

“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, or that the Legislature may after the Constitution by an ordinary act.” *Id, at 176-177*.

“If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must: govern the case to which. they both apply.

“Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

Appendix O

“This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is **expressly forbidden**, such act, notwithstanding the express prohibition, **is in realty effectual**. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.” *Id*, at 177.

D. The “Waiver” also Contravenes State and Federal Statutes and Court Rules
D.1. Statutes:

This new “waiver” of the duty to first determine the underlying statute is “lawful” contravenes State and Federal statutes and court rules.

The Federal civil contempt statute, 18 USC 401 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.

*Appendix O***[Pages 31-33]**

Federal Rule 28 CFR Rule 12(h)(3) states:

“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.**”

[Page 34]

D.3 Violation of the Fourteenth Amendment to the Constitution

Finally, it implicates the US Constitution’s directive that “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.” US Const. Am 14.

So, perpetuating *Zante*’s adoption of this “waiver” of subject-matter jurisdiction for failure to exhaust appellate remedies in a *civil* contempt case is grievous error. It eliminates access to the Constitutions’ safeguards provided in case law dating from 1803, statutes and court rules. Judicial recognition, at any stage, that it is without subject-matter jurisdiction under the Constitution, is fatal to the entirety of the proceedings. Put plainly, the court’s cannot enforce an unconstitutional law, at any time. It voids the case. The statute is *void ab initio*, from its

Appendix O

inception, and the courts have no power to save it, delay it, or perpetuate it.

Even now, this case should be dismissed.

[Page 35]

**THERE IS NO DUTY TO COMPLY WITH AN
UNCONSTITUTIONAL STATUTE.**

Contrary to the opinions below, and also the result of conflating criminal with civil contempt, is the idea Petitioner had a duty to comply with an unconstitutional EO. In fact, the opposite is true – civil disobedience is “required” and “expected” in order to obtain standing. *US Coin, supra*, 401 US at 727. The law of *civil* contempt permits civil disobedience. It is presumed, as noted above, that the constitutional challenge will be addressed by the court during the contempt hearing, as required by MCL 600.1701(g)’s mandate that the court first determine the contempt is on a “lawful order:”

[Page 36]

“However, an order of the court must be complied with at the time it is entered even if the order is clearly incorrect, *Kirby v. Michigan High School Athletic Ass’n*, 459 Mich. 23, 40, 585 N.W.2d 290 (1998), or it is set aside on appeal, *United States v. United Mine Workers of America*, 330 U.S. 258, 294, 67 S.Ct. 677, 91 L.Ed. 884 (1947). As this Court stated in *In*

Appendix O

re Contempt of Dudzinski, supra at 111, 667 N.W.2d 68, '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.'

Thus, **it would appear** that defendant was bound to comply with the court's grandparenting time order, notwithstanding the fact that MCL 722.27b was subsequently declared unconstitutional. *United Mine Workers, supra at 293, 67 S.Ct. 677. But the above-cited rules only apply to 'an order issued by a court with jurisdiction over the subject matter and person.'* *Id.*" *Johnson v. White, 261 Mich App 332; 682 N.W.2d 505, 513 (2004) Emphasis added.*

Federal jurisprudence is in accord with *Hague*. As noted above, in *United Mine Workers, at 293*, the Court specifically held, "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed."

[Page 38]

Prospective application of decisions affecting fundamental constitutional liberties, as *Zante* and *Pavlos-Hackney II* do here, also conflict with US Supreme Court decisions in *Griffith v. Kentucky, 479 U.S. 314, 328 (1987); James Beam*

Appendix O

Distilling Co v. Georgia, 501 U.S. 529, 537-538 (1991), and *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993) which rightly find prospectivity “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.

“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.*” *Willy v. Coastal Corporation*, 503 U.S. 131, 139 (1992).

Likewise, *U.S. v US Coin* holds an unconstitutional statute should be held void ab initio, especially where “mere 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.*

An unconstitutional statute does not go in and out of effect; it either always was constitutional, or it was void from its inception, *void ab initio*.

Petitioner submits that leave should be granted to address this conflict and bring it back in line with the

Appendix O

doctrine of constitutional supremacy, equal protection, and longstanding state and federal precedent, commencing from 1803 in *Marbury*, through the current decisions 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*.

[Pages 45-46]

IV.

**CORE TENETS OF THE LAW-OF-THE-CASE
DOCTRINE PRECLUDES ITS APPLICATION HERE**

**A. Law-of-the-Case Is Inappropriate on Review of
Constitutional Questions**

The law-of-the-case doctrine is not mandatory, but discretionary, and does not preclude courts from reexamining issues that address their constitutional power, as this case implies. *Messenger v. Anderson*, 225 U.S. 436, 444; 32 S.Ct. 739; 56 L.Ed. 1152 (1912), *Safir v. Dole*, 231 U.S.App.D.C. 63, 718 F.2d 475 (1983) and *Locricchio v. Evening News Ass’n*, 438 Mich. 84, fn 13; 476 N.W.2d 112 (1991). It is logically discouraged when the opinion affects constitutional rights:

Appendix O

“[T]he law-of-the-case doctrine ‘merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.’

“We do not here question the generally sound principles of efficiency, comity, and finality that animate the law-of-the-case doctrine. However, **in a libel case affecting constitutionally protected public discourse, the law-of-the-case doctrine should not have precluded a second review by a subsequent Court of Appeals panel. Indeed, in such cases the law-of-the-case doctrine must yield to a competing doctrine: the requirement of independent review of constitutional facts.**”

Locricchio v. Evening News Ass’n, 438 Mich. 84, 109-110, & fn 13; 476 N.W.2d 112 (1991).

Appendix O

V.

THE OPINIONS BELOW CREATE A “CATCH-22” WHEREIN BOTH THE CITIZEN THAT OBEYS THE UNCONSTITUTIONAL LAW AND THE ONE ENGAGING IN CIVIL DISOBEDIENCE, BOTH FORFEIT THEIR RIGHT TO CONTEST THE CONSTITUTIONALITY OF AN UNLAWFUL STATUTE, AS DEMONSTRATED IN *T&V ASSOCS I* AND THE DECISIONS BELOW

Petitioner also begs leave of the Court to address how the application of a “waiver” of constitutional subject-matter jurisdiction will effect standing to contest the constitutionality of a law or statute, in contravention of State and Federal Constitutions.

Petitioner submits the lower Courts’ “waiver” creates a “catch-22” whereby both the obedient and the civil disobedient citizen will lack standing to challenge the validity of the statute and the governments abuse of their “unalienable” rights. This then implicates denial of due process, equal protection and right to redress of grievances under the First, Fifth and Fourteenth Amendments to the US Constitution and Const. 1963, Art. I, §§2, 3, and 17, depriving Michigan citizens of their due process, equal protection right to redress of grievances. See subsection C. & Issue VI below.

*Appendix O***A. Civil Disobedience Is Not Only Expected, it is Required for Standing**

The case and controversy requirement for Article III standing to challenge the constitutionality of any given law, cannot be hypothetical, it generally requires the statute or law to be violated. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-1 (1937).

One of America's original dissidents, Thomas Jefferson, in a letter to President James Madison, addressed the Shay rebellion and the place for civil disobedience in addressing government abuses:

“Even this evil is productive of good. It prevents the degeneracy of government, and nourishes a general attention to the public affairs. I hold it that a little rebellion now and then is a good thing, & as necessary in the political world as storms in the physical. Unsuccessful [sic] rebellions indeed generally establish the incroachments [sic] 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[sic] necessary for the sound health of government.**” <https://founders.archives.gov/documents/Madison/01-09-02-0126>
Emphasis added.

Our US Supreme Court agrees. It recognizes the “usual mode” of addressing government overreach requires

Appendix O

first, civil disobedience, and second, judicial temperance in setting aside the impulse to punish the protest.

“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 *United States v. U.S. Coin & Currency*, 401 U.S. 715, 727 (1971) *Internal citations omitted. Emphasis added.*

Appendix O

The ruling below is precisely what the US Supreme Court denounced; the “waiver” [51] instituted in Petitioner’s case “approv[es of] punishment of an individual for the *lese-majeste* of asserting a constitutional right before [the Court] said [s]he had it.” *Id.* It is not only unjust, it crosses other constitutional barriers, including deprivation of due process, equal protection and the right to redress of grievances by depriving both the obedient, and the civil disobedient, of standing to contest an unconstitutional statute.

B. The Waiver Results in a “Catch-22” Precluding Standing to Review Subject-Matter Jurisdiction

[Pages 50-51]

C. The Opinion Defies Petitioner’s Fourteenth Amendment Right to Redress Of Grievances, Due Process And Equal Protection Under The Law

Both Michigan and US Constitutions secure the right to redress of grievances against the government abuses of power. *Const 1963, Art I, § 3* and US Const, Amendments 1 & 14.

“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 [54] of the laws.” US Const., Am. 14. Emphasis added.

¹³ App C, p 27-28 and App G

Appendix O

“Congress **shall make no law** respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging** the freedom of speech, or of the press; or **the right of the people** peaceably to assemble, and **to petition the Government for a redress of grievances.**”
US Const., Am. 1. Emphasis added.

“**The people have the right** peaceably to assemble, to consult for the common good, to instruct their representatives and **to petition the government for redress of grievances.**”
Const, 1963, Art 1, §3. Emphasis added.

Zante and Contempt of Pavlos-Hackney II held Petitioner’s failure to exhaust appellate remedies forfeited her right to challenge the constitutionality of the government’s taking of her food license, her personal liberty and property, pursuant to an unconstitutional statute. This newly imposed “waiver” violates her due process, equal protection right to redress of grievances under Const, 1963, Art 1, §2, §3, & §17 and US Const, Ams 1&14.

Whether this is a viable “waiver” that conforms to the protections guaranteed by the other sections of the Constitution are issues necessitating this Court’s review.

Appendix O

VI.

**REFUSAL TO GRANT PETITIONER REVIEW
OF SUBJECT-MATTER JURISDICTION UNDER
IN RE CERTIFIED QUESTIONS VIOLATES HER
DUE PROCESS AND “CLASS-OF-ONE” EQUAL
PROTECTION RIGHTS, UNDER *VILLAGE OF
WILLOWBROOK V. OLECH*, 528 U.S. 562 (2000)**

**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 [55] 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).

These violations of her due process and equal protections granted others under *In re Certified Questions*, culminate in unmatched evidence of targeted, inequitable, class-of-one disparate treatment under the law. *Willowbrook*, *supra*, at 564.

[Pages 53-55]

*Appendix O***C. Rational basis**

The favorable treatment to the Landshark Bar, *App I*, 65-66, the Iron Pig Smokehouse in *Moore Murphy*, and the refusal to dismiss Petitioner's case after its unconstitutionality was irrefutably confirmed by *T&V Assocs I*, at the time this judgment for costs was entered, has no rational basis. Moreover, the fact that this is the last case standing, is also telling. The totality of the evidence establishes the basis was neither rational, or justified, but likely emanates from one's innate loathing of an upstart who turns out to be right. *U.S. Coin, supra*, 727. Leave is required to end this class-of-one equal protection, due process violation.

**APPENDIX P — EXCERPTS OF DEFENDANT-
APPELLANT’S BRIEF ON APPEAL OF THE COURT
OF APPEALS OF MICHIGAN, DATED APRIL 17, 2024**

IN THE COURT OF APPEALS
OF THE STATE OF MICHIGAN

COA No. 370227

Ingham County Circuit Court
No. 21-000113-CZ
Judge Wanda Stokes
30th Circuit Court

IN RE CONTEMPT OF PAVLOS-HACKNEY,

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 BRIEF ON APPEAL

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

190a

Appendix P

SUBMITTED ON APRIL 17, 2024

BY:

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STATEMENT OF QUESTIONS PRESENTED

I.

DO THE COURTS HAVE SUBJECT MATTER JURISDICTION TO IMPOSE A CONTEMPT PENALTY FOR VIOLATION OF UNCONSTITUTIONAL COVID-19 EOS AFTER *IN RE CERTIFIED QUESTIONS AND T & V ASSOCS*?

The Circuit Court Answered: Yes
Plaintiff-Appellee Answered: Yes
Defendant-Appellant Answers: No

II.

CAN THE DEFENSE OF LACK OF CONSTITUTIONAL SUBJECT MATTER JURISDICTION BE WAIVED OR FORFEITED BY DEFENDANT'S ACTION OR INACTION?

The Circuit Court Answered: Yes
Plaintiff-Appellee Answered: Yes
Defendant-Appellant Answers: No

Appendix P

No government is immune from authoritarian impulse, particularly when convinced of its utopian good.

“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.” *In re Certified Questions*, 506 Mich at 434.⁵

“It is this concern over a new king that propels my unease here. It is not enough to be content with how a specific individual may be wielding their power. Instead, we are concerned with the inherent authority to act, because in our system of government, leaders may come and go depending on the will of the electorate. That a specific leader can be credited with acting in good faith does not prevent a successor from behaving differently. It can only help sharpen our understanding of how best to protect our democracy to think about how an unknown future actor might exercise this authority and what concerns that might raise.” *In re Certified Questions*, 506 Mich at 435.

[Page 14]

⁴ To this writer’s knowledge, having retired from a 25-year: cancer in prosecution, the salaries of these entities are derived from taxpayer coffers. Neither MDARD nor any other agency or individual has been *actually* injured, nor requires compensation. other than the Defendant.

⁵ Quoting The Federalist No. 51 (Madison) (Rossiter ed., 1961), p. 322.

Appendix P

“The Michigan Constitution is a limitation on the plenary power of government, and its provisions are paramount. It is so basic as to require no citation that the constitution is the fundamental law to which all other laws must conform. All state public officers, legislative, executive, and judicial, are required by *Const. 1963, art. 11, Sec. 1*, to swear or affirm to support that same document. In light of the preeminence of the constitution, statutes which conflict with it must fall.” *Smith v. Department of Public Health*, 428 Mich. 540, 640-641; 410 NW2d 749 (1987).

[Page 15]

ISSUE I.

THE COURTS LACK SUBJECT MATTER JURISDICTION TO IMPOSE A CONTEMPT PENALTY FOR VIOLATION, OF THE UNCONSTITUTIONAL COVID-19 EOS AFTER *IN RE CERTIFIED QUESTIONS AND T & V ASSOCS.*

A. Constitutional Deficiency of the Covid-19 EOs

In October 2020, our Supreme Court held “the executive orders [EOs] issued by the Governor in response to the COVID-19 pandemic **now lack any basis under Michigan law.**”, in *Midwest Inst. of Health, PLLC v. Governor of Mich (In re Certified Questions from the U.S. Dist. Court)*, 506 Mich 332, 338; 958 NW2d 1 (2020). *Emphasis added.* It found the EPGA, the statute on which MDHHS’ EOs were authorized, were overly broad delegations of legislative authority in violation of Michigan’s separation-of-powers clause, Const. 1963, art. 3, § 2:

Appendix P

“The powers of government are divided into three branches: legislative, executive and judicial. **No person exercising powers of one branch shall exercise powers properly**

[Page 15]

belonging to another branch except as expressly provided in this constitution.”
Const. 1963, art. 3, § 2 Emphasis added.

Const. 1963, art. 4, § 1 states “the **legislative power** of the State of Michigan **is vested in a senate and a house of representatives,”** not the executive branch. Emphasis added.

On application of this constitutional construct, the Supreme Court held:

“We conclude that the **Governor lacked the authority** to declare a ‘state of emergency’ or a ‘state of disaster’ under the EMA **after April 30, 2020**, on the basis of the COVID-19 pandemic. Furthermore, we conclude that the EPGA is in **violation of the Constitution of our state because it purports to delegate to the executive branch the legislative powers** of state government--including its plenary police powers--and to allow the exercise of such powers indefinitely. As a consequence, the EPGA cannot continue to provide a basis for the Governor to exercise emergency powers.”

Appendix P

In re Certified Questions, 506 Mich at 385.
Emphasis added.

The opinion emphasizes the separation of powers clause vests the Executive Branch with *enforcement* powers *tethered* to the dictates of the legislature, and that the language of the Emergency Management Act (“EMA”), MCL 30.401 *et seq*, required renewed legislative authorization for Covid-19 EOs after April 30, 2020. *Id.* Because the legislature refused to extend EMA authority, and the EPGA was unconstitutional, the Supreme Court held that “the executive orders issued by the Governor in response to the COVID-19 pandemic [thereafter] lack[ed] **any basis** under Michigan law.” *In re Certified Questions*. at 506 Mich 338 & 385. *Emphasis added.*

However they provided the necessary procedure required for the Governor or the Executive Branch to continue Covid 19 EOs, thereafter, as outlined in footnote 1 of the opinion:

“Our decision leaves open many avenues for **the Governor and Legislature to work together** to address this challenge and we hope that this will take place. See *Gundy v. United States*, 588 U.S. ———, ———, 139 S. Ct. 2116 2145, 204 L. Ed. 2d 522 (2019) (Gorsuch, J., dissenting) (“Respecting the separation of powers forecloses no substantive outcomes. It only requires us to respect along the way one of the most vital of the procedural protections of individual liberty found in our Constitution.”)

Appendix P

In re Certified Questions, 406 Mich at 338, fn 1. *Emphasis added.*

If there is any doubt the Supreme Court was relegating the Executive Branch back to their position of law enforcer, not law producer, *House of Representatives v Governor*, ___Mich ___, 949 N.W.2d 276, (2020) made it abundantly clear:

It should **again be emphasized**, see *In re Certified Questions*, --- Mich. at ---- n. 1, --- N.W.2d ----, slip op. at 3 n. 1, that our decision today, like our decision in *In re Certified Questions*, leaves open many avenues for **our Governor and Legislature to work together in a cooperative spirit and constitutional manner to respond to the COVID-19 pandemic**. *Id.* *Emphasis added.*

These opinions were published October 2 and 12, of 2020, with both the Governor and the AG reciting an accurate understanding of the decisions within days of their release⁶. But shortly thereafter the Executive Branch's administrative agency, MDHHS, reissued the Covid-19 EOs citing MCL 333.2253 as its legislative authority.

It was months later, in 2021, long after these decisions and admissions, that Marlana's Bistro was cited for violation of the resurrected social distancing, dine-in and masking Covid-19 EOs. In line with the Supreme Court opinion and the declaration of the AG in her local

Appendix P

news,⁷ she protested the MDARD licensing sanctions as unconstitutional. But her restaurant license was suspended for violation of those EOs and she was found in contempt for failing to comply. See ALJ and Circuit Court orders, Appendices C, G, and 3/4/2021 hrg tr, Appendix L, pp 112-115). The appeal, *sub nom*, *MDARD v Zante*, followed.

[Pages 16-17]

B. *Void Ab Initio*:

“As a general rule, an unconstitutional statute is *void ab initio*; it is void for any purpose and is as ineffective as if it had never been enacted.” *Stanton v. Lloyd Hammond Produce Farms*, 400 Mich. 135, 144-145; 253 N.W.2d 114 (1977), and *Johnson v. White*, 261 Mich App 332; 682 N.W.2d 505, 507 (2004).

⁹ As we note in Issue II, timing of an opinion is not controlling on the issue of subject matter jurisdiction. The law is void at its inception – *void ab initio*,

“The Michigan Constitution is a limitation on the plenary power of government, and its provisions are paramount. It is so basic as to require no citation that the constitution is the fundamental law to which all other laws must conform. All state public officers, legislative, executive, and judicial, are required by *Const. 1963, art. 11, Sec. 1*, to swear or affirm to support that same document. In light of the preeminence of the constitution, statutes which conflict with it must fall.” *Smith v. Department of Public Health*, 428 Mich. 540, 640-641; 410 NW2d 749 (1987).

Appendix P

[Pages 20-21]

“When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it is absolutely void.”

“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, supra 375 Mich at 243-244, internal citations omitted.*

[Page 24]

Appendix P

The Courts must void the action *at any point* in the proceedings—whether in the trial court, on direct appeal, or on collateral attack—by their own initiative or upon motion of the parties. *Id.*

“It is well settled that where a tribunal has jurisdiction and has acted, its action may not be drawn in question **collaterally** though it may be subject to direct attack. ***But where there is a want of jurisdiction, such lack of jurisdiction may be taken advantage of at any time.*** Attorney General *ex rel O’Hara v Montgomery*, 275 Mich. 504, 510; 267 N.W. 550 (1936). *Emphasis added.*

Likewise, *Jackson City Bank v Fredrick*, 271 Mich 538, 544; 260 NW 908 (1938) held “When there is a want of jurisdiction . . . , the action thereof is void because of its want of jurisdiction, and consequently its proceedings **may be questioned collaterally** as well as directly. They are of no more value than as though they did not exist.” *Emphasis added.*

“As in the law of contempt, [the defendant] was free to disregard an order void for lack of jurisdiction.” *In re Hague, supra.*, 412 Mich at 544. *Emphasis added.*

[Page 25]

“We note that defendant failed to raise his defense based on the exclusive remedy provision

Appendix P

of the WDCA until more than 11/2 years after the filing of plaintiff's complaint. We consider such an assertion of the defense dilatory under the circumstances. We also note, however, that Michigan has long recognized that actions for injuries incurred as a result of a coemployee's negligence and arising out of the scope of employment are barred by the exclusive remedy provision of the WDCA. **Moreover, a defense of lack of subject-matter jurisdiction may be raised at any time. Subject-matter jurisdiction cannot be granted by implied or express stipulation of the litigants. Likewise, a defense of lack of subject-matter jurisdiction cannot be waived by a litigant.** Consequently, defendant did not waive his defense based on the exclusive remedy provision when he failed to include it in his answer to plaintiff's complaint or by way of amendment. *Harris, at 617 NW2d 770, emphasis added and internal citations omitted.*

Wherefore, while we dispute the circuit and appellate court's labeling of the Declaratory Judgment and these appeals as collateral attacks – even assuming, *arguendo*, that it is, – the most venerable axiom of our constitutional jurisprudence requires recognition of a court's jurisdictional limitations, and necessitates the case be vacated on determination that the underlying statute, from which the violation originally emanates, is unconstitutional. *Johnson v White, supra, 682 N.W.2d 514-5*. It renders the entire case *void ab initio*. *Id at 507*.

Appendix P

[Pages 25-26]

“One may not be held in contempt for disobedience of an order or command which the court had no jurisdiction to make.” *In re Mead*, 220 Mich. 480; 190 N.W. 235, 236 (1922). *Emphasis added.*

[Pages 26-27]

Thus, it would appear that defendant was bound to comply with the court’s grandparenting time order], notwithstanding the fact that MCL 722.27b was subsequently declared unconstitutional. *United Mine Workers, supra at 293*, 67 S.Ct. 677. **But the above cited rules only apply to pan order issued by a court with jurisdiction over the subject matter and person.’** *Id.*” *Johnson v. White*, 261 Mich App 332; 682 N.W.2d 505, 513 (2004) *Emphasis added.*

[Page 27]

201a

**APPENDIX Q — 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 ****

* * *

Appendix Q

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

Appendix Q

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*

Appendix Q

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

* * *

Appendix Q

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.

Appendix Q

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 R — EXCERPTS OF BRIEF IN
SUPPORT OF MOTION OF THE STATE OF
MICHIGAN, DATED SEPTEMBER 26, 2022**

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

[Page 10]_____

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.

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Appendix R

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**BRIEF IN SUPPORT MOTION FOR
DECLARATORY JUDGMENT AND DISMISSAL**

“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).

[Page 9]

“[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, 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, leg the same monarch or senate should enact tyrannical laws, to execute them

Appendix R

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.

[Page 10]

It is also worth noting the Federal District Court created and certified these questions to the Supreme Court as dispositive.

[Page 12]_____ [Referencing the Michigan Supreme Court case *In re Certified Questions*]

“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. 398, 425-426; 54 S.Ct. 231; 78 L. Ed. 413 (1934).

[Page 16]

“[E]ven the war power does not remove constitutional limitations safeguarding essential liberties. When the

210a

Appendix R

provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented.” Blaisdell, 290 US at 426.

[Page 17]