

STATE OF MICHIGAN
IN THE COURT OF APPEALS

MARC SLIS and 906 VAPOR,

Plaintiffs-Appellants,

Court of Appeals Case No. 350888

Court of Claims Case No. 2019-000152-MZ

v.

STATE OF MICHIGAN and MICHIGAN
DEPARTMENT OF HEALTH AND HUMAN
SERVICES,

Defendants-Appellees.

**BRIEF OF AMICI CURIAE CAMPAIGN FOR TOBACCO-FREE KIDS AND
MICHIGAN CHAPTER AMERICAN ACADEMY OF PEDIATRICS**

KERR, RUSSELL AND WEBER, PLC
Daniel J. Ferris (P69633)
Attorneys for Amici Curiae
500 Woodward Avenue, Suite 2500
Detroit, MI 48226-3427
(313) 961-0200; FAX (313) 961-0388
dferris@kerr-russell.com

Of counsel:
Dennis Henigan
Swati Rawani
Campaign for Tobacco-Free Kids
1400 Eye St., NW
Washington, D.C. 20005

RECEIVED by MCOA 10/4/2019 4:18:42 PM

TABLE OF CONTENTS

INDEX OF AUTHORITIES..... ii

STATEMENT OF QUESTION PRESENTED iii

INTRODUCTION AND STATEMENT OF INTEREST OF AMICI CURIAE CAMPAIGN
FOR TOBACCO-FREE KIDS AND MICHIGAN CHAPTER AMERICAN ACADEMY OF
PEDIATRICS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The State of Michigan Faces A Vaping Crisis Among Youth..... 4

II. Vaping Products Available in Thousands of Flavors Increase Youth Usage and Pose
Serious Health Risks to Youth..... 7

III. Michigan’s Emergency Rules Are Necessary Because Other Existing Tobacco
Regulations Are Insufficient to Address the Epidemic of E-cigarette Use Among
Kids..... 11

CONCLUSION..... 12

RECEIVED by MCOA 10/4/2019 4:18:42 PM

INDEX OF AUTHORITIES

Cases

M & S, Inc v Attorney General,
165 Mich App 301 (1987)..... 3

Statutes

MCL 24.248..... 3
MCL 333.2226(d)..... 3

Rules

MCR 7.212(H)(3) 1

RECEIVED by MCOA 10/4/2019 4:18:42 PM

STATEMENT OF QUESTION PRESENTED

This brief amicus curiae will address the question whether a preliminary injunction issued to prevent enforcement of the Michigan Protection of Youth from Nicotine Product Addiction Emergency Rules would harm the public interest.

RECEIVED by MCOA 10/4/2019 4:18:42 PM

**INTRODUCTION AND STATEMENT OF INTEREST OF
AMICI CURIAE CAMPAIGN FOR TOBACCO-FREE KIDS AND MICHIGAN
CHAPTER AMERICAN ACADEMY OF PEDIATRICS**

The Campaign for Tobacco-Free Kids and the Michigan Chapter American Academy of Pediatrics submit this brief amicus curiae in opposition to the motion for a preliminary injunction against the Michigan Protection of Youth from Nicotine Product Addiction Emergency Rules (“Emergency Rules”).¹

Amicus Curiae Campaign for Tobacco-Free Kids (Tobacco-Free Kids) is the leading advocacy organization working to reduce tobacco use and its deadly consequences in the United States and around the world. Through strategic communications and policy advocacy campaigns, Tobacco-Free Kids promotes the adoption of proven solutions that are most effective at reducing tobacco use and save the most lives.

Amicus Curiae Michigan Chapter American Academy of Pediatrics (MIAAP) is a diverse group of over 1,400 pediatricians. Members include general pediatricians, sub-specialists, and academicians. Members are active in promoting the health and well-being of the children in the State of Michigan. The MIAAP is an affiliate of the American Academy of Pediatrics. The mission of the MIAAP is to identify, develop and manage opportunities to improve the health and welfare of children and the practice of pediatric medicine and to provide ongoing Continuing Medical Education opportunities for its members. MIAAP’s pediatrician members actively screen their patients for use of tobacco and provide counseling to their patients and patients’ parents about the health hazards of tobacco use, in an effort to prevent tobacco initiation. MIAAP and its

¹ Pursuant to MCR 7.212(H)(3), Amici Curiae state that neither party’s counsel authored this brief in whole or in part, nor contributed money that was intended to fund the preparation or submission of the brief. Further, no person other than the amici curiae has contributed money intended to fund the preparation and submission of this brief.

members regard the current e-cigarette epidemic among adolescents as a serious threat to the health and well-being of young people in Michigan and across the country. MIAAP and its pediatrician members have a strong professional interest in ensuring the timely enforcement of Michigan's Emergency Rules because the availability of e-cigarettes with flavors that have special appeal to adolescents threatens to addict a new generation of children to nicotine and to undermine the effectiveness of pediatricians, in Michigan and elsewhere, in counseling their patients and their parents to avoid initiation of tobacco products.

Amici respectfully submit this brief in opposition to Plaintiff's Motion for Preliminary Injunction. By this filing, amici seek to demonstrate that a preliminary injunction against Michigan's Emergency Rules would be contrary to the public interest because it would deprive residents of the state, and particularly its young people, of the demonstrable public health benefits of prohibiting the sale of flavored vapor products.²

The amici have a strong interest in the implementation of tobacco control policies that will prevent the initiation of tobacco use by young people and save lives. Reducing the availability of flavored vaping products that are especially appealing to young people is one such policy. Flavored e-cigarettes are addicting a new generation of kids to nicotine and threaten to reverse decades of progress in reducing youth tobacco use. The amici have an interest in enhancing this Court's understanding of the public health benefits of the Emergency Rules under attack and in assuring their timely implementation.

SUMMARY OF ARGUMENT

In determining whether to issue a preliminary injunction against the enforcement of a regulation or statute, courts must determine whether the injunction would be in the public interest.

² The Emergency Rules state that e-cigarettes are also known as vapor products. We use the terms e-cigarettes and vapor products interchangeably in this brief.

See M & S, Inc v Attorney General, 165 Mich App 301 (1987) (finding issue of an injunction would harm public interest). An injunction against the Emergency Rules would be contrary to the public interest because the rules represent a science-based policy that is critical to curbing the youth e-cigarette epidemic that is currently facing the State of Michigan.³

Youth e-cigarette use in the United States has skyrocketed to what the U.S. Surgeon General and the U.S. Food and Drug Administration (FDA) have called “epidemic” levels. It is a public health crisis and *it is getting worse*. Newly released data from the 2019 National Youth Tobacco Survey (NYTS) shows that e-cigarette use among high school students more than doubled from 2017 to 2019, to 27.5 percent of students, or more than 1 in 4 high schoolers.⁴ Altogether, 5 million middle and high school students used e-cigarettes in 2019 – an increase of nearly 3 million users in two years.⁵ The Emergency Rules constitute a proper and appropriate use of the State’s emergency authority to protect the health of Michigan’s children by ending the sale of flavored vaping products and thereby reducing the use of highly-addictive e-cigarettes by Michigan youth.

³ Amici curiae are disappointed that Plaintiff-Appellants would argue that protecting the health of Michigan’s youth is incongruent with protecting the “public health, safety, or welfare.” MCL 24.248; see also MCL 333.2226(d). According to Plaintiff-Appellants, the Governor and Department of Health and Human Services could never declare an emergency to protect Michigan’s youth because they constitute merely a subset of the population. Amici curiae believe that Plaintiff-Appellants’ interpretation of the law runs contrary to the most basic social values.

⁴ FDA, *Trump Administration Combating Epidemic of Youth E-Cigarette Use with Plan to Clear Market of Unauthorized, Non-Tobacco-Flavored E-Cigarette Products*, September 11, 2019, https://www.fda.gov/news-events/press-announcements/trump-administration-combating-epidemic-youth-e-cigarette-use-plan-clear-market-unauthorized-non?utm_source=CTPEblast&utm_medium=email&utm_term=stratout&utm_content=pressrelease&utm_campaign=ctp-vaping.

⁵ Edney, A., et al., *Vaping Furor Intensifies as Trump Vows Tough U.S. Scrutiny*, Bloomberg, September 11, 2019, <https://www.bloomberg.com/news/articles/2019-09-11/trump-to-hold-meeting-on-vaping-after-reports-of-u-s-illness>.

ARGUMENT

I. The State of Michigan Faces A Vaping Crisis Among Youth.

The Emergency Rules respond to an epidemic of youth usage of flavored e-cigarettes by ending the sale of flavored vaping products in Michigan (except tobacco flavored products). The severity of this epidemic cannot be overstated. E-cigarettes have become by far the most commonly used tobacco products among U.S. youth. Whereas the 2019 NYTS showed that 5.8% of high school students smoked regular cigarettes, use of e-cigarettes by high school students soared to 27.5% in 2019, up from 20.8% in 2018 and 11.7% in 2017.⁶ Kids are not just experimenting with e-cigarettes, but are using them frequently. More than a quarter (27.7%) of high school e-cigarette users are frequent users, using e-cigarettes on at least 20 of the preceding 30 days.⁷ Alarming, 1 in 9 of all high school seniors (11.7%) report that they vaped nicotine nearly daily, a strong indication of addiction.⁸

Trends in e-cigarette use in Michigan mirror the epidemic levels that are seen nationwide. According to the 2017 Youth Risk Behavior Study, 14.8% of Michigan high school students use e-cigarettes, compared to 4.9% of adults.⁹ Between the years 2015-16 and 2017-18, counties across Michigan witnessed between a 30% and 118% increase in use among high school students

⁶ FDA, *supra* note 1.

⁷ CDC, *Use of Electronic Cigarettes and Any Tobacco Product Among Middle and High School Students—United States, 2011-2018*, Morbidity and Mortality Weekly Report (MMWR), 67(45): 1276-1277; CDC, *Behavioral Risk Factor Surveillance System, Prevalence and Trends, E-Cigarette Use, Michigan (2017)*, <https://nccd.cdc.gov/BRFSSPrevalence/>.

⁸ Miech, R, et al., “Trends in Adolescent Vaping, 2017-2019,” *New England Journal of Medicine*, published online September 18, 2019.

⁹ CDC, *Youth Risk Behavior Surveillance – United States, 2017*, Morbidity and Mortality Weekly Report (MMWR), 67(8), Table 67, <https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2017/ss6708.pdf>.

who used an e-cigarette during the past month. In several Michigan counties, more than a third of high school students use e-cigarettes.¹⁰

Both the Commissioner of the FDA and the Surgeon General of the United States have recognized that youth usage of e-cigarettes has reached epidemic proportions. According to Norman E. “Ned” Sharpless, Acting Commissioner of the FDA, “Years of progress to combat youth use of tobacco – to prevent lifetimes of addiction to nicotine – is now threatened by an epidemic of e-cigarette use by kids.”¹¹ In December 2018, the Surgeon General issued an advisory on e-cigarette use among youth, declaring the growing problem an epidemic. The Surgeon General called for “aggressive steps to protect our children from these highly potent products that risk exposing a new generation of young people to nicotine.”¹²

The increasing number of vaping related pulmonary illnesses around the country only heightens the concern about initiation of vaping by youth.¹³ Doctors report that the lung damage

¹⁰ MDE and MDHHS, *Michigan Profile for Healthy Youth Survey*, 39 County Data from 2015-2016 and 2017-2018 for e-cigarette usage among high school students, https://www.michigan.gov/documents/mdhhs/ENDS_MI_County-Level_Data_659995_7.pdf; Testimony of Dr. Joneigh S. Khaldun, MD, MPH, FACEP, Chief Medical Executive, State of Michigan, Chief Deputy Director for Health, Michigan Department of Health and Human Services, Hearing, *Sounding the Alarm: The Public Health Threats of E-Cigarettes*, Department of Health and Human Services, State of Michigan, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, September 25, 2019, <https://docs.house.gov/meetings/IF/IF02/20190925/110008/HHRG-116-IF02-Bio-KhaldunMDMPHJ-20190925.pdf>.

¹¹ FDA, *Statement on the agency’s actions to tackle the epidemic of youth vaping and court ruling on application submission deadlines for certain tobacco products, including e-cigarettes*, Statement from Acting Commissioner of Food and Drug Administration, July 15, 2019, <https://www.fda.gov/news-events/press-announcements/statement-agencys-actions-tackle-epidemic-youth-vaping-and-court-ruling-application-submission>.

¹² Office of the Surgeon General, *Surgeon General’s Advisory on E-Cigarette Use Among Youth*, December 18, 2018, <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>.

¹³ Abbot, B., *What We Know About Vaping-Related Lung Illness*, The Wall Street Journal, Oct. 3 2019.

in some people who have become ill after vaping resemble a chemical burn. Speaking about the pattern of injuries observed in the lungs, a surgical pathologist recently noted, “To be honest, they look like the kind of change you would expect to see in an unfortunate worker in an industrial accident where a big barrel of toxic chemicals spills, and that person is exposed to toxic fumes and there is a chemical burn in the airways.”¹⁴

Indeed, as of October 1, 1,080 confirmed or probable cases of acute lung illness associated with the use of e-cigarette or vaping products have been reported to CDC and 18 deaths have been confirmed in 15 states.¹⁵ On October 4, the Michigan Department of Health and Human Services announced the first vaping-related death in Michigan and reported that there have been a total of 30 vaping-associated lung injury cases in Michigan¹⁶ The known vaping associated illnesses in Michigan have afflicted teens and other young people, with the youngest victim being 16 years old.¹⁷

These statistics establish that Michigan, like other states across the nation, faces a vaping crisis among youth which must be addressed. As explained more fully below, any injunction delaying implementation of the Emergency Rules would deprive this State of a vital tool to bring this epidemic under control. An injunction thereby would seriously harm the public interest.

¹⁴ Grady, D., *Lung Damage From Vaping Resembles Chemical Burns, Report Says*, The New York Times, Oct. 2, 2019.

¹⁵ CDC, *Outbreak of Lung Injury Associated with E-cigarette Use, or Vaping*, https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html (last updated October 3, 2019).

¹⁶ Michigan Department of Health and Human Services Press Release, Oct. 4, 2019, https://content.govdelivery.com/attachments/MIDHHS/2019/10/04/file_attachments/1298633/Vaping%20NR.pdf

¹⁷ Testimony of Dr. Joneigh S. Khaldun, MD, MPH, FACEP, Chief Medical Executive, State of Michigan, Chief Deputy Director for Health, Michigan Department of Health and Human Services, Hearing on “Sounding the Alarm: The Public Health Threats of E-Cigarettes,” Department of Health and Human Services, State of Michigan, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, September 25, 2019;

II. Vaping Products Available in Thousands of Flavors Increase Youth Usage and Pose Serious Health Risks to Youth.

In recent years, tobacco companies have significantly stepped up the introduction and marketing of flavored non-cigarette tobacco products, especially e-cigarettes. Flavored e-cigarettes are undermining the nation's overall efforts to reduce youth tobacco use and putting a new generation of kids at risk of addiction and the serious health harms that result from it.

Internal tobacco industry documents show that tobacco companies have a long history of using flavors to reduce the harshness of their products and to make them more appealing to new users, almost all of whom are under age 18.¹⁸ In recent years, companies have extended this strategy of using flavored products to attract kids to the emerging market for e-cigarettes. As of 2017, researchers had identified more than 15,500 unique e-cigarette flavors available online.¹⁹ An earlier study of e-cigarette flavors found that among the more than 400 brands available online in 2014, 84% offered fruit flavors and 80% offered candy and dessert flavors.²⁰ In addition to the more conventional candy and fruit flavors like mint and mango, e-liquids are also being sold in such kid-friendly options as cotton candy and gummy bear. These products are widely available through convenience stores, other retail outlets and online retailers.

News stories across the country have documented the popularity of flavored e-cigarettes like JUUL. According to one high school student, "It [JUUL] spread like wildfire for two

¹⁸ HHS, *Preventing Tobacco Use Among Youth and Young Adults, A Report of the Surgeon General*, 2012, <http://www.cdc.gov/Features/YouthTobaccoUse/>.

¹⁹ Zhu, S-H, et al., *Evolution of Electronic Cigarette Brands from 2013-2014 to 2016-2017: Analysis of Brand Websites*, *Journal of Medical Internet Research*, 20(3), J Med Internet Res 2018;20(3):e80, <https://www.jmir.org/2018/3/e80/>.

²⁰ Zhu, S-H, et al., *Four Hundred and Sixty Brands of E-cigarettes and Counting: Implications for Product Regulation*, *Tobacco Control*, 23(Suppl 3):iii3-iii9, 2014.

reasons...the first reason is the flashy flavors like crème brulee. The flavors are responsible for bringing the kids in, the nicotine keeps them.”²¹

The data confirms that flavors play a major role in youth initiation and continued use of e-cigarettes. The 2016 Surgeon General Report on e-cigarettes concluded that flavors are among the most commonly cited reasons for using e-cigarettes among youth and young adults.²² Data from the 2016-2017 wave of the government’s Population Assessment of Tobacco and Health (PATH) study found that 70.3% of current youth e-cigarette users say they use e-cigarettes “because they come in flavors I like.”²³ The PATH study also found that found that 97% of current youth e-cigarette users had used a flavored e-cigarette in the past month.²⁴ The 2019 NYTS found that 63.9% of high school e-cigarette users use mint or menthol flavors, an increase from 51.2% in 2018.²⁵ Mint and menthol flavors are about as popular as fruit flavors among high school e-cigarette users.²⁶

²¹ Ramanathan, L, *We killed the cigarette. What we got in return is mango-flavored nicotine in ‘party mode,’* Washington Post, August 8, 2018, https://www.washingtonpost.com/lifestyle/style/we-killed-the-cigarette-what-we-got-in-return-is-mango-flavored-nicotine-in-party-mode/2018/08/08/bf4db3a8-8b8a-11e8-8aea-86e88ae760d8_story.html?noredirect=on&utm_term=.2a6418f461f3

²² HHS, *E-Cigarette Use Among Youth and Young Adults. A Report of the Surgeon General.* Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2016.

²³ FDA, *Modifications to Compliance Policy for Certain Deemed Products: Guidance for Industry, Draft Guidance,* at 9, March 13, 2019, <https://www.fda.gov/media/121384/download>.

²⁴ *Id.*

²⁵ FDA, *Trump Administration Combating Epidemic of Youth E-Cigarette Use with Plan to Clear Market of Unauthorized, Non-Tobacco-Flavored E-Cigarette Products,* September 11, 2019, https://www.fda.gov/news-events/press-announcements/trump-administration-combating-epidemic-youth-e-cigarette-use-plan-clear-market-unauthorized-non?utm_source=CTPEblast&utm_medium=email&utm_term=stratout&utm_content=pressrelease&utm_campaign=ctp-vaping.

²⁶ *Id.*

Flavored tobacco products play a key role in enticing new users, particularly kids, to a lifetime of addiction. There is growing concern that use of e-cigarettes may function as a gateway to the use of conventional cigarettes and other combustible tobacco products, thereby undermining decades of progress in curbing youth smoking. A 2018 report by the National Academies of Science, Engineering and Medicine (NASEM) concluded that, “There is substantial evidence that e-cigarette use increases risk of ever using combustible tobacco cigarettes among youth and young adults.”²⁷ A nationally representative analysis found that from 2013 to 2016, youth e-cigarette use was associated with more than four times the odds of trying cigarettes and nearly three times the odds of current cigarette use. The researchers estimate that this translates to over 43,000 current youth cigarette smokers who might not have become smokers without e-cigarettes.²⁸ Use of e-cigarettes is not limited to youth who are likely to become cigarette smokers. E-cigarette use is associated with trying cigarettes even among youth who are unlikely to smoke. Several studies have found that the link between e-cigarette use and starting to smoke cigarettes is stronger for youth who had lower risk factors for smoking.²⁹

E-cigarettes and refill liquids contain widely varying levels of nicotine, and the nicotine delivered through the aerosol can also vary depending on the device characteristics and user practices.³⁰ While e-cigarettes can be used for non-nicotine products, including marijuana, more

²⁷ National Academies of Sciences, Engineering, and Medicine (NASEM), *Public health consequences of e-cigarettes*, 2018, Washington, DC: The National Academies Press, <http://nationalacademies.org/hmd/Reports/2018/public-health-consequences-of-e-cigarettes.aspx>.

²⁸ Berry, KM, et al., *Association of Electronic Cigarette Use with Subsequent Initiation of Tobacco Cigarettes in U.S. Youths*, JAMA Network Open, 2(2), published online February 1, 2019.

²⁹ *Id.* See also, Barrington-Trimis, JL, et al., *E-Cigarettes and Future Cigarette Use, Pediatrics*, 138(1), July 2016; Wills, TA, et al., *E-cigarette use is differentially related to smoking onset among lower risk adolescents*, Tobacco Control, published online August 19, 2016.

³⁰ NASEM, *supra* note 24.

than two-thirds of youth e-cigarette users report using e-cigarettes exclusively for nicotine-containing products.³¹ Nicotine is a highly addictive drug that can have lasting damaging effects on adolescent brain development.³² Nicotine also impacts the cardiovascular system.³³ The Surgeon General concluded that, “The use of products containing nicotine poses dangers to youth, pregnant women, and fetuses. The use of products containing nicotine in any form among youth, including in e-cigarettes, is unsafe.”³⁴

Flavorings in e-cigarettes can pose additional health hazards. According to the Surgeon General, “while some of the flavorings used in e-cigarettes are generally recognized as safe for ingestion as food, the health effects of their inhalation are generally unknown” and noted that some of the flavorings found in e-cigarettes have been shown to cause serious lung disease when inhaled.³⁵ An article in the *Journal of the American Medical Association* raised concerns that the chemical flavorings found in some e-cigarettes and e-liquids could cause respiratory damage when the e-cigarette aerosol is inhaled deeply into the lungs.³⁶

³¹ CDC, *Characteristics of Electronic Cigarette Use Among Middle and High School Students—United States, 2015*, MMWR, 65(50-51): 1425-1429, <https://www.cdc.gov/mmwr/volumes/65/wr/pdfs/mm655051a2.pdf>.

³² HHS, *The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General*, CDC, Office of Smoking and Health (OSH), 2014, <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/index.html>. See also, CDC Office on Smoking and Health, *Electronic Nicotine Delivery Systems: Key Facts*, July 2015.

³³ HHS, *How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease: A Report of the Surgeon General*, Centers for Disease Control and Prevention, Office on Smoking and Health, 2010 <http://www.ncbi.nlm.nih.gov/books/NBK53017/>.

³⁴ HHS, *E-Cigarette Use Among Youth and Young Adults. A Report of the Surgeon General*, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2016.

³⁵ *Id.*

³⁶ Barrington-Trimis, JL, Samet, JM, & McConnell, R, *Flavorings in Electronic Cigarettes: An Unrecognized Respiratory Health Hazard?*, *The Journal of the American Medical Association*, doi:10.1001/jama.2014.14830, published online November 10, 2014.

Thus, given the fast-spreading epidemic of youth e-cigarette use, caused in large part by the appeal of flavored products, the Emergency Rules are critical to this State's efforts to protect its young people from the addictive and other harmful effects of e-cigarettes.

III. Michigan's Emergency Rules Are Necessary Because Other Existing Tobacco Regulations Are Insufficient to Address the Epidemic of E-cigarette Use Among Kids.

Although Michigan's age-restrictions on sale of tobacco products are important and necessary measures to restrict access, they are insufficient on their own to combat the e-cigarette epidemic among youth. Young people entering stores cannot avoid being accosted by an array of e-cigarettes—virtually all with flavors designed to enhance their appeal to youth. Experience demonstrates convincingly that, because flavored e-cigarettes have such a powerful appeal to youth, laws prohibiting sales to minors are simply not enough.

According to the 2018 Monitoring the Future Survey, more than 60% of 10th grade students say it is easy to get vaping devices and e-liquids.³⁷ Indeed, it is clear that, despite age restrictions, retailers continue to sell these products to minors. In the summer of 2018, the FDA's undercover enforcement efforts yielded over 1,300 warning letters and fines to brick-and-mortar and online retailers for illegally selling e-cigarettes to minors.³⁸ According to FY2019 data, Michigan has a sales to minors violation rate of 10%.³⁹ FDA reported 809 sales to minors violations in 2018 in Michigan, involving the issuance of 532 warning letters, 275 civil money penalties, and 2 no-tobacco sale orders.⁴⁰ A study in JAMA Pediatrics found that in California,

³⁷ University of Michigan, Monitoring the Future Study, *Trends in Availability – Tables 15-17*, 2018, <http://monitoringthefuture.org/data/18data/18drtbl15.pdf> and <http://monitoringthefuture.org/data/18data/18drtbl16.pdf>.

³⁸ FDA, *Modifications to Compliance Policy for Certain Deemed Products: Guidance for Industry, Draft Guidance*, March 13, 2019, <https://www.fda.gov/media/121384/download>.

³⁹ Michigan Annual Synar Report, FFY 2019, at 39, https://www.michigan.gov/documents/mdhhs/SYNAR_Report_2019_637850_7.pdf.

⁴⁰ FDA, *Compliance Check Inspections of Tobacco Product Retailers* (through 8/31/2019), https://www.accessdata.fda.gov/scripts/oc/inspections/oc_insp_searching.cfm.

where the tobacco sales age is 21, 44.7% of tobacco and vape shops sold e-cigarettes to underage decoys.⁴¹

Given the obvious insufficiency of age restrictions alone, the Emergency Rules prohibiting the sale of flavored e-cigarettes are absolutely necessary to reduce the use of e-cigarettes by Michigan kids.

CONCLUSION

Michigan is the first state to prohibit the sale of flavored vaping products and several states, including Massachusetts, New York, and Utah, have followed Michigan's example in initiating restrictions on flavored vaping products to address the youth e-cigarette crisis. At least 200 localities also have passed restrictions or complete prohibitions on the sale of flavored e-cigarettes.⁴² Michigan children and families should not be deprived of the benefits of this necessary and appropriate response to the current epidemic. A preliminary injunction delaying implementation of the Emergency Rules addressing the vaping crisis would not be in the public interest and should be denied.

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

By: /s/ Daniel J. Ferris

Daniel J. Ferris (P69633)
Attorneys for Amici Curiae
500 Woodward Avenue, Suite 2500
Detroit, MI 48226-3427
(313) 961-0200; FAX (313) 961-0388
dferris@kerr-russell.com

Dated: October 4, 2019

⁴¹ Roeseler, A, et al., *Assessment of Underage Sales Violations in Tobacco Stores and Vape Shops*, JAMA Pediatrics, June 24, 2019.

⁴² Campaign for Tobacco-Free Kids, *States & Localities That Have Restricted the Sale of Flavored Tobacco Products*, <https://www.tobaccofreekids.org/assets/factsheets/0398.pdf>.

CERTIFICATE OF SERVICE

Cynthia J. Villeneuve, being first duly sworn deposes and says that on October 4, 2019, she filed the foregoing Brief of Amici Curiae Campaign for Tobacco-Free Kids and Michigan Chapter American Academy of Pediatrics and this Certificate of Service with the Clerk of the Court using the Court's electronic filing system which will electronically serve all counsel of record.

/s/ Cynthia J. Villeneuve
Cynthia J. Villeneuve

RECEIVED by MCOA 10/4/2019 4:18:42 PM