STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: November 5, 2019]

VAPOR TECHNOLOGY ASSOCIATION, DONNA DIONNE, and RI E-CIG & VAPES,	:	
Plaintiffs,	:	
v.	:	**C.A. No. PC-2019-10370**
GINA RAIMONDO, in her official capacity as GOVERNOR OF THE STATE OF RHODE ISLAND, RHODE ISLAND DEPARTMENT OF HEALTH, and NICOLE ALEXANDER-SCOTT, MD, in her official capacity as DIRECTOR OF THE RHODE ISLAND DEPARTMENT OF HEALTH,	:	
Defendants.	:	

DECISION

STERN, J. Before this Court is Vapor Technology Association, Donna Dionne, and RI E-Cig & Vapes' (collectively, Plaintiffs) Motion for a Temporary Restraining Order. Gina Raimondo, in her official capacity as Governor of the State of Rhode Island (Governor Raimondo), the Rhode Island Department of Health (DOH), and Nicole Alexander-Scott, MD, in her official capacity as Director of the Rhode Island Department of Health (Director Alexander-Scott) (collectively, Defendants) have objected. Jurisdiction is pursuant to G.L. 1956 §§ 42-35-7 and 9-30-1, as well as Super. R. Civ. P. 65(b) (Rule 65).

I

Facts and Travel

On September 25, 2019, Governor Raimondo issued Executive Order 19-09 (the Executive Order), entitled "Protecting Rhode Island Youth Against the Harms of Vaping." Pls.' V. Compl. Ex. 2. The Executive Order, *inter alia*, directed the DOH to "promulgate emergency regulations to prohibit the sale of flavored [Electronic Nicotine Delivery Systems]." *Id.* Accordingly, on October 4, 2019, the DOH and Director Alexander-Scott issued Emergency Regulations 216-RICR-50-15-6 (the Emergency Regulations). *Id.* Ex. 1. The Emergency Regulations completely ban "[t]he manufacture, distribution, sale, or offer for sale of, or the possession with intent to manufacture, distribute, sell, or offer for sale flavored electronic nicotine-delivery system products to consumers." *Id.* The ban on flavored vaping products includes any product that has a "distinguishable taste or aroma . . . including, but not limited to, tastes or aromas relating to any fruit, mint, menthol, wintergreen, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice." *Id.* The Emergency Regulations do not ban the manufacture, distribution, or sale of tobacco flavored or unflavored vaping products. The Emergency Regulations took effect immediately upon issuance, will remain in effect for 120 days, and can then be extended for an additional 60 days. *Id.* Ex. 3.

Plaintiffs filed the instant action on October 23, 2019, challenging the enforcement of the Emergency Regulations and seeking declaratory and injunctive relief. *See generally* V. Compl. Plaintiffs also filed a Motion for a Temporary Restraining Order. Plaintiffs allege that the Emergency Regulations violate the separation of powers doctrine and are procedurally and

substantively invalid under the DOH's enabling act.[1] Defendants filed an objection and memoranda in opposition to the Plaintiffs' Motion for a Temporary Restraining Order. On October 29, 2019, this Court heard oral argument on the motion. This decision follows.

II

Standard of Review

The Plaintiffs seek to have this Court issue a Temporary Restraining Order to prevent DOH from continuing to effectuate the Emergency Regulations. The Temporary Restraining Order would stay enforcement of the Emergency Regulations for a limited period, and the Court would schedule a preliminary injunction hearing at the earliest possible time. *See* 1 Robert B. Kent, et al., *Rhode Island Civil and Appellate Procedure* § 65:2 (2018-2019 ed.). The decision to extend injunctive relief is within the discretion of the trial justice. *See Hagenberg v. Avedisian*, 879 A.2d 436, 441 (R.I. 2005). In considering whether to grant a temporary restraining order, a trial justice must consider:

> '"whether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo."' *Vasquez v. Sportsman's Inn, Inc.*, 57 A.3d 313, 318 (R.I. 2012) (quoting *Iggy's Doughboys, Inc. v. Giroux*, 729 A.2d 701, 705 (R.I. 1999)).

[1] Plaintiffs also alleged that the Emergency Regulations violate constitutional free-speech guarantees. However, based on the Defendants' representations at oral argument that the Emergency Regulations do not regulate speech, Plaintiffs' counsel indicated that it would not be pursuing the First Amendment claims.

III

Analysis

A

Irreparable Harm

"A party seeking a [temporary restraining order] 'must demonstrate that it stands to suffer some irreparable harm that is presently threatened or imminent and for which no adequate legal remedy exists to restore that plaintiff to its rightful position.'" *National Lumber & Building Materials Co. v. Langevin*, 798 A.2d 429, 434 (R.I. 2002) (quoting *Fund for Community Progress v. United Way of Southeastern New England*, 695 A.2d 517, 523 (R.I. 1997)). "Irreparable injury must be either 'presently threatened' or 'imminent'; injuries that are prospective only and might never occur cannot form the basis of a permanent injunction." *Id. (*quoting *Rhode Island Turnpike & Bridge Authority v. Cohen*, 433 A.2d 179, 182 (R.I. 1981)). "Irreparable harm is measured in terms of the harm arising during the interim between the request for an injunction and the final disposition of the case on the merits." 42 Am. Jur. 2d *Injunctions* § 35 (Nov. 2019 Update).

In Rhode Island, the vaping-products industry accounts for $54 million in annual economic output, generates jobs for approximately 460 individuals, and includes 2 vaping-products manufacturers, 1 vaping-liquid manufacturer, and 43 retail vape shops. V. Compl. ¶ 31. The Plaintiffs assert that they will suffer irreparable harm in the absence of injunctive relief because the Emergency Regulations ban the sale of flavored vaping products, which are responsible for the bulk of the Plaintiffs' income. *Id.* ¶ 6. Plaintiffs further allege that the Emergency Regulations threatens forced closure of their businesses and lay-off of employees. *Id.*; *see also* V. Compl. Ex. 24 (averring that Donna Dionne has been forced to close her Coventry store, that sales at her Warwick store are down 78 percent, that she has been forced to lay off seven out of her eight

employees, and that if the ban remains in place the greatly reduced business at her Warwick store will force her to shut that store as well).

Our Supreme Court has recognized that the inability to conduct business and the loss of good will to a business constitutes irreparable harm for which there is no adequate remedy at law. *Leone v. Town of New Shoreham*, 534 A.2d 871, 874 (R.I. 1987) (holding the plaintiff demonstrated irreparable harm where town denied her license to operate moped business because "[i]nability to conduct business during the [] summer season would have meant loss of good will to the business from inability to serve returning customers"). Here, Plaintiffs have demonstrated through Donna Dionne's affidavit that the Emergency Regulations have rendered her unable to conduct the majority of her business and have resulted in loss of good will to her retail vaping stores. The Plaintiffs could not have mitigated this harm because unlike the non-emergency rulemaking process—where there is notice, public hearings, and a business impact analysis—the emergency rulemaking that occurred in this case gave little time for the Plaintiffs to prepare. In a very real sense the Plaintiffs will lose their business, their customers, their employees, and possibly their inventory.

Moreover, the Court is not persuaded by Defendants' position that a three-week delay in filing suit challenging the Emergency Regulation and seeking a Temporary Restraining Order negates the irreparable harm. While it is recognized that a plaintiff's delay in seeking a temporary restraining order may indicate the absence of an immediate threat, the delay must be months or years, not merely weeks. *See Nickerson-Malpher v. Baldacci*, 560 F. Supp. 2d 72 (D. Me. 2008) (finding no irreparable harm for alleged unlawful seizure of plaintiff's property where seizure occurred over one and one-half years prior to the motion for temporary restraining order); *RCM Technologies, Inc. v. Beacon Hill Staffing Group, LLC*, 502 F. Supp. 2d 70, 74 (D.D.C. 2007)

(finding no irreparable harm for alleged violation of non-competition agreement where plaintiff waited twelve months to seek a temporary restraining order). Accordingly, this Court finds that Plaintiffs have succeeded in showing irreparable harm.

B

Status Quo

The next factor is whether the issuance of injunctive relief will preserve the parties' respective positions pending a final resolution.

> '"[T]he office of a preliminary injunction is not ordinarily to achieve a final and formal determination of the rights of the parties or of the merits of the controversy, but is merely to hold matters approximately in status quo, and in the meantime to prevent the doing of any acts whereby the rights in question may be irreparably injured or endangered."' *Fund for Community Progress*, 695 A.2d at 521 (quoting *Coolbeth v. Berberian*, 112 R.I. 558, 564, 313 A.2d 656, 659 (1974)).

Our Supreme Court has recognized that the "status quo is the last peaceable status prior to the controversy." *E.M.B. Associates, Inc. v. Sugarman*, 118 R.I. 105, 108, 372 A.2d 508, 509 (1977). Here, the status quo would be allowing sales of flavored vaping products because that was the condition that existed prior to the enactment of the Emergency Regulations and the initiation of the instant dispute. As such, this Court finds that issuance of a Temporary Restraining Order would preserve the status quo.

C

Balancing of the Equities

In balancing the equities, this Court must first weigh the hardship to the moving party if the injunction is denied, and then the hardship to the nonmoving party if the injunction is granted. *See In re State Employees' Unions*, 587 A.2d 919, 925 (R.I. 1991). A court must also weigh the public interest in granting or denying the injunction. *See id.* Bearing in mind that the purpose of

an injunction is to preserve the status quo, *Vasquez*, 57 A.3d at 318, it follows that a court must strive to attain an outcome protective of all parties' interests. *Sterling Drug Inc. v. Bayer AG*, 14 F.3d 733, 747 (2d Cir. 1994).

Plaintiffs argue that the balance of the equities and public interest favor issuance of a Temporary Restraining Order because vaping products help smokers quit, and the Emergency Regulations may cause former smokers to return to cigarettes—or turn to the unregulated black market—both of which Plaintiffs assert are more dangerous than flavored vaping products. Additionally, Plaintiffs argue that flavored vaping products are an important catalyst in convincing smokers to quit; over 90% of Donna Dionne's sales are flavored vaping products and the majority of her customers are former smokers. V. Compl. Ex. 24 ¶¶ 15, 16. Plaintiffs are also businesspeople who legally opened their stores, signed leases, hired employees, and bought inventory. *See id*. ¶¶ 2, 20-29. Plaintiffs allege that there is a very real possibility that when the Emergency Regulations expire—either in 120 days, or 180 if they are extended—they will no longer be in business because of the devasting effect of banning flavored vaping products.

Defendants counter, contending that the public interest weighs in favor of temporarily banning flavored vaping products due to the recent outbreak of vaping-related illnesses and death. Defs.' Mem. Opp'n Pls.' Mot. 23. First, the Defendants maintain that because the Emergency Regulations do not ban all vaping products, current users of vaping products—or smokers who are looking to quit—will still have access to tobacco flavored or unflavored nicotine vaping products. Moreover, Defendants argue that there is a prevalent and emergent public health crisis associated with vaping. Specifically, Defendants assert that there have been over 1,600 reported vaping-associated lung injuries and over 30 deaths reported nationwide since August 2019. *See* Alexander-Scott Aff. ¶ 26. Of these reported lung injuries, 46% of the victims are over 25 years

of age, and 39% of the victims are under 25 years of age. *See id*. ¶ 23. Accordingly, Defendants argue that preventing death and serious illness outweighs any hardship to the Plaintiffs. Defendants also point to the fact that the Emergency Regulations are, by their nature, only temporary, and any final regulations promulgated by the DOH or any statute enacted by the General Assembly may differ from the Emergency Regulations. Defs.' Mem. Opp'n Pls.' Mot. 24.

Here, the Court finds there are compelling arguments on each side. Quite clearly, the Plaintiffs stand to lose much if the Temporary Restraining Order is not granted, including loss of business, loss of the benefit of their expenditure on flavored vaping inventory, and loss of livelihood. Moreover, the public—namely adult users of flavored vaping products—would suffer the hardship of being unable to purchase those products and possibly being required to turn to using more dangerous and unregulated black-market products. However, the Defendants have decided that youth vaping is a national epidemic and there is a public interest in determining what is causing the rapid increase in vaping-related illnesses and death.

D

Likelihood of Success on the Merits

Notwithstanding the foregoing, the "sine qua non" of the test for a temporary restraining order is the likelihood of success on the merits. *See New Comm Wireless Services, Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002). "In determining the reasonable likelihood of success on the merits, we do not require the moving party to establish 'a certainty of success'; rather, we 'require only that [the moving party] make out a prima facie case."' *DiDonato v. Kennedy*, 822 A.2d 179, 181 (R.I. 2003) (quoting *Fund for Community Progress*, 695 A.2d at 521). "Prima facie evidence is the amount of evidence that, if unrebutted, satisfies the burden of proof on a particular issue." *DiLibero v. Swenson*, 593 A.2d 42, 44 (R.I. 1991) (citing *Paramount Office*

Supply Company, Inc. v. D.A. Maclsaac, Inc., 524 A.2d 1099, 1101 (R.I. 1987)). The moving party's burden is to show "a reasonable probability of ultimately succeeding on a final hearing." *Town of Smithfield v. Fanning*, 602 A.2d 939, 943 (R.I. 1992).

Here, the Plaintiffs allege that the Emergency Regulations violate the law for three reasons: 1) DOH's promulgation of the Emergency Regulations violate separation of powers; 2) DOH's promulgation of the Emergency Regulations violates the non-delegation doctrine; and 3) DOH's promulgation of the Emergency Regulations violates the Administrative Procedures Act (APA) and are not proper, expedient, or necessary. The Court will address each of these contentions, *seriatim*.

1

Separation of Powers

First, Plaintiffs assert that the Emergency Regulations are invalid because they are an unconstitutional exercise of legislative power by the Executive branch. Specifically, Plaintiffs assert that the Emergency Regulations constitute a "fundamental policy decision," which only the Legislative branch is empowered to make.

Article V of the Rhode Island Constitution sets forth the separation of powers doctrine, stating that "[t]he powers of the government shall be distributed into three separate and distinct departments: the legislative, executive, and judicial." R.I. Const. art. V. "'Functionally, the doctrine may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another.'" *Woonsocket School Committee v. Chafee*, 89 A.3d 778, 793 (R.I. 2014) (quoting *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58 (R.I. 1995)). However, our Supreme Court has recognized that—without

violating the separation of powers doctrine—"[l]egislative, judicial, and executive functions are routinely and appropriately combined in a single agency." *In re Request for Advisory Opinion from House of Representatives (Coastal Resources Management Council),* 961 A.2d 930, 940 (R.I. 2008). "Accordingly, administrative agencies may combine, to a certain extent, the functions of all three departments of government." *Id.* As such, the relevant inquiry before the Court is whether the DOH was properly delegated the authority to act.

2

Delegation

Section 42-18-1 of the General Laws established the DOH and provides that "[t]he head of the [DOH] shall be the director of health, who shall carry out" the functions delegated to the DOH by various statutes. The director of health is appointed by the Governor, confirmed by the Senate, and serves for a term of five years. Sections 42-6-3, 42-18-1. Among the functions delegated, "[t]he [DOH] shall take cognizance of the interests of life and health among the peoples of the state . . . and adopt proper and expedient measures to prevent and control diseases and conditions detrimental to the public health in the state." G.L. 1956 § 23-1-1. Plaintiffs argue that this statute—one that enables DOH to adopt and promulgate rules and regulations as it deems necessary and in the interest of life and health among the people of the state—violates the non-delegation doctrine because it is too broad and without limiting language.

"'[T]he delegation of legislative functions is not a per se unconstitutional action.'" *Narragansett Indian Tribe v. State*, 110 A.3d 1160, 1164 (R.I. 2015) (quoting *Milardo v. Coastal Resources Management Council of Rhode Island*, 434 A.2d 266, 270-71 (R.I. 1981)). In relaxing the non-delegation doctrine, our Supreme Court has recognized "that because the General Assembly must confront modern problems of ever-increasing complexity, strict adherence to the

nondelegation doctrine would detrimentally inhibit the Legislature's ability to execute its constitutional duties." *Marran v. Baird*, 635 A.2d 1174, 1179 (R.I. 1994). However, any delegation must be "reasonable" and "lay[] out an intelligent principle to which an administrative officer or body must conform." *Newport Court Club Associates v. Town Council of Middletown*, 800 A.2d 405, 417 (R.I. 2002). Accordingly, in determining whether the delegation in § 23-1-1 is unconstitutional, the Court "examine[s] the specificity of the functions delegated, the standards accompanying the delegation, and the safeguards against administrative abuse." *Bourque v. Dettore*, 589 A.2d 815, 818 (R.I. 1991).

a

Specificity of Functions Delegated

First, the Court must consider the specificity of the functions delegated by § 23-1-1. The statute delegates to the DOH the functions to 1) "take cognizance of the interests of life and health among the peoples of the state"; 2) "make investigations into the causes of disease, the prevalence of epidemics and endemics among the people, the sources of mortality, the effect of localities, employments and all other conditions and circumstances on the public health"; 3) "do all in its power to ascertain the causes and the best means for the prevention and control of diseases or conditions detrimental to the public health"; and 4) "adopt proper and expedient measures to prevent and control diseases and conditions." Section 23-1-1. Thus, the DOH is specifically required to exercise its powers only to accomplish these particular statutory purposes. *See Marran*, 635 A.2d at 1180 (holding a statute vesting the director of the State Department of Administration with the power to appoint a budget and review commission in any city or town where a recognized rating agency has assigned the community's bonds a rating below investment grade and the community faces imminent threat of default on any of its debt obligations constitutional because

the commission was clearly delegated two specific functions, both linked to maintaining a balanced budget). By its terms, the statute confers the limited function of granting to the DOH power to act in certain specifically enumerated instances regarding the public health.

b

Standards

Next**,** viewing the statutory scheme in its entirety, the Court must determine whether adequate standards exist to govern the delegation of authority. *Town of East Greenwich v. O'Neil*, 617 A.2d 104, 113 (R.I. 1992). These standards can be general directives but must enunciate "sufficiently intelligible standards." *Almond v. Rhode Island Lottery Commission*, 756 A.2d 186, 192 (R.I. 2000). Our Supreme Court has previously held that standards such as "fiscal emergency," "reasonable," and "in an environmentally sound manner," are "sufficiently intelligible standards" to pass constitutional muster. *See Moreau v. Flanders*, 15 A.3d 565, 584 (R.I. 2011) (noting the delegation of power to the Director of the Department of Revenue to declare that a "fiscal emergency" exists in a municipality constitutional); *Thompson v. Town of East Greenwich*, 512 A.2d 837, 842 (R.I. 1986) (reversing the trial justice's decision and finding that the delegation of power to local liquor-licensing boards to place conditions on the issuance of a liquor license was properly restricted to those which were "reasonable"); *Davis v. Wood*, 427 A.2d 332, 336 (R.I. 1981) (finding "the Legislature's [] directive that activities relating to the management of solid waste be conducted 'in an environmentally sound manner' creates a sufficiently intelligible standard by which the DEM must function within this specific area of its responsibilities").

Here, DOH—in executing its statutorily prescribed functions—is required to "adopt ***proper and expedient*** measures to prevent and control diseases and conditions," and "shall adopt and

promulgate rules and regulations that it deems ***necessary*** . . . to carry out [its] purposes." Section 23-1-1 (emphasis added). As such, the General Assembly has specifically directed the DOH that its actions must be proper, expedient, and necessary. These are "sufficiently intelligible standards" by which the DOH must conform to and are comparable to the standards our Supreme Court has previously held constitutional.

c

Safeguards

Lastly, the Court considers whether there exist adequate safeguards against administrative abuse. *See O'Neil*, 617 A.2d at 114. The availability of judicial review of the actions and determinations made pursuant to the delegated functions is an adequate safeguard. *See State v. Peloquin*, 427 A.2d 1327, 1331 (R.I. 1981) (finding adequate safeguards where final determinations made by the director of health under the Rhode Island Uniform Controlled Substances Act are subject to judicial review). Here, the Court finds that adequate safeguards exist against administrative abuse by the DOH because any actions or determinations made pursuant to § 23-1-1 are subject to judicial review. Specifically, the APA allows this Court to review the validity or applicability of a rule promulgated by DOH and decide appeals from decisions of the DOH. Sections 42-35-7, 42-35-15. Additionally, with respect to emergency rules, the "governor, or the governor's designee, must sign the emergency rule to become effective." Section 42-35-2.10. This is an additional safeguard against administrative abuse.

Based on the foregoing, the Court finds that the specificity of the functions delegated by section 23-1-1, along with the standards of "proper," "expedient," and "necessary," and the accompanying safeguards of judicial review and signing by the governor are sufficient for a constitutional delegation of power.

3

Administrative Procedures Act

Next, the Plaintiffs argue that the DOH violated the APA in promulgating the Emergency Regulations. Under the APA, administrative agencies are normally required to follow a statutorily prescribed process before a final rule or regulation can take effect. The agency publish notice of the proposed rule thirty days before the filing of the final rule. Section 42-35-2.7. Then, the agency must hold a public-comment period of at least thirty days after the publication of notice of the proposed rule. Section 42-35-2.8. The agency must consider "all information and comments on a proposed rule which is submitted . . . within the comment period." *Id.* The agency must also prepare a regulatory analysis for the proposed rule, which includes:

> "(1) An analysis of the benefits and costs of a reasonable range of regulatory alternatives . . .;
> "(2) Demonstration that there is no alternative approach among the alternatives considered during the rulemaking proceeding which would be as effective and less burdensome to affected private persons as another regulation. This standard requires that an agency proposing to write any new regulation must identify any other state regulation which is overlapped or duplicated by the proposed regulation and justify any overlap or duplication; and
> "(3) A determination whether:
> "(i) The benefits of the proposed rule justify the costs of the proposed rule; and
> "(ii) The proposed rule will achieve the objectives of the authorizing statute in a more cost-effective manner, or with greater net benefits, than other regulatory alternatives." Section 42-35-2.9.

In addition to these steps, the agency must consider the impact of the proposed rule on small businesses and submit an economic impact statement. Section 42-35.1-3. The impact statement must identify the number of small businesses subject to the proposed rule, the cost of compliance with the proposed regulation, the probable effect on small businesses, and a description

of any less intrusive or less costly alternatives to achieving the purposes of the proposed regulations. Section 42-35.1-3.

However, an exception to the normal rulemaking requirements allows an agency to promulgate a rule or regulation in the absence of notice and comment, provided that the

> "agency finds that an imminent peril to the public health, safety, or welfare or the loss of federal funding for an agency program requires the immediate promulgation of an emergency rule and publishes in a record with the secretary of state and on its agency website reasons for that finding." Section 42-35-2.10.

The Emergency Regulations at issue were promulgated as emergency rules, and therefore, did not go through the traditional notice, comment, and analysis procedures outlined by statute. As such, the validity of the Emergency Regulations rests on compliance with § 42-35-2.10. Plaintiffs assert that the DOH failed to follow the statutorily mandated procedures because: 1) DOH's purported findings of "imminent peril" are unsupportable, nor are the Emergency Regulations "proper, expedient, and necessary"; and 2) the DOH did not publish on its website the reasons for its findings of imminent peril. The Court will address the latter assertion first.

a

Publication

The DOH issued a press release on October 4, 2019, entitled "Emergency Health Regulations Ban the Sale of Flavored E-Cigarettes in Rhode Island." On its website, the DOH posted a short blurb from the press release under the "News" landing page. http://www.health.ri.gov/news/. This landing page contained a link which brings a user to the full press release on the RI.gov state website. https://www.ri.gov/press/view/36850. However, the statement of Reason for Finding Imminent Peril (the Statement) is only available on the Rhode Island Secretary of State's website. https://rules.sos.ri.gov/regulations/part/216-50-15-6.

It is well-established that "'when the language of a statute is clear and unambiguous, [this Court] must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.'" *Liberty Mutual Insurance Co. v. Kaya*, 947 A.2d 869, 872 (R.I. 2008) (quoting *State v. LaRoche*, 925 A.2d 885, 887 (R.I. 2007)). "Publication" is defined as "the act of declaring or announcing to the public." *Publication*, Black's Law Dictionary 1483 (11th ed. 2019). Here, while DOH posted the press release and link on its website, it failed to announce to the public, through posting on its website, the Statement. Accordingly, DOH failed to comply with the procedural requirements of § 45-35-2.10.

b

Finding of Imminent Peril and Whether the Emergency Regulations are "Proper, Expedient, and Necessary"

Plaintiffs also assert that the DOH's purported reasons for enacting the Emergency Regulations do not adequately support a finding of "imminent peril" required by § 42-35-2.10, nor are "proper," expedient," and "necessary," as required by § 23-1-1. Specifically, Plaintiffs assert that Rhode Island already bans the sale of nicotine vaping products to persons under the age of eighteen, and therefore, banning flavored vaping products for adults is not necessary or expedient to prevent youth vaping, nor is there an imminent peril. The Defendants argue that the ban on flavored vaping products is proper, expedient, and necessary because: 1) the demographic the Emergency Regulations seek to prohibit from accessing flavored vaping products, *i.e.*, youth, includes those individuals who are twenty-five years and younger; 2) DOH has reason to believe that the prohibition on sale of nicotine vaping products to those under the age of eighteen is ineffective based on the numerous violations issued by the department; and 3) there is an imminent peril because youth vaping is an epidemic causing illness and death.

Our Supreme Court has not directly addressed what level of scrutiny this Court should apply when reviewing an emergency regulation promulgated under § 42-35-2.10.[2] However, the Plaintiffs contend that the Court should review the Emergency Regulations the same way the Court would review a final order of an agency under the APA—whether the agency's decision was arbitrary and capricious. *See* Section 42-35-15. Conversely, the Defendants contend that the Court should defer to the administrative expertise of the agency and accept the DOH's finding of sufficiently imminent peril to require emergency rulemaking under § 42-35-2.10.

On the few occasions our Supreme Court has addressed the validity of an emergency regulation, the Court has seemingly given a great deal of deference to the agency's finding of "imminent peril." First, in *State ex rel. Town of Middletown v. Watson*, the court considered whether the DOH properly adopted emergency regulations regarding certifying breathalyzer operators. 698 A.2d 181, 182 (R.I. 1997). In upholding the regulations, the court found that the DOH's findings indicated the regulations were "necessary to establish approved preliminary breath testing instruments and procedures for testing breathalyzers, for reliable quantitative determinations and effective administrative practices to protect the safety and welfare of the public." *Id.* Accordingly, based on these findings, the court upheld the emergency regulations because enforcement of drunk-driving "is a matter of the highest concern for the health, safety, and welfare of the public." *Id.* at 183.

Nearly ten years later, in *Park v. Rizzo Ford, Inc.*, the court determined whether a regulation enacted by the Rhode Island Department of Transportation (DOT), which placed a twenty-dollar

[2] Additionally, unlike Massachusetts' APA, which specifically provides that the court's review of emergency regulations includes inquiry into "the sufficiency of the reasons for its adoption as an emergency regulation," Rhode Island's APA is silent as to the level of scrutiny applied during a judicial review of emergency regulations. M.G.L.A. c. 30A § 7.

limit on all title preparation fees, was in fact an emergency regulation. 893 A.2d 216, 219 (R.I. 2006). In doing so, the Court found that the DOT "made the requisite finding of imminent peril," because without the regulations "[t]he industry would be unregulated and the Department would be powerless to combat unfair business practices . . . ." *Id.* at 220. In both cases, the Court concluded the agency had made the requisite finding of "imminent peril" without undertaking an exhaustive review of the agency's findings or determinations.

This deference to an agency's determination is consistent with Rhode Island's administrative agency jurisprudence. Under Rhode Island law, legislative rules—that is, rules "promulgated pursuant to the specific statutory authority provided by the Legislature"—"ha[ve] the force and effect of law." *Town of Warren v. Bristol Warren Regional School District*, 159 A.3d 1029, 1039 (R.I. 2017). Thus, when reviewing a legislative rule, the Court is required to give it deference and cannot substitute its own construction of the statute for that of the agency. *Cf. id.* (holding that because the rule at issue was not a legislative rule, but rather an interpretive rule, the court was not required to give it deference and was free to substitute its own construction of the statute for that of the agency). However, "[our Supreme Court] certainly ha[s] never suggested that [the Court] owe[s] any administrative agency's interpretation blind obeisance"; *Mancini v. City of Providence*, 155 A.3d 159, 168 (R.I. 2017); rather, the Court accords "great deference to an agency's interpretation of its rules and regulations and its governing statutes, ***provided that the agency's construction is neither clearly erroneous nor unauthorized***." *Endoscopy Associates, Inc. v. Rhode Island Department of Health*, 183 A.3d 528, 533 (R.I. 2018) (emphasis added).

Here, the DOH promulgated the Emergency Regulations pursuant to § 42-35-2.10. Under the statute, the DOH—along with all agencies—is charged with enacting emergency rules upon a finding of "imminent peril to the public health, safety, or welfare." Section 42-35-1. In the statute,

the General Assembly failed to define the term "imminent peril." Thus, because the statute is silent, this Court "must defer to a reasonable construction by the [DOH, as it is] charged with its implementation." *See Labor Ready Northeast, Inc. v. McConaghy*, 849 A.2d 340, 346 (R.I. 2004).

The Statement, which is over eight-hundred words long, includes numerous findings and citations to the Centers for Disease Control, the Food and Drug Administration, and other studies. The Statement finds that youth vaping is a crisis and that nationwide Electronic Nicotine Delivery System "use among middle and high school students collectively increased 900% between 2011-2015." Specific to Rhode Island, the Statement highlights that "[t]wo out of five Rhode Island high school students reported trying e-cigarettes in 2017," and that "[a]pproximately 16,000 children now under 18 and alive in Rhode Island will ultimately die prematurely from smoking, given currents (*sic*) rates of morbidity and mortality."

The Statement links the youth vaping crisis to the conduct prohibited by the Emergency Regulations by finding that youths primarily use flavored vaping products, and that nicotine—a drug found in most e-cigarettes—is highly addictive and alters the brain development of youth. To support the determination, the Statement cites that "81% of youth e-cigarette users reported their first use of an E[lectronic Nicotine Delivery System] product was a flavored [one]," and "[t]he aggressive marketing and promotion of flavored e-cigarette products toward youth by the vaping industry has had a measurable and deleterious effect on downward trends on youth nicotine addiction and cigarette smoking." This conclusion is buttressed by findings that "[n]ationally, 63.6% of middle and high school students have used a flavored tobacco product in the past month," and "31% of teenagers said they started vaping because of the flavor availability . . . [which] appeal to the tastes of young people because they come in fruit, candy, and minty flavors."

In order to control the youth vaping crisis, the Statement finds that "successful prevention efforts must begin by curbing tobacco and nicotine consumption at an early phase in youth development" because "children who used E[lectronic Nicotine Delivery Systems] were four times more likely to try smoking tobacco cigarettes, and nearly three times more likely to become regular smokers within two years." Accordingly, the DOH determined that "[b]anning the sale of all flavored [Electronic Nicotine Delivery Systems] throughout Rhode Island is a reasonable and effective first step to address this problem."

Based on these findings and reading the Statement in its entirety, the Court finds that the DOH and Director Alexander-Scott reasonably interpreted what constitutes "imminent peril" and made the requisite findings to support that interpretation. While the Court was presented with numerous studies and affidavits submitted by the Plaintiffs which seemingly run counter to those cited in the Statement, the Court need only find some plausible rationale for the DOH and Director Alexander-Scott's determination that an imminent peril exists; *see Coleman v. Metropolitan Life Insurance Co.*, 919 F. Supp. 573, 581 (D.R.I. 1996) ("[w]hen it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious"); and the Court cannot "substitute its judgment for that of the [DOH]." *See J. M. Mills, Inc. v. Murphy*, 116 R.I. 54, 71, 352 A.2d 661, 670 (1976).

Moreover, the DOH's determination that enactment of the Emergency Regulations is proper, expedient, and necessary is also supported by the Statement. The Statement highlights the emergent nature of the youth vaping crisis and the necessity of promulgating short-term Emergency Regulations which will afford the DOH additional time to investigate the crisis, without risking further illnesses or death. As discussed *supra*, this Court accords deference to the DOH's determinations and judgments when carrying out the functions statutorily prescribed to it

and will only overturn the agency's decision if it is clearly erroneous. The DOH and Director Alexander-Scott's determination of the existence of an imminent peril and that enactment of the Emergency Regulations was proper, expedient, and necessary to combat the youth vaping crisis is not clearly erroneous in light of the evidence presented in the Statement.[3]

The Court finds that the Plaintiffs have demonstrated a likelihood of success on the merits regarding improper publication but have failed to demonstrate a likelihood of success on the merits of the remaining issues. Complying with the publication requirements of § 42-35-2.10 is statutorily mandated by the Legislature and the Defendants have promulgated the Emergency Regulations upon unlawful procedure. However, the Court recognizes that invalidating the Emergency Regulations upon these grounds would simply result in the Defendants immediately adopting the same Emergency Regulations with the publication requirements fulfilled. Accordingly, and in the interest of judicial efficiency, the Defendants shall have the opportunity to cure the deficiency and properly publish the statement of Reason for Finding Imminent Peril in accordance with § 42-35-2.10. Defendants shall file a certificate of compliance with the Court by 4:00 p.m. on Friday, November 8, 2019. If the Defendants fail to comply within the prescribed time period, the parties are ordered to appear before this Court at 9:30 a.m. on Tuesday, November 12, 2019, for further proceedings on the issue of publication.

[3] The Plaintiffs' Motion for Temporary Restraining Order asked this Court to enjoin the Defendants "from enforcing the emergency regulations promulgated by the [DOH and Director Alexander-Scott], on October 4, 2019 . . . ." Pls.' Mot. TRO 1. As such, the Plaintiffs sought injunctive relief from enforcement of the Emergency Regulations as a whole. The Court was not presented with specific arguments or evidence regarding the propriety of the individual provisions of the Emergency Regulations that prohibit the manufacture and distribution of flavored vaping products. This Court cannot grant the Plaintiffs relief that they did not request. *See Nye v. Brousseau*, 992 A.2d 1002, 1011 (R.I. 2010). However, if the Plaintiffs move for a preliminary injunction and the Court is presented with a full evidentiary record, the issue of whether there was a sufficient basis for a finding of "imminent peril" that necessitated the banning of manufacturing and distributing of flavored vaping products may be considered.

IV

Conclusion

Based on the foregoing, the Court finds that the Plaintiffs have failed to carry their burden for a Temporary Restraining Order. Accordingly, Plaintiffs' Motion is denied. Counsel for the Defendants shall prepare and submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Cover Sheet

TITLE OF CASE:	Vapor Technology Association, et al. v. Gina Raimondo, et al.
CASE NO:	PC-2019-10370
COURT:	Providence County Superior Court
DATE DECISION FILED:	November 5, 2019
JUSTICE/MAGISTRATE:	Stern, J.
ATTORNEYS:	
For Plaintiff:	Robert C. Corrente, Esq.; Christopher N. Dawson, Esq.; Joseph M. Terry, Esq.
For Defendant:	Sean Lyness, Esq.