STATE OF MICHIGAN
IN THE COURT OF APPEALS

MARC SLIS AND 906 VAPOR,

Plaintiff-Appellee,

v

STATE OF MICHIGAN and DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants.
/

Court of Appeals No.

Court of Claims No. 19-000152-MZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

A CLEAN CIGARETTE CORPORATION, a Michigan Corporation,

Plaintiff-Appellee,

v

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

Defendants-Appellants.
/

Court of Appeals No.

Court of Claims No. 19-000154-MZ

Defendants-Appellants request a ruling from this Court by October 31, 2019

DEFENDANTS-APPELLANTS' STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND GOVERNOR GRETCHEN WHITMER'S EMERGENCY APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to MCL 600.308(2)(c) and MCL 600.309, because Defendants-Appellants appeal by leave an interlocutory order from the court of claims. This Court also has jurisdiction pursuant to MCR 7.203(B)(1) and the appeal is timely filed under MCR 7.205(A). The Order appealed, which granted Plaintiffs' motion for preliminary injunction, was entered on October 15, 2019. (App Vol 5, pp 786-800.)

STATEMENT OF QUESTIONS PRESENTED

1. Did the court of claims abuse its discretion when it granted Plaintiffs-Appellees the extraordinary relief of a preliminary injunction where Plaintiffs-Appellees did not demonstrate a likelihood of success on the merits and where the remaining factors also weighed in favor of Defendants?

   Appellants' answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

MCL 24.248

If an agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice and participation procedures required by sections 41 and 42 and states in the rule the agency's reasons for that finding, and the governor concurs in the finding of emergency, the agency may dispense with all or part of the procedures and file in the office of the secretary of state the copies prescribed by section 46 endorsed as an emergency rule, to 3 of which copies must be attached the certificates prescribed by section 45 and the governor's certificate concurring in the finding of emergency. The emergency rule is effective on filing and remains in effect until a date fixed in the rule or 6 months after the date of its filing, whichever is earlier.

Department of Health and Human Services Bureau of Health and Wellness, Public Health Administration Protection of Youth from Nicotine Product Addiction Emergency Rules, September 18, 2019. (See App Vol 1, pp 1-5.)

MCL 333.2233(2)

If the Michigan supreme court rules that sections 45 and 46 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.245 and 24.246 of the Michigan Compiled Laws, are unconstitutional, and a statute requiring legislative review of administrative rules is not enacted within 90 days after the Michigan supreme court ruling, the department shall not promulgate rules under this act.

21 U.S.C. § 387p(2)

(A) In general

No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.

(B) Exception

Subparagraph (A) does not apply to requirements relating to the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age, or relating to fire safety standards for tobacco

products. Information disclosed to a State under subparagraph (A) that is exempt from disclosure under section 552(b)(4) of title 5 shall be treated as a trade secret and confidential information by the State.

Mich Const 1963, art 10, § 2

Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law.

INTRODUCTION

This case cries out for immediate action, which is why Defendants-Appellants ask for relief by October 31. Middle school and high school students are increasingly using flavored nicotine vapor products at an explosive and alarming rate. Nicotine is highly addictive and negatively impacts the developing brain. Research shows that youth who use such products are significantly more likely to start smoking combustible cigarettes—notwithstanding the documented and well-known negative health consequences associated with the use of cigarettes. This information led the Michigan Department of Health and Human Services (DHHS) to determine that the State of Michigan faces a vaping crisis among youth. Therefore, DHHS, in accordance with its authority under MCL 24.248, issued the *Protection of Youth from Nicotine Product Addiction Emergency Rules* (Rules) to address the crisis. The Rules were promulgated on September 18, 2019, with enforcement beginning 14 days later. (App Vol 1, pp 1-5.)

On October 15, 2019, the court of claims issued an Opinion and Order granting Plaintiffs' request for a preliminary injunction preventing the State Defendants from enforcing the Rules. (App Vol 5, pp 786-800.) The court determined that the information and data upon which DHHS relied to identify the crisis was "stale" because it had been in DHHS's possession for about eight months.[1] Even while acknowledging that a youth vaping crisis in Michigan exists,

[1] While not necessarily material to the court's ruling, the information in DHHS's possession was, at most, seven months old, not eight.

the court nevertheless determined that Plaintiffs were likely to succeed on the merits. The court's rationale was that DHHS's alleged delay in declaring the youth vaping emergency supported Plaintiffs' claim that the Rules were procedurally invalid.

The court erred when it determined that Plaintiffs would likely prevail on their claim that the Rules were procedurally invalid. The sole basis for this determination was the court's misinterpretation and misapplication of MCL 24.248(1) and its determination that DHHS's alleged delay in promulgating the Rules somehow makes them invalid. But the other factors also weigh in Defendants-Appellants' favor, and the court erred in its analysis of them as well.

It is undisputed that youth vaping is a troubling public health crisis, and Michigan's youth will suffer substantial harm by awaiting final judgment before taking an appeal. If review is delayed, more and more Michigan youth will continue to use flavored nicotine vapor products and become dependent on nicotine. There is uncontroverted evidence that the use of nicotine vapor products by youth—in Michigan and other states that imposed age restrictions on the purchase of such products years ago—has continued to skyrocket. And youth in Michigan are getting access to and using nicotine vapor products at shocking rates. Flavored nicotine vaping products are one of the driving forces of this epidemic. Whether the information that DHHS relied on to declare the emergency was months, days, or hours old, the public health crisis exists today. Enjoining Defendants from enforcing the Rules that were enacted to address this emergency sets a precedent

that is both dangerous and contrary to law: courts second-guessing the expert judgment of public health officials dealing with a public health emergency.

STATEMENT OF FACTS AND PROCEEDINGS

DHHS promulgates the emergency rules.

On September 18, 2019, in accordance with its rule-making authority under MCL 333.2221, MCL 333.2226, MCL 333.2233 and MCL 24.248, DHHS promulgated the "Protection of Youth from Nicotine Addiction Emergency Rules" (Rules) based on its determination that "the State of Michigan faces a vaping crisis among youth." (App Vol 1, pp 1-5.) In reaching its conclusion that Michigan faces a vaping crisis among youth, DHHS relied on a number of studies and reports that showed the negative effects of nicotine on youth and the skyrocketing increase in the use of e-cigarettes (also known as vapor products) by youth both nationwide and in Michigan.

More specifically, DHHS based its conclusions of an emergency on reports showing that:

- Nationwide, e-cigarette use among middle and high school students increased 900% from 2011-2015. (App Vol 1, p 1.)
- From 2017 to 2018, e-cigarette use among youth increased 78% among high school students and 48% among middle school students. (App Vol 1, p 1.)
- The total number of children who are currently using e-cigarettes rose to an astonishing 3.6 million in 2018, 1.5 million more than the previous year alone. (App Vol 1, p 1.)
- From the years 2015-2016 and 2017-2018, counties across Michigan (cross section of 39 reporting) witnessed between a 30% and 118% increase in

use among high school students who used an e-cigarette during the past month. (App Vol 1, p 1.)

- The nicotine in e-cigarettes can rewire the brain to crave more of the substance and create a nicotine addiction. Resulting brain changes may have long-lasting effects on attention, learning, and memory. (App Vol 1, p 2.)

- Research has also shown that youth who use e-cigarettes are significantly more likely to start smoking combustible cigarettes despite the well-known, documented, and often deadly health consequences such as lung cancer and heart disease. (App Vol 1, p 2.)

- In December 2018, United States Surgeon General Jerome Adams officially declared e-cigarette use among youth in the United States an epidemic. (App Vol 1, p 2.) Dr. Adams issued an advisory on e-cigarette use among youth, noting that action must be promptly taken to protect the health of young people. (App Vol 1, p 2.)

- Dr. Adams was joined by the Secretary of the U.S. Department of Health & Human Services, Alex Azar, who called the historic increase in e-cigarette use by youth, which has outpaced any other substance, an "unprecedented challenge." (App Vol 1, p 2.)

- According to a recent study, 81% of youth e-cigarette users reported using a flavored e-cigarette at first use. (App Vol 1, p 2.) This study concluded that flavored tobacco products may attract young users and serve as "starter products to regular tobacco use." (App Vol 1, p 2.)

- Another study revealed that nearly two thirds (63.6%) of current middle and high school tobacco users have used a flavored tobacco product in the past month. (App Vol 1, p 3.)

DHHS, specifically Chief Medical Executive Joneigh Khaldun, M.D, concluded that the youth vaping epidemic is attributable in large part to the appeal of flavored vapor products to youth as well as the advertising and promotional activities by companies that glamorize use of nicotine products nationwide. (App Vol 1, p 3.)

After DHHS determined that the preservation of public health required emergency rules and stated its reasons for its findings, Governor Whitmer concurred in the finding of emergency in accordance with MCL 24.248. The Rules were then filed with the Secretary of State and became effective on September 18, 2019. (App Vol 1, pp 1-5.)

In general, the Rules prohibited the sale and distribution of flavored nicotine vapor product in Michigan, allowed the unrestricted sale and distribution of tobacco-flavored nicotine vapor product, and placed limitations on advertising and marketing flavored vapor product, including vapor product that contains zero nicotine. (App Vol 1, pp 3-4.) The Rules did not otherwise prohibit the sale or distribution of flavored vapor product that contained zero nicotine and did not restrict or prohibit the sale or marketing of any product outside of Michigan. (App Vol 1, pp 3-4.) Further, the Rules made no distinction between in-state and out-of-state retailers or resellers. And, notably, the Rules did not prohibit the possession or use of flavored nicotine vapor products, provided the products are not possessed with intent to sell or distribute the flavored nicotine products in Michigan. (App Vol 1, pp 3-4.)

Litigation ensues.

On September 25, 2019, Plaintiff Marc Slis and his business, 906 Vapor (collectively "Slis"), filed a complaint in Houghton County Circuit Court seeking declaratory judgment that the Rules were invalid based on a number of different theories. (App Vol 1, pp 6-45.) First, Slis contended that the Rules were ultra vires

because DHHS lacked authority to enact emergency rules based on MCL 333.2233(2). (App Vol 1, pp 26-27.) Second, Slis alleged that the Rules were procedurally invalid because there was no true emergency to justify deviating from the regular rule-making process under the Administrative Procedures Act (APA) or, alternatively, that even if there was a true emergency, the Rules only address an alleged threat to a small group of the general public (i.e. youth), which is insufficient to justify deviating from regular rule-making process under the APA. (App Vol 1, pp 27-30.) Third, Slis alleged that the Rules were substantively invalid because they were not within the subject matter of DHHS's enabling statute and because they were arbitrary and capricious. (App Vol 1, pp 30-33.) Slis alleged the Rules were arbitrary and capricious because they were overly broad and because DHHS did not consider alternatives to addressing the youth vaping crisis or how the Rules would adversely impact the vaping industry or adult users of nicotine flavored vapor products. (App Vol 1, pp 30-33.)

In addition to his Complaint, Slis filed an emergency ex parte motion for temporary restraining order (TRO). (App Vol 1, pp 46-99.)

On September 25, 2019, the Houghton County Circuit Court entered an order denying Slis's request for TRO. (App Vol 1, p 100.) On September 26, 2019, Slis filed an emergency motion for reconsideration of the Houghton County Circuit Court's denial of TRO, but Defendants filed a notice of transfer on September 26, 2019, transferring the case to the court of claims. (App Vol 1, pp 101-104).

Following transfer of Slis's case to the court of claims, the court of claims entered an order denying Slis's motion for TRO and set the matter for a hearing on October 1, 2019 to address Slis's motion for preliminary injunction. (App Vol 1, p 105.)

By October 1, 2019, Plaintiff A Clean Cigarette (Clean Cigarette) had filed its own court of claims complaint for declaratory judgment and injunctive relief challenging the Rules. In its complaint, Clean Cigarette argued that the Rules were invalid because they only addressed a subset of the community (i.e. youth) and did not address a threat to the public health of the community as a whole. (App Vol 1, pp 106-118.) Like Slis, Clean Cigarette also requested a TRO and a preliminary injunction to prevent enforcement of the Rules. (App Vol 1, pp 119-149.)

On October 1, 2019, the court of claims held a hearing on Slis's motion for preliminary injunction and also apparently learned of the existence of Clean Cigarette's lawsuit. At the October 1, 2019 hearing, the Court heard Slis's testimony on the issue of irreparable harm only (App Vol 2, pp 292-364), after which the court issued an order denying, without prejudice, Slis's motion for preliminary injunction. (App Vol 1, p 150.) Additionally, on October 2, 2019, the court consolidated Slis's and Clean Cigarette's cases and scheduled a hearing for October 8, 2019 to address Plaintiffs' combined motions for preliminary injunction. In its October 2, 2019 Order, the court directed the parties to file supplemental briefing by October 5, 2019 and witness lists by no later than 12 noon on October 7, 2019. (App Vol 1, p 150.)

On October 2, 2019, Slis filed an emergency application for leave to appeal, motion for peremptory reversal and/or to issue TRO and/or preliminary injunction in the Michigan Court of Appeals. (App Vol 1, pp 151-173.) Defendants filed a brief opposing Slis's emergency application for leave to appeal on October 4, 2019 (App Vol 1, pp 174-193), to which Slis filed a reply later that same day. (App Vol 1, 194-233.)

Also on October 4, 2019, Clean Cigarette filed a First Amended Verified Complaint for Declaratory and Injunctive Relief. (App Vol 2, pp 235-265.) In its First Amended Complaint, Clean Cigarette alleged that the Rules violated the dormant commerce clause, were preempted by 21 USC § 387 of the Tobacco Control Act, amounted to an unlawful takings by the State in violation of Mich Const 1963, art 10, § 2, and were otherwise invalid because no emergency existed or, alternatively, if an emergency existed, it was limited to a subset of the population and did not affect the community as a whole. (App Vol 2, pp 235-265.) In conjunction with its First Amended Complaint, Clean Cigarette again requested a TRO and preliminary injunctive relief. (App Vol 2, pp 266-276.)

On October 7, 2019, Defendants filed a response to Clean Cigarette's renewed request for TRO and preliminary injunction and addressed why the Rules did not violate the dormant commerce clause, were not preempted by the Tobacco Control Act, and did not amount to an unlawful takings under Mich Const 1963, art 10, § 2.[2]

[2] Defendants had previously addressed Clean Cigarette's re-asserted claim that the Rules were invalid under the APA.

(App Vol 2, pp 277-291.) Additionally, on October 7, 2019, this Court issued an Order denying Slis's application for leave to appeal "for failure to persuade the Court of the need for immediate appellate review." (App Vol 2, p 234.)

On October 8 and 9, 2019, the court of claims held a hearing on Plaintiffs' motions for preliminary injunction. (App Vol 3, pp 365-524 and Vol 4, pp 525-774.) Following the hearing, the court directed the parties to submit proposed findings of fact and conclusions of law.

The court of claims issues its Opinion and Order.

In its October 15, 2019 Opinion and Order, the court made several findings of fact, including that:

- In reaching its decision that an emergency existed as it pertains to youth vaping, DHHS cited numerous studies; the latest publication of the studies/documents was February 2019; and most of the underlying data was from instruments created prior to 2018 (App Vol 5, pp 789-790.)
- DHHS considered the passage of 2019 PA 18, amending the Youth Tobacco Act, when it recommended the emergency rules, which "prohibited the sale of e-cigarettes and other non-traditional products to minors." (App Vol 5, p 790.)
- DHHS had a basis for determining that 2019 PA 18 would not be a significant deterrent to youth e-cigarette use based on the historic data on e-cigarette use in other states which adopted similar legislation to 2019 PA 18 prior to Michigan. (App Vol 5, p 790.)

Although not specifically stated as a "finding of fact," the court also determined that "[t]here is no serious dispute with respect to whether a vaping-use crisis exists among youth." (App Vol 5, p 795.) Indeed, throughout the proceedings, Clean Cigarette never disputed the Finding of Emergency as it relates to: 1) "the

staggering increase in youth usage of vape"; 2) an "epidemic among youth"; and 3) that "flavors [are] driving youth" use of e-cigarettes. (App Vol 1, p 127.)

Despite the court's conclusion that a vaping-use crisis exists among youth, and Clean Cigarette's agreement with that conclusion, the court granted Plaintiffs' motions for preliminary injunction based, in part, on its determination that the various reports and studies that DHHS relied on to support its finding of emergency were "stale" information, inasmuch as DHHS had been in possession of the data for at least eight months before the Rules were issued.[3] (App Vol 5, p 795.) Pointing to *Michigan State AFL-CIO v Secretary of State*, 230 Mich App 1 (1998), the court framed this substantive assessment of DHHS's information as a question of "procedural[] validity" subject to the court's de novo review. (App Vol 5, p 794.) Applying this standard of review, the court explained that it was not convinced that the record at this juncture adequately substantiated the declaration of an emergency necessitating promulgation of the Rules and, thus, ruled that Plaintiffs showed "a likelihood of success on their assertion that the emergency rules are procedurally invalid." (App Vol 5, p 797.)[4] While the court briefly addressed Plaintiffs' other challenges to the Rules, it did not explain its analysis in any depth. (App Vol 5, pp 793, 797-798, n 6.)

[3] Again, DHHS disputes the court's reliance on eight months.

[4] Clean Cigarette never alleged that the Rules were invalid because DHHS relied on outdated statistics or information or waited too long after receiving the information before acting to promulgate the Rules. Rather, the sole basis for Clean Cigarette's assertion that the Rules were invalid under the APA was because the Rules allegedly applied only to a subset of the public (i.e. youth) and not the entire community.

As for the remaining factors used to determine whether to grant a preliminary injunction, the court concluded that Plaintiffs showed that they would likely suffer irreparable harm, that DHHS did not show that it would suffer any harm, and that the harm to the public did not favor either granting or denying the preliminary injunction. (App Vol 5, pp 798-800.) In making its determination as it relates to the public harm, the court acknowledged that Defendants presented evidence showing that "the risk that youth will try vaping products or that they will continue to use vaping products is exacerbated by the existence of flavored products," and that "the risks to youth who use vaping products are real and substantial." (App Vol 5, pp 798-799.) The court also found, however, that adults who previously smoked combustible cigarettes but have switched to flavored nicotine vapor product might suffer harm if no injunction issued, as there was evidence introduced to support the notion that "these adult users of [nicotine] flavored vapor products will return to more harmful combustible tobacco products." (App Vol 5, p 799.)

Additional concurrent proceedings.

In conjunction with this appeal, and for purposes of full disclosure to this Court, Defendants anticipate filing a bypass application for leave to appeal to the Michigan Supreme Court under MCR 7.303(B)(1) and MCR 7.305(C)(1)(b) as soon as practicable.

STANDARD OF REVIEW

This Court reviews a lower court's decision to grant injunctive relief for an abuse of discretion. *Pontiac fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8 (2008); *Oshtemo Charter Tp v Kalamazoo County Road Comm'n*, 288 Mich App 296, 301 (2010). It reviews questions of law underlying that decision de novo. *State v McQueen*, 493 Mich 135, 146 (2013).

ARGUMENT

I. The court of claims abused its discretion when it granted Plaintiffs the extraordinary relief of a preliminary injunction.

The Michigan Supreme Court has explained that preliminary injunctive relief is an "extraordinary remedy." *Michigan Coalition of State Employee Unions v Michigan Civil Service Com'n*, 465 Mich 212, 219 (2001). That extraordinary remedy is not warranted here, and the court of claims abused its discretion in issuing the preliminary injunction.

In issuing a preliminary injunction, a court must consider (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. *Alliance for the Mentally Ill v Dep't of Community Health,* 231 Mich App 674, 660–661 (1998).

A court's decision whether to award injunctive relief may not be arbitrary, but rather must be in accordance with the fixed principles of equity jurisdiction and the evidence in the case. *Jeffrey v Clinton Twp*, 195 Mich App 260, 263 (1992). When seeking injunctive relief, the plaintiff has the burden of proof on each of these factors. MCR 3.310(A)(4).

The preliminary injunction factors are not met here. The court of claims committed legal errors in concluding otherwise and, as a result, abused its discretion in granting this extraordinary relief. Accordingly, Defendants file the instant emergency application for leave to appeal, along with motions to vacate the injunction and for immediate consideration.

A. The court of claims erred when it determined that Plaintiffs were likely to succeed on the merits.

Plaintiffs are not likely to succeed on the merits because DHHS (the executive branch) properly exercised its rulemaking authority and promulgated valid emergency rules.

1. The court of claims exceeded its authority by second-guessing DHHS's determination that an emergency youth vaping crisis exists.

The court of claims erred by determining that it was appropriate to review de novo DHHS's finding of emergency. Both the statutory text and the constitutional commitment to separation of powers, see Const 1963, art 3 § 2, compel a court to afford considerable deference to DHHS when reviewing its finding of emergency under MCL 24.248(1). Whether and to what extent a court can second-guess the judgments of public health experts and the governor when

confronted with a crisis is of critical import. Here, the court of claims exceeded that authority and, in doing so, mistakenly determined that Plaintiffs showed a likelihood of success on the merits.

Of all the actions that compose the response to a public health emergency, none is more thoroughly committed to the executive branch than the finding that the emergency exists. Whether circumstances give rise to a public health emergency is a decision for public health officials with experience and expertise in assessing the relevant data. What data to use, how to use it, when to act, how to interpret multiple data streams that may raise contradictions, and how to assess trajectories in the data and ascertain when data is out-of-date are all judgments for public health experts. The legislature has duly delegated these judgments to the executive branch.

The Michigan Supreme Court has not yet addressed whether a court has power to review an agency's finding of emergency, and if so what standard of review should govern. The primary decision from this Court on the topic, however, *Michigan State AFL-CIO v Secretary of State*, 230 Mich App 1 (1998), provides a muddled reading of the law and, as a result, unduly invites courts to second-guess the judgments of executive-branch public health experts about whether a public health emergency exists. The court of claims' ruling in the instant case exemplifies this problem and warrants correction by this Court.

In *Michigan State AFL-CIO*, a panel of this Court assessed an emergency rule for substantive and procedural validity. *Id*. at 14. As to the former, the

panel followed the well-established framework under *Luttrell v Department of Corrections*, 421 Mich 93, 101 (1984). Cf *Michigan Farm Bureau v Department of Environmental Quality*, 292 Mich App 106, 129 (2011). The panel then reviewed the lower court's decision that no emergency existed to justify the emergency rules as a matter of procedural validity. *Michigan State AFL-CIO*, 230 Mich App at 17–21. In determining what standard of review to apply to the agency's finding of emergency, the panel rejected this Court's earlier decision in *Michigan Petroleum Association v State Fire Safety Board*, 124 Mich App 187 (1983), which considered whether the finding had a "substantial basis" and whether the agency "abused" its rulemaking authority. *Id.* at 193–95. Instead, the panel characterized the question under review "as an issue of statutory construction, which is a question of law that we review de novo." *Michigan State AFL-CIO,* 230 Mich App at 21.

Next, the panel identified the three procedural conditions required by MCL 24.248:

> (1) the agency must "find[] that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice and participation procedures required by section 41 and 42;" (2) "state[] in the rule the agency's reasons for that finding"; and (3) "the governor [must] concur[] in the finding of emergency." [*Id.* at 21.]

The panel then concluded that the agency failed to satisfy the first of these requirements because the basis the agency had identified for the emergency applied only to a limited class and not the public at large. *Id.* at 24.

The panel did not explain, however, why its assessment of the adequacy

of the emergency's basis was a matter of "procedural validity" suitable for de novo review. This silence has proven problematic, as it has left the door open for courts to treat any evaluation of an agency's finding of an emergency, no matter how substantive, as a procedural matter governed by no measure of deference to the agency whatsoever. As Le Duc explained in his treatise appraising *Michigan State AFL-CIO*,

> [The Court of Appeals'] failure to give deference to the factual conclusions of an agency charged by the Legislature with responsibility to administer a statute and to substitute its judgement for that of the highest official in the executive branch regarding the existence of an emergency are both violative of the Constitution's separation of powers provisions. [Le Duc, *Michigan Administrative Law*, § 4.38.]

In this case, the court of claims' lack of appropriate deference to DHHS's findings contributed significantly to its erroneous ruling. Repeatedly citing *Michigan State AFL-CIO*, the court of claims characterized Plaintiffs' challenge to the sufficiency of DHHS's finding of an emergency as a question of procedural validity subject to de novo review. Further, the court agreed with Plaintiffs "that defendants' proffered reasons for the emergency declaration have fallen short" and, in doing so, grounded its belief that the information underlying the emergency finding was "stale." (App Vol 5, pp 793-796.)

But framing this substantive assessment of DHHS's finding of emergency as a matter of "procedure" subject to de novo review was wrong as a matter of law. A finding of emergency is a determination of fact, not of law, and an evaluation of the sufficiency of that finding is not suitable for treatment within

the standard framework applicable to ordinary rulemaking. See Le Duc, *Michigan Administrative Law*, § 4.38 (explaining that judicial review of emergency rules requires a consideration not encompassed by the traditional review for substantive and procedural validity of administrative rules: "whether there was justification for the use of the emergency rulemaking procedures.")

By reviewing DHHS's emergency finding under the "procedural" prong of the traditional framework for analyzing non-emergency rules, the court of claims erred in multiple ways: it failed to account for the factual nature of these findings, the separation of powers concerns that inevitably surround emergencies, and the statutory limitations created in MCL 24.248. Whether a public health emergency exists is an inherently factual determination appropriate for experts with special training in how to assess and apply public health data and information. If the finding of a public health emergency is subject to judicial review at all, the review must be appropriately deferential to that expertise.

The significant limitations inherent in emergency rulemaking power, and the fundamental separation-of-powers principles they embody and reflect, further bolster the case for considerable deference in judicial review of emergency findings. To invoke its emergency rulemaking power, the agency must not only provide a rationale for its finding of emergency, MCL 24.248(1), but also obtain the governor's concurrence in the finding of an emergency. *Id.* This requirement serves both to require direct review by the highest official in

the executive branch and to create in the governor direct political accountability for the finding and the ensuing rule. Finally, the Rules are only temporary: limited to six months and a single six-month extension. *Id.* If the agency wants a similar rule to remain in effect past this time, the agency must follow the full procedures outlined in the APA, including notice and comment. MCL 24.248(4).

These limitations serve to define the scope of, and provide the requisite checks on, the power that the Legislature has delegated to the executive to use emergency rulemaking in response to an emergency. By inserting de novo review into this emergency-response mechanism, the court of claims violated its carefully delineated separation of powers and cast uncertainty on the State's ability to respond to a public health crisis. This Court should clarify that a finding of emergency under MCL 24.248(1) is a factual determination, which may be reviewed—if at all—with utmost deference to the agency.

2. The court of claims improperly determined that DHHS failed to comply with MCL 24.248(1) when promulgating the Rules, because speed is not a specific statutory factor.

The legislature authorized the DHHS to issue an emergency rule if three conditions are met: (1) DHHS finds that preservation of the public health, safety, or welfare requires it; (2) DHHS states in the rule its reasons for that finding; and (3) the governor concurs in the finding of emergency. MCL 24.248(1). None of these elements imposes any requirements or limitations on the data or other information that an agency can rely on when finding an emergency, let alone mandates that the emergency be based only on data discovered within a certain timeframe.

When a statute is clear and unambiguous, there is no room for judicial construction or interpretation. *People v McIntire*, 461 Mich 147, 152–153 (1999). Given clear legislative intent, "the proper role of a court is simply to *apply* the terms of the statute to the circumstances in a particular case." *Id.* (emphasis in original). For that reason, when a statute sets out a discrete set of requirements for an agency to follow, the court may not add additional requirements based on its policy preferences or judgment.

Smith v Cliffs on the Bay Condominium Association, 463 Mich 420 (2000) (later abrogated on other grounds by *Jones v Flowers*, 547 US 220 (2006)), is instructive here. In *Smith*, even though the legislature developed a "set of procedures for notice of the steps in the tax sale process," the lower court held that the state was required to make a "meaningful effort to obtain the correct address of the property owner" if the mailed notice was returned undeliverable, and found the state's efforts to provide notice lacking because this new requirement was not met. The Michigan Supreme Court held that even if another notice process might have been wiser or fairer, "[t]he courts lack the authority to create new notice requirements." *Id.* at 430; see also *Kidd v Gen Motors Corp*, 414 Mich 578, 588 (1982) ("It is axiomatic that when the language of an act clearly enunciates a standard and a definition which coincidentally also comport with the spirit and purpose of the act, it is repugnant to attempt to judicially read into the act other requirements or conditions that operate to defeat or limit its aim.").

Similarly here, the court of claims had no authority to impose a timing

requirement on DHHS's finding of emergency. The legislature required no such thing in MCL 24.248(1), and it was not for the court to override the legislature's decision. And indeed, this case well illustrates the wisdom of that decision. The youth vaping crisis in Michigan was clearly an emerging issue at the time the crisis was declared, and it is still emerging. This is not a situation where DHHS knew about the crisis and how to best respond to it for years before making the declaration. As DHHS's Chief Medical Executive Dr. Khaldun testified, it is not only the existence of data that impacts the determination as to whether a public health emergency should be declared, but the data needs to be reviewed and the risks and benefits of declaring the emergency must also be considered. (App Vol 4, pp 659, 683-684.) Even if the reports DHHS relied upon were taken from 2018 and early 2019 data, that information needed to be analyzed and the risks and benefits needed to be assessed and weighed. A thorough and reasoned review, coupled with a robust discussion of how best to address the crisis, takes time. A few months is entirely reasonable and appropriate when talking about declaring a public health emergency, especially one of this magnitude and complexity.

In short, the basis upon which the court of claims determined that Plaintiffs showed a substantial likelihood of prevailing is wrong. DHHS met all of the requirements of MCL 24.248 when it promulgated the Rules, and the court committed reversible error by considering the methodology and underlying basis for DHHS's determination. This is not a case where the

court found no basis for determining that a public health crisis exists. Again, the court stated in no uncertain terms that "[t]here is no serious dispute with respect to whether a vaping-use crisis exists among youth." (App Vol 5, p 795.) Rather, the court takes to task DHHS's alleged failure to act more quickly in promulgating the Rules, not that the Rules were unnecessary to address the public health youth vaping crisis.[5] But the speed by which DHHS acted to identify and/or promulgate the Rules is not a factor under MCL 24.248(1), and the court's reading such a requirement into the statute was clear error.

3. The court of claims' reliance on cases applying the federal Administrative Procedures Act is inapt and ignores the plain language of MCL 24.248(1).

Further, the federal cases the court cited to support its conclusion that an agency's inaction or delay undercuts the notion that an emergency exists, are not only not binding but also easily distinguishable. Underlying all of these federal cases is 5 USC § 553(b)(3)(B), which allows a federal agency to dispense with notice and hearing when it "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Section 553(b)(3)(B) therefore differs from MCL 24.248(1) in three critical respects: (1) the

[5] The court of claims further acknowledged that, "the record in this case established that this [youth vaping] is an area that could very well benefit from rulemaking …." (App Vol 5, pp 796-797.)

substantive standard is quite different; (2) it requires "good cause"; and (3) it does not provide for review by the chief executive.

As the plain language of the respective statutes makes clear, a finding of emergency under MCL 24.248(1) should be reviewed substantially more deferentially than one under its federal counterpart. The good cause requirement of § 553(b)(3)(B) and the lack of any review by the chief executive signal that Congress intended the courts to substantively review these determinations. Michigan's legislature decided not to subject an agency's finding of emergency to a good cause requirement, however, and instead charged the governor with review of the agency's finding, thus strongly suggesting that it did not intend for courts to substitute their judgment for that of the agency and the governor. Indeed, these features buttress the conclusion that separation of powers requires highly deferential review.

The court of claims, however, ignored these distinctions and instead accepted Plaintiffs' invitation to second-guess the DHHS's expertise and erroneously conclude that the Rules were procedurally invalid.

4. Plaintiffs failed to show a likelihood of success on the merits as to their other challenges to the validity of the Rules.

The court of claims determined that Plaintiffs demonstrated a likelihood of success on the merits based on their assertion that the Rules are procedurally invalid. For the reasons set forth above, however, that determination was plainly wrong. While the court briefly addressed Plaintiffs' other arguments in support of

their assertion that they were likely to prevail on the merits and found them lacking, the court did not thoroughly explain its rational. The reason is simple. The law makes clear that these additional arguments are meritless and that Plaintiffs have failed to show a likelihood of success on the merits on these arguments as well.

Given the plain lack of legal merit in these claims, there is no need for this Court to remand them to the court of claims for a fuller explanation. Instead, in the interests of judicial economy and in light of the urgent importance of restoring the public-health protections duly provided by the emergency rules as quickly as possible, Defendants offer the following analysis of these claims and urge this Court to confirm that Plaintiffs have not shown a substantial likelihood of success on the merits.

a. The Rules are not ultra vires.

Plaintiff Slis contends that DHHS's promulgation of the Rules is ultra vires in light of MCL 333.2233(2), which was enacted by 1996 PA 67, and provides:

> If the Michigan supreme court rules that sections 45 and 46 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.245 and 24.246 of the Michigan Compiled Laws, are unconstitutional, and a statute requiring legislative review of administrative rules is not enacted within 90 days after the Michigan supreme court ruling, the department shall not promulgate rules under this act.

According to Slis, this provision was triggered by the Michigan Supreme Court's decision in *Blank v Dep't of Corrections*, 462 Mich 103 (2000)—meaning that in the nearly twenty years since that decision, DHHS, by operation of MCL 333.2233(2), has been promulgating rules under the Public Health Code, emergency and

otherwise, without any authority to do so. Slis is wrong. MCL 333.3322(2) is unconstitutional, invalid, and ultimately irrelevant.

First, MCL 333.2233(2) was legally invalid from the start: its enactment was in violation of several sections of the Michigan Constitution of 1963,[6] and it also amounted to an unenforceable attempt by the 1996 legislature to dictate or restrict the legislative actions and authority of future legislatures.[7]

Second, even if MCL 333.2233(2) were somehow legally valid, it would have no effect on DHHS's rulemaking authority because, as is clear from *Blank* and the legislative history of sections 45 and 46 of the APA, its requirements have always been satisfied. In *Blank*, the Michigan Supreme Court ruled that portions of the "legislative approval" process then codified in Sections 45 and 46 of the APA were unconstitutional. Shortly before the Court issued its decision, however, the legislature amended sections 45 and 46 of the APA to remove the portions at issue

[6] For instance, the legislative history of MCL 333.2233(2) makes clear that its manner of enactment – as a last-minute addition to a bill that had comprised, up until that point, a series of technical amendments to statutes incorporated in the Natural Resources and Environmental Protection Act – was in violation of article 4, sections 24 and 26 of the Michigan Constitution of 1963. MCL 333.2233(2) was shoehorned into the bill after its third reading and immediately before its passage in the Senate, see 1996-8 Journal of the Senate 199. This is precisely the circumstance against which the Constitution seeks to protect. See *Anderson v Oakland County Clerk,* 419 Mich 313, 329 (1984). Furthermore, because MCL 333.2233 was the only section of the Public Health Code that was reenacted and republished when MCL 333.2233(2) was enacted, MCL 333.2233(2) could not constitutionally impair or affect DHHS's rulemaking authority under any other sections of the Public Health Code. See Mich Const 1963, art 4, § 25.

[7] See, e.g., *LeRoux v Sec'y of State*, 465 Mich 594, 615–616 (2002) (reciting the "fundamental principle" that "[t]he Legislature, in enacting a law, cannot bind future Legislatures").

in *Blank* and replace them with a "legislative review" process that did not contain the same constitutional flaws. See 1999 PA 262. This preemptive action by the legislature ensured that, when the Court issued its decision in *Blank*, the decision would not—and did not—trigger MCL 333.2233(2) and put DHHS's rulemaking authority at risk.[8]

Simply put, nothing about MCL 333.2233(2) casts doubt on DHHS's fundamental authority to promulgate rules, emergency and otherwise, under the Public Health Code, or on DHHS's uninterrupted exercise of that authority over the past twenty years. Accordingly, Plaintiffs fail to show a likelihood of success on the merits based on this claim.

b. The Rules do not violate the dormant Commerce Clause.

"The Commerce Clause of the Constitution grants Congress the power '[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.' Art. I, § 8, cl.3. 'Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court has long recognized that it also limits

[8] In addition to *Blank* and MCL 333.2233(2), Plaintiff Slis points to *Verizon v Mich PSC*, 263 Mich App 567 (2004), characterizing it as "binding precedent" in support of his position. *Verizon* provides nothing of the sort. *Verizon* involved the Michigan Public Service Commission's rulemaking authority under the Michigan Telecommunications Act. It did not apply or analyze MCL 333.2233(2), and did not consider the constitutional infirmities of that legislation or its interaction with *Blank*. Furthermore, while *Verizon* passingly discussed the history of *Blank* and the legislature's corresponding corrective amendments of sections 45 and 46 of the APA, it plainly misunderstood that history, attributing the corrective amendments to 2004 legislation rather than the 1999 legislation of which they were actually a part. See *id*. at 571 n 2; 1999 PA 262. *Verizon* is in no way persuasive, let alone dispositive, here.

the power of the States to erect barriers against interstate trade.' " *Maine v Taylor*, 477 US 131, 137 (1986), citing *Lewis v BT Investment Managers, Inc*, 447 US 27, 35 (1980). But "[t]he limitation imposed by the Commerce Clause on state regulatory power 'is by no means absolute,' and 'the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected.'" *Maine*, 477 US at 138; citing *Lewis*, 447 US at 36.

"When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Supreme Court has] generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, [the Supreme Court has] examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Ferndale Laboratories, Inc v Cavendish*, 79 F3d 488, 494 (CA 6, 1996) (internal citations omitted).

Here, the Rules do not directly regulate or discriminate against interstate commerce and their effect does not favor in-state economic interests over out-of-state interests. The Rules plainly apply equally to retailers and resellers located in Michigan or out of Michigan with respect to the sale or distribution of flavored nicotine vapor product in Michigan. Indeed, the Rules give no economic advantage

to in-state distributors and, as implemented, will be applied evenhandedly. Lest there be any concern about the application of the Rules, on October 4, 2019, DHHS issued an "Interpretive Statement Regarding Emergency Rules for Protection of Youth from Nicotine Addiction," making clear that the "Rules do not prohibit the transportation of flavored nicotine vapor products to persons outside of the State of Michigan. Such activity is not in violation of the Rules." (App Vol 5, p 785.)

Thus, because the Rules only incidentally affect interstate commerce and are non-protectionist in nature, a determination of whether the Rules violate the Commerce Clause should be analyzed under *Pike v Bruce Church, Inc*, 397 US 137 (1970). "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 US at 142; *Ferndale Laboratories*, 79 F3d at 495. Further, as Justice Markman explained in his concurring opinion in *National Wine & Spirits, Inc v State*, 477 Mich 1088, 1089 (2007) (Markman, J. concurring), when a Michigan law restriction does not "distinguish between in-state and out-of-state [sellers]," it "does not discriminate against or unduly burden interstate commerce in violation of the Commerce Clause."

Because the Rules are non-discriminatory, Plaintiffs would have to show that "the burden [they] impose[] upon interstate commerce is clearly excessive in relation to the putative local benefits." *Int'l Dairy Foods Ass'n v Boggs*, 622 F3d 628,

644 (CA 6, 2010). Under *Pike*, the Rules are constitutional if "there is a rational basis to believe that the Rule's benefits outweighs any burden that [they] impose[]." *Id*. at 650.

Michigan has demonstrated much more than a rational basis to believe that the benefits of the Rules outweigh any burdens that they may impose. Michigan enacted the Rules to address the crisis related to the use of flavored vapor products by its youth. The rationale for implementing the Rules is set forth in the "Finding of Emergency." (App Vol 1, pp 1-3.) Michigan's interest in preventing the documented and dangerous effects of the use of vapor products, and in particular nicotine flavored products, is manifest—Michigan implemented the Rules to protect the health, safety and welfare of its inhabitants. "As long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' *Baldwin v GAF Seeling*, Inc, 294 US 511, 527 (1935), it retains broad regulatory authority to protect the health and safety of its citizens…." *Ferndale Laboratories*, 79 F3d at 495; citing *Maine v Taylor*, 477 US at 151. In light of the compelling putative interest in protecting health and safety, and the minimal burdens that the Rules impose on interstate commerce, the Rules are constitutional under *Pike*.

c. The Rules are not preempted by the Tobacco Control Act.

Plaintiffs also fail to show a substantial likelihood of success on their claim that the Rules are preempted by the Tobacco Control Act (TCA). This is for two reasons: first, the TCA explicitly allows states to impose restrictions on the sale of

vapor products separate from those imposed by federal law; second, the TCA allows states to regulate advertising of vapor products.

21 U.S.C. § 387p(2) provides:

> (A) In general
>
> No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.
>
> (B) Exception
>
> *Subparagraph (A) does not apply to requirements relating to the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age, or relating to fire safety standards for tobacco products.* Information disclosed to a State under subparagraph (A) that is exempt from disclosure under section 552(b)(4) of title 5 shall be treated as a trade secret and confidential information by the State. [Emphasis added.]

Thus, the TCA expressly permits states to impose "requirements relating to the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products," including vapor products. Pursuant to the carve-out for regulation of "sale" and "distribution," the flavored nicotine vapor products ban is not preempted by the TCA. And pursuant to the carve-out for "advertising and promotion," the restrictions on (1) the use of imagery explicitly or implicitly representing a characterizing flavor to sell, give, or otherwise distribute a vapor product (Rule 2(1)(b)), (2) the use of fraudulent or misleading terms to sell vapor products (Rule 3), and (3) the proximity of vapor

product advertisements to points of sale (Rule 6) are not preempted by the TCA. (App Vol 1, pp 3-4.) Moreover, the Rules do not prescribe the inclusion of any label content whatsoever, and thus do not constitute a "labeling" requirement as preempted by 21 USC § 387p(a)(2)(A). There is thus no merit to Plaintiffs' preemption arguments.

d. The Rules do not amount to a taking of private property for public use in violation of Article 10, § 2 of the Michigan Constitution.

Article 10, § 2 of the Michigan Constitution provides, in relevant part, that "[p]rivate property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." While Clean Cigarette alleges the Rules violate Mich Const 1963, art 10, § 2, it fails to articulate how the Rules amount to a taking where, as here, no vapor products are taken from the possession of anyone, let alone taken for public use. Plaintiffs are still free to sell and distribute their products in accordance with the Rules, which includes the sale and/or distribution of its products outside the state of Michigan. Moreover, there is no prohibition on possession of even nicotine flavored vapor products, so long as the products are not possessed with the intent to sell or distribute them in Michigan while the Rules are in effect. Accordingly, there is no "categorical taking," as the Rules do not deny Plaintiffs of economically beneficial use of their products. *Grand/Sakwa of Northfield, LLC v Northfield Tp*, 304 Mich App 137, 146 (2014), citing *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015 (1999).

Further, in *Grand/Sakwa of Northfield, LLC*, the Court stated that:

> "[T]he government may execute laws or programs that adversely affect recognized economic values," and that a regulatory taking will not be found where a state tribunal reasonably concludes that the land-use limitation promotes the general welfare, even if it "destroy[s] or adversely affect[s] recognized real property interests. [*Penn Central Transp Co v New York City*, 438 US 104, 124-125.]" [*Grand/Sakwa*, 304 Mich App at 147.]

As discussed above, the Rules restrict Plaintiffs from selling flavored nicotine vapor products to Michigan customers but do not prevent them from possessing these products, transporting the products, or selling them out of state. (App Vol 1, pp 3-4.) As such, the rules leave intact multiple "strands" of Plaintiffs' "bundle" of rights in their inventory. See *Adams Outdoor Advert v City of East Lansing*, 463 Mich 17, 35 (2000). Further, state laws may require owners to exercise "substantial effort" to use their property for their own economic benefit without effecting a regulatory taking. *Id.* at 35–36.

There is no question that the Rules were enacted to promote and protect the health, safety, and welfare of Michigan's youth from the risks associated with flavored vapor and flavored nicotine vapor products. The Rules are tailored to address the crisis at hand, and do not amount to an unlawful taking under Mich Const 1963, art 10, § 2.

B. The court of claims erred in its evaluation of the other preliminary injunction factors.

1. The court of claims erred in balancing the harms that the parties will face under the Rules.

The court of claims essentially determined that DHHS would suffer no harm if an injunction issued, finding that Defendants (1) "have not articulated a harm that will befall *them* if injunctive relief issues," and (2) will not "necessarily suffer

harm if they are made to comply with the APA's established rulemaking before implementing rules that regulate vaping products." (App Vol 5, p 798 (footnote omitted).)

Contrary to the court's suggestion, however, DHHS's authority to promulgate emergency rules is no way an abandonment of or departure from "compliance with the APA's established rulemaking," but is instead a longstanding and essential part of that established rulemaking process. Emergency rules under the APA are designed to complement the process for promulgating permanent rules: the former provide a temporary means to respond to an emergency while the latter runs its course. And that is precisely how DHHS has used its rulemaking authority here—to stem the tide of a recognized public health emergency while permanent responsive measures are developed.

By enjoining DHHS's exercise of this emergency rulemaking authority, the court is not reining in some rogue agency, but instead severely compromising DHHS's ability to duly exercise a core and critical executive power. In accordance with Mich Const 1963, art 4, § 51, "public health and general welfare" must always be treated as "a matter of primary public concern." DHHS has been charged with ensuring this is so by "continually and diligently endeavor[ing] to prevent disease, prolong life, and promote the public health." MCL 333.2221. Emergency rulemaking is central and indispensable to DHHS's ability to carry out this charge on behalf of the people of Michigan.

Enjoining DHHS from enforcing its properly enacted Rules impairs DHHS's constitutional and statutory duty to take action to protect the health, safety, and welfare of Michigan's citizens. Again, "[t]here is no serious dispute" that the rampant increase of nicotine use by youth using flavored nicotine vapor products amounts to a public health crisis. Preventing DHHS from addressing this health crisis directly damages DHHS and its execution of its institutional charge—and this, in turn, damages the health of the public, including a generation of youth who will continue to use flavored nicotine vapor products while the injunction remains in place, and also the health of this state, which will be bearing the financial costs of these poor health outcomes for decades to come. This harm is "compelling" and "noteworthy," and outweighs the harms that Plaintiffs have claimed to suffer as a result of the Rules. The court erred in ignoring this harm and failing to duly account for it in its balancing.

2. The court of claims erred in concluding that Plaintiffs will suffer irreparable harm if a preliminary injunction is not awarded.

The court of claims also erred in assessing the nature and irreparability of the harm that Plaintiffs have claimed. It is well settled that a "*particularized* showing of irreparable harm" is necessary to obtain a preliminary injunction. *Pontiac Fire Fighters Union Local 376*, 482 Mich at 9 (emphasis added). "Equally important is that a preliminary injunction should not issue where an adequate legal remedy is available." *Id*.

The court of claims recited these controlling principles in its ruling but failed to duly apply them. As to Clean Cigarette, the court focused on the "loss of

goodwill" that the business alleged it would suffer from the emergency rules, citing caselaw for the proposition that such loss "can" amount to irreparable harm. (App Vol 5, pp 791-792.) The court, however, failed to evaluate whether the Rules, if not enjoined, necessarily *would* result in a loss of goodwill to Clean Cigarette so severe and incalculable as to be irreparable. For instance, while the court rightfully observed that Clean Cigarette's name is in violation of the Rules' prohibition against misleading advertising, it failed to require a particularized showing from Clean Cigarette that irreparable harm not only could, but in fact would, flow from rebranding itself to the extent needed under the Rules. About half of Clean Cigarette's online sales, for instance, occur out of state, and thus beyond the reach of the Rules. (App Vol 3, p 470.) And as to the company's business within Michigan, the Rules only temporarily bar Clean Cigarette's misleading advertising practices. Thus, while Clean Cigarette may have shown that it might lose some customer goodwill for some period of time as a result of the Rules, it failed to show that it would be "force[d] to rebrand itself entirely" (App Vol 5, p 792) or that the extent of rebranding required by the Rules would in fact cause loss so certain, pervasively destructive, and incalculable as to be irreparable.

The court of claims' analysis of Slis's claimed irreparable harm was similarly flawed. The court pointed to testimony from Slis that the Rules would cause him to lose his business. Again, the court recognized that a complete loss of one's business could amount to irreparable harm under the law, but it failed to hold Slis to his burden of showing that such severe harm was, in fact, a necessary consequence of

the Rules for Slis. The Rules leave ample space for retailers and resellers of vapor product to operate: they permit the sale, online or otherwise, of flavored nicotine vapor products outside of Michigan; within Michigan, they permit the sale of tobacco-flavored nicotine vapor products and flavored vapor products containing zero nicotine. And as to the segment of vapor product within the scope of the Rules' prohibition, that prohibition, it bears repeating, is only temporary—indeed, shorter than the ten-month average shelf life of the product. (App Vol 5, p 789.) Slis made no particularized showing that he could not adapt his business to take advantage of the sales opportunities left open by the Rules, or that the loss he would suffer from that change in business practices would be so complete and incalculable as to be irreparable. This was something the court of claims acknowledged when it first reviewed this matter and denied Slis's request for a TRO; the court was right then, and nothing Slis presented thereafter warranted the court reversing course.

In sum, while the court of claims was correct to recognize that the type of losses Plaintiffs claimed to suffer could conceivably amount to irreparable harm, the court failed to hold Plaintiffs to their burden of showing, in particularized fashion, that their losses would in fact amount to such harm. Instead, Plaintiffs showed, at best, that they would suffer economic loss, not the type of irreparable harm that the law deems "indispensable" to warrant the issuance of a preliminary injunction. *Pontiac Fire Fighters Union Local 376*, 482 Mich at 9.

3. The court of claims erred in failing to recognize the substantial harm to the public interest that will occur if DHHS is precluded from enforcing the Rules.

Finally, the court of claims erred in concluding that consideration of harm to the public interest weighs neither in favor of nor against the award of a preliminary injunction. As discussed above, the record leaves no doubt that the public interest will suffer certain and significant harm while the injunction is in place. There is uncontroverted evidence that the use of nicotine vapor products by youth—in Michigan and other states that imposed age restrictions on the purchase of such products—has continued to skyrocket. There is no question that youth in Michigan are getting access to and using nicotine vapor products at alarming rates, and that such use amounts to a public health crisis. And so long as Defendants are enjoined from enforcing the Rules, more and more Michigan youth will use flavored nicotine vapor products and suffer injury as a result.

There is no meaningful dispute about these facts and the substantial harm to the public interest they demonstrate. The court of claims gestured to this harm, but then dismissed it as essentially irrelevant in light of "proofs" Plaintiffs offered "to show that there is a real risk of harm to a segment of the public should injunctive relief not issue"—namely, individuals who might turn to combustible cigarettes if their access to flavored vapor product is restricted. (App Vol 5, p 799.) The court did not detail these "proofs" nor explain whether and how they interacted with the actual scope and effect of the rules—e.g., the continued ability of Michiganders to purchase tobacco-flavored vapor products in state and vapor products of any flavor out of state. Nor did the court assess what the size of this "segment of the public" might be. And most fundamentally, the court failed to explain why the mere

existence of evidence that certain individuals might be adversely affected by the Rules was enough to neutralize, for purposes of this prong, the countervailing, uncontroverted evidence of certain, substantial, and lasting harm to the youth population of this state.

Plaintiffs do not carry a mere burden of production on this prong. Rather, they carry, as with all other prongs of this analysis, the burden of proof—namely, proof that the public interest would be harmed more severely by the denial of a preliminary injunction rather than the grant of it. Plaintiffs did not carry this burden.

CONCLUSION AND RELIEF REQUESTED

Defendants respectfully ask this Court to (1) grant the application for leave to appeal and (2) immediately vacate the preliminary injunction and grant such other and further relief as this Court deems appropriate by October 31, 2019.

Respectfully submitted,

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