STATE OF MICHIGAN
IN THE COURT OF CLAIMS

MARC SLIS and 906 VAPOR,

Plaintiffs,

v

STATE OF MICHIGAN and DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

Case No. 19-000152-MZ

Hon. Cynthia Stephens

Consolidated with:

A CLEAN CIGARETTE CORPORATION,

Plaintiff,

v

GOVERNOR GRETCHEN WHITMER, in her official capacity, and the STATE OF MICHIGAN, acting through the Governor's office, MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

Case No. 19-000154-MZ

Hon. Cynthia Stephens

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MARC SLIS AND 906 VAPOR'S SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs understand that the parties have already submitted several lengthy pleadings, motions, briefs, exhibits, and other materials for this Court's consideration. Plaintiffs will not repeat any of their previous arguments again here, but will focus exclusively on responding to new arguments that Defendants raised in their October 4, 2019 supplemental brief and/or during the hearings this week. (Plaintiffs' counsel briefly addressed these issues during closing arguments on October 9, 2019, but, for the Court's convenience, it may be helpful to review this written response as well with case citations and more thorough analysis/explanation).

I. Plaintiffs Have Shown a Likelihood of Success on the Merits.

A. DHHS Does Not Have Authority to Promulgate the Rules.

The plain language of MCL 333.2233(2) unambiguously specifies that the Department of Health and Human Services "shall not" promulgate rules if (1) the Michigan Supreme Court finds sections 45 and 46 of the APA unconstitutional; and (2) no statute requiring legislative review of administrative rules is enacted within 90 days of the Supreme Court's ruling. See MCL 333.2233(2). Both contingencies have occurred. In *Blank v Department of Corrections*, the Supreme Court found sections 45 and 46 of the APA unconstitutional. 462 Mich 103; 611 NW2d 530 (2000). And within 90 days of *Blank*, no statute requiring legislative review was enacted.

Indeed, Plaintiffs have also cited binding precedent, *Verizon v Mich PSC*, 263 Mich App 567; 689 NW2d 709 (2004), that nullified another agency's rules based on language that is exactly the same as MCL 333.2233(2). Defendants' Supplemental Brief does not even attempt to distinguish *Verizon*.

The decision in *Verizon* makes perfect sense, and it is a published, binding precedent. Under Michigan law, the Legislature is presumed to act with knowledge of current judicial interpretations, and, when statutory provisions are construed by a court and the Legislature

responds or declines to respond, courts must presume that the Legislature acquiesced to the judicial interpretation. *Geering v King*, 320 Mich App 182, 191; 906 NW2d 214, 220 (2017). See also *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505–06; 475 NW2d 704, 714 (1991) ("It is a well-established principle of statutory construction that the Legislature is presumed to act with knowledge of statutory interpretations by the Court of Appeals and this Court."). The Legislature declined to enact "a statute requiring legislative review of administrative rules . . . within 90 days after the Michigan supreme court ruling." MCL 333.2233(2). Based on MCL 333.2233's plain text and the decision in *Verizon*, Plaintiffs have shown a very strong likelihood that the Emergency Rules are ultra vires.

1. MCL 333.2233(2) Precludes Defendants from Relying on MCL 333.2221 and MCL 333.2226.

Given MCL 333.2233(2), Defendants cannot rely on MCL 333.2226 and MCL 333.2221 as authority for the Emergency Rules. Setting aside that MCL 333.2221 does not even purport to grant DHHS any rulemaking authority, both MCL 333.2226 and MCL 333.2221 predate MCL 333.2233. When two statutory provisions conflict, the later enacted will control. See *Farmers Ins Exch v Farm Bureau Ins Co*, 272 Mich App 106, 119; 724 NW2d 485, 493 (2006); *Travelers Ins v U-Haul of Michigan, Inc*, 235 Mich App 273, 279–80; 597 NW2d 235, 239 (1999) ("[T]he rules of statutory construction also provide that a more recently enacted law has precedence over the older statute."). The rule on later enacted statutes "is particularly persuasive when one statute is both the more specific and the more recent." *Farmers Ins Exch*, 272 Mich App at 119. "In order to determine which provision is truly more specific and, hence, controlling," courts "consider which provision applies to the more narrow realm of circumstances, and which to the more broad realm." *Miller v Allstate Ins Co*, 481 Mich 601, 613; 751 NW2d 463, 470 (2008).

Not only is MCL 333.2233 the later enacted statue,[1] but it is also more specific. MCL 333.2226 concerns the powers and duties of the Department in general and lists among the various powers the ability to "[e]xercise authority and promulgate rules to safeguard properly the public health . . . and to implement and carry out the powers and duties vested by law in the department." *Id.* at 333.2226(d). And MCL 333.2221, while not conferring any rulemaking power in its text,[2] deals with general duties regarding the promotion of health. In contrast, MCL 333.2233 deals specifically with the promulgation of rules. "[S]pecific provisions ... prevail over any arguable inconsistency with the more general rule. . . ." *Jones v Enertel, Inc*, 467 Mich 266, 271, 650 NW2d 334 (2002). By both its clear terms and the well-established rules of statutory construction, MCL 333.2233(2) prevents Defendants from relying on more general, older statutory provisions such as MCL 333.2226 and MCL 333.2221.

2. MCL 24.248 Also Does Not Provide Rulemaking Authority.

Defendants also claim that the APA provides an independent basis of authority to promulgate the Emergency Rules. Defendants rely on MCL 24.248(1) for this proposition. This reliance is misplaced for at least two reasons. First, MCL 333.2233(2) is both later in time and more specific than MCL 24.248(1),[3] and therefore trumps MCL 24.248(1), for all the reasons explained above. Second, MCL 24.248(1) is not the fount of any substantive rulemaking power.

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[1] MCL 333.2226 and MCL 333.2221 were enacted in 1978 while the pertinent language in MCL 333.2233 was added in 1996.

[2] As a baseline principle in Michigan, "the power and authority of an agency must be conferred by clear and unmistakable statutory language." *Herrick Dist Library v Library of Michigan*, 293 Mich App 571, 583; 810 NW2d 110, 117 (2011). No language in MCL 333.2221 even mentions rulemaking.

[3] MCL 24.248(1) has existed since 1969 with only immaterial amendments in the interim. Since 2012, MCL 24.248(2) has given DHHS a limited emergency power to schedule substances as a controlled substances. That provision is not relied on or at issue here.

On its face, the provision simply allows agencies to skip certain safeguards where the agency makes a finding regarding the public health, safety, or welfare. But the provision assumes the agency has the power to make rules on some subject in the first place. It does not purport to give any agency substantive rulemaking powers. See *Herrick Dist Library v Library of Michigan*, 293 Mich App 571, 583; 810 NW2d 110, 117 (2011) (stating that "the power and authority of an agency must be conferred by clear and unmistakable statutory language").

3. MCL 400.247 Does Not Provide Rulemaking Authority.

Defendants also claim in passing that MCL 400.227 provides it authority to promulgate the Emergency Rules. That Executive Order, however, did not purport to create any rulemaking authority. Rather, it only purported to transfer existing powers to the newly reorganized DHHS.

4. MCL 333.2233(2) is Constitutional.

Defendants' Supplemental Brief includes a new argument that MCL 333.2233(2) is unconstitutional under Article IV, § 25 of the Michigan Constitution. That provision states that "[n]o law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length." Defendants assert that by removing DHHS's rulemaking authority, Public Act 67 of 1996, which created MCL 333.2233(2), improperly "revised, altered, or amended" MCL 333.2221 and MCL 333.2226 because the Act never "republished" those sections.

Defendants' constitutional argument has several flaws. To start, Michigan courts have held that Article IV, § 25's prohibition does not apply to a statutory provisions that are not amendatory but which are independent, original in form, and complete within themselves. See *People v. Arnold*, No. 325407, 2019 WL 2439061, at *10 (Mich. Ct. App. June 11, 2019) (quoting *People v. Meeks*, 92 Mich. App. 433, 444, 285 N.W.2d 318 (1979)) ("If an act is complete within itself, it does not fall within the constitutional prohibition."). As Justice Cooley explained:

> If, whenever a new statute is passed, it is necessary that all prior statutes modified by it by implication should be re-enacted and published at length as modified, then a large portion of the whole code of laws of the state would require to be republished at every session, and parts of it several times over, until from the mere immensity of the material, it would be impossible to tell what the law was.

People ex rel Drake v Mahaney, 13 Mich 481, 496–97 (1865). Thus, rather than being a provision meant to force mass republication, Article IV, § 25 was designed to prohibit "[a]n amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section." *Id.* at 497. In contrast, "an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent." *Id.*[4]

Here, MCL 333.2233 is complete within itself and does not confuse or mislead. It does not revise, alter, or amend within the meaning of Article IV, § 25. The mere fact that a statue affects prior laws does not mean that the Michigan constitution requires republication of each law. Indeed, the Michigan Supreme Court has explicitly rejected the argument "that there can be no supplemental or partial alterations to an act which are inconsistent with or which otherwise do violence to any other statute." *In re Requests of Governor & Senate on Constitutionality of Act No 294 of Pub Acts of 1972*, 389 Mich at 473; 208 NW2d 469 (1973) ("That language is not in the constitution. It is not our function to introduce it therein.").

Further, it is well-settled that even where a statute amends others, but only does so by implication, it is not covered by Article IV, § 25's prohibition. See, e.g., *In re Requests of*

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[4] In interpreting Article IV, § 25, the Michigan Supreme Court has looked to "cases decided at a time proximate to the ratification of the constitution" as those cases "better reflect the meaning of the language of the constitution." *In re Requests of Governor & Senate on Constitutionality of Act No 294 of Pub Acts of 1972*, 389 Mich 441, 470–71; 208 NW2d 469, 476–77 (1973). Article IV, § 25 first appeared in the 1850 Michigan Constitution and thus Justice Cooley's 1865 opinion offers guidance on its meaning.

Governor & Senate on Constitutionality of Act No 294 of Pub Acts of 1972, 389 Mich at 477 (distinguishing amendment by implication from the conduct that Article IV, § 25 prohibits); *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389, 399 (1872) ("The position is, that a new statute which only purports to add a new section, cannot have the effect by implication to amend sections of the original act without coming directly in conflict with § 25, of Art. IV of the constitution, which requires the sections amended to be re-enacted and published at length. But we have heretofore decided that statutes which amend others by implication are not within the contemplation of that section"); *Ripley v. Evans*, 87 Mich. 217, 232, 49 N.W. 504, 509 (1891) ("It has been repeatedly held in this state that the statute having amendatory effect by implication to repeal inconsistent acts is not in conflict with section 25 of article 4 of the constitution, because not re-enacting and publishing at length the acts so altered and amended by implication."); *Arnold*, 2019 WL 2439061, at *10 (Mich. Ct. App. June 11, 2019) ("[A]mendment by implication is not the evil sought to be avoided by [Const 1963, art 4, § 25].") (citing *People v. Hughes*, 85 Mich. App. 674, 681, 272 N.W.2d 567 (1978)); *Lucas v Bd of Co Rd Com'rs of Wayne Co*, 131 Mich App 642, 664; 348 NW2d 660, 670–71 (1984) ("Michigan case law does not prevent amendment by implication. To the contrary, amendment by implication is permitted without republishing or reenacting every previous statute affected by the new law.").

Courts have held as much for good reason: amendments by implication are the "inevitable by-product of the legislative scheme of government." *In re Requests of Governor & Senate on Constitutionality of Act No 294 of Pub Acts of 1972*, 389 Mich at 477. Indeed, it would "boggle[] the mind to contemplate the laws which would be rendered unconstitutional ab initio and the avalanche of litigation which would follow" if courts were to "construe § 25 in so extended a manner as to find" amendment by implication unconstitutional. See *id.* But that is precisely what

Defendants demand: that the Legislature republish any law that might be affected in any way by another statute.

Given that MCL 333.2233(2) does not revise, amend, or alter any statute within the meaning of Article IV, § 25, and could at any rate only do so by implication, there is no merit to Defendants' constitutional challenge. Further, Defendants bear the burden on their constitutional challenge. See *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 11, 740 N.W.2d 444 (2007) ("A statute challenged on a constitutional basis is clothed in a presumption of constitutionality, and the burden of proving that a statute is unconstitutional rests with the party challenging it.") (quotation marks and citations omitted). And MCL 333.2233 enjoins a strong presumption of constitutionality. See *id.* If the Court has concerns about the issue, the most prudent course would be to order more briefing while granting an injunction that prevents Mr. Slis from facing irreparable harm while the Court considers this question.

II. Defendants Should be Barred From Relying on the Post-Hoc Rationalizations First Introduced in their Supplemental Briefing.

Defendants declared an emergency to ban flavored nicotine vapor products through administrative rulemaking and have been called upon to defend those rules before this Court. As Plaintiffs have pointed out, it is a fundamental principle in administrative law that they can only do so on the bases they actually articulated to justify them. See, e.g., *Kisor v Wilkie*, 139 S Ct 2400, 2421; 204 L Ed 2d 841 (2019) ("Remember that a court may defer to only an agency's authoritative and considered judgments. . . . No ad hoc statements or post hoc rationalizations need apply."); *Motor Vehicle Mfrs Ass'n of US, Inc v State Farm Mut Auto Ins Co*, 463 US 29, 50; 103 S Ct 2856, 2870; 77 L Ed 2d 443 (1983) ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."); *Burlington Truck Lines, Inc v United States*, 371 US 156, 168–69; 83 S Ct 239; 9 L Ed 2d 207 (1962) ("*SEC v Chenery Corp*,

332 US 194; 67 S Ct 1575; 91 L Ed 1995 (1947), requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself").

Defendants' additional filings make assertions that go outside of the statistics, sources, and rationale contained within the Rules themselves. Defendants assert that "[a]s of September 27, 2019, 12 deaths have been linked to vaping-related lung injuries and the number of vaping related lung illnesses has risen to 805." Defs Br in Opp at 5. Defendants state that "[a]s of September 20, 2019, the State of Michigan has 13 confirmed or probable cases and is currently investigating several more. The vaping associated lung injuries we know about in Michigan have afflicted younger people, with an age range of 16 to 31 years and a median age of 21 years." *Id.* However, the DHHS's Finding of Emergency was not predicated in any way on the recent vaping-related illnesses, which have been found to be caused by after-market illicit additives. *See* Pls Mot for Prelim Inj at 9-10, Pls Mot in Limine at 1. And Dr. Khaldun testified herself that the recent lung illnesses were not a basis for the finding of emergency or the promulgation of the Emergency Rules.

III. The Court of Appeals' Reasoning in *Michigan State AFL-CIO* Applies Here

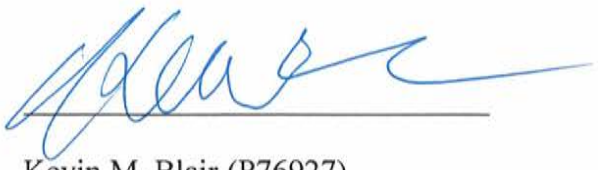
An emergency rule is justified if the agency "finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule..." MCL 24.248(1). Though the Court of Appeals analyzed whether the rule at issue in *Michigan State AFL-CIO* was justified for the preservation of "public welfare," its reasoning also applies to "public health." The Court of Appeals cited to the Black's Law Dictionary definition of "public welfare" to inform its decision that the rule did not preserve the interests "of the public at large, or of a whole community, as distinguished from the advantage of an individual or limited class."

Though the Emergency Rules were promulgated to "safeguard the public health," this does not render *Michigan State AFL-CIO* inapplicable. "Public health" is defined as "[t]he health of

the community at large." Black's Law Dictionary (11th ed. 2019). Because the Emergency Rules would only protect a very limited subset of Michigan residents—those aged 10-17 who would only try nicotine if stores could legally sell flavored nicotine vapor products to adults—Defendants cannot meet the statutory substantive standard of "preservation of the public health," i.e., "the health of the community at large." MCL 24.248(1); Black's Law Dictionary (11th ed. 2019).

Further, the DHHS states in its Finding of Emergency that "the following emergency rules are necessary to preserve the public health, safety, ***and welfare***." DHHS Finding of Emergency at 3 (emphasis added). Because the Rules state they are necessary for health, safety, and welfare, the fact that public health is "the primary concern" does not render *Michigan State AFL-CIO* inapposite to the present matter. Defs Supp Br in Opp at 15.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2019, I served Plaintiff's and Defendants' counsel via email (at their request).

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