

STATE OF MICHIGAN  
IN THE SUPREME COURTIN RE CERTIFIED QUESTION  
(MIDWEST INSTITUTE OF HEALTH).

Supreme Court No. 161492

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**GOVERNOR GRETCHEN WHITMER'S  
MOTION TO BIFURCATE BRIEFING UNDER MCR 7.308  
ASKING FOR INITIAL BRIEFING ON WHETHER THIS COURT  
SHOULD ACCEPT THE CERTIFIED QUESTIONS**

Governor Gretchen Whitmer, by and through her attorneys, Deputy Solicitor General B. Eric Restuccia and Assistant Solicitor General Christopher Allen, moves this Court to bifurcate the briefing on the certified questions that were sent to this Court on June 17, 2020 from Judge Paul Maloney in *Midwest Institute of Health, PLLC, d/b/a Grand Health Partners v Gretchen Whitmer* (No. 20-cv-414) (WD Mich) (*Grand Health*), and the Governor asks that this Court separate briefing on (1) the issue whether this Court should in its discretion accept the certified questions from (2) the issue of the merits of the questions themselves, and states the following in support of this motion under MCR 7.308(A) and MCR 7.311:

1. In *Grand Health*, the plaintiffs have raised federal and state-law challenges to certain mitigation measures that had previously been put in place by Governor Whitmer and the Director of the Michigan Department of Health and Human Services, Robert Gordon, to protect the public health and safety of this State from the COVID-19 pandemic. Namely, the plaintiffs challenged the prior requirement that certain health care facilities temporarily postpone non-essential medical procedures and the corresponding limitation on travel for such procedures.

2. On June 16, 2020, the federal district court for the Western District of Michigan certified the following two questions to this Court:

Whether, under the Emergency Powers of the Governor Act, MCL § 10.31, *et seq.*, or the Emergency Management Act, MCL § 30.401, *et seq.*, Governor Whitmer has the authority after April 30, 2020 to issue or renew any executive orders related to the COVID-19 pandemic.

Whether the Emergency Powers of the Governor Act and/or the Emergency Management Act violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution. [See Exhibit A.]

3. While, as general matter, the Governor and the State strongly support the certification of state law questions to the Michigan Supreme Court, on June 5, 2020, the Governor and Director Gordon opposed this motion for certification on three grounds: (1) the claims are moot and otherwise nonjusticiable, as the measures challenged by the plaintiffs have been rescinded and the plaintiffs are free to engage in this conduct; (2) the same legal issues are pending in the state appellate courts; and (3) the district court should, at most, decline supplemental jurisdiction over the state-law claims or hold them in abeyance pending their disposition in the state appellate courts. (See Exhibit B, Governor and Director Gordon's Statement on Certification, filed on June 5, 2020 in *Grand Health*.)

4. The Governor also opposed certification in a motion for reconsideration on Eleventh Amendment grounds. (See Exhibit C, Joint Motion of Governor and Director Gordon and Attorney General for Reconsideration, filed on June 11, 2020 in *Grand Health*.) The district court denied this motion on the same day it granted the certification, June 16, 2020.

5. On June 25, 2020, the Governor filed a notice of appeal regarding the court's denial of her claim of Eleventh Amendment immunity, which operates to stay the proceedings in the federal case on that issue. (See Sixth Circuit No. 20–1611.)

6. The rules governing certification confer “discretion” on this Court as to whether it should grant review on certified questions, see MCR 7.303(B) (“discretionary review), (B)(4), but the rules do not address whether the parties may brief the exercise of this discretion as contrasted with the merits of the questions:

**MCR 7.308**

(A) Certified Questions

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(2) From Other Courts.

(a) When a federal court, another state's appellate court, or a tribal court considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative or that of an interested party certify the question to the Court.

(b) A certificate may be prepared by stipulation or at the certifying court's direction, and must contain . . .

The presiding judge must sign it, and the clerk of the federal, other state, or tribal court must certify it.

(3) *Briefing. The parties to the underlying proceeding shall submit briefs in conformity with MCR 7.312 that include a request for oral argument on the title page of the pleading, if oral argument is desired. Unless the Court directs a different time or procedure for filing, or the parties file a written stipulation agreeing to a different schedule;*

*(a) the brief and appendixes of the appellant, or the plaintiff if the underlying proceeding was not an appeal, are due within 35 days after the certificate is filed with the Court;*

*(b) the brief and appendixes of an appellee, or a defendant if the underlying proceeding was not an appeal, are due within 28 days after service of the appellant's brief; and*

*(c) a reply brief is due within 21 days after service of the last timely filed appellee's or defendant's brief. [Emphasis added.]*

7. In the view of the Governor, the question whether this Court should accept these certified questions should be separated from the briefing on the merits of the questions. Given the substantial issues of justiciability and immunity in the underlying federal matter (including the Sixth Circuit's pending review of the Governor and Director's claim of Eleventh Amendment immunity), there are significant issues about the prudential wisdom of accepting these questions. As a matter of judicial economy, it would make sense for this Court to consider these threshold issues on the request for certification before exploring the merits of the certified questions.

8. And the substantially same issues were presented by the bypass applications from the Legislative Plaintiffs and the Governor in *House of Reps v Governor* (No. 161377) that this Court elected to deny, largely based on the consideration that the Court would benefit from a first review by the Court of Appeals. See *id.* at slip op p 1 (Bernstein, J., lead opinion) ("I believe the parties and this Court would benefit most from having the vital constitutional issues of this case fully argued in the Court of Appeals before receiving a final determination from our Court"); *id.* at slip op, p 5 n 5 (Clement, J., joined by McCormack, C.J., and Cavanagh, J.) ("I do not believe it would be wise to exercise any discretion we may have to hear this case without allowing it full appellate review"). This rationale may be lost if this Court invited briefing on the merits of these questions without first determining whether it should exercise its discretion to grant the certification.

Wherefore, the Governor asks this Court to order an initial briefing schedule on the issue whether the Court should exercise its discretion and accept the certified questions, deferring merits briefing until after this threshold issue is resolved.

**CONCLUSION AND RELIEF REQUESTED**

The Governor asks this Court to bifurcate this process and invite briefing first on whether it should exercise its discretion and accept the certified questions from the U.S. Federal District Court for the Western District of Michigan related to the Governor's authority.

Respectfully submitted,

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