

10/09/2019

IN THE STATE OF MICHIGAN

COURT OF CLAIMS

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Marc Slis, et al.,
Plaintiff,

Case No. 19-000152-MZ

v

Hon. Cynthia Diane Stephens

State of Michigan, et al.,
Defendants.

/

A Clean Cigarette Corporation, a Michigan
Corporation,
Plaintiff,

Case No. 19-000154-MZ

v

Hon. Cynthia Diane Stephens

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.

/

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1 The Proceedings of AMELIA HOWARD, DR. JONEIGH KHADUN
2 Taken at 3020 W. Grand Boulevard,
3 Detroit, Michigan,
4 Commencing at 10:00 a.m.,
5 Wednesday, October 9, 2019,
6 Before Shacara V. Mapp, CSR-9305.

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1 Detroit, Michigan

2 Wednesday, October 9, 2019

3 About 10:03 a.m.

4 * * *

5 THE BAILIFF: All rise. Hear ye, hear ye,
6 hear ye, the State of Michigan Court of Claims is now
7 in session. Presiding, the Honorable Cynthia Diane
8 Stephens.

9 All persons having business therein, draw
10 near, give attention and they shall be heard.

11 God, save these United States, the State of
12 Michigan, and this honorable court. Please be seated.

13 THE COURT: The resumption of a hearing in
14 Slis and 906 versus the State of Michigan Department of
15 Health and Human Services and Clean Cigarette, case
16 00192 and 3, I think.

17 Counsel, would you state your appearances for
18 the record.

19 MR. BLAIR: Good morning, Your Honor. Kevin
20 Blair on behalf of Plaintiff Mark Slis and 906 Vapor.

21 MR. DAVIS: Good morning, Your Honor. Aaron
22 Davis on behalf of Plaintiff, Clean cigarette.

23 MS. REED: Good morning, Your Honor. Shaina
24 Reed here, also on about behalf of the Plaintiff, Clean
25 Cigarette.

1 MR. MAINS: Good morning, Your Honor. Doug
2 Mains also here on behalf of Mark Slis and 906 Vapor.

3 MR. POTCHEN: Good morning, Your Honor.
4 Joseph Potchen on behalf of the Defendants.

5 MR. LONG: And James long on behalf of
6 Defendants.

7 THE COURT: And on behalf of Mr. Slis, I
8 believe you had another witness.

9 MR. BLAIR: We do, Your Honor. There was
10 some discussion yesterday about pictures. Would you
11 like to do that ahead of the next witness?

12 THE COURT: That's fine.

13 MR. POTCHEN: Okay.

14 MR. DAVIS: With your indulgence, may I
15 approach, Your Honor?

16 THE COURT: Well, you're not going to get
17 close enough to me for me to take anything. Have you
18 shown this proposed exhibit to your colleagues?

19 MS. DAVIS: Yes, ma'am, they do have a copy
20 of them.

21 THE JUDGE: Okay. Can you indicate for the
22 record, what you have named the proposed exhibits and
23 what they depict?

24 MR. DAVIS: Sure.

25 THE JUDGE: And then we'll get a stipulation

1 to admit them. And more likely than not, it will be
2 our court reporter, and good morning, who will enter
3 them into the record.

4 MR. DAVIS: Very good, Your Honor. What I've
5 designated as Clean Cigarette Exhibit 1 is a photo
6 showing the T-shirt bearing my client's logo and name.

7 And what we've designated as Clean Cigarette
8 Number 2 is actually their product showing the battery
9 as well as the -- in this case, the nicotine cartridge
10 showing again, both their logo and their name.

11 THE COURT: And as it relates to Clean
12 Cigarettes' Exhibits 1 and 2 on behalf of clearly, the
13 other Plaintiff, stipulates; is that correct?

14 MR. BLAIR: Correct.

15 THE COURT: And on behalf of The People of
16 the State of Michigan?

17 MR. POTCHEN: Yes, Your Honor, we believe
18 these are accurate pictures.

19 THE COURT: Okay. Those will be admitted in.

20 PLAINTIFF'S EXHIBIT 1

21 PHOTO OF A CLEAN CIGARETTE T-SHIRT WITH LOGO AND
22 NAME ON IT; and

23 PLAINTIFF'S EXHIBIT 2

24 A CLEAN CIGARETTE 1ST GENERATION SHOWING THE

25 BATTERY AND NICOTINE CARTRIDGE W/NAME AND LOGO

1 **WAS MARKED FOR IDENTIFICATION AND ADMITTED**

2 MR. BLAIR: Your Honor, Plaintiffs Mark Slis
3 and 906 Vapor have three pictures. All three of them
4 shown to opposing counsel. What I'll call Plaintiff's
5 Exhibit 3 is a picture of Mr. Slis's open tank system
6 that he testified about yesterday while on the stand,
7 next to a ruler, showing the size. What will be marked
8 as Plaintiff's Exhibit 3 is a similar --

9 THE COURT: I thought you said that was 3.

10 MR. BLAIR: You're correct, Your Honor, I'm
11 sorry.

12 THE COURT: 4.

13 MR. BLAIR: So 4 will be a picture of the
14 Clean Cigarette vaping product that was discussed on
15 the stand yesterday, also next to this ruler, for size.

16 And Plaintiff's Exhibit 5 is another closed
17 pod vaping device that we will talk about today, also
18 next to --

19 THE COURT: We'll be introducing that through
20 somebody; is that correct?

21 MR. BLAIR: Yes.

22 THE COURT: Okay. So we'll wait for that
23 one.

24 So as it relates to 3 and 4, on behalf of the
25 State of Michigan?

1 MR. POTCHEN: No objection, Your Honor.

2 THE COURT: They are admitted.

3 PLAINTIFF'S EXHIBIT 3

4 PHOTO OF TANK SYSTEM W/RULER; and

5 PLAINTIFF'S EXHIBIT 4

6 PHOTO OF CLEAN CIGARETTE VAPING PRODUCT W/RULER

7 WERE MARKED FOR IDENTIFICATION AND ADMITTED

8 MR. BLAIR: Your Honor, did you say you want
9 the court reporter to hang on to these, or do you want
10 these?

11 THE COURT: You know what, I'm going to have
12 to actually ask that our court officer hold on to them
13 because our court reporter isn't really our court
14 reporter. She's visiting with us today, and if we
15 continue, I have no idea who the next court reporter
16 will be.

17 So in order to maintain these, we will make
18 copies and make sure that the court reporter has a copy
19 to the extent that that's necessary for the transcript.

20 MR. BLAIR: Okay. May I approach to hand it
21 to the officer?

22 THE COURT: Yes.

23 MR. BLAIR: Thank you, very much.

24 THE COURT: And with that, are you ready to
25 call your witness?

1 MR. BLAIR: Yes, Your Honor. Plaintiffs
2 Mr. Mark Slis and 906 Vapor call Ms. Amelia Howard to
3 the stand, please.

4 THE COURT: Ms. Howard, if you could, once
5 you're seated, raise your right hand?

6 AMELIA HOWARD,
7 having first been duly sworn, was examined and
8 testified on her oath as follows:

9 THE COURT: Thank you. And Ms. Howard, in
10 the course of being questioned by counsel, it's
11 important that you give all of your answers orally
12 rather than by gesture, shaking your head, things of
13 that nature.

14 It is also important that you allow counsel
15 to finish their question before you answer it. It's
16 probably not your problem, but a lot of us have had
17 that difficulty over the last couple of days.

18 Additionally, counsel may make objections
19 regarding the questions or the answers. If they start
20 to do that, they'll stand up, they'll state their
21 objection. Wait until after we've managed that. We'll
22 give you further direction. Do you have any questions?

23 **THE WITNESS: Nope, understood.**

24 THE COURT: And finally, if someone asks you
25 a question that befuddles you, in any way you don't

1 understand it, please tell the questioner and they will
2 indefinitely clarify.

3 **THE WITNESS: Okay. Thank you.**

4 THE COURT: Thank you. Please continue, sir.

5 MR. BLAIR: Thank you, Your Honor.

6 THE COURT: Ms. Howard, could you state your
7 full name for the record and spell it.

8 **THE WITNESS: Yes. My name is Amelia Howard**
9 **A-m-e-l-i-a H-o-w-a-r-d.**

10 EXAMINATION BY MR. BLAIR:

11 Q. Thank you, Ms. Howard. Good morning.

12 Ms. Howard, where do you live?

13 **A. I live in Kitchener; Ontario, Canada.**

14 Q. And what is your occupation?

15 **A. I'm currently a Ph.D. candidate at the University of**
16 **Waterloo in the Department of Sociology and Legal**
17 **Studies.**

18 Q. I'm going to hand you what's been marked as Exhibit 6.

19 **A. Okay.**

20 Q. Do you recognize that document?

21 **A. Yes. This is a -- my CV.**

22 Q. And does this provide a fair summary of your
23 experience?

24 **A. Yes, it does.**

25 Q. Could you please describe for us, your post-high school

1 education?

2 A. Sure. I did an undergraduate degree in arts at the
3 University of Waterloo and I majored in sociology and
4 legal studies. I graduated in the top two of my class.

5 Q. Okay. After undergrad, did you have any post-grad
6 studies?

7 A. Yes. I've done all of my post-grad studies at the
8 University of Waterloo as well. I did a masters in
9 sociology.

10 Q. And anything after the masters?

11 A. The Ph.D. program that I'm currently in.

12 Q. On what topic is your dissertation?

13 A. My dissertation -- in sociology, we have theoretical
14 focuses and empirical ones. The empirical focus of my
15 dissertation is on vaping. It's on vaping, the
16 controversy around it. It's on the technology, how it
17 was made, and how the knowledge and the understanding
18 of vaping outside of the market was made.

19 My sociological training and expertise is the
20 sociology of knowledge, technology, and science. And
21 so, yeah, I look at vaping, the innovation history of
22 vaping, the history of the development in different
23 markets, and the history of science around vaping, and
24 also, the history of public knowledge around vaping, as
25 a way of understanding how different groups in society

1 come to know certain new things. And in my case, it's
2 vaping. That's the new thing.

3 Q. Okay. So if I understand you correctly, one aspect of
4 your dissertation research is kind of an empirical
5 history of vaping?

6 A. Yes.

7 Q. Is that a fair --

8 A. Yes. Yes. That's this sort of the first part. My
9 thesis is in three parts. And the first part goes over
10 the history of this technology. The sociological
11 history of this technology goes over who innovated it,
12 why, what problems were they solving, and how this new
13 market and space kind of approved.

14 Q. Okay. So that was one aspect of your dissertation.
15 What said there were a few. What were the other
16 aspects?

17 A. Yeah, so my dissertation has three parts. The first
18 covers the history of vaping and that work has not been
19 really done yet. The second part of my dissertation
20 looks at, from the system's level, what happens when a
21 new marketplace, a new technology, a new, sort of,
22 proposed solution to a smoking problem, what happens
23 when that interfaces with existing systems of
24 knowledge? Existing industries?

25 Basically, the whole ecology that's built

1 around tobacco and tobacco problems. What happens when
2 this new technology comes in and disrupts that?

3 The third part of my thesis examines the
4 moral panic over vaping as it's been put out in the
5 media. It looks at the rhetoric around vaping. It
6 looks at the claims that are made about vaping and
7 evaluates the basis of those claims. And looks at sort
8 of how vaping is -- has come to be portrayed in the
9 media and how people understand vaping through media
10 representations.

11 Q. Okay. I'm going to ask two follow-ups on that. First,
12 before, while it's still fresh in mind, when we were
13 talking about the empirical history, you said something
14 about, and that work hasn't been done before or is not
15 done yet. Is that -- did you mean that you're the
16 first to do it, or that you're not finished with your
17 work?

18 A. Well, both. My dissertation is not defended yet. But
19 I -- I'm the -- from what I know, I am the first person
20 to be looking at this as a sociological phenomenon as
21 an innovation history thing. This is a very new
22 technology and it hasn't received a lot of attention
23 outside of the public health field. And so, my work is
24 some of the first stuff, or will be.

25 Q. Okay. And then, I want to circle back about the third

1 aspect. You talked about the moral panic. Can you
2 describe what that is?

3 A. Yes. Moral panic is a very established sociological
4 concept or framework for understanding a particular
5 kind of phenomenon. So it has a sociological
6 definition. The word gets thrown around to sort of
7 discredit things. And I want to make sure that it's
8 clear that I'm using it in the sociological sense where
9 there's sort of objective criterias for measuring what
10 it is.

11 So moral panic is a situation where a group
12 or a new behavior, or a new thing becomes regarded as
13 problematic or threat to the values of society. And
14 one of the criteria of moral panic -- so that's sort of
15 the definition.

16 And then also, there's sort of the
17 mobilization of the state or of the media or of --
18 "moral entrepreneurs" is the term they use in
19 sociology. But just basically an enterprise that
20 builds around the stalk of the threat.

21 Now, the criteria as to whether or not you
22 would evaluate something as a moral panic or say that
23 it is a moral panic in sociology, it has to meet
24 certain objective criteria. One of them is that the
25 threat, the perceived threat, is there's measurable

1 exacerbation of the scope of the problem and of the
2 seriousness of the problem. So the disproportionality
3 is one.

4 Another one is moral panics tend to have,
5 yeah, a disproportionate reaction. So the solution to
6 this problem is harsher than the solution to say an
7 equally or more serious threat.

8 And then, the other aspect of moral panic,
9 just in the tradition of studying moral panics is to
10 really look at the media and look at how media
11 narratives shape the moral panic and shape this, sort
12 of, ideal typical, like, playing out of the good versus
13 the evil threat and how, sort of, stereotypes play into
14 that, demonization play into that.

15 So I look at vaping and the elements of the
16 vaping case, they do fall into that, that model.

17 Q. Thank you. And so, what research have you done as part
18 of your studies and part of your dissertation project?

19 A. So I -- three sort of research things. So obviously --
20 well, not obviously. Obviously to me, I look at
21 sociological literature on how to study technology,
22 theoretical grounds of moral panic, the social
23 construction of knowledge, et cetera.

24 Another important part is to understand the
25 state of evidence on E-cigarettes, in general, but

1 especially on nicotine tobacco, just how nicotine and
2 tobacco have been studied. So I'm quite interested in
3 the history of the tobacco industry and their deception
4 and things like that.

5 Like, I look at sort of how did, you know,
6 the consensual knowledge come about that cigarettes
7 cause cancer? What was put in there? Like, what's the
8 history of knowledge in this field?

9 And then, I look at the state of evidence on
10 vaping and how does that fit into it and how do we
11 measure vaping as opposed to, say tobacco?

12 How has this expert field -- so I look at the
13 actual state of knowledge and then, I also look at how
14 the expert field that studied tobacco understands this
15 new thing. Do they -- do they redevelop their methods?
16 Do they -- or are they, like, compliant?

17 So I'm very -- this is a long way of saying
18 that I just read a lot and critically evaluate the
19 work, the research on vaping. And then, I have an
20 empirical component where I look at the historical
21 development through historical archives online, of
22 vaping as a user innovation.

23 Q. I want to circle back.

24 A. Sure.

25 Q. You used the word "consensual" and I want to make sure

1 I understand what you mean by that word. You don't
2 mean, like consensual as opposed to someone not giving
3 consent?

4 **A. No.**

5 THE COURT: You're addressing the issue of a
6 consensus; is that correct?

7 **THE WITNESS: Yeah, a scientific consensus.**

8 MR. BLAIR: Okay.

9 BY MR. BLAIR:

10 Q. When did you start researching vaping?

11 **A. Academically, officially, in 2014 when I defended my
12 dissertation proposal.**

13 Q. Have you published any articles in peer-reviewed
14 publications?

15 **A. I have published a Sociology of Knowledge piece in the
16 Oxford Handbook of peer review, which is peer reviewed,
17 I believe that's 2017 or '18. I don't know the exact
18 date, I guess.**

19 Q. And have you published any articles related to vaping?

20 **A. Yes. I've published in a Canadian Policy, national
21 policy magazine called Policy Options. I've published
22 a piece with my colleague, Adam Houston, on vaping and
23 its reaction on the environments. I recently had an
24 article published in the Philadelphia Inquirer arguing
25 that the government should not ban flavors, Federal**

1 Government.

2 I've published a comment in the Journal of
3 Pediatrics. It was editorial. But that's what I can
4 think of right now.

5 Q. Okay. Have you been interviewed in any peer review
6 articles?

7 A. I have. I was interviewed in the Financial Post about
8 vaping and the tobacco industry's interest in it.

9 I was -- I've been interviewed, but for
10 stories that have not been published, by Wall Street
11 Journal and by Bridge Magazine in Michigan.

12 Q. When you say not published, you mean not published yet?

13 A. They haven't -- they haven't come out yet. I was
14 interviewed for them. I don't know.

15 Q. Okay. Have you lectured or interviewed at any
16 conferences regarding vapor products?

17 A. Regarding vapor products, yes. I've lectured at
18 several conferences. The ones regarding vapor products
19 were the Global Forum on Nicotine. I did two years of
20 that. The first was an invited lecture or speech that
21 I did before the keynote speaker who won an award.

22 The second one was a presentation of my
23 research on how the tobacco industry's past is used to
24 control the vaping industry's future and understanding.

25 Q. Any other conferences you've attended or helped

1 organized?

2 A. Yeah. So I've attended conferences in the sociology of
3 expertise and knowledge in Wales. I've helped organize
4 a conference recently -- or, no, it was a round table.
5 It was a private round table prior to an event called
6 the E-cigarette Summit, which is the sort of flagship
7 E-cigarette -- like, how the flagship E-cigarette
8 conference.

9 And so I -- this had nothing to do with it,
10 but we were there and I organized sort of a pre-meeting
11 with people in the industry, in the independent
12 industry to talk about sort of -- to talk about
13 disruption and to talk about how they were responding
14 to disruption and to get a dialogue going between
15 independent companies in the United Kingdom and
16 independent companies in the United States.

17 Q. Can you just briefly elaborate? What do you mean by
18 talk about disruption?

19 A. Yeah. So there is -- there is an issue with this
20 industry and it's actually quite typical of new
21 technologies where it's being responded to, in what I
22 understand as an overly forceful way.

23 And part of that is the disruptive -- so we
24 talked about, you know, what's needed to disrupt
25 tobacco cigarettes. How do we -- and also, because

1 this is a new industry and the reason, kind of, I was
2 there is, sort of, how do we talk about this as a
3 technology because there's a very grass roots component
4 to vaping and it's always sort of developed itself in
5 relation to what people in public health and tobacco
6 control are saying about it. And I think there are
7 some valid arguments that it's sort of positive in that
8 sense.

9 But it also is a disruptive technology and so
10 we were sort of talking more about, what does it mean
11 to be this new technology that's developing and how do
12 you sustain it and how do you develop it responsibly?
13 And also, you know, in the context of being independent
14 companies because independence is very important to
15 disruption.

16 THE COURT: Counsel, if I may.

17 MR. BLAIR: Yes.

18 THE COURT: Could you please share with me on
19 what areas that are pertinent to this Court's
20 determination of the issuance of a preliminary
21 injunction, is this witness going to provide us
22 information?

23 MR. BLAIR: Your Honor, she will provide
24 expert testimony. And I was just about to tender her
25 as an expert in sociology of science, knowledge, and

1 technology with a focus on empirical history of vaping.
2 Her testimony is relevant to the bounds of harms
3 element and the public interest element in so far as
4 she can help tell the other side of the story, of
5 whether there is some value to vaping, whether the
6 bounds of public harms --

7 THE COURT: Okay. I just want to make sure
8 that I understand what I've just heard.

9 MR. BLAIR: Yes.

10 THE COURT: I've heard your proposed witness
11 talk about how people receive information regarding the
12 technology, and how they process it, and what the
13 response is to the technology of vaping.

14 I did not hear your witness talk about the
15 science as to whether or not vaping occasions physical
16 harm to humans; is that correct?

17 MR. BLAIR: I don't believe that's correct,
18 Your Honor. I could have been more clear in eliciting
19 that from the witness, but --

20 THE COURT: Apparently it wasn't because I
21 didn't -- I heard her say that she has looked at how a
22 consensus came to be formed relative to what we've been
23 referring to now, as burning tobacco.

24 MR. BLAIR: Yes.

25 THE COURT: I'm just trying to be consistent.

1 We'll call it BT.

2 MR. BLAIR: Yep.

3 THE COURT: And she has looked at whether or
4 not that similar process has been applied in evaluating
5 E-cigarettes. Is that what you mean by her scientific
6 knowledge?

7 MR. BLAIR: That's one aspect of it, yes,
8 Your Honor. I believe she also testified, and I can
9 have her elaborate a bit on the point about she -- I
10 think it was the second aspect she had mentioned that
11 she's very familiar with all the scientific research on
12 vaping, specifically, and how that consensus has come
13 about.

14 THE COURT: She said that she, as a
15 non-scientist has read it, yes. So she's going to
16 report to me as a non-scientist, what the scientist
17 wrote.

18 Do you see my challenge here? Telling me
19 that she did a survey of the literature is one thing.
20 Telling me that she can evaluate the contents of that
21 literature would, to me, require more than the same
22 ability I have, which is reading. There would have to
23 be a level of scientific knowledge that I have not
24 heard demonstrated.

25 So perhaps you want to move to let me

1 understand that a little bit.

2 MR. BLAIR: Yes, Your Honor. Thank you.

3 BY MR. BLAIR:

4 Q. Can you tell me more about your sociology expertise and
5 your study of methodologies and how you can kind of
6 distinguish reliable --

7 A. Yeah.

8 Q. -- data from unreliable data?

9 A. Yes. I think that's a valid question and I apologize
10 if I got off track on to some of my empirical, sort of,
11 interests.

12 I am a trained social scientist. I will
13 graduate with that degree, that is science. I -- a lot
14 of the -- so there's -- this tobacco, it's a
15 multi-disciplinary field. I will not claim to have
16 knowledge in things that are non-sociological. What is
17 sort of sociological and what I am able to evaluate,
18 say, would be things like survey methodologies, the
19 statistics on vaping, the national use of tobacco
20 survey, that type of stuff.

21 This is data that I do work with in my
22 dissertation, and it's -- this is a social science.
23 But that's sort of part of what I was trained to do, is
24 to, you know, look at social data on vaping.

25 I do have a strong familiarity with, also,

1 what the scientists are saying about it, that's the
2 other component. But that doesn't mean that -- well, I
3 do just want to make clear that yeah, as a sociologist,
4 that's a very important thing. And we are -- it's not
5 just simply reading and digesting something. You're
6 trained to recognize what a good quality study is, what
7 a valid survey question is, the strengths and limits of
8 different methods and answering different research
9 questions.

10 Did you -- yeah.

11 MR. BLAIR: Does that address your question,
12 Your Honor?

13 THE COURT: It addresses it.

14 So what I've heard now is that she is, in
15 part, going to address the efficacy of the social
16 science, not --

17 No disrespect, I was a Ph.D. candidate in
18 political science in economics, so I like social
19 science, but you know, hard science. And I'm concerned
20 that she not go into -- it's one thing to have a
21 dialogue that shares the weaknesses of survey
22 methodology, questions, analyses of an aggregation of
23 the survey data; and another to talk about the hard
24 science of, here is a physical phenomenon that either
25 has a causal connection or some other connection to

1 another physical result.

2 And I could not tell from her questioning,
3 which one of those she was going to do. I think I
4 understand it better.

5 MR. BLAIR: Okay. And to be clear, we're not
6 going to be asking her questions that you would expect
7 a medical doctor to be answering. She's being tendered
8 as an expert in the sociology of the technology and
9 medicine with an emphasis and specialty in vaping
10 which, I think, she's uniquely qualified to speak on
11 that subject. She testified that this --

12 THE COURT: You're going to be challenged to
13 keep it within those bounds, but good luck.

14 MR. BLAIR: Okay. So, Your Honor, I would
15 tender her as an expert in sociology of science,
16 knowledge, and technology with a focus on the empirical
17 history of vaping.

18 MR. POTCHEN: May I voir dire, Your Honor?

19 THE COURT: Yes, sir, you certainly may.

20 VOIR DIRE BY MR. POTCHEN:

21 Q. Good morning, Ms. Howard.

22 A. Good morning.

23 Q. My name is Joe Potchen, I represent the Defendants in
24 this case.

25 So you're not a medical doctor, correct?

- 1 A. **No. Yes. Yes, correct.**
- 2 Q. And you're a Ph.D. candidate in sociology, correct?
- 3 A. **Correct.**
- 4 Q. And your dissertation hasn't been completed, correct?
- 5 A. **No.**
- 6 Q. And it hasn't been presented or approved, correct?
- 7 A. **No.**
- 8 Q. That's not correct?
- 9 A. **I'm sorry, that is correct.**
- 10 Q. Okay. Thank you.
- 11 You have no degree in public health, correct?
- 12 A. **No, I do not.**
- 13 Q. And you have one peer-reviewed study; is that correct?
- 14 A. **Yes.**
- 15 Q. And that didn't deal with vaping, correct?
- 16 A. **No, it didn't deal with vaping.**
- 17 Q. So you have no peer-reviewed articles that have dealt
- 18 with vaping; is that correct?
- 19 A. **Yes, that would be correct.**
- 20 Q. And you're not going to be testifying about any sort of
- 21 studies that the harm nicotine does in developing the
- 22 brain; is that correct?
- 23 A. **I -- if I were asked that question, I would do --**
- 24 Q. You don't have any specialized knowledge on the
- 25 nicotine addiction, correct?

1 A. Well, I do.

2 Q. Scientific.

3 A. I do. I don't necessarily have a dissertation. Like,
4 I don't have a dissertation done, but a dissertation is
5 a final product of a process that I'm near the end of.
6 I understand the point you're making, but I certainly
7 do have expertise in that area. I don't know whether
8 you'll find it --

9 Q. Scientific expertise?

10 A. I -- most all sociologists consider social science to
11 be a science, yes.

12 Q. You've never testified as an expert in court; is that
13 correct?

14 A. I have not.

15 Q. And have you reviewed the emergency rules that we're
16 discussing in court?

17 A. I have.

18 MR. POTCHEN: I object to the extent they
19 have not met the criteria set out in rule 702, Your
20 Honor. We submit they have not proffertized any
21 specialized knowledge that would assist this court in
22 making the determination at issue.

23 THE COURT: So you're actually going for a
24 blanket she's not qualified to talk about anything?

25 MR. POTCHEN: Not qualified to be an expert.

1 THE COURT: Not qualified to be an expert in
2 any area relevant to this case?

3 MR. POTCHEN: Yes.

4 THE COURT: Okay.

5 MR. BLAIR: Your Honor, the bar set by 702 is
6 fairly low. It's any scientific specialized knowledge
7 that will assist the fact finder. This individual is
8 uniquely qualified to speak as to the topics that we've
9 tendered her for. If we vary from those, there can be
10 objections that can be dealt with at that time.

11 At a bare minimum, Your Honor, I would say
12 that she's qualified as an expert to help lay the
13 foundation for reliability of potential impeachment
14 material under 707. Michigan Rule of Evidence, 707.

15 THE COURT: She's going to provide the basis
16 for impeachment material. Then, we would have to have
17 the initial proffer of the materials for them to be
18 impeached, wouldn't they? Or statements, correct? So
19 that would make her, to me, a rebuttal witness.

20 MR. BLAIR: That is one component of what
21 Rule 707 expressly contemplates that our expert can lay
22 the foundation of reliability of material that we can
23 use to impeach the other side's expert. I don't think
24 that it necessarily have to be after their expert
25 testifies.

1 THE COURT: It does in my brain.

2 MR. BLAIR: Okay.

3 THE COURT: Because you want me to remember
4 what we're impeaching?

5 MR. BLAIR: Yep.

6 THE COURT: I don't even know if it's ever
7 going to come in, right?

8 This is not a circumstance as we would have
9 in most trials where there would have been extensive
10 discovery. So you will know that their expert is
11 definitely going to be talking about this, that, and
12 the other and you will be able to tell me, this is why
13 we're going to do it.

14 At this point, other than the -- I don't know
15 that we have a capacity to do that at this point. So
16 to the extent that she's going to be rebuttal, I would
17 like her to rebut and come in afterwards.

18 The Court will not allow this witness to
19 testify as to the physical effects of nicotine products
20 whether vaping or burning, on human development or the
21 human physiology.

22 The Court will not allow this witness to
23 testify on what I will loosely call, the science of
24 addiction, in terms of what physically and
25 psychologically makes an individual susceptible to

1 addiction, more difficult to ween from that addiction.

2 The witness has demonstrated specialized
3 knowledge in survey methodology and, therefore, can
4 assist this Court in understanding the degree to which
5 underlying data which may be presented or was relied
6 upon, to state that there was an emergent condition
7 justifying under the APA, an emergency rule.

8 MR. BLAIR: Thank you, Your Honor.

9 THE COURT: You may proceed.

10 EXAMINATION BY MR. BLAIR:

11 Q. I understand this question has already been asked, but
12 I'm going to ask it again. You've read the emergency
13 rules that were issued by the Department of Health and
14 Human Services on September 18, 2019, correct?

15 A. Yes.

16 Q. And have you read the finding of emergency in those
17 rules?

18 A. Yes.

19 Q. Do you agree that flavored vapor products are causing
20 an increase in vapor usage?

21 A. I don't agree that there's evidence to show that, no.

22 Q. And why not?

23 A. Because it hasn't been measured. I -- the way that
24 these questions are asked on surveys is in
25 multiple-select answers. So youth that have used, that

1 are taking the survey, that have used vaping products
2 in the past 30 days are given a list of potential
3 reasons that they've used it and they're asked to check
4 all that apply. And a lot of the research on this is
5 based on these check-all-that-apply questions where one
6 of those answers is because it comes in flavors I like.
7 Whereas, other answers are because it -- I think it's
8 less harmful than smoking. Because I'm trying to quit
9 smoking. Because my parents use it. Because my
10 friends use it. Other.

11 And they can select multiple ones. And to
12 me, when I look at that, I think it certainly shows
13 that young -- that, you know, young people do consider
14 flavors when they're thinking of why they like
15 something, but why would anyone try something they --
16 that they don't like?

17 And so, to me, that doesn't really show --
18 that doesn't indicate that there's something special
19 about flavors that's causing youth use of nicotine
20 right now, through that.

21 Q. And when was kind of a peak time of the number of
22 flavors on the market?

23 A. So that would be in 2016 because the FDA prohibit -- or
24 because the FDA prohibited new introductions of
25 flavors. So the way that the flavor market has grown

1 has been sort of a fermentation or a proliferation. It
2 really is kind of a flavor market. So there's
3 thousands of different flavors. And, you know, mixing
4 around and developing new flavors. And so, that
5 process happens, basically, in a fairly, like, moving
6 out sort of way than if you kind of compare that with
7 the youth prevalence rates of past 30-day usage.

8 THE COURT: Counsel, the question you asked
9 was: When were there the most flavors?

10 MR. BLAIR: Yes.

11 THE WITNESS: Oh, sorry, I've answered that,
12 then.

13 THE COURT: Okay.

14 THE WITNESS: So 2016.

15 BY MR. BLAIR:

16 Q. And in 2016, what was the trend use of youth use of
17 vaping --

18 A. It was the first --

19 Q. -- in that year?

20 A. I'm sorry, can you repeat?

21 Q. What was the trend of youth use of vaping in the year
22 that the amount of flavors increased, so to speak?

23 THE COURT: Counsel, I'm a little confused.
24 How do you have a trend in a year?

25 BY MR. BLAIR:

1 Q. What was the trend leading up to that year?

2 A. The trend leading up to it from when it started in
3 2011, was rising in one year. In 2016, you have the
4 first statistically significant drop. That remained
5 solid into 2017. In 2018, you have the jump up. 2019,
6 it appears, from initial statistics that it's gone up
7 again. The flavor, we reached peak flavor in 2016.

8 THE COURT: On what statistics are you
9 relying on?

10 THE WITNESS: I am relying on a study, I
11 think it's by Zhu et al. I can get the actual study
12 where they counted. They did an inventory of unique
13 flavors by brand and they traced -- they did one in
14 2014 where they counted things, and one in 2016.

15 And I'm also relying on market, general
16 market data and knowledge of, like, how vaping
17 developed.

18 But the two numbers that I'm relying on are
19 from the study by Zhu et al.

20 THE COURT: So --

21 THE WITNESS: And then, the prevalence rates
22 is National Youth Tobacco Survey.

23 THE COURT: The prevalence rate is national
24 youth survey. And is the National Youth Tobacco Survey
25 a multiple-choice survey as well?

1 THE WITNESS: Yes.

2 THE COURT: Okay.

3 BY MR. BLAIR:

4 Q. Okay. So just a recap, the year of peak number of
5 flavors was the first year of statistically significant
6 decline in youth vapor usage; is that correct?

7 A. Yes. I don't know if you want me to expand.

8 Just usually, when, like, timing is a big
9 part in causality and you don't see -- just when you --
10 the argument that flavors are sort of the special
11 driver of youth use, to me, doesn't make complete sense
12 in terms of when the, quote on quote, epidemic was
13 called, which was two years after flavors had kind of
14 --

15 Q. Okay. So that's one reason why you don't believe that
16 flavors are causing increase in youth usage, correct?

17 A. Yeah. I don't believe that flavors are causing youth
18 addiction to nicotine, or that there's anything special
19 in the flavors in that respect.

20 MR. POTCHEN: Again, Your Honor, this is
21 beyond the area of expertise she's testifying about, so
22 objection.

23 THE COURT: She is certainly qualified to
24 testify as to the efficacy of the data collection,
25 period.

1 MR. BLAIR: And within her specialty of
2 sociology, she can't testify that this incident in the
3 first statistically decline does not -- is not a
4 reliable counter indication of the narrative that
5 flavor is causing youth to vape more?

6 THE COURT: She can't say X didn't cause Y,
7 which is what she just did. And I am going to
8 disregard that answer.

9 MR. BLAIR: Okay. Thank you, Your Honor.

10 BY MR. BLAIR:

11 Q. I believe you also said that -- is it true that there
12 really hasn't been any scientific studies to try to
13 establish a causation link between flavors and youth
14 usage?

15 MR. POTCHEN: I'm going to object to the
16 extent she's not an expert in this area.

17 THE COURT: Objection as to whether or not
18 she can testify as to the existence of such studies is
19 overruled.

20 **THE WITNESS: The studies that are powered**
21 **and designed to evaluate the cause in vaping -- or in**
22 **flavors and youth vaping are not the studies being**
23 **cited here. There's one that I know of, which is an**
24 **experiment, and it's old.**

25 THE COURT: Okay. When you say being sited

1 here.

2 THE WITNESS: Oh, sorry.

3 THE COURT: Here is what?

4 THE WITNESS: The studies that I saw in the
5 complaint or not the complaint, the declaration of
6 emergency.

7 Can you repeat the question because I just
8 want to make sure I stay within my bounds? But can you
9 just repeat the question that you asked me?

10 MR. BLAIR: Yeah, I want to make sure I'm not
11 -- Your Honor, did you have a question before I repeat?

12 THE COURT: No, I didn't have one.

13 MR. BLAIR: Okay.

14 BY MR. BLAIR:

15 Q. The question was: Are there studies to determine if
16 there's a causal link between vapors -- between flavors
17 and youth vapor usage?

18 THE COURT: Actually, counsel, your question
19 was, were there scientific studies.

20 MR. BLAIR: Thank you, Your Honor.

21 BY MR. BLAIR:

22 Q. And you mentioned one, right?

23 A. Right. So an experiment, there's one. And it found
24 that youth were, I believe, more interested in flavors
25 like whiskey than ice cream.

1 But -- so the research that does exist is
2 survey research, population survey research which is
3 very good at what it does, but what it doesn't do is
4 show the cause because it is a social survey. And it's
5 cross sectional. Sorry.

6 THE COURT: And it's cross sectional?

7 THE WITNESS: So the -- Your Honor, the
8 surveys that they use or that measure any element of
9 flavor with youth use are -- they're cross-sectional
10 population surveys. So they're not the type of
11 surveys. They're not longitudinal and they can
12 determine correlations, but they can't show causation.

13 MR. BLAIR: Can I hand this to the witness,
14 Your Honor?

15 THE COURT: You may.

16 PLAINTIFF'S EXHIBIT 7

17 DEPARTMENT OF HEALTH AND HUMAN SERVICES BUREAU OF
18 HEALTH AND WELLNESS, PUBLIC HEALTH ADMINISTRATION
19 PROTECTION OF YOUTH FROM NICOTINE PRODUCT
20 ADDICTION EMERGENCY RULES
21 WAS MARKED

22 BY MR. BLAIR:

23 Q. The Exhibit I'm handing you was marked as Exhibit 7.

24 Do you recognize that document?

25 A. This is the finding of emergency.

1 Q. If you can flip through the whole thing, are those the
2 emergency rules that we were just talking about?

3 A. Yes.

4 Q. And does that appear to be a true and accurate copy of
5 the emergency rules including the declaration of
6 emergency?

7 A. Yes.

8 MR. BLAIR: All right. Your Honor, I move to
9 admit Exhibit 7.

10 MR. POTCHEN: I'm not sure what this is.

11 MR. BLAIR: Pardon me, Your Honor, I think
12 the copy I gave opposing counsel had the wrong page in
13 it. Are you missing a page, or is it just an extra
14 page?

15 MR. POTCHEN: An extra page.

16 BY MR. BLAIR:

17 Q. Ms. Howard, can you tell me, does the second page of
18 your document say Exhibit B on it? Can I look at it
19 real quick?

20 MR. BLAIR: Just for the record, the copy I
21 handed the witness appears to be a correct copy and
22 somehow on mistake, I apologize, the version I gave
23 opposing counsel had an extra page which was just a
24 blank instead of Exhibit B. But I think we fixed that
25 now.

1 THE COURT: And counsel, I would indicate
2 that everyone has given me multiple copies of this same
3 declaration.

4 MR. BLAIR: Yes. Your Honor, I'm sorry, I
5 don't believe you've ruled on this.

6 THE COURT: I will admit it, but we don't
7 need it. It's Exhibit B, sum to the complaint.

8 MS. BLAIR: It is, Your Honor, but --

9 THE COURT: She can answer questions about
10 it, yes.

11 BY MR. BLAIR:

12 Q. Okay. Ms. Howard, could you please turn to page 2?

13 A. Yes.

14 Q. And I'm going to ask you to read, please, the beginning
15 of the bottom paragraph there that begins, according.
16 Can you read slowly, that paragraph, and then the
17 following sentence?

18 A. According to a recent study, 81 percent of youth
19 E-cigarette users reported using flavored E-cigarettes
20 at first use, or a flavored E-cigarette at first use.

21 The study concluded that flavored tobacco
22 products may attract young users and serve as a starter
23 product or starter product to regular tobacco use.

24 Do you want me to keep going?

25 Q. Yes, please.

1 A. Another study revealed nearly two-thirds of current
2 middle and high-school tobacco users have used a
3 flavored tobacco product in the past month.

4 Q. And then one more sentence, please.

5 A. The epidemic can therefore be attributed, in large
6 part, to the appeal of vapor products to youth, as well
7 as the advertising and promotional activities by
8 companies that glamorize the use -- that glamorize the
9 use of nicotine products nationwide.

10 Q. Okay. So let's take that in pieces. I think you
11 already said -- do you agree that the epidemic that's
12 being talked about in that final sentence of youth use
13 can therefore be attributed in large part to the appeal
14 of flavor vaped products?

15 A. No.

16 MR. POTCHEN: Excuse me, what was the
17 question, Your Honor? I may have an objection. I
18 don't understand what the question is.

19 MR. BLAIR: The question was: Does she agree
20 that the epidemic can therefore be attributed in large
21 part to the appeal of flavored vapor products?

22 MR. POTCHEN: Your Honor, that goes beyond
23 the scope of her expertise that she's been proffered
24 for.

25 MR. BLAIR: I'm asking her based on her

1 sociological expertise of the science and literature in
2 this area.

3 THE COURT: Okay. So the document of which
4 you speak --

5 MR. BLAIR: Yes.

6 THE COURT: -- cites first, a survey that is
7 by AC Delonte Johnson, Ambrose, et cetera. The next
8 one is footnoted to a doc makes changes in flavor
9 tobacco uses to current tobacco users in the United
10 States, a JAMA publication.

11 If you want to ask her about the efficacy of
12 the underlying data for footnote 13 and 14, she may
13 answer that.

14 MR. BLAIR: Those are my next questions.
15 Thank you, Your Honor.

16 BY MR. BLAIR:

17 Q. Let's start with the first sentence you read. It
18 starts with the word "according to" and the cited
19 authority there is footnote 13.

20 Do you agree with that sentence; and is it
21 supported by the study cited in footnote 13?

22 **A. I agree with the first sentence. The first sentence is**
23 **an accurate representation of the data that those**
24 **researchers were working with in this study. The**
25 **second sentence says the study concluded that flavored**

1 tobacco products may attract young users and serve as a
2 starter product for regular tobacco use.

3 That is the researcher's interpretation,
4 actually, one of them for the potential interpretations
5 for the correlation that they found. They did not
6 measure whether -- they did not measure whether or not
7 these were a starter product, but they found that 81
8 percent of youth E-cigarette users reported using a
9 flavored E-cigarette at first use. I was slightly
10 surprised that that was so low considering the fact
11 that all E-cigarettes are flavored.

12 So I would disagree that this is the main
13 conclusion of the study. The conclusion of a survey
14 study is what the data show. This is an interpretation
15 of that conclusion. They have others in this paper.
16 They say, for example, they may have overestimated
17 youth use in certain respects.

18 There's recall biases. This is an
19 explanation for -- a potential explanation for what
20 they found.

21 Q. And I want to circle back. You said you thought 81
22 percent was low because all vapors are flavored. Is
23 that what you said?

24 A. Yes. I'm thinking back to when I actually read this
25 study, when it first came out. That's the unique thing

1 about vaping products is they are all -- it's a
2 flavored market. So that could be that maybe youth are
3 using tobacco flavored vapes and they don't consider
4 that a flavor. Maybe they don't remember.

5 But I just found that interesting because,
6 like, some of the numbers that were presented here
7 yesterday, and just from my own understanding of the
8 market, they're all flavored products, so I'm just
9 wondering what these unflavored products were they were
10 using. Yeah, it's just --

11 Q. So to say it another way, am I understanding correctly?
12 So there's 19 percent of people who responded to the
13 survey and said they tried an E-cigarette that wasn't
14 flavored, but there is no such thing as an unflavored
15 E-cigarette, is that what you're saying?

16 A. I can't -- I can't remember the details of that
17 question, but -- so I don't know how it was worded, but
18 81 percent use flavors. Again, I think all
19 E-cigarettes are flavored.

20 I'm not trying to say that that's not
21 credible or anything, it's just 81 percent use of
22 flavored products is just, you know, all E-cigarettes
23 are flavored.

24 Q. Okay. Let's go on to the next sentence that starts,
25 another study revealed that nearly two-thirds of

1 current middle and high-school tobacco users have used
2 a flavored tobacco product in the past month. And that
3 cites to footnote 14?

4 What do you know about that study, if
5 anything?

6 A. I don't -- I don't know as much about this study. I've
7 looked to the study I've used in a review. And I think
8 I've read the abstract in some parts.

9 I -- yeah, I don't know, like, specific
10 details of this study. I know that it was done with --
11 I think it was done with NYTS data. I know it was a
12 study survey, but I wouldn't be able to, like, go back
13 to parts of that study like I did with the other one.

14 Again, I don't question that this is what
15 they found, 63 percent used a flavored tobacco product,
16 especially since we do know that youth are reporting
17 higher numbers of vaping products. That sounds
18 surprising to me.

19 Q. Do you know if the study that they're citing here
20 distinguished between tobacco products and vaping
21 products? As a layperson, I noticed that the
22 proceeding sentences were precise about using
23 E-cigarette terminology whereas this sentence talks
24 about tobacco users.

25 A. I'm not able to speak to how this study was

1 interpreted. I would think that the researchers would
2 include all tobacco products there, but I don't know
3 and I don't have this specific study.

4 Q. All right. Thank you.

5 Based on your research and review of the
6 literature, do you believe that there's any correlation
7 between flavored vapor products and youth vapor usage?

8 MR. POTCHEN: Your Honor, I'm going to object
9 again. That goes beyond the scope of what she's been
10 called to testify as an expert about.

11 THE COURT: Sustained.

12 BY MR. BLAIR:

13 Q. Based on your research and review of the literature,
14 are there other factors that contribute to youth vapor
15 usage?

16 MR. POTCHEN: Your Honor, we object to that
17 as well.

18 THE COURT: Overruled.

19 THE WITNESS: There is other factors that are
20 measured such as -- sorry, youth vapor usage.

21 So perception of the product, is it safer
22 than smoking? That is a popular choice among youth.
23 Harm reduction options, so quitting smoking. Social
24 reasons. These are sort of normal measures.

25 The question was on youth vapor usage,

1 correct?

2 Q. Are there any other specific factors that contribute to
3 youth vapor usage?

4 A. Yeah. Yeah.

5 Like, I mean, based on -- yes. Like harm
6 reduction. So motivationally, harm reduction, smoking
7 sensation goals.

8 Am I allowed to say that they measure
9 addiction signs in surveys that might -- you know,
10 nicotine might contribute to some previously existing
11 nicotine dependents in cigarettes. This is what's
12 measured in these surveys.

13 And there's nothing, to my knowledge, that's
14 special about flavors that has shown cause. Yeah,
15 there's plenty of reasons that youth use vapor
16 products, tobacco, alcohol, any substance. That's why
17 we have big surveys about them. Sorry.

18 Q. Have you reviewed statistics related to youth vapor and
19 cigarette usage in Michigan?

20 A. Yes.

21 Q. And what's notable about those statistics?

22 A. Michigan has --

23 THE COURT: Where did those statistics come
24 from?

25 BY MR. BLAIR:

1 Q. Where did those statistics come from?

2 A. **My understanding, I read it on the Tobacco Free Kids**
3 **page. My understanding is they're the Youth Risk**
4 **Behavior Survey statistics.**

5 THE COURT: Okay. You're saying you've read
6 something on a website?

7 THE WITNESS: **No, the -- so when I -- it's**
8 **the smoking statistics by state on a --**

9 THE COURT: So that you understand, you're
10 making a statement saying that something is true
11 according to something. I'm trying to understand what
12 the thing is that you read, that reports whatever it is
13 you're about to say. Because when I hear these
14 surveys, I don't know what they are.

15 MR. BLAIR: Yes.

16 THE COURT: So do you want to maybe lead her
17 down this path without leading questions --

18 MR. BLAIR: Yes.

19 THE COURT: -- that will allow her to give
20 the foundation for her conclusion?

21 MR. BLAIR: Yes.

22 THE COURT: Thank you.

23 BY MR. BLAIR:

24 Q. What are the underlying surveys, if any, that you've
25 looked at regarding youth vapor usage and youth tobacco

1 usage in Michigan?

2 **A.** I have looked, myself, at the Youth Risk Behavior
3 Survey on Michigan Smoking and Vaping Rates. I have
4 also looked at the Campaign for Tobacco Free Kids.
5 Sheets on something where they collect and aggregate
6 smoking statistics from national surveys. That's where
7 I said I believe this is YRBS because, to my knowledge,
8 that is the statewide.

9 What I was going to say in answer to your
10 question --

11 MR. POTCHEN: Objection. She's answered his
12 question.

13 THE COURT: You've answered the question.

14 **THE WITNESS: Okay. Thank you.**

15 BY MR. BLAIR:

16 Q. What do these statistics show?

17 THE COURT: What are these statistics? So
18 she's given us two sources.

19 MR. BLAIR: Yes.

20 THE COURT: And you asked her what these
21 statistics show. I do not know which of these two
22 she's relying on.

23 MR. BLAIR: Thank you, Your Honor. I
24 apologize for that.

25 **THE WITNESS: Sorry.**

1 BY MR. BLAIR:

2 Q. Could you remind me again, one was the Tobacco Free
3 Youth study?

4 A. It's a --

5 THE COURT: Your witness indicated that it
6 was the YRBS study.

7 THE WITNESS: YRBS.

8 THE COURT: Pardon me.

9 THE WITNESS: Yeah.

10 THE COURT: She gave you two. She indicated
11 YRBS as a singular entity, and Campaign for Tobacco
12 Free Kids, which she said aggregated that.

13 BY MR. BLAIR:

14 Q. What does the YRBS data show?

15 A. The YRBS data that I looked at shows the -- the YRBS
16 data shows, basically, the same thing that other
17 national surveys show in Michigan, which is, if you
18 look at smoking, you see it going down. If you look at
19 vaping, you see it going up.

20 The reason I brought up the Tobacco Free Kids
21 data, which is YRBS data --

22 THE COURT: There's only one question.

23 THE WITNESS: Okay. Sorry. Sorry.

24 BY MR. BLAIR:

25 Q. Why did you mention the Tobacco Free Kids compilation

1 of the YRBS data?

2 **A. Because you can compare state and national rates. And**
3 **Michigan has the -- has a higher than average smoking**
4 **rate among youth. I believe it's twice as high as the**
5 **national average and half that when you get to vaping.**
6 **So vaping rates in Michigan are half of what they are**
7 **nationally. And smoking rates are higher than**
8 **nationally.**

9 **Q.** Thank you. As part of your dissertation, I think you
10 mentioned that you researched the genesis of vapor
11 products and technology in the marketplace. Why were
12 vapor products first invented?

13 **A. Vapor products --**

14 MR. POTCHEN: I'm going to object to the
15 invention of vapor products and why she's testifying
16 about this at all. I think number one, what she's been
17 proffered as an expert for, and number two, what this
18 court needs to decide.

19 MR. BLAIR: Your Honor, we did proffer her as
20 an expert on the history of vaping, sociology, and an
21 empirical history of vaping. She understands the
22 history of the technology and the innovations, which
23 help explain some issues related to the Court's
24 analysis today. They will be brief, but I'm asking for
25 some latitude to get into this very briefly.

1 THE COURT: Then I guess you want to tell me
2 how she would understand why a thing was invented. On
3 what basis would she come to that conclusion?

4 BY MR. BLAIR:

5 Q. Yes. How do you know how vaping was invented?

6 THE COURT: No, we know how. The question
7 was why.

8 MR. BLAIR: Right. The question is why.

9 BY MR. BLAIR:

10 Q. How do you know why vaping was invented?

11 A. That's one of my research questions. So I look at
12 online archival discussions between people that
13 invented different things in vaping and look at the
14 problems that they were solving. So that would be, you
15 know, what were they trying to do, what problem were
16 they trying to solve, and how this is a solution to it.
17 That's the data that I work with and the question that
18 I have.

19 Q. So when was vaping -- where was vaping invented, if you
20 know?

21 A. All over the world, but China was where the first
22 modern E-cigarette came from. It looked like a
23 cigarette. It's the -- it was invented by somebody who
24 smoked who was a pharmacist, and he had the problem,
25 himself, of wanting to quit smoking. He created a

1 little gadget that looks like a cigarette, delivers
2 nicotine without smoke, and that was copied by other
3 Chinese companies. And the market kind of grew early
4 for that, and that's how people in the west started to
5 buy these devices and try to use it to quit smoking.

6 Q. And when did flavors become an aspect of vaping?

7 A. Very early on. The early devices from China had a
8 selection of flavors, tobacco flavors. It's important
9 to understand that tobacco flavor and vaping is like --
10 that's a name for something, but it doesn't necessarily
11 taste like burning tobacco.

12 And then, some other things that were sort of
13 strange to a western pallet, ginseng or something like
14 that. And then, people that were using these products
15 were talking and the discussions that I've observed,
16 they were talking about the fact that they didn't work
17 very well or they didn't like the taste of them. They
18 didn't like --

19 So flavors came along in about two thousand
20 -- 2008, I would say, would be the first sort of flavor
21 as we know it now, the idea of, like, have your own
22 flavor in an E-cigarette.

23 Q. And how is technology related to vapor products evolved
24 overtime, and what has driven that innovation?

25 A. It's an example of automap innovation. It's an example

1 of -- I call it fermentation, in terms of what the
2 process is. If you use flavors as the example, flavors
3 were sort of imported into the category as a
4 non-commercial solution to a problem by users. Again,
5 this was around 2008.

6 What happened was because users didn't really
7 like these tobacckoey [sic] flavors, there was a lot of
8 experimentation going on between people trying to quit
9 smoking, trying to get it to taste more like a
10 cigarette. And they were, you know, boiling tobacco
11 and seeing if they could get the acids from that.

12 Somebody noticed that this industry exists
13 that services, you know, confectionary applications,
14 baking, perfuming. And it's the food flavoring
15 industry, concentrated food flavorings. And what users
16 noticed is that these food flavorings have the same
17 solvents that's used to suspend nicotine in vaping,
18 which is propylene glycol, and these are food products.
19 And somebody thought, okay, maybe if I put this in my
20 E-cigarette it will taste better, and they did and
21 shared their findings online.

22 MR. POTCHEN: Objection, Your Honor. We're
23 just going way beyond this short time period of the
24 history of vaping and this does not even seem pertinent
25 to, again, what the issues are before you and what

1 she's been proffered as an expert for.

2 THE COURT: You have wandered a little ways.

3 MR. BLAIR: That's what we're going to talk
4 about in the innovation of the flavors. There, it is
5 relevant as well to talk briefly about the innovations
6 and other developments in vaping. For example, battery
7 usage. And this gets to the different kinds of vapor
8 technology.

9 If I could have just a little bit more leeway
10 to get into that, it's directly relevant to the public
11 harm aspect and the public --

12 THE COURT: I cannot imagine how, but I'll
13 give you ten minutes --

14 MR. BLAIR: Thank you, Your Honor.

15 THE COURT: -- to bring this to a noble end.

16 MR. BLAIR: Thank you, Your Honor. Thank
17 you, Your Honor.

18 BY MR. BLAIR:

19 Q. Okay. Let's talk about innovations in battery power.
20 Very briefly, describe what the early generations of
21 E-cigarettes were like and how innovation drove to the
22 options we have today.

23 A. Sure. Early generations of E-cigarettes looked like
24 cigarettes. They had small batteries. They didn't
25 emit a lot of vapor, which people who smoked didn't

1 like because they wanted it to -- they liked to feel
2 the smoke in their mouth. So somebody ended up --
3 there was arguments about why this was and one person
4 ended up saying, you know, it can't be a cigarette
5 shape. So as a proof of concept, he developed -- he
6 machined a flashlight and stuck an atomizer, an
7 E-cigarette, like the tip, on to it to vape it.

8 And that's sort of where I, in my own
9 research, marked the beginning of the open systems
10 vaping market where you have this new battery that was
11 introduced. It was through hacking a flashlight.

12 Q. Okay. So let's just back up for a second.

13 You said the first one looked like a
14 cigarette. Would that be like an example of what we
15 were talking about yesterday, the clean cigarette?

16 A. Yeah, that's an example of an older generation of
17 E-cigarette.

18 Q. Okay. I forget the Exhibit Number, but that's been
19 admitted, a picture of that and this is the clean
20 cigarette that we were talking about yesterday.

21 So you mentioned that the batteries were
22 going dead, right?

23 A. Yeah.

24 Q. And there was innovation to get more power and there
25 was a guy that strapped a flashlight to an atomizer,

1 right?

2 **A. Yeah.**

3 Q. And that was kind of the genesis of the open system,
4 like what Mr. Slis had yesterday?

5 **A. Mm-hmm.**

6 Q. Is that a yes or no?

7 **A. It was about -- sorry. Yes.**

8 It was about getting the technology to the
9 state where it was pleasant, it tasted good, and it
10 worked well. Where it met all of the particular needs
11 of users, as many of them were smokers.

12 Q. Okay. So we talked about innovations in battery
13 technology. And that's what led from things that look
14 like a cigarette to things that look like this, right?

15 **A. Yes.**

16 Q. Let's talk about the innovations in the atomizers.
17 What developments and innovations have occurred in that
18 aspect of the vapor?

19 **A. Atomization technology is really connected to
20 innovation in batteries and innovation in flavors.
21 It's the part that makes the vapor.**

22 The general innovations in atomizer's
23 technology have been ways to keep an atomizer wet,
24 essentially. So tanks -- ways to power it enough, or
25 an atomizer to be powered enough to emit enough vapor.

1 **And then, things like temperature control, wattage.**

2 **And then, yeah, I'll just stop there.**

3 Q. So briefly, before we move on, the -- these are open
4 systems, correct?

5 **A. Yes.**

6 Q. The one that Mr. Slis has?

7 **A. Yes, that's an open system device.**

8 Q. And are you generally familiar with how much an open
9 system device like this would cause?

10 **A. Yeah. It varies, but probably your base price for a**
11 **full kit would be about 60 dollars or 69 dollars if you**
12 **want to get kind of the low end.**

13 Q. Okay. And so you talked about the innovations in the
14 battery and the innovation in the atomizer kind of go
15 hand and hand, right? Everybody was trying to solve --

16 **A. The innovation evolved goes hand and hand, yes.**

17 Q. Okay. So just loosely, we're calling this first
18 generation, right, the ones that look like a cigarette?
19 The second generation started with somebody strapping a
20 flashlight to an atomizer. And obviously now, they've
21 gotten more sophisticated and they cost 60 dollars,
22 roughly.

23 What about closed system pods, how did those
24 evolve from first and second generation?

25 **A. So closed system pods are sort of a mass market**

1 innovation. So they're manufactured innovation, not
2 necessarily consumer innovation. So they came sort of
3 from what worked from the open systems category and
4 they reduce it into an easy-to-use product. One of the
5 big innovations with the most popular pod system or
6 closed system is the ability to use a small battery
7 with a higher nicotine level so that you don't need the
8 power to effectively deliver nicotine.

9 Q. So that is like the -- a Juul. Is that what this is?

10 A. Yes.

11 Q. And explain to me again why -- the first generation got
12 bigger because it needed a bigger battery. But how did
13 it get smaller again?

14 A. Juul patented a kind of nicotine -- nicotine insolvent
15 form for vaping, which makes nicotine easier -- higher
16 levels of nicotine easier to inhale, so you don't need
17 as much vapor to get as much nicotine.

18 Q. And this is more kind of mass produced, correct?

19 A. Yes, it's a mass market product.

20 Q. So the Juuls closed pod system, is that the accurate
21 term they call the Juuls of the world?

22 A. That would be accurate.

23 Q. Okay. As opposed to the open systems where you're
24 buying the liquid and --

25 A. Yeah. There's a different supply chain for the two of

1 them. There's maybe some overlap, but Juul is the mass
2 market retail outlets, so our tobacco industry
3 cigarettes, or E-cigarettes, whereas vape shops --
4 there's a whole vape shop system for open systems.

5 Q. So these are smaller and they're mass produced. What
6 are some of the limitations of the closed pod system?
7 Can you adjust the level of nicotine like you can in an
8 open system?

9 A. No. Because it is a closed system device, it sort of
10 controls. The user has to either accept or reject the
11 manufacturer's predetermined idea of what the users
12 need, whereas with something like the big mod there,
13 basically a consumer is building their own E-cigarette
14 from the ground up every time.

15 Q. Okay. Is this another example of a closed pod vapor
16 product?

17 A. I believe that is an open -- or a hybrid pod.

18 Q. A hybrid?

19 A. You can use it for a liquid.

20 Q. Okay. So are you -- you said you kind of follow this
21 field with a particular interest. Have you been
22 following the litigation in states around the country,
23 concerning vape pens?

24 A. Yes.

25 Q. As far as you're aware, is Juul involved in any of

1 those cases?

2 MR. POTCHEN: Objection, Your Honor. I don't
3 understand how this is, again, relevant to the issues
4 before you.

5 THE COURT: Sustained.

6 BY MR. BLAIR:

7 Q. Ms. Howard, what has your research and your review of
8 literature shown as to how vapor products have impacted
9 smoking sensation efforts?

10 MR. POTCHEN: Objection, Your Honor. That's,
11 again, beyond the scope of the proffer as an expert.

12 MR. BLAIR: We're going to get to the studies
13 themselves, Your Honor, if that's what --

14 THE COURT: I'm not going to refute the
15 conclusion until I understand what -- fairly
16 consistently, you'll ask her for a conclusion. I don't
17 know what its basis is, so therefore, it is not the
18 most effective persuasive tool.

19 MR. BLAIR: Thank you, Your Honor, for that
20 feedback.

21 BY MR. BLAIR:

22 Q. Before I move on to that, I want to circle back to the
23 Juul really quickly. Do you know when the Juul came on
24 to the market?

25 A. 2014, I believe. Or 2015, I'm sorry.

1 Q. Okay. Are you aware -- so back to -- are you aware of
2 empirical studies concerning the -- how vapor products
3 have impacted smoking sensation efforts?

4 **A. Yes.**

5 Q. Okay. And can you describe some of the more reputable,
6 reliable studies in that field and what they have
7 shown?

8 THE COURT: I'd start out with, that's a
9 compound question.

10 MR. BLAIR: Yep.

11 THE COURT: What do you consider to be the
12 reliable studies?

13 **THE WITNESS: Oh, you're asking me?**

14 THE COURT: Yes, ma'am.

15 **THE WITNESS: So I mean, reliable on the**
16 **basis of the gold standard would be the randomized**
17 **control trial that just happened. It was published, I**
18 **believe, at the beginning of this year.**

19 THE COURT: And it was published by someone
20 that has a name?

21 **THE WITNESS: Oh, by Peter Hayek and**
22 **colleagues. And it was published in -- actually, I**
23 **won't volunteer where it was published because I**
24 **forget. I think it was the New England Journal of**
25 **Medicine, but I'm not sure.**

1 There's also a great deal of population
2 evidence. There's a very good study done with United
3 States census data showing that --

4 THE COURT: The study. And that study is
5 called what, and was published by?

6 THE WITNESS: Zhu is the lead author on that
7 study.

8 THE COURT: How do you said that.

9 THE WITNESS: Zed-h-u, I believe. And I
10 believe he's at the University of California Davis. I
11 don't remember -- I think -- I don't remember the name
12 of the study.

13 I can look it up after, but yeah. Should I
14 continue? Do you want me to continue talking about
15 that?

16 THE COURT: I just asked the name of it.

17 THE WITNESS: Oh, okay.

18 BY MR. BLAIR:

19 Q. Are there any other studies that you find reliable in
20 this area of looking at how vapor products have
21 impacted smoking sensation efforts?

22 A. Yeah. I mean, there's those two. There's ones on
23 flavors. There's -- there was a good one, actually, by
24 Tackett et al, where they did biochemically verify
25 smoking sensation results. So what they did was they

1 had vape shop customers come in and tested their blood
2 or their urine for bio records of smoking before and
3 after, and found that the use of non-tobacco flavors
4 was more likely to be the ones that were in people that
5 were biochemically free.

6 THE COURT: Is the Zhu article in which you
7 spoke called E-cigarette use in associated changes in
8 population --

9 THE WITNESS: Yes.

10 THE COURT: -- smoking sensation, evidence
11 from the U.S. current population survey published in
12 2017?

13 THE WITNESS: Yes, Your Honor.

14 BY MR. BLAIR:

15 Q. Your Honor, that was going to be one of my next
16 questions. If we have these studies, can I hand them
17 to her to remind her of the details of these, or is she
18 expected to --

19 THE COURT: I've never had an expert testify
20 like this in my life, without some data in front of
21 them.

22 MR. BLAIR: So I can hand them off? I'm not
23 offering them into evidence at this time.

24 THE COURT: I understand.

25 MR. BLAIR: Yes? Okay.

1 THE COURT: Okay. I'm going to make a
2 radical suggestion. If you are going -- if this is to
3 be an individual who is going to testify based upon
4 reliability of known -- of identified studies.

5 MR. BLAIR: Yes.

6 THE COURT: I'm going to suggest that we take
7 45 minutes, the world's earliest lunch, but it won't
8 really be lunch because what you'll be eating is paper.
9 And give your colleague copies of this paper so that
10 he, too, knows what you're talking about.

11 MR. BLAIR: Yes.

12 THE COURT: So we will -- it is 11:24. At
13 12:15, we'll resume. But please deliver copies to your
14 colleague.

15 MR. BLAIR: Will do. Thank you.

16 MR. POTCHEN: Thank you.

17 THE COURT: We are in recess.

18 THE BAILIFF: All rise.

19 (A short recess was taken at 11:24 a.m.)

20 (On the record at about 12:17 p.m.)

21 THE BAILIFF: All rise. The State of
22 Michigan Court of Claims is now in session.

23 THE COURT: On behalf of Mr. Slis. Please be
24 seated. You're up.

25 MR. BLAIR: Your Honor, we discussed at the

1 break, and I believe opposing counsel has a stipulation
2 he wants to read into the record.

3 THE COURT: Okay.

4 MR. POTCHEN: Your Honor, on the behalf of
5 the Defendants, we will concede that there is a study
6 out there somewhere that shows a correlation between
7 adults using flavored E-cigarettes and their reducing
8 use of combustible cigarettes.

9 THE COURT: Thank you.

10 Did you have further questions of your
11 witness?

12 MR. BLAIR: Your Honor, with that
13 stipulation, I am prepared to reserve Ms. Howard to
14 call as a rebuttal witness, with one caveat. First, we
15 would like to, before we move on, move into evidence
16 Exhibit 5, which is a picture of the closed pod system
17 that Ms. Howard was just testifying about.

18 THE COURT: Objection?

19 MR. POTCHEN: Objection as to relevance, Your
20 Honor.

21 THE COURT: They already talked about it, so
22 it's kind of in. Okay. Thank you.

23 PLAINTIFF'S EXHIBIT 5

24 CLOSED POD VAPING DEVICE W/RULER

25 WAS MARKED FOR IDENTIFICATION AND ADMITTED

1 MR. BLAIR: So if that's admitted, then we
2 would reserve Ms. Howard for rebuttal.

3 THE COURT: Okay.

4 MR. POTCHEN: I do have a short cross of her.

5 THE COURT: Okay.

6 MR. BLAIR: Pardon me, can I approach to give
7 the exhibit to the court officer?

8 THE COURT: Absolutely. Thank you. Do you
9 have water?

10 **THE WITNESS: I do, thank you.**

11 CROSS-EXAMINATION BY MR. POTCHEN:

12 Q. Ms. Howard, when were you first contacted about
13 testifying in this case?

14 MR. BLAIR: I'm sorry, I didn't hear the
15 question. Can you repeat it, please?

16 BY MR. POTCHEN:

17 Q. When were you first contacted about testifying in this
18 case?

19 **A. I don't know the exact date. May I give an
20 approximation?**

21 Q. Yes, you may.

22 **A. About a week ago, I was contacted and asked if I would
23 be able to give testimony, over the phone.**

24 Q. Who contacted you?

25 **A. It came through Azime Choultry and then I was in**

1 **contact with Doug.**

2 Q. Who is Azime Choultry?

3 A. **The gentleman right there.**

4 Q. And did they contact you or did you contact them first?

5 A. **They contacted me.**

6 Q. Okay. How many discussions have you had with those
7 attorneys?

8 A. **Including my time here?**

9 Q. Yes.

10 A. **Since I got in on Monday -- or sorry, what day is it**
11 **today? Tuesday -- I don't know how many distinct**
12 **discussions we've had, but I've been here since**
13 **Tuesday. Or since -- yeah, since Tuesday.**

14 THE COURT: You got here yesterday?

15 THE WITNESS: Sorry. Yeah. No, I was here

16 --

17 THE COURT: You got here Monday?

18 THE WITNESS: Yeah, so Tuesday is when we
19 began talking. Sorry.

20 BY MR. POTCHEN:

21 Q. And have you had discussions with the lawyers
22 representing Clean Cigarette?

23 A. **Just in the courtroom, informally here today.**

24 Q. And are you getting paid to testify here?

25 A. **No.**

1 Q. Are you getting reimbursed for your travel?

2 A. I am.

3 Q. And who is reimbursing you?

4 A. I was told to keep receipts and to give them to
5 counsel.

6 MR. POTCHEN: No further questions, Your
7 Honor.

8 THE COURT: Okay. Albeit you don't have
9 anything to rebut from that.

10 MR. BLAIR: Correct, Your Honor. We'll
11 re-direct at this time.

12 THE COURT: And you had nothing.

13 MR. DAVIS: I had nothing, Your Honor. I'm
14 sorry I didn't stand up before and say that.

15 THE COURT: That's all right. Please stand
16 up and resume your seat.

17 **THE WITNESS: Thank you.**

18 THE COURT: So on behalf of your clients, you
19 would now?

20 MR. BLAIR: We would now rest our Case in
21 Chief, reserving the right to call Ms. Howard as a
22 rebuttal witness.

23 THE COURT: Okay. Sir, if you'd call your
24 first witness.

25 MR. POTCHEN: Your Honor, at this time, we

1 would like to call Dr. Khaldun.

2 THE COURT: Raise your right hand, please.

3 DR. JONEIGH KHALDUN,
4 having first been duly sworn, was examined and
5 testified on her oath as follows:

6 THE COURT: Thank you. Would you please both
7 state and spell your first and last name?

8 THE WITNESS: Dr. Joneigh Khaldun, first
9 name, J-o-n-e-i-g-h. Last name, Khaldun,
10 K-h-a-l-d-u-n.

11 EXAMINATION BY MR. POTCHEN:

12 Q. Dr. Khaldun, can you please tell us your title at the
13 Michigan Department of Health and Human Services?

14 A. I'm the Chief Medical Executive and the Chief Deputy
15 Director for Health.

16 Q. Can you please tell us a little bit about your
17 educational background?

18 A. I have a bachelor's degree in biology, from the
19 University of Michigan. I have a medical degree from
20 the University of Pennsylvania School of Medicine in
21 Philadelphia.

22 I completed my emergency medicine residency
23 training at Kings County Hospital in Downstate Medical
24 Center in Brooklyn, New York. And I have a master's
25 degree in public health with a specialty in health

1 policy from George Washington University.

2 Q. Can you give us a little more information about your
3 clinical background?

4 A. I'm a board certified practicing emergency medicine
5 physician. I've worked many hospitals; Philadelphia,
6 in the City of New York, I've worked in several
7 emergency departments. Specifically, in the state of
8 Maryland, and I currently practice emergency medicine
9 in the City of Detroit.

10 Q. And can you give us a little bit of background in
11 public health?

12 A. I have been working on various public health
13 initiatives or leading public health initiatives for at
14 least 17 years. I've helped develop violence
15 prevention, injury prevention programs. I've led local
16 and national efforts advising on policies around public
17 health. I've taught classes, lectures on public health
18 to public health students and medical students. I
19 helped develop a health policy curriculum for medical
20 residents.

21 I have served as the Chief Medical Officer of
22 the Baltimore City Health Department where I oversaw
23 all of their seven clinics in a freestanding lab. And
24 I also oversaw their key public health programs and
25 responses.

1 And I have served as the Chief Health Officer
2 for the City of Detroit's Health Department as an
3 appointee of the Mayor of Detroit. And then, I also
4 serve in the capacity as the Medical Director for the
5 City of Detroit Health Department.

6 Q. Are you a member of any professional societies?

7 A. Yes, as many, the American Academy of Emergency
8 Physicians, The American Public Health Association.
9 There's many current and former associations.

10 Q. Is it fair to say that you've also received some honors
11 and awards?

12 A. Yes. I've received both local and national awards for
13 my work in public health. I recently received -- I
14 received the National Minority Quality Form Award for
15 -- I forget the exact name they were, but for advancing
16 minority health policy in public health.

17 I received the Beaumont Foundation Award for
18 40 under 40 in Public Health, and more recently, I
19 received from my alma mater, George Washington
20 University School of Public Health, their Dean's 950
21 award for my work in public health.

22 Q. Dr. Khaldun, I'm going to show you what's been marked
23 as D1, for Defendant's Exhibit No. 1.

24 MR. POTCHEN: May I approach, Your Honor?

25 THE COURT: Certainly.

1 BY MR. POTCHEN:

2 Q. And can you tell us what that is?

3 A. **This is my CV that was last updated, maybe, six months**
4 **ago or so. But not my most updated CV.**

5 Q. And is everything on your CV true and accurate?

6 A. **Yes.**

7 MR. POTCHEN: Your Honor, I move for the
8 admission of Exhibit D1.

9 THE COURT: Without objection, it's admitted.

10 MR. BLAIR: No objection, Your Honor.

11 MS. REED: Nothing from us, Your Honor.

12 DEFENDANT'S EXHIBIT D1

13 JONEIGH S. KHALDUN, MD, MPH, FACEP CV

14 WAS MARKED FOR IDENTIFICATION AND ADMITTED

15 BY MR. POTCHEN:

16 Q. In your experience, have you dealt with public health
17 crisis?

18 A. **Yes. I -- many public health crisis. When I was the**
19 **Chief Medical Officer in Baltimore. Actually, within**
20 **days of me starting there, we had a potential measles**
21 **case at a hospital. And so, I'm the one who oversaw**
22 **how we determined if there was a risk for measles. If**
23 **there was a risk, who would be at risk and how we would**
24 **respond to that.**

25 I also oversaw, in my role as the Chief

1 Medical Officer in Baltimore, I was there when we had
2 civil unrest and riots. And so, there were several
3 pharmacies that burned down. Residents didn't have
4 access to medication and food, and so, I was involved
5 in coordination of how we got people what they needed
6 in that public health crisis.

7 I also oversaw the Baltimore City Health
8 Department's responses to the opioid epidemic and the
9 response, rather it's general community members or
10 engaging with physicians, clinicians.

11 And when I was in the City of Detroit, I also
12 am the one who oversaw, from 2016, to when I left, the
13 response to the largest hepatitis A outbreak in modern
14 history in this country, and Detroit's response to
15 that.

16 Q. In your role as Chief Medical Executive for the State
17 of Michigan, is it one of your duties to determine
18 whether a public health emergency exists?

19 A. Yes.

20 Q. And can you tell us, generally, how people in your
21 position determine whether a public health crisis or a
22 public health emergency exists?

23 A. So in general, part of my role is to look at data, and
24 understand what the data shows, understand how it may
25 impact the public's health overall, understand what

1 potential things could be done in order to mitigate
2 that public health risk. And then, part of my role is
3 to also be able to determine, pretty quickly, if there
4 is a risk, what actions should be done and to take
5 those actions quickly, if necessary.

6 Q. So when you're talking about taking action, you're
7 talking about in response to a public health crisis; is
8 that what you mean?

9 A. Correct.

10 Q. Can you tell us what factors people in your position
11 think about when responding to a public health crisis?

12 A. You think about who's potentially at risk, why they are
13 at risk, if there is anything that can be done to stop
14 that risk from occurring. You have to look at all, you
15 know, all those factors in determining how you respond.

16 And you also -- it's very important that you
17 respond quickly, especially once you identify that
18 risk. You need to be able to move quickly and make a
19 determination of what to potentially do.

20 Q. When talking about a public health response and there's
21 a potential harm to a subset of people, does that
22 impact public health generally?

23 A. I would say yes. When you're talking about a subset of
24 people -- in this particular case, we're talking about
25 youth, but when we talk about a subset of people, I'm

1 responsible for everyone in the State of Michigan. So
2 a subset of people would be protecting public health.

3 Q. So I'm going to follow up on that question. If there
4 is concerns about youth's health, does that impact
5 public health generally?

6 A. Absolutely. Yes. If something impacts the health of
7 youth now, and certainly the adults of the future,
8 which our youth are, I would say absolutely, it impacts
9 public health.

10 MR. BLAIR: Your Honor. May I lodge an
11 objection at the time? I understand the hectic base of
12 this case hasn't allowed the Court an opportunity to
13 rule on our motion in limine, but can I have a standing
14 objection as to the questions going outside the scope
15 of what was actually articulated in the emergency rule?

16 THE COURT: You can certainly have a standing
17 objection.

18 The Court understands that the basis of its
19 decision is focused on the statement issued and the
20 transcript that is accompanying the emergency rule. I
21 will, however, just as with your witness, allow some
22 background. And the factors, for example, that are to
23 be considered in ascertaining whether it is a public
24 health emergency are relevant and would be considered.

25 MR. BLAIR: Thank you, Your Honor.

1 THE COURT: Thank you.

2 BY MR. POTCHEN:

3 Q. So in your opinion, taking steps to protect youth, does
4 that have benefits for the entire community?

5 A. Yes.

6 Q. And were you the person who declared the public health
7 emergency in the State of Michigan with regard to youth
8 vaping?

9 A. Yes.

10 Q. In making that determination, what facts and evidence
11 did you look at?

12 A. I looked at national and state data with regards to the
13 number of youth that are using vaping products. And
14 I've also reviewed evidence about the harmful impacts
15 of nicotine, specifically on youth.

16 Q. And is it fair to say that your findings of emergency
17 outlines some of the material that you looked at?

18 A. Correct.

19 Q. And can you please explain what the public health
20 crisis is regarding youth and vaping? In other words,
21 why is youth vaping a public health emergency?

22 A. There's no question that youth vaping is a public
23 health emergency. When you look at -- I looked at data
24 for every county that reported the numbers of youth,
25 the percentages of high school students, specifically,

1 that are using E-cigarettes over the past several
2 years. And every county that reported showed that they
3 had an increase. There are some counties where more
4 than a third of the high school students are using
5 these products. There was one county where the use
6 actually doubled.

7 THE COURT: Do we know the source of the
8 data?

9 BY MR. POTCHEN:

10 Q. I'm sorry, can you please explain the data you're
11 referencing?

12 A. So that is -- I don't have it in front of me, but that
13 is the -- if the survey -- may I ask a question?

14 Q. If I showed you your findings --

15 A. The emergency --

16 Q. -- of an emergency, would that be helpful?

17 A. Yes. Yes.

18 MR. POTCHEN: Your Honor, may I approach the
19 witness?

20 THE COURT: Yes.

21 THE WITNESS: That would be the MI number 5,
22 the Michigan Profile for Health and Youth Survey, the
23 Michigan Department's Education and MDHSS. That is
24 what I'm describing.

25 BY MR. POTCHEN:

1 Q. You can keep it.

2 THE COURT: That's referenced at footnote
3 which?

4 THE WITNESS: That is number five.

5 THE COURT: Okay.

6 BY MR. POTCHEN:

7 Q. In determining that there was a public health crisis
8 with youth vaping, were there any findings regarding
9 links to flavors in youth vaping?

10 A. Yes. There is evidence that many youth use flavors to
11 initiate as a reason why they initiate using these
12 products.

13 Q. Are you aware that there were recent changes to
14 Michigan's Youth Tobacco Act regarding vaping products?

15 A. Yes.

16 Q. What is your understanding of those changes?

17 A. My understanding is that they banned the sale of the
18 products to individuals under the age of 18 and that
19 they penalize individuals under the age of 18 for
20 possessing those products.

21 Q. In your view, despite those changes, did you still
22 believe these emergency rules were necessary?

23 A. Oh, absolutely. I have no reason to believe that those
24 -- the new rules would be impactful. Specifically
25 because the --

1 Q. I'm sorry, you said the new rules.

2 A. I'm sorry, not the new rules, the changes in the Youth
3 Tobacco Act. And specifically, banning E-cigarettes
4 for youth under the age of 18. I have no reason to
5 think that that law in the State of Michigan would have
6 an impact on youth vaping. Specifically, because the
7 FDA, in 2016, banned it already. So I believe that
8 that law, in the State of Michigan, is redundant.

9 And what we also know is that we still see,
10 after the FDA put that into effect in 2016, significant
11 increases in the numbers of youth that are using those
12 products.

13 I also know there's one state or several
14 states, but in particular, I can recall Minnesota, put
15 a ban on the sale of those products under the age of 18
16 into effect in 2010 and they still saw after that went
17 into effect, increases in the numbers of youth that
18 were using these products.

19 Q. So in your mind, states with age limits are still
20 seeing an alarming increase in youth vaping. Is that
21 what you're testifying to?

22 A. Yes.

23 Q. All right. So is it your opinion as the State of
24 Michigan's Chief Medical Executive, that age limits
25 alone are not sufficient to address the youth vaping

1 crisis?

2 **A. That is correct.**

3 Q. You had mentioned a study, and I want to show you --

4 THE COURT: Your Honor, if I may approach.

5 BY MR. POTCHEN:

6 Q. -- a graph and I'm going to ask you if you know what
7 this graph is.

8 THE COURT: And you are going to label that
9 graph as?

10 MR. POTCHEN: It's going to be D2 if -- I
11 believe it's --

12 THE COURT: Well, we'll call it D2 now. It's
13 got to have a name if we're going to talk about it.

14 MR. POTCHEN: I'm sorry, I'm going to mark it
15 D2.

16 THE COURT: Okay.

17 BY MR. POTCHEN:

18 Q. And can you tell us what that graph is? And
19 specifically, I'm looking at the green line on the
20 graph.

21 **A. This graph shows the percentage of high school students**
22 **who are using E-cigarettes between -- it goes from**
23 **November of 2013 all the way through the last date**
24 **which is March of 2019. But what it also shows is --**

25 THE COURT: Okay. It hasn't been admitted as

1 an exhibit, so talking about its content is a little
2 bit dicey.

3 BY MR. POTCHEN:

4 Q. Yeah. So do you know where the information came from
5 for the green line?

6 A. **Honestly, I do not recall.**

7 Q. Did the state rely on the National Youth Tobacco Study?

8 A. **Yes.**

9 Q. Does this green line reflect the figures from that
10 study?

11 A. **Yes.**

12 MR. POTCHEN: And so, I'm going to move to
13 admit Exhibit D2.

14 MS. REED: No objection, Your Honor.

15 MR. BLAIR: No objection.

16 THE COURT: Admitted.

17 DEFENDANT'S EXHIBIT D2

18 YOUTH CIGARETTE EPIDEMIC & JUUL

19 MARKET DATA + NYTS GRAPH

20 WAS MARKED FOR IDENTIFICATION AND ADMITTED

21 BY MR. POTCHEN:

22 Q. The reason why I brought this to your attention, you
23 had mentioned the FDA had some regulations. And again,
24 what is -- again, what does that chart depict as far as
25 the FDA regulations and the rise of tobacco use by

1 youth? I'm sorry, vaping by youth.

2 **A. So this shows that in the middle of the graph, August**
3 **of 2016, which is when the FDA began enforcing the**
4 **federal minimal legal sales age for E-cigarettes of 18.**
5 **And what it shows is after that went into effect, the**
6 **numbers of high school -- high schoolers using**
7 **E-cigarettes continued to rise significantly. It looks**
8 **like it more than doubled, actually, after that went**
9 **into effect.**

10 **Q. I'm going to talk a little bit about the impact of**
11 **E-cigarettes and helping adults quit smoking. Have you**
12 **reviewed studies regarding the impact of E-cigarettes**
13 **and adults quitting smoking?**

14 **A. I've seen some.**

15 **Q. And the Plaintiffs are claiming that the banning of**
16 **flavored nicotine products are harmful because people**
17 **who are trying to quit need them.**

18 Do you have any views or opinions on that?

19 **A. Yeah. So E-cigarettes are not approved by the FDA as a**
20 **smoking sensation product. What I also know is that**
21 **specifically, there are studies that show that**
22 **specifically for adults, when you compare them to**
23 **youth, tobacco flavor is actually one of the most**
24 **popular flavors amongst adult E-cigarette users who**
25 **have used in the previous 30 days.**

1 MS. REED: Your Honor, could the witness
2 identify the study that she's referring to?

3 BY MR. POTCHEN:

4 Q. You had indicated that tobacco use is a popular flavor
5 among adults; is that correct?

6 A. Correct.

7 Q. And where did you get that information from?

8 A. So specifically, the tobacco flavored E-cigarette
9 product, that is from The Path Study that I believe was
10 published earlier this summer. But it's in that study.

11 THE COURT: Okay. And the name of the study
12 is what?

13 MR. POTCHEN: P-A-T-H.

14 THE COURT: Path. Okay.

15 And it was published where?

16 MR. POTCHEN: If I showed the witness, this
17 might help refresh her recollection and she
18 can identify it.

19 THE COURT: You can read it, I don't care.

20 MR. POTCHEN: I'm sorry. At WA 3 dash 2050.

21 THE WITNESS: So it's published in The
22 International Journal of Environmental Research and
23 Public Health. And let's see, published August 20th of
24 2019.

25 BY MR. POTCHEN:

1 Q. Oh, you had mentioned that E-cigarettes are not
2 approved FDA. Are there other approved FDA smoking
3 sensation products?

4 A. Yes, there are. And that is what I would recommend
5 that people use. I have not seen any conclusive
6 evidence that E-cigarettes are actually an effective
7 smoking sensation tool.

8 Q. And those other products --

9 THE COURT: Ma'am, what do you define as
10 smoking sensation?

11 THE WITNESS: Yes. So smoking sensation is
12 actually not using tobacco products at all. And if I
13 may, including cigarettes. So not using E-cigarettes
14 as well.

15 BY MR. POTCHEN:

16 Q. Okay. In your opinion, Doctor, will there be harm to
17 the public health if these emergency rules are stopped
18 from being forced?

19 A. Absolutely, there will be harm. Every day, there are
20 youth who are getting their hands on these products.
21 We know that youth get their products from social
22 sources as well. And so, that is why this particular
23 ban is very necessary to protect public health.

24 I do not believe that another day should go
25 by, and we allow this epidemic to continue.

1 MR. POTCHEN: No further questions, Your
2 Honor, at this time.

3 THE COURT: Okay.

4 CROSS-EXAMINATION BY MS. REED:

5 Q. Good afternoon, Doctor. My name is Shaina Reed and I'm
6 an attorney for one of the Plaintiffs, Clean Cigarette.

7 You were asked some questions about Public
8 Act 18. Do you recall those questions?

9 **A. Can you refresh my memory of what they were?**

10 Q. You were just generally asked to discuss what your
11 understanding is of what Public Act 18 did.

12 **A. I do not recall specifically being asked of Public Act
13 18. Can you define it for me?**

14 Q. Well, sure. Will you agree with me that Public Act 18,
15 which was recently enacted, which addresses and
16 modifies the Youth Tobacco Act here in the State of
17 Michigan, to address the vaping products? Does that
18 refresh your recollection?

19 **A. Yes. Thank you.**

20 Q. Okay. Would you agree with me that those -- the
21 modifications that were enacted in Public Act 18 do all
22 of the following? And I'll just go one by one. If you
23 agree, let me know. If you disagree or don't know, let
24 me know. Fair enough?

25 **A. Yes.**

1 Q. Okay. So the Public Act 18 now acts to prohibit a
2 person from selling or giving a vapor product to a
3 minor.

4 A. **To someone under the age of 18, yes. That is --**

5 Q. Okay.

6 A. **If I saw it, I could -- but if that's what it reads,
7 that's what it says.**

8 Q. Okay. But that's just your general understanding?

9 A. **That is my understanding of what it says.**

10 Q. Okay. And it also acts to prohibit a minor, someone
11 under 18, from possessing or using a vapor product.

12 Is that your understanding?

13 A. **Yes, I recall reading that.**

14 Q. And the Public Act 18 also increases the monetary
15 penalty for selling, giving, or furnishing a tobacco
16 vapor product to someone under the age of 18.

17 Is that your understanding?

18 A. **Yes. If that's what it says, that is what it says.**

19 Q. Okay. And it goes on to say employer signage be posted
20 by retailers to indicate that the purchase of vapor
21 products by people under 18 is illegal.

22 Were you aware of that?

23 A. **If that is what it says, that is what it says.**

24 Q. Fair enough. And furthermore, the Public Act 18 now
25 requires a person to verify that a person seeking to

1 buy vapor products be at least 18 years of age and show
2 that -- excuse me, show that identification before they
3 will sell or furnish a tobacco or vapor product to a
4 person for sale.

5 So in other words, ID is to be presented
6 showing that a person is 18 or older before a vapor
7 product can be sold to them.

8 **A. If that is what it says, that is what it says, yes.**

9 Q. And lastly, there is an affirmative defense of having
10 or enforcing a preventive written policy to a charge of
11 selling a vapor to a minor.

12 Are you familiar with that as well?

13 **A. Yes. Your reading law. Yes.**

14 Q. Thank you, Doctor.

15 In looking at your resume, there was one area
16 that I found pretty interesting. It's when you were in
17 Baltimore, you were dealing with the opioid epidemic.
18 Do you remember that time in your career?

19 **A. Sure.**

20 Q. Sure. Would you agree with me, from your experience
21 and familiarity of the Baltimore area with the opioid
22 epidemic, that people who can't get prescription
23 opioids sometimes end up using heroin off the street?

24 **A. I'd have to look at data. The opioid epidemic is very**
25 **complex. So I could not say that specifically. That**

1 would not be my words.

2 Q. Okay. So when a person can't obtain prescription
3 opioids, you don't know whether they have resorted to
4 the use of heroin? You just don't know?

5 MR. POTCHEN: Objection, Your Honor. I don't
6 know why we're getting into the use of opioid and the
7 use of heroin.

8 THE COURT: She's going to draw an analogy
9 and you know it. Overruled.

10 MS. REED: Thank you, Your Honor.

11 BY MR. BLAIR:

12 Q. You can answer the question, if you can.

13 A. **I'm sorry, can you repeat the question?**

14 Q. Sure. So again, drawing from your experience in
15 Baltimore, are you aware that when people can't obtain
16 prescription opioids, they will resort to obtaining
17 heroin on the streets?

18 A. **That is not a definite response. They may. That's a
19 possibility.**

20 Q. You have no knowledge of people who couldn't get
21 prescription opioids, using heroin?

22 A. **No, there are -- so it's may. Not definite, but may.**

23 Q. Sure. Sure.

24 A. **Yes.**

25 Q. So if someone can't access a particular drug,

1 prescription opioids, in this case, Norco, Oxycodone,
2 things along that lines, there are people who have used
3 heroin off the streets instead; is that true?

4 **A. There are people, yes.**

5 Q. Thank you.

6 **A. In instances.**

7 Q. And that's a street drug, correct?

8 **A. Yes.**

9 Q. That's not regulated by the FDA, correct?

10 **A. No.**

11 Q. And heroin is often laced with things like Fentanyl; is
12 that true?

13 **A. It can be.**

14 Q. And heroin that's laced with -- no way of knowing
15 what's in street drugs. Fair to say?

16 **A. Yes.**

17 Q. Would you agree with me that as a general proposition,
18 a product sold out of a store tends to be safer than a
19 product sold on the Black Market or out of the back of
20 a van?

21 **A. That depends, actually. I would have to, like, compare
22 apples to apples to be able to say that in a blanket
23 statement way.**

24 Q. Just as a general proposition, it's being sold out of a
25 store, it tends to be safer than something obtained off

1 the street?

2 **A. Sometimes.**

3 Q. Okay. I recognize that probably no one in this
4 courtroom was directly affected by the prohibition of
5 alcohol in this country, but would you agree with me
6 that the record -- the history books show that
7 Americans continued to use alcohol despite the
8 prohibition enforced by the amendment to the U.S.
9 Constitution? Do you know?

10 **A. I know that people drink alcohol.**

11 Q. My question was a little bit different.

12 THE COURT: Your question was really your
13 argument. So it's okay, we know people continue to
14 drink through prohibition.

15 BY MS. REED:

16 Q. Were you aware that tens of thousands of Americans died
17 from bootlegged alcohol that was spliced with poison,
18 arsenic, a manner of other things because it was
19 bootlegged? Are you aware of that?

20 **A. I have not reviewed any studies or data that shows
21 that, but I've heard people say that.**

22 Q. Doctor, do you consider yourself an addiction
23 specialist?

24 **A. I'm not board certified in addiction. However, I have
25 treated many people in emergency departments who suffer**

1 from addiction.

2 Q. In your experience as an emergency room physician, do
3 you have an opinion about whether people who are
4 addicted will pursue and obtain their drug of choice
5 through any means?

6 A. **Could you repeat that?**

7 Q. Sure. In your experience, working in an ER as a
8 physician, addressing people who are in acute crisis
9 situations; is that a fair summation?

10 A. **I do take care of people in emergencies, yes.**

11 Q. Okay. For addicts who appear in the emergency room, is
12 it your experience that those people will do whatever
13 it takes to obtain their drug of choice?

14 A. **That would not -- those would not be my words.**

15 Q. Oh, okay.

16 A. **I would say that --**

17 Q. Okay.

18 A. **-- I call them people with substance abuse disorders.**

19 Q. Sure.

20 A. **I don't call them addicts.**

21 Q. Sure.

22 A. **But people with substance abuse disorders, I do believe**
23 **there's a chemical imbalance in their brain such that**
24 **it can cause them to have different behaviors that seek**
25 **that substance that their brain is craving.**

1 Q. And I appreciate the clarification. And in no way am I
2 trying to disgorge those who are afflicted with
3 substance abuse disorders. So I appreciate that,
4 Doctor?

5 Would you agree with me that minors here in
6 the State of Michigan still use combustible tobacco
7 products despite the fact that it's illegal?

8 **A. They may. But I understand also that it's decreased**
9 **significantly and that E-cigarettes are by far the most**
10 **common tobacco products the youth in Michigan use.**

11 Q. You mentioned some state data that looked at the number
12 of youth using vape products. Do you remember
13 testifying about that?

14 **A. Yes.**

15 Q. Okay. Do you have any knowledge whether those studies
16 considered whether the youth reporting use of the vape
17 product previously used a combustible tobacco product?

18 **A. Can you repeat the question, please?**

19 Q. Sure. So the statistics that you looked at, the data
20 that you looked at that considered the increase in
21 youth using vape products, okay? You follow?

22 **A. Mm-hmm.**

23 Q. Do you have any knowledge whether those statistics,
24 those studies considered whether those youth previously
25 used a combustible tobacco product?

1 **A. I cannot, at this time, specifically answer that**
2 **question. But if you showed me something, I could.**

3 Q. Well, it was data that you referred to and a study that
4 you referred to, so I'm asking -- I'm trying to probe
5 your knowledge about what that study said and how much
6 validity and veracity you could give to it.

7 THE COURT: Okay. I just want to know, she
8 referred to two studies, so which one?

9 MS. REED: Either one. Either one.

10 THE COURT: So that was the Michigan Profile
11 and the Path study.

12 BY MS. REED:

13 Q. So Doctor, you've testified that there's an increase in
14 youth using vape, right?

15 **A. Correct.**

16 Q. And my question to you: Is the data that you're
17 relying on, the surveys that you're relying on, is
18 there any indication in those surveys that contemplated
19 whether those minors were using combustible tobacco
20 products before using a vape product?

21 **A. I believe, yes.**

22 Q. And what is the data on that?

23 **A. So what I know, and again, I'm not looking at them**
24 **right now, but what I do know is that --**

25 MS. REED: If counsel has the statistics that

1 the State -- I'm sorry, the surveys that you were
2 referring to, and I don't have a copy, but if you'd
3 like to look at them, that would be -- I'm fine with
4 that. Take your time.

5 **THE WITNESS: So yeah, I think there's many**
6 **things in this study.**

7 BY MS. REED:

8 Q. Yeah. Is there any indication that they considered
9 whether the youth who are reporting vape previously
10 used combustible tobacco products?

11 THE COURT: And is the study you have in
12 front of you the Path?

13 **THE WITNESS: Yes, that is what I have in my**
14 **hands.**

15 BY MS. REED:

16 Q. Because I reviewed it --

17 THE COURT: Okay. You asked her a question.

18 MS. REED: Yep.

19 THE COURT: She's reviewing it.

20 MS. REED: Fair enough.

21 THE COURT: Let's give her a second to
22 refresh.

23 MS. REED: Thank you, Your Honor. I
24 apologize.

25 **THE WITNESS: What stood out to me about this**

1 **study?**

2 BY MS. REED:

3 Q. Do you have a response to my question?

4 **A. No, I do not believe so.**

5 Q. Okay. Thank you. Thank you, Doctor.

6 So the answer is no, correct?

7 **A. Correct.**

8 Q. Okay. So we have no baseline information on how many
9 minors were using combustible tobacco products before,
10 perhaps, transitioning to vapor products; is that fair
11 to say?

12 **A. This particular study does not talk about that.**

13 Q. Fair enough. You testified about the harmful impact of
14 nicotine on youth and then you linked it to the
15 flavors.

16 Do you recall that testimony?

17 **A. Yes.**

18 Q. Okay. You were here in the courtroom when Ms. Howard
19 testified about the, shall I say, deficiencies in those
20 surveys in that they were multiple-choice and they
21 allowed folks to check multiple boxes.

22 Do you remember hearing that testimony?

23 **A. I remember hearing her say that, yes.**

24 Q. And I'm not a trained sociologist and I'm not a trained
25 medical doctor, but are you as familiar with the

1 methodology of these tests as Ms. Howard? Or would
2 Ms. Howard have more expertise in that particular area?

3 **A. So I would say that my expertise is specifically in**
4 **looking at the data that is in front of me in**
5 **determining whether action needs to be made --**

6 Q. So not --

7 **A. -- equivocally.**

8 Q. Sorry, no, you finish. My mistake.

9 **A. Oh, so my expertise is in looking at data,**
10 **understanding the data in front of me, and being able**
11 **to understand whether a risk exists to the public's**
12 **health and knowing when I have enough data in front of**
13 **me to be able to make a decision and act quickly to**
14 **protect the public's health.**

15 Q. And that makes sense. So would you agree with me that
16 as far as the methodology of these surveys that you
17 looked at, the data that you looked at, someone like
18 Ms. Howard would have more knowledge, more expertise in
19 really dissecting what went into the survey? Are there
20 potential errors in the survey? Are we potentially
21 going to run into some misinformation because of the
22 way the survey was conducted? Would you agree with me?

23 **A. I do not dispute what she may claim to know.**

24 Q. Okay. You testified that you have -- I believe your
25 words were - no reason to believe that the new rules --

1 that the rules that I read to you at the onset of my
2 cross-examination of you, you remember, the five or six
3 rules that I read aloud to you? Remember those?

4 **A. Could you describe what you're explaining so I**
5 **understand?**

6 Q. Sure. Sure.

7 The content of Public Act 18, the banning of
8 applying vapor products to the Tobacco Control Act.

9 **A. Yes. Thank you.**

10 Q. Okay. Would you agree with me that two days passed
11 after Public Act 18 went into effect before you made
12 the assessment that, boy, those rules just aren't going
13 to cut it? It was two days. Is that true?

14 **A. If those are the dates, those are the dates.**

15 Q. So two days is not a very long time to see what the
16 effect is; is that fair?

17 **A. I was not involved in -- I've been at the State for six**
18 **months. And my role is to look at the data that I have**
19 **and then to make decisions based on what I see in front**
20 **of me.**

21 But my understanding of the changes is that
22 there's no reason to believe they would be impactful in
23 addressing the epidemic of youth vaping. And so, I do
24 not believe it would be appropriate to -- as often
25 happens in public health responses, sometimes you

1 cannot wait for the perfect data to come in when you're
2 talking about people's lives and life and death
3 situations.

4 Q. But again, two days is really not a significant --

5 THE COURT: And that is a great argument.

6 MS. REED: Thank you, Your Honor. I'll move
7 on. I appreciate that.

8 BY MS. REED:

9 Q. What evidence do you have, Doctor, that there is a
10 health crisis among adults with respect to the use of
11 flavored nicotine vaping products?

12 A. I do know that many adults are using E-cigarettes. I
13 have not, however, seen definitive evidence that shows
14 that they are effective in stopping using tobacco
15 products overall. And I do not know of any studies
16 that have been done that look at the long-term health
17 impacts of adults using these E-cigarettes and their
18 safety.

19 Q. So when I asked the question of what evidence do you
20 have of a public crisis among adults, I think your
21 answer put simply, would be none. Is that fair to say?

22 You have no evidence of a public crisis among
23 adults as it relates to flavored nicotine vaping
24 products; is that fair?

25 A. I would --

1 Q. We don't know.

2 **A. My words would be that there is an epidemic when it**
3 **comes to youth using nicotine products, based on the**
4 **skyrocketing numbers of youth that are using them.**

5 Q. Well, that again was not my question. My question is
6 related specifically to a public emergency as it
7 relates to adults.

8 Do you have any evidence of a public health
9 crisis for those 18 and over using vapor products?

10 **A. I know that there are many adults who use vaping**
11 **products.**

12 Q. And is there any evidence that that is a public crisis
13 for those individuals? A study? A survey? Anything?
14 Do you have any evidence?

15 **A. I would say because I care about all people, I do not**
16 **think that adults -- it's important -- I do not think**
17 **that adults should be using these products, either,**
18 **necessarily. But what I do think is that everyone**
19 **should avoid using nicotine and tobacco products.**

20 Q. Oh, are you prepared to issue emergency rules banning
21 combustible tobacco products?

22 **A. There have been declines in the numbers of people who**
23 **are smoking combustible tobacco products.**

24 Q. Well, that's not really responsive to my question,
25 Doctor, respectfully.

1 My question was this, look, you said it's my
2 concern that people are using nicotine and tobacco
3 products. Did I get that right?

4 **A. My public health emergency is about youth using
5 nicotine products.**

6 Q. So when I asked you the question about whether we could
7 expect emergency rules banning combustible tobacco
8 products, your answer was what?

9 **A. I currently am concerned about the adults of tomorrow
10 as well as the youth of today when it comes to
11 addiction to nicotine products.**

12 Q. Doctor, do you ever look at articles promulgated by the
13 Center of Disease Control Prevention, the CDC?

14 **A. Ever, yes. In general, yes.**

15 Q. Did you review articles from the CDC relative to the
16 use of vapor products and associated lung injuries?
17 Have you looked at any of that data?

18 **A. I do know that there is lung injury associated with
19 vaping products. That is not relevant to the emergency
20 rules that we're discussing today, is my understanding.**

21 Q. Oh, okay. So the lung injury has absolutely no bearing
22 whatsoever on these emergency rules; is that -- is that
23 the department's position?

24 **A. My emergency rules specifically talk about the youth
25 available --**

1 MR. POTCHEN: Your Honor, I thought we had a
2 motion in limine on this. I thought we had a motion in
3 limine on this topic, but don't know what we're going
4 to do here.

5 THE COURT: You had a motion in limine?

6 MR. POTCHEN: No, no. They had a motion in
7 limine. We don't have a motion in limine.

8 .MS. REED: I never filed a motion in limine,
9 Your Honor.

10 MR. POTCHEN: We kept it focused on the
11 rationale for the emergency rules.

12 MS. REED: I'm asking what considerations,
13 which articles, which surveys, which data did she
14 review in determining there was a public health
15 emergency with respect to vaping products.

16 THE COURT: Okay. I think you did ask that.
17 But if you want to ask that again as opposed to going
18 to the literature that exists on many other health
19 crisis, you can do so.

20 BY MS. REED:

21 Q. I just want to make sure that I understand what the
22 Department's position is with respect to what you're
23 relying on in determining that there's a public health
24 crisis in Michigan for youth using vapor products.

25 Did you review any CDC articles that looked

1 at lung injuries in E-cigarettes as it relates to THC?

2 Did you look at any of that?

3 THE COURT: As it relates to THC?

4 MS. REED: Yes, Your Honor.

5 THE COURT: Oh, we've gone far field now.

6 Everybody keeps talking about correlation, causation.

7 You've added another independent variable. I am going

8 to sustain the objection with THC.

9 BY MS. REED:

10 Q. Okay. Let me try to ask this a little bit more neatly.

11 Did you review CDC articles relating to lung injury in

12 contemplating and determining that there was a public

13 health emergency for youth vaping; yes or no? That's

14 the question.

15 **A. No. The epidemic in the emergency is about youth being**

16 **addicted to nicotine.**

17 Q. Okay. Would you agree with me that traditional

18 combustible cigarettes are harmful to the health of

19 adults and children?

20 **A. Yes.**

21 Q. Can you explain to me whether you have any evidence

22 that vapor products are any more harmful than

23 traditional combustible cigarettes?

24 **A. In medicine, I tend to not use general terms like more**

25 **or less. I like to look at more specific. I look at**

1 the data and be able to describe for my patient in
2 front of me, for example --

3 Q. Sure. Sure.

4 A. -- what the risks and benefits are of whatever they may
5 be ingesting, inhaling.

6 And so, in some ways, E-cigarettes may be
7 less harmful. But I also, for somethings, some toxins,
8 scientists, no one refutes that.

9 However, the evidence about the long-term
10 impacts of E-cigarettes and specifically, what other
11 toxins, what those impacts may have on health. As well
12 as whether or not E-cigarettes are actually effective
13 at smoking sensation, meaning not using any tobacco,
14 nicotine products at all. I have not seen data that
15 actually shows that that's true.

16 Q. So as you sit here right now, you do not know whether
17 combustible cigarettes versus vapor products, one is
18 more harmful than the other? You just don't know? Did
19 I characterize that correctly?

20 A. Specifically -- no, that is not my words.

21 Specifically, I would say there are some
22 toxins in combustible cigarettes that it seems, are not
23 in E-cigarettes. And so, therefore, for that
24 particular reason of those toxins, they may be less
25 harmful. However, there are other toxins in

1 E-cigarettes that, quite frankly, no one knows, which
2 is scary, what the impacts are. And there is no
3 definitive evidence that E-cigarettes are actually a
4 proven smoking sensation tool.

5 Q. And again, with respect to the data surrounding youth
6 using vapor products, you have no idea what percentage
7 of youth were using a combustible smoking product
8 before using a vapor product; is that true?

9 A. I do not recall that number.

10 MS. REED: Okay. Nothing further.

11 CROSS-EXAMINATION BY MR. BLAIR:

12 Q. Good afternoon, Dr. Khaldun. Am I pronouncing that
13 correctly?

14 A. Khaldun, yes. Thank you.

15 Q. Thank you. I think there was a similar question by my
16 colleague, but I'm going to phrase it slightly
17 differently.

18 Would you agree that vaping is less hazardous
19 than using combustible tobacco products?

20 A. I would not use that, that sentence, no.

21 Q. Pardon me. Are you familiar with the National
22 Academies of Sciences, Engineering, and Medicine study
23 published January 23, 2018 entitled Public Health
24 Consequence of E-cigarettes?

25 A. Could you show it to me?

1 Q. I could, yeah.

2 MR. BLAIR: Your Honor, I do have an extra
3 copy if you'd like to flip along.

4 THE COURT: I would be delighted.

5 MR. BLAIR: Okay.

6 MR. POTCHEN: Counsel, which study?

7 THE COURT: You're never going to reach me.

8 MR. BLAIR: These two documents. And I'll
9 represent to the Court, so there's one thinner document
10 that's a Power Point that summarizes the main data in
11 here. And I'm going to ask Dr. Khaldun about both of
12 them. And both of these have been provided to opposing
13 counsel before now.

14 MR. POTCHEN: I want to make a record that
15 this document is roughly six inches, hundreds of pages
16 long, and I just received it before we broke for lunch
17 and I have not had an opportunity to review either one
18 of these studies that he's talking about.

19 THE COURT: That makes several of us. So I
20 don't know what that means, though, after that.

21 MR. POTCHEN: I guess --

22 THE COURT: He's going to -- I suspect he's
23 going to go through --

24 MR. POTCHEN: I mean, as far as the doctor,
25 if she's familiar with it, I'm good. I'm just -- so he

1 can ask the doctor if she's familiar with this. I
2 don't object to that.

3 THE COURT: Okay.

4 MR. BLAIR: Your Honor, may I approach the
5 witness?

6 THE COURT: Certainly. And so long as you're
7 not going to assault them, anybody who needs to
8 approach a witness with an item may do so, so you can
9 stop asking.

10 MR. BLAIR: Okay. Thank you. It's a habit,
11 Your Honor.

12 BY MR. BLAIR:

13 Q. So the question was: Are you familiar with this study,
14 the National Academies of Science, Engineering and
15 Medicine study that was published January 23, 2018,
16 entitled Public Health Consequences of E-cigarettes?

17 **A. Yes. I'm familiar that this study existed. I have not**
18 **read these 600 or however many pages these are.**

19 Q. Okay. I can represent to you, I can proffer that the
20 --

21 THE WITNESS: I'm sorry, can I ask a
22 question? I just want to know what I'm looking at.

23 Who made these slides?

24 BY MR. BLAIR:

25 Q. These slides were made by the same organization to

1 summarize the --

2 **A. Thank you.**

3 THE COURT: Well, that's a separate question,
4 then. Are you familiar with these slides? Have you
5 ever seen them?

6 **THE WITNESS: I've never seen these slides.**

7 THE COURT: Okay.

8 MR. BLAIR: Rebuttal, Your Honor, I think we
9 can argue these slides are part of the document.

10 THE COURT: It will not happen unless
11 something else happens on rebuttal. You're not going
12 to ask her about slides she's never seen. We're not
13 going to do that right now.

14 You want to can her about the study?

15 MR. BLAIR: I'm going to ask her under the
16 impeachment of 707. She's already said she's aware of
17 this study.

18 THE COURT: We have to go a little bit
19 further before awareness.

20 MR. BLAIR: Yes, that was my next question.

21 THE COURT: Okay.

22 BY MR. BLAIR:

23 Q. Do you have any reason to believe that this study is
24 not reliable data?

25 **A. I haven't read through these slides or the --**

1 THE COURT: The negative is not what has to
2 be established, it's the positive.

3 BY MR. BLAIR:

4 Q. Do you have a general understanding of what this study
5 was?

6 A. I would have to look through these hundreds of pages as
7 quickly as possible, but I would have to do that in
8 order to be able to say with my background, you know.
9 In order to be able say that statement, I would have to
10 spend more time saying I definitively know what this
11 is. I cannot say I definitively know what these pages
12 are that you put in my lap, well, not put in my lap,
13 you handed them to me.

14 Q. Let me see if I can go another way. You said you are
15 familiar with the National Academies of Science,
16 Engineering, and Medicine, correct?

17 A. I'm familiar with that entity.

18 Q. Okay. And what is that entity?

19 A. It has -- in general, it has a lot of experts in the
20 field that pointed to it and so, they tend to be a
21 well-respected entity. I'll say that.

22 Q. Well-respected entity?

23 A. Mm-hmm.

24 Q. Are you familiar with other studies that they've put
25 out?

1 A. I'm sure in my medical training and what not, that's in
2 general, people know that the entity puts out studies.

3 Q. In general, do people know that the studies that this
4 organization puts out are reliable?

5 A. From my medical training, I tend to take every study
6 based on its face value regardless of who did it or who
7 they work for. I tend to just look at the actual
8 study. That's how I determine whether it's a good
9 study or not.

10 Q. Let me see if I can speed this up a little bit. I'll
11 explain to you my understanding of what this study was
12 and then you can tell me if you agree, disagree, or
13 don't know.

14 MR. POTCHEN: Your Honor, I think, again, the
15 witness has already identified she has not gone through
16 the hundreds and hundreds of pages in front of her.
17 She's been shown a Power Point she's never seen before
18 and now we're going to go over counsel's understanding
19 of what all these documents say. I mean that is
20 objectionable on a number of fronts.

21 One -- well, we object.

22 MR. BLAIR: Your Honor, I was proposing that
23 I could summarize what this is.

24 THE COURT: Okay. So what we've got to do
25 here.

1 MR. BLAIR: Yep.

2 THE COURT: We're at impeachment by learned
3 treatise.

4 MR. BLAIR: Yes.

5 THE COURT: Which was our favorite class in
6 law school.

7 MR. BLAIR: Yes.

8 THE COURT: So we haven't established that it
9 is, in fact, a learned treatise. You have established
10 that it was finished by an organization which is held
11 in general high esteem. That's it.

12 MR. BLAIR: Yes. And I'm not allowed to ask
13 the negative that she's not aware of any --

14 THE COURT: You have to establish the
15 positive.

16 MR. BLAIR: Correct.

17 THE COURT: That this document could qualify
18 as a learned treatise, not that anything published by
19 this esteemed entity could be, but is this.

20 BY MR. BLAIR:

21 Q. Could you flip to page six of the Power Point, please?

22 A. **Which one?**

23 Q. There's a little number six at the top.

24 A. **Oh, I see. Thanks. I hadn't seen it before.**

25 Q. I believe this is a page that summarizes what the study

1 is, indicating that this study summarized all the
2 available data through early 2018, related to vaping
3 and related subjects?

4 MR. POTCHEN: Okay. Your Honor, we object to
5 the extent she's already testified she's never seen the
6 Power Point before and now he's asking for specifics
7 about the Power Point that she's never seen before.
8 And then, uses it to represent what the 600-page
9 document or so is.

10 MR. BLAIR: Your Honor, could we approach?
11 I'm not trying to make this difficult. I'm trying to
12 go as fast as I can.

13 THE COURT: I think you're trying to go to a
14 place where there are immense barriers that you do not
15 have the capacity to climb with this witness. Asking
16 her about what the thing says, it could say anything,
17 but unless it is shown to be under the rubric of a
18 learned treatise by a witness competent to say so, the
19 questions will be irrelevant.

20 MR. BLAIR: So if I --

21 THE COURT: Now, if you believe, and I would
22 be amazed to see how that could happen, but if you
23 believe that you need to ask that this witness step
24 down and that you've somehow established the
25 reliability by another human being, you can certainly

1 do that and get back to it. But I don't see this as
2 going very far. I'll let you continue trying.

3 MR. BLAIR: Your Honor, I'd be prepared then,
4 to call Ms. Howard as a rebuttal to lay the foundation
5 of this.

6 THE COURT: We'll just interrupt the
7 testimony. Please take your seat again, Dr. Khaldun.

8 MR. BLAIR: Your Honor, may I ask if the
9 Court has a preference whether I should do this one
10 study at a time, or if you would like me to try to get
11 through all the ones that I expect to use?

12 THE COURT: I suspect you ought to try them
13 all.

14 MR. BLAIR: Thank you, Your Honor.

15 AMELIA HOWARD:

16 MR. BLAIR: May I proceed?

17 THE COURT: You may. The witness is still
18 under oath.

19 RE-EXAMINATION BY MR. BLAIR:

20 Q. Ms. Howard, are you familiar with the National
21 Academies of Engineering, Science, and Medicine study
22 that we were talking about?

23 A. **Yes, the systematic review.**

24 Q. The systematic review.

25 A. **Yeah.**

1 Q. Can you explain to me what the study was?

2 A. It was a study of approximately 800 research articles
3 on electronic cigarettes stemming on topics like their
4 biological effects, addictive properties, population
5 level data, biomarkers of harm, mechanical features.
6 It's like a comprehensive review of this state, of this
7 state of evidence performed by a board of volunteer
8 experts in public health on tobacco.

9 Q. Is this study reliable in your opinion?

10 A. I think that the -- what matters is it's reliable in
11 what is judged to be a reliable study, which would be
12 the way that the National Academies -- the procedure
13 that they go through when they write these big evidence
14 reviews. And you do have traits of, sort of,
15 reliability and credibility being important, too. Not
16 just anyone can review a study on the National
17 Academies.

18 So yeah, I would say it's objectively
19 according to, sort of, the standard, a systematic
20 review --

21 MR. POTCHEN: I'm going to object to the
22 standard that she's talking about. I mean she is a
23 sociologist Ph.D. candidate and I don't understand how
24 she's talking about any standards that may be relevant
25 or what this report looks at. And there's doctors who

1 wrote this. How can she say this is a learned treatise
2 for doctors or anyone else?

3 She can testify as to sociologist. Or maybe,
4 I'm not even sure she can do that. She's a Ph.D.
5 candidate. So to call this a standard would be
6 inappropriate.

7 THE COURT: I don't know standards from what
8 field of endeavor.

9 THE WITNESS: May I clarify?

10 THE COURT: No.

11 THE WITNESS: Sorry.

12 THE COURT: So you want to try again?

13 MR. BLAIR: Yes. May I have a follow-up?

14 THE COURT: Please.

15 BY MR. BLAIR:

16 Q. Why do you believe that this is a reliable study?

17 A. Because according to the Standard of Evidence that we
18 learned, anybody with systematic scientific training
19 learns, systematic reviews are a kind of evidence that
20 we trust. They're object -- like, that is -- that's
21 what I can say to that.

22 There's -- it's a good -- like, it's the
23 National Academies of Science. They do reviews
24 according to what we, in the scientific community,
25 believe produces an objective piece of work.

1 Q. Given the high esteem of the individuals and the
2 organization, would you say that every study that they
3 have, that they produce is reliable?

4 A. I can't answer that question. I'm sorry. I can't
5 answer that question from my position because I do
6 think that -- I haven't read every 800-page review from
7 the National Academies. All I'm able to say is that I
8 am familiar with the method of systematic review.
9 Anybody is who has done training up to a certain point
10 in any science, and I trust that. And I am familiar
11 with the names that were on this Academy and I know how
12 the National Academy --

13 I have no reason to doubt the National
14 Academy doesn't pick people who are qualified to
15 discuss things to do their reviews. That's all I can
16 really say there. I can't give an opinion on, you
17 know, if everything the National Academy publishes is
18 good. I don't know.

19 MR. BLAIR: Your Honor, may I ask another
20 housekeeping question? Do you want me to pause for
21 cross-examination on each item, or should I go through
22 them once and opposing counsel can -- I know this is
23 unconventional, obviously, without discovery.

24 THE COURT: Okay. You believe you've
25 established your foundation for Public Health

1 Consequences of E-cigarettes 2018? Ah, the real page
2 is on the front.

3 The Committee on the Review of Health Effects
4 of the Electronic Nicotine Delivery Systems, a
5 Consensus Report of the National Academies of Sciences,
6 Engineering, and Medicine.

7 MR. BLAIR: Yes. I believe I've laid the
8 foundation that that's a reliable study for impeachment
9 purposes.

10 THE COURT: You want to respond to that?

11 MR. POTCHEN: Your Honor, we don't believe
12 he's established the necessary foundation to seek
13 admittance of this document, the learned treatise
14 document.

15 THE COURT: And?

16 MR. BLAIR: I believe we have.

17 THE COURT: Okay. These are two good
18 statements. You believe you have. You believe you
19 didn't. Neither of you kind of pointed to the aspect
20 of the actual Court Rule 803 A or 707. So do you want
21 to do that?

22 MR. BLAIR: Yes. Under the --

23 THE COURT: Michigan Rules of Evidence. I'm
24 sorry, I said court rule.

25 MR. BLAIR: Yes. Under Michigan Rule 803 and

1 707, we have laid the foundation that this study is
2 reliable for impeachment purposes of Dr. Khaldun.

3 THE COURT: That's it? Okay.

4 Yes, sir, do you want to couch your response
5 in terms of the rules?

6 MR. POTCHEN: Yes, Your Honor. We don't
7 believe they've established the necessary foundation
8 under 803 or 707.

9 THE COURT: Wow. All right.

10 So this is going to force me to read the rule
11 out loud.

12 MR. POTCHEN: And I can --

13 THE COURT: To the extent called to the
14 attention of an expert witness upon cross-examinations,
15 statements contained in published treatises,
16 periodicals, or pamphlets on a subject of history,
17 medicine, or other science or art, established as a
18 reliable authority by the testimony or admission by the
19 expert or other expert witnesses, or by judicial notice
20 are admissible for impeachment purposes only.

21 We have a consensus study of the National
22 Academies of Science, Engineering, and Medicine. In
23 order for it to be established to be reliable, someone
24 has to indicate within a relevant field that they do,
25 in fact, rely on it and that it is made by a competent

1 authority.

2 What I have heard from the individual who is
3 versed in social sciences, that generally speaking, The
4 Academy is respected.

5 I have not heard by anyone, heard from anyone
6 in the field of public health, because that's what
7 we're talking about, that this is a study that it would
8 be deemed reliable either, based upon its methodology
9 which is all this tendered expert can speak to, or
10 based upon other initial within industry of public
11 health. So no, you did not meet the criteria.

12 MR. BLAIR: Your Honor, may I have a moment
13 to consult with co-counsel?

14 THE COURT: Absolutely.

15 BY MR. BLAIR:

16 Q. Ms. Howard, have you received this specific study?

17 A. **Which study are you referring to?**

18 Q. This is the National Academies of Science, Engineering,
19 Medicine Public Health Consequences of E-cigarettes?

20 A. **I've reviewed the findings, the summary findings at the
21 end of each chapter and the executive report at the
22 beginning.**

23 Q. And have you relied on this document in your research?

24 A. **I have. There's certainly information in there that's
25 -- does not -- like, that's in other sciences that I**

1 would rely more on an expert body than go do the
2 research myself or read the original studies.

3 Q. So you're saying --

4 MR. POTCHEN: Your Honor, the whole point of
5 this witness coming up was to establish a foundation
6 which wasn't done. And now, we can go back and finish
7 the cross-examination, it seems.

8 THE COURT: He has a series of articles, if
9 you recall, and he stopped with one and he said he was
10 going to go to others.

11 You do still seem to be working on this one.
12 So you were asking for the opportunity to expand your
13 foundation?

14 MR. BLAIR: Yes, Your Honor. May I continue
15 with those questions?

16 THE COURT: For a while.

17 MR. BLAIR: Thank you.

18 BY MR. BLAIR:

19 Q. Your studies are in sociology and the studying of
20 expert knowledge, right? And how methodologies work?

21 Could you put it in your words please, again,
22 because I'm going to butcher it?

23 A. Yeah. I study -- so my field is the sociology of
24 knowledge. I study, specifically, sociology of
25 scientific and technical expertise. I'm studying the

1 science of technology and controversy around vaping and
2 the media world that's based on versions of that.

3 Q. Is the methodology of this study, in your opinion,
4 valid and reliable?

5 A. Yes.

6 My study or that study?

7 Q. This study. Excuse me.

8 A. Yes.

9 Q. Are you aware of this study being relied on by other
10 experts in the field?

11 A. Yes.

12 THE COURT: In the field of what?

13 BY MR. BLAIR:

14 Q. In the field of public health, in the field of --

15 THE COURT: No, my ruling was real specific.
16 I said it has not been shown to be reliable in the
17 field of public health. She is not an expert in public
18 health. Her telling me that somebody else she heard
19 about in public health relied on it, I do not doubt
20 that she is sincere and honest, but it is not
21 persuasive for this purpose.

22 So if you want to go to some other -- if you
23 think there's another way of attacking this, please do
24 so.

25 MR. BLAIR: I think there is, Your Honor.

1 BY MR. BLAIR:

2 Q. Ms. Howard, are you familiar with Mr. John Britton?

3 A. Yes.

4 Q. And are you familiar with the British Medical Journal?

5 A. Yes.

6 Q. Is Mr. Britton, a respected expert, in the field of
7 public health?

8 MR. POTCHEN: Objection, Your Honor, she's
9 again testifying in the area of public health, not
10 sociology.

11 MR. BLAIR: I'm trying not to -- I'm trying
12 to stay within the confines of your ruling, Your Honor.
13 I asked her if she knows Mr. Britton to be --

14 THE COURT: Okay. I obviously was not as
15 clear as I might have -- I have not heard that this
16 particular -- and by the way, it's a compendium of
17 studies -- is relied upon by experts in the field of
18 public health by an individual who is competent to say
19 that.

20 I do not know if there is a field of
21 competence that this witness has, through which she
22 could establish its reliability for purposes relevant
23 to this case. I don't know.

24 MR. BLAIR: Your Honor, where I was trying to
25 get with that is just to establish with this witness

1 that Mr. Britton is a respected expert in public health
2 and this recent publication from Mr. Britton cites to
3 the study we're talking about, which would show experts
4 in public health do rely on this study.

5 May I hand this to --

6 THE COURT: So you want to use another study
7 which would have to be shown to be a learned treatise,
8 to establish that this study fits under the learned
9 treatise?

10 MR. BLAIR: Yes.

11 THE COURT: Okay. I'll try that again.

12 You want to use the study that hasn't been
13 established as a learned treatise, through that, to
14 make this a learned treatise? Which means, how do I
15 consider the Britton study until it is shown to be a
16 learned treatise? How do I do that?

17 MR. BLAIR: Well, Your Honor, I would say
18 that the learned treatise exception doesn't apply to
19 the Britton study because we're not admitting it for
20 the truth of the fact of the matters stated. We're
21 simply asserting --

22 THE COURT: Yeah, but the learned treatise
23 rule is an impeachment rule. So we know that you're
24 not offering it for the truth of the matter because
25 it's not asserted into evidence. It is an impeachment

1 rule.

2 MR. BLAIR: Correct. And so I was --

3 THE COURT: No. I guess -- I have to just
4 leave it no. I don't know how to make this clearer.
5 It could be that my understanding of the Rules of
6 Evidence is more limited than yours, but I'm not seeing
7 how -- that would be like saying I've got this hearsay
8 for which I don't have an exception that I'm going to
9 use to prove an exception for another item of hearsay,
10 otherwise known as double hearsay.

11 We've got to establish the admissibility of
12 the second thing in order to get back to the first.
13 That's the best I can offer.

14 Would you like a break for a moment to think
15 this through a little more?

16 MR. BLAIR: Yes, Your Honor.

17 THE BAILIFF: All rise. Court is in recess.

18 (A short recess was taken at 1:36 p.m.)

19 (On the record at about 1:47 p.m.)

20 THE BAILIFF: All rise. The State of
21 Michigan Court of Claims is back in session.

22 THE COURT: Please be seated. Counsel.

23 MR. BLAIR: Thank you, Your Honor. Thank you
24 for the brief recess. I'm going to call Ms. Howard.

25 RE-EXAMINATION BY MR. BLAIR:

1 Q. Ms. Howard, back to the National Academies Science,
2 Engineering, and Medicine, the studies we've been
3 talking about, who commissioned the study, do you know?

4 **A. The United States Food and Drug Administration.**

5 MR. BLAIR: Your Honor, at this time, we
6 would ask the court to take judicial notice that this
7 is a reliable learned treatise and if we haven't met
8 that standard, we can talk about what we may need to do
9 instead. But can I present it just as the first part?
10 We would ask the Court to take judicial notice. This
11 is a well-respected study relied upon throughout
12 experts in this field.

13 THE COURT: It might be. I don't have
14 evidence in this record to indicate that this is relied
15 upon by persons or should be relied upon by persons in
16 the public health arena. I don't doubt there are
17 people who can give me information.

18 What I have heard from your witness is that
19 it was supported by contract -- she didn't say this,
20 but it's supported by contract HHSF and it goes on,
21 between the National Academy of Sciences and the U.S.
22 Department of Health and Human Services, Food and Drug
23 Administration.

24 Any opinions, findings, conclusions
25 expressing this publication do not necessarily reflect

1 the views of any organization or agency that provided
2 support for the project. That's what I know.

3 MR. BLAIR: Your Honor, if we have not met
4 the standard for judicial notice and we cannot meet the
5 standard with the witnesses that are here today, we
6 would ask for permission to do this out of order and
7 come back to it later.

8 And I will make a proffer for the record,
9 that we sincerely appreciate the Court's efforts,
10 extraordinary efforts to move this case as fast as
11 possible.

12 There are -- some of our experts are involved
13 in similar cases in Massachusetts and could not be here
14 for that. There are also experts that could not be
15 here because of the Jewish holidays which just happen
16 to coincidentally fall on the two days of our hearings.

17 So there are some experts that could not be
18 here today in person, that we could use to lay the
19 foundation of this. And I would respectfully request
20 that we be given the opportunity to come back with that
21 expert, specifically just for that purpose and we can
22 resume the cross-examination of Dr. Khaldun to use the
23 time today.

24 THE COURT: Counsel?

25 MR. BLAIR: Yes.

1 THE COURT: I believe that you could make an
2 offer of proof that there is literature that does say
3 that E-cigarette use correlates to improved health
4 outcomes for some.

5 MR. BLAIR: We would like to do that with
6 specific studies to impeach Dr. Khaldun beyond the --

7 THE COURT: Okay. I tried.

8 So the witness will step down, apparently.
9 Okay. You are asking that this hearing be continued
10 for yet, another day at some other place and time?

11 MR. BLAIR: No, Your Honor. There are other
12 aspects of the cross of Dr. Khaldun that I can continue
13 today.

14 THE COURT: I didn't say that you're asking
15 for it to stop, but you are saying that you want to
16 continue on some other day at some other time. That
17 gives me logical conclusion to you want to bring some
18 human being here to establish reliability of several
19 studies. And I'm saying to you that you can probably
20 make an offer of proof.

21 But there are studies that say, that
22 contradict or have a close pallet additional aspect to
23 their view on vaping, to the one that the doctor has
24 instructed.

25 So it's either we have a hearing on another

1 day or we don't. This doesn't mean we stop. But your
2 request is that we continue this hearing beyond today.
3 That is what it is, isn't it?

4 MR. BLAIR: Your Honor, I'm sorry. I'm not
5 sure I understand this.

6 THE COURT: If you want to bring in a human
7 being that's not here today, we can't end today, can
8 we?

9 MR. BLAIR: I understand that part.

10 THE COURT: Okay. That's --

11 MR. BLAIR: The part I'm not understanding is
12 the difference between you're saying that I can make an
13 offer of proof versus I would like to have these
14 specific studies for impeachment purposes.

15 THE COURT: You don't understand the
16 difference? The difference is that you will be able to
17 argue that there are counter authorities that say
18 something else and you can argue it. Or you can do
19 this another day and argue it specifically based upon
20 lots of paper. If that's what you want to do, you have
21 the right to do that. I am not going to depose my
22 methodology for you to manage your client's business.

23 I believe you have elected to request that
24 the hearing reconvene at another time and place after
25 today's proceedings so that you can bring in another

1 witness on the issue of a preliminary injunction, not
2 the lengthy meteor issue of declaratory relief.

3 So I would think that doctor will be resuming
4 the witness stand and you will be concluding your
5 cross-examination. Did I miss apprehend what you were
6 saying?

7 MR. BLAIR: You did not, Your Honor.

8 THE COURT: Okay.

9 MR. BLAIR: But I think after further
10 consideration, I think the offer of proof will be
11 sufficient for the purposes of the PI. And we will
12 certainly have other experts here if there are hearings
13 beyond the PI issue.

14 THE COURT: Well, there have to be.

15 MR. BLAIR: Yes.

16 THE COURT: Because the PI doesn't resolve
17 the case.

18 MR. BLAIR: Understood.

19 THE COURT: Now, I guess that's what I was
20 trying to say to you guys earlier. The only issue here
21 is whether or not injunctive relief goes forward.
22 Ultimate relief in this case will depend upon hearing
23 of all issues, and the Court will be required to make
24 findings of fact in that regard, independently.

25 MR. BLAIR: Thank you, Your Honor. I'm sorry

1 it took me a while to understand your suggestions.

2 THE COURT: Okay. In any case, I do believe
3 that Dr. Khaldun, you'll resume the witness stand and
4 he does have some additional cross-examination.

5 MR. BLAIR: Yes.

6 THE COURT: Is that correct?

7 MR. BLAIR: Yes, Your Honor. Thank you.

8 DR. JONEIGH KHALDUN:

9 CROSS-EXAMINATION BY MR. BLAIR:

10 Q. Dr. Khaldun, would you agree that there are scientific
11 studies showing that the -- that vaping is less harmful
12 to health than using combustible tobacco?

13 A. **I would agree that there are some studies that show for
14 some of the toxins that are in combustible cigarettes,
15 E-cigarettes are a better option with regards to
16 health.**

17 Q. I want to talk about, in the emergency rules, you rely
18 on the U.S. Surgeon General's conclusion that
19 E-cigarette use was epidemic in 2018, correct?

20 A. **Yes, the U.S. Surgeon's conclusion on the emergency
21 rules.**

22 Q. And that was -- that Surgeon General's finding was in
23 December of 2018, correct?

24 A. **That is what -- I believe we would have to look up the
25 exact date just to make sure we don't misstate that,**

1 but I don't recall that. I don't want to say that's
2 inaccurate.

3 Q. Let me see if I can help refresh your memory.

4 A. It does say December of 2018.

5 Q. Okay. Thank you.

6 You found it quicker than I did. Thank you.

7 A. Mm-hmm.

8 Q. So the United States Surgeon General officially
9 declared E-cigarette use among youth as an emergency
10 epidemic in December of 2018, correct?

11 A. That is when he declared it from my understanding.

12 Q. And you declared it in Michigan, August 30th of 2019,
13 correct?

14 A. Yes. I believe that is the date.

15 THE COURT: I know that you're weary, but
16 could you keep your voice up a bit?

17 THE WITNESS: Oh, yes. Yes.

18 THE COURT: Thank you.

19 BY MR. BLAIR:

20 Q. So you mentioned before, that in emergencies, it's very
21 important that, I think I scribbled down your exact
22 words. It was very important to act quickly and
23 determine there was an emergency, correct?

24 A. Yes.

25 Q. And you're relying on the Surgeon General's finding

1 that this was an epidemic in December of 2018, correct?

2 **A. That's one of the things we considered.**

3 Q. But the finding in Michigan of an emergency wasn't
4 until the end of August, correct?

5 **A. That is the time that we declared the emergency.**
6 **That's the date.**

7 Q. Did you help draft the emergency rules?

8 **A. I was consulted by many people in the State of Michigan**
9 **government.**

10 Q. Can you explain what branches of government you spoke
11 with about the emergency rules?

12 **A. We have the Michigan Department of Health and Human**
13 **Services. We do have the Governor's Office as well.**

14 Q. When was your first conversation about emergency rules
15 on vaping products?

16 **A. I do not recall.**

17 Q. Relative to the finding of emergency on August 30,
18 2019, was it a matter of days before then? Weeks
19 before then? Months? Can you narrow it down that way?

20 **A. I can say I started my role officially for the State,**
21 **April 15th of 2019. And so, it would definitely be**
22 **after that where I would have started looking at the**
23 **data because it is important to look at data first,**
24 **before issuing any rules.**

25 Q. So it was after April.

1 A. But I don't --

2 Q. You can't help narrow it down at all between April and
3 August 30th? You don't know when you first
4 conversation with anyone about the emergency rules was?

5 A. I don't want to say anything that's not factual. I'm
6 sure maybe two months before the issuance of the rules,
7 I probably looked at it more than the initial two
8 months when I was at the State. I don't want to say
9 anything that's not factual.

10 Q. Were you involved with crafting the public messaging
11 aspect of the emergency rules?

12 A. Can you explain that a little more, please?

13 Q. Yes. I want to say marketing, but I don't mean that
14 with a negative pejorative connotation. There's the
15 drafting of the rules itself. And then, would you
16 generally agree that disseminating that information to
17 the public was an important component of issuing the
18 emergency rules?

19 A. In general, informing the public of what we are doing
20 is something that is important. We do have a
21 communications department within the Department of
22 Health and Human Services. That is the lead for
23 communicating out to the public.

24 Q. Were you involved in those discussions about how to
25 craft the public education aspect of the emergency

1 rules communications?

2 **A. Specifically a communications plan, I'm not a**
3 **communications expert. But I do focus on consulting on**
4 **public health matters.**

5 **Could you explain a little more?**

6 **Q.** Let me give you a specific example. There was a press
7 release on September 4th. Were you involved in any
8 discussions leading up to that press release?

9 **A. I don't recall. I remember -- they send me press**
10 **releases, and sometimes they get out without me**
11 **actually reviewing them. That is the truth.**

12 **Q.** All right. This specific one, do you have a
13 recollection of whether you saw it before it went out
14 or not?

15 **A. I very likely did.**

16 **Q.** Okay.

17 **A. But sometimes, I don't have the final approval for**
18 **whether or not it goes out. And I don't always read**
19 **every word of every press release that goes out to the**
20 **department.**

21 **Q.** Understood. Thank you for clarifying that.

22 **Were the emergency rules your idea?**

23 **A. I'm the one who gives the public health consultation**
24 **that determines that an emergency exists. And yes, I'm**
25 **the one who declared a public health emergency.**

1 Q. Okay. So let's separate that a bit. The declaration
2 of emergency versus the promulgation of the rules. Did
3 you decide to promulgate emergency rules that banned
4 vapor products?

5 A. I'm not a lawyer, so there are others in the department
6 who are lawyers that will say how we can move forward
7 in doing things from a legal perspective. I give the
8 medical and public health guidance.

9 Q. The press release we were talking about, from September
10 4th, indicates that Governor Whitmer ordered your
11 department to issue emergency rules to ban the sale of
12 flavored nicotine vaping products.

13 Do you agree with that characterization?

14 A. I provide the medical guidance. I will defer to my
15 lawyers as far as the nuances of orders and legals and
16 what you can do. I defer to my lawyers on that.

17 Q. Do you agree with the characterization that the
18 Governor ordered the department to issue the emergency
19 rules?

20 A. I issued -- I said that there was a public health
21 emergency. I'm not the one who is an expert in who
22 directs what. I'm actually not the director of the
23 Department of Health and Human Services and I'm not a
24 lawyer. So I go based on those folks' guidance as far
25 as what to do. But I did declare a public health

1 emergency and looked to my colleagues, lawyers, and
2 what not, to be able to decide how we move forward.

3 Q. You testified that you were involved in conversations
4 leading -- that occurred before the issuance of the
5 emergency rules, correct?

6 A. Yes.

7 Q. And so, as a person that was involved in those
8 conversations, do you believe it's an accurate
9 characterization to say that the Governor ordered the
10 department to issue those emergency rules?

11 A. The Governor, in general, this is how I think about my
12 profession and my role, people do not order me to say
13 what the medical and public health aspects are. No one
14 influences that.

15 Now, whether or not there was an order to do
16 something based on the emergency that I found, based on
17 public health and science, then perhaps. But to be
18 clear, no one ordered me to do anything from a medical
19 or science perspective.

20 Q. Understood. And I didn't mean to insinuate that in any
21 way.

22 So again, I want to separate the finding of
23 emergency versus the issuance of the rules. And I
24 think you said perhaps, as to whether it's an accurate
25 characterization that the Governor ordered the

1 department to issue the emergency rules. Is that --
2 did I hear that correctly?

3 **A. That may be true, but I would defer to my lawyers to**
4 **determine what, even the word "order" means exactly. I**
5 **don't know that I was issued, in my office, something**
6 **that said Dr. Khaldun, I order you to do this. I don't**
7 **know. That could have happened, but again, I will**
8 **defer when I talk to some lawyers. I'll defer to my**
9 **lawyers on how that happened. I stick to medical**
10 **public health guidance in my role.**

11 **Q.** We were talking a little bit before kind of the public
12 education aspect of the emergency rules and getting the
13 word out about emergency rules, correct? And you agree
14 that that's generally an important aspect of the rules?
15 Would you agree with that?

16 **A. We want people to know about the rules.**

17 **Q.** And I'm sorry, I just forgot, did you say that you were
18 part of that discussion about drafting that public
19 education strategy?

20 **A. I'm not the communications manager for the department,**
21 **but I did provide public health medical guidance on**
22 **what we can do to address the public health emergency.**

23 **Q.** Are you familiar with the Gonwer publication?

24 **A. Yes.**

25 **Q.** G-o-n-w-e-r?

1 A. I don't know who writes them, but I think I get the
2 e-mails for those.

3 Q. I'm going to hand the witness --

4 MR. BLAIR: Your Honor, would you like a copy
5 as well?

6 THE COURT: No, thank you.

7 BY MR. BLAIR:

8 Q. Dr. Khaldun, I'm going to direct you to the second page
9 of this, Gonwer news alert, third paragraph up from the
10 bottom.

11 THE COURT: Counsel.

12 MR. BLAIR: Yes.

13 THE COURT: It has a date?

14 MR. BLAIR: It has a date. The date is
15 September 4, 2019.

16 BY MR. BLAIR:

17 Q. I'm going to read there and can you just verify I'm
18 reading this correctly? It says, "Today, Ms. Whitmer
19 saw to draw national attention to her action, first
20 providing details of her plan to The Washington Post
21 and later conducting an interview with MSNBC."

22 Did I read that correctly?

23 A. That is what you read.

24 Q. Do you know whether that's true or false that she first
25 interviewed with The Washington Post before the local

1 newspapers?

2 **A. I have no idea. I do not have access to the governor's**
3 **calendar. I don't know.**

4 Q. Were you involved in discussions about how to
5 disseminate the public education aspect of the
6 emergency rules?

7 MR. POTCHEN: Objection. Your Honor, that's
8 been asked and answered and I think we can move on.

9 MR. BLAIR: I'll move on.

10 THE COURT: Okay.

11 BY MR. BLAIR:

12 Q. Sorry. So there's the initial press release September
13 4th, we talked about. Would it be fair to say that as
14 of September 4th, the plan was to issue emergency rules
15 within a few weeks and then the affected individuals
16 would have 30 days to come into compliance with the
17 emergency rules?

18 **A. I don't -- I don't recall that. They weren't -- the**
19 **rules are what they are.**

20 Q. I'm asking you what the plan was in early September.
21 September 4th, there was a press release, there was
22 press conferences, and it was widely reported in the
23 media that the plan was to issue emergency rules within
24 a few weeks and then everybody would have 30 days to
25 comply.

1 Are you familiar with that press coverage?

2 **A. If it exists, you show me that article, then yes, there**
3 **was press coverage of that.**

4 MR. POTCHEN: Just to save time, Your Honor,
5 I'll object to the relevance of this. The emergency
6 rules were issued and that's what we're talking about.
7 What other ideas or plans may have been don't seem
8 relevant to the emergency rules.

9 THE COURT: Can you share with me why plan A,
10 plan B, or plan C that may have went into the current
11 emergency rules are relevant?

12 MR. BLAIR: This goes to the arbitrary
13 capriciousness, Your Honor, that there's other evidence
14 as well that at least one aspect of these emergency
15 rules appear to be more for press coverage,
16 specifically national press coverage, and that the
17 timeline that was announced and everybody was relying
18 on was accelerated because Michigan was going to no
19 longer be the first state to ban these. So the
20 timeline was accelerated from 30 days to 14 days of
21 compliance.

22 THE COURT: If you can find anything that
23 this witness knows firsthand about that, she can
24 certainly answer. But what was covered in the press is
25 interesting, but not persuasive of standing alone.

1 BY MR. BLAIR:

2 Q. Dr. Khaldun, I've handed you what is the press release
3 from September 18, 2019. Do you recognize this press
4 release?

5 **A. Yes.**

6 Q. This was the press release that was issued on the day
7 that the emergency rules were announced, correct?

8 **A. Likely. Again, the communications department is the**
9 **final go ahead on the press releases. But I do know a**
10 **press release was issued, and it looks like this was**
11 **it.**

12 Q. Okay. The first sentence in the second paragraph there
13 says, "Michigan was the first state in the nation to
14 announce the ban of the sale of nicotine flavored
15 vaping products known as E-cigarettes."

16 Did I read that correctly?

17 **A. That is what this says.**

18 Q. Okay. Can you explain to me, is it important to
19 emphasize that Michigan was the first in terms of
20 helping disseminate the message and protect youth?

21 MR. POTCHEN: I'm going to object, Your
22 Honor, to the extent that this witness can testify as
23 to how this press release and what the press person
24 felt was important or not important.

25 THE COURT: Well, the press release is an

1 admission on the party upon, and so she can indicate
2 what, if anything she knows. But you asked her another
3 compound question.

4 MR. BLAIR: I'll try to break it up, then.

5 BY MR. BLAIR:

6 Q. The objective of the emergency rules is to protect
7 youth, right?

8 A. Yes.

9 Q. Emphasizing that Michigan was the first to do that, how
10 does that help protect youth?

11 A. You would have to ask the communications person.

12 Q. And you traveled to Washington D.C. and testified
13 before Congress, correct, about the vaping ban rules
14 here in Michigan?

15 A. Yes, I did.

16 Q. I'm going to hand you a copy of this. And after a kind
17 of introductory, thank you for the opportunity to be
18 here, the first sentence there that starts, earlier
19 this month. It says, "Earlier this month, Michigan
20 became the first state to announce it was banning the
21 sale of all flavored nicotine vaping products."

22 Did I read that correctly?

23 A. You did.

24 Q. I did not read that whole sentence, just to be clear.
25 I'm not trying to misrepresent it, but that portion of

1 the sentence, I read correctly?

2 **A. Yes, sir.**

3 Q. So it was not just in a press release, this was also in
4 your testimony before Congress.

5 My question, again: Why emphasize that
6 point? What does that have to do with protecting the
7 youth of Michigan?

8 **A. I would say it is just a fact. But that is a fact.**

9 Q. It's a fact that Michigan was the first to ban flavored
10 nicotine vapor products?

11 **A. I believe that that is a fact and that is what is
12 listed here.**

13 Q. Did you draft this statement?

14 **A. I had other people who helped draft it for me. And
15 yes, I did participate in the drafting as well.**

16 Q. Were there people from the Governor's Office that
17 participated in drafting that?

18 **A. They did review -- if I recall, they did review a
19 draft.**

20 Q. Okay. And when you were editing it, did it occur to
21 you that maybe it's not so important to emphasize that
22 Michigan was the first to do it?

23 **A. It is a fact. It had nothing to do with the
24 declaration of a public health emergency.**

25 Q. Can you please flip to page two of your congressional

1 testimony, please? I'm going to direct your attention
2 to the final sentence of the first full paragraph on
3 paragraph two there. It begins with the word "we."
4 I'll read it and you can just follow along and let me
5 know if I read this correctly.

6 "We now have a new generation who are
7 addicted to nicotine unmistakably because of insidious
8 and fraudulent marketing of these products towards
9 youth, and lack of sufficient regulatory oversight."

10 Did I read that correctly?

11 **A. Yes.**

12 Q. Do you believe that Mr. Slis or 906 Vapor participated
13 in any insidious or fraudulent marketing of these
14 products, too?

15 **A. I'm not familiar with their business and their
16 day-to-day operations, so I cannot speak to that.**

17 Q. Okay. You were here yesterday for his testimony, yes?

18 **A. Yes.**

19 Q. Did you hear him testify under oath that he's never
20 sold vaping products to anyone under 18?

21 **A. That is what he said.**

22 Q. And do you have any reason to doubt that he was telling
23 the truth when he testified about that yesterday?

24 **A. I don't think that's for me to determine. That is what
25 he said yesterday.**

1 Q. Did you take into consideration, all of the people who
2 would be negatively impacted by the emergency rules who
3 had nothing to do with insidious and fraudulent
4 marketing of these products to youth?

5 A. Can you explain what you mean by that statement?

6 Q. The question was: Did you consider the adverse effects
7 to other people who had nothing to do with -- let's
8 assume for a second that there were some people that
9 were involved with insidious and fraudulent marketing
10 of these products towards youth. Can we start with
11 that assumption?

12 A. Yes. This testimony is the -- let me just say it. The
13 hearing was not about Michigan's -- that I wrote this
14 for was not about Michigan's emergency rules. It was
15 about vaping overall. And so, that was the view from
16 which I needed this. So this is not about the
17 emergency rules that were issued. So I just want to be
18 clear in what I'm describing here.

19 This may be what I wrote and said, but it's
20 not about our emergency rules. They're two different
21 things, in my mind.

22 Q. I just want to better understand that. What do you
23 mean when you say it's not related to the emergency
24 rules?

25 A. My understanding of the hearing that I was asked to

1 come to was that it was about the -- let me just read
2 the title. The public health threat of E-cigarettes.

3 But I was not asked to come and specifically
4 talk about the emergency rules that Michigan did. And
5 so, therefore, this testimony and the words that may be
6 in it, it's, in my mind, when I was writing them or
7 involving the emergency rules, there was a different
8 lens through which I would be thinking about them and
9 writing them.

10 Q. There are aspects of the emergency rules that prohibit
11 what some might say misleading advertisement. Is that
12 a fair statement?

13 A. We can read the emergency rules, certainly.

14 Q. Rule Three, in particular, prohibits certain
15 advertising?

16 A. Yes.

17 Q. Did you make a determination that that rule was
18 necessary to protect Michigan youth?

19 A. Yes. I think the advertising specifically geared
20 towards youth contributes to youth using E-cigarettes.

21 Q. Did you have any evidence to suggest that Clean
22 Cigarette, using the word "clean" in the name is
23 misleading or defrauding youth?

24 A. As a physician, I would not tell a patient that an
25 E-cigarette is clean.

1 Q. Did you --

2 A. **But I cannot speak to that particular business. I'm**
3 **just not familiar with their business.**

4 Q. And that kind of gets back to another point. Did you
5 think about all the other people that would be affected
6 by the rules, who have nothing to do with this
7 insidious fraudulent marketing, as you called it in
8 your congressional testimony?

9 A. **I considered the public health epidemic of youth vaping**
10 **and what we need to do to address it.**

11 Q. We talked a little bit before about the statute that
12 went into effect September 2nd, I believe.

13 A. **I'm sorry, what statute? You mean the actual rules**
14 **themselves?**

15 Q. No. The statute, the Youth Tobacco Act.

16 A. **Oh, I see. I see, yes.**

17 Q. That went into effect September 2, 2019, correct?

18 A. **That is my understanding.**

19 Q. What resources were allocated at the department to help
20 enforce that on September 2nd?

21 A. **We have a tobacco section in general, at the Department**
22 **of health and community services, that supports tobacco**
23 **prevention efforts.**

24 Q. There's special efforts to begin enforcing that
25 statutory change immediately?

1 **A.** Our department actually testified against the rules.
2 We have no reason to believe they would be effective
3 based on national data that I've described.

4 We are also in the middle of some budgetary
5 issues in this state, so I do not have the authority to
6 find new money for my programs. But I would love more
7 money to prevent people from using tobacco in general.

8 **Q.** I'm sorry, I want to be precise with my question.

9 Were there resources allocated to start
10 enforcing the statutory change on day one, September 2,
11 2019?

12 **A.** **So can you explain what you mean by enforcement?**

13 **Q.** There was a change in the statute, correct?

14 **A.** **Yes.**

15 **Q.** And conduct that was permissible on September 1st was
16 no longer permissible on September 2nd under state law?

17 **A.** **Correct.**

18 THE COURT: Counsel, are you asking her if
19 there was a supplemental appropriation?

20 MR. BLAIR: No. I'm asking if there was any
21 effort at all to enforce the statutory rules on
22 September 2nd.

23 THE COURT: In any portion of state
24 government?

25 MR. BLAIR: Within the Department of Health

1 and Human Services.

2 THE WITNESS: I don't know. We don't have
3 police in the Department of Health and Human Services,
4 so I'm not -- but other parts of state government may
5 have done things that I'm not familiar with.

6 We focus on prevention in the areas that I
7 oversee.

8 BY MR. BLAIR:

9 Q. Do you know how many violations of the new statute have
10 been found or reported since September 2, 2019?

11 A. I do not, no.

12 Q. Have you asked about that data, any of your colleagues
13 in the department?

14 A. I actually have asked. I have not received it. I was
15 -- I was told, actually, that it would be difficult to
16 get it because the Department of Health and Human
17 Services does not enforce. So that would be dead.
18 Other people would have to give it to us. So I do not
19 have that data.

20 Q. The department doesn't enforce because you choose not
21 to enforce the statutory prohibition on sale to minors?

22 A. My department does not. I'm new. I'm six months into
23 the department, but when I've asked my team, we do not
24 have people who knock on doors and give out tickets.
25 That is my understanding, including for these emergency

1 rules. It is primarily a police enforcement. I do not
2 oversee the Police Department.

3 Q. Are you aware of any violations of the new statute
4 since September 2, 2019?

5 A. I would say that because I don't know does not mean
6 that they do not exist.

7 Q. I understand that. The question is: Are you aware of
8 any violations of the new statute since September 2,
9 2019?

10 A. No one has given me any data at all, on whether there
11 are none or several, I just have no way to answer that
12 because no one has sent me anything.

13 Q. But based on other state's experiences, you've made the
14 determination that you don't think the statute was
15 enough, these emergency rules were necessary?

16 A. Yes.

17 Q. Is that fair?

18 A. Yes.

19 Q. Okay. Dr. Khaldun, I've handed you a draft version of
20 the rules. Have you seen these before?

21 A. I'm sorry, there's so many drafts, it'll be hard for me
22 to say. I focus on what the actual rules are. I don't
23 know what this -- there are so many drafts, I can't say
24 I'm familiar with this particular draft.

25 MR. POTCHEN: Object to the line of question

1 about draft rules, Your Honor. We're talking about the
2 rules that were promulgated by the department.

3 MR. BLAIR: Again, Your Honor, this goes at a
4 minimum, to the arbitrary capricious showing
5 differences between the drafts and the final rules and
6 the reasoning, if any of those, concerning those
7 changes.

8 THE COURT: What will you argue to me is the
9 persuasive import of one draft versus another? I'm
10 going to presume that there are drafts that say 60
11 days, 30 days, 20 days, and that there were many
12 changes. I'm going to also presume that within the
13 specific language, there were many changes.

14 That -- if that were an indication or indicia
15 of arbitrary capriciousness, the legislature which
16 marks up pieces of legislation for at least three
17 readings unless it's an emergency would be consistently
18 arbitrary and capricious. Instead, it's an indicia of
19 deliberation, so I would decline the question at this
20 time.

21 MR. BLAIR: Your Honor, I could either make a
22 proffer or I could answer your questions in this manner
23 of three questions with the witness and it can then be
24 stricken if you still don't believe this is relevant.

25 THE COURT: Three.

1 MR. BLAIR: Three. Thank you.

2 BY MR. BLAIR:

3 Q. Could you turn to page three, please? The last
4 sentence before rule number one starts there.

5 **A. Okay.**

6 Q. I'm going to read a portion of that sentence.

7 THE COURT: Don't read a portion of the
8 sentence.

9 MR. BLAIR: Don't?

10 THE COURT: Please read a whole sentence.

11 MR. BLAIR: I'll read the whole sentence.

12 Okay. It starts with based upon.

13 "Based upon the above information and
14 pursuant to its authority under the public health code
15 in the Administrative Procedures Act, the Department of
16 Health and Human Services includes that an emergency
17 exists with regard to the youth's use of E-cigarettes
18 and alternative nicotine products and that they -- and
19 that the following emergency rules are necessary to
20 preserve the public health safety and welfare."

21 Did I read that correctly?

22 **A. You read that sentence.**

23 Q. And that sentence, specifically says that there's an
24 emergency that exists with regard to youth use of
25 E-cigarettes, one, and alternative nicotine products,

1 correct?

2 **A. That is what this sentence says.**

3 Q. In this draft version of the rules, Rule 1, one
4 parenthesis, 1 C, includes the definition for flavored
5 alternative nicotine product. Does it not?

6 **A. Rule C says what it says.**

7 THE COURT: The definition, or it uses the
8 word?

9 MR. BLAIR: Both. It's a defined term that's
10 then used in the rest of the word.

11 THE COURT: You said that sentence defines
12 it. The sentence uses the word. It's defined
13 elsewhere in another sentence. Is that not correct?

14 MR. BLAIR: No, I'm sorry. I am specifically
15 talking about the definition of it.

16 THE COURT: You just -- okay. I must not
17 understand. You asked her to read a sentence that
18 included alternative --

19 MR. BLAIR: Nicotine products.

20 THE COURT: -- nicotine products.

21 And now, your question is whether that
22 sentence includes a definition of something?

23 MR. BLAIR: No, I'm sorry, the two questions
24 were about two separate sentences in the rules. One
25 was of the finding of emergency where the alternative

1 nicotine products were an emergency. And then, I'm --
2 I was directing her to this version of the draft rules,
3 prohibited alternative nicotine products.

4 THE COURT: I heard that.

5 MR. BLAIR: Okay. The final version of the
6 rules do not prohibit --

7 THE COURT: Doesn't include that, I know.
8 Has no meaning to me whatsoever, sir.

9 The fact that a rule goes through multiple
10 iterations before it is promulgated is not an indicia
11 or arbitrary and capriciousness. It is, in fact, an
12 indicia of deliberation.

13 MR. BLAIR: Okay.

14 THE COURT: So I'm going to sustain the
15 relevance of the multiple versions. I will accept that
16 there were multiple versions with different definitions
17 and that there were multiple versions with different
18 timelines as an absolute truth.

19 MR. BLAIR: Thank you.

20 BY MR. BLAIR:

21 Q. As of September 4, 2019, did you believe that
22 alternative nicotine products was an emergency risk to
23 youth of Michigan?

24 A. **Whatever our final rules are is what I say my answer**
25 **is. If I can read those to you.**

1 Q. No. I want to be more precise because the final rules
2 did not come out until September 14th.

3 I'm asking, as of September 4th, did you
4 think that alternative nicotine products posed an
5 emergency risk to Michigan youth?

6 A. I don't recall what I thought on September 4th versus
7 September 5th, to be honest. But what we have in our
8 final product is what I can concur with.

9 I don't -- honestly, show me more things.
10 But where I -- I mean, I don't recall what I thought on
11 September 4th. There were many drafts, and the lawyers
12 in my department did work on many drafts. I can't
13 promise that I reviewed every single draft and how
14 words got changed around. I was not the one who
15 actually wrote the actual -- like, literally typed out
16 the rules. I did not do that.

17 Q. Was it your idea to take out the prohibition of
18 alternative nicotine products in the final version of
19 the rules?

20 A. I can't say I recall having a conversation about that.
21 I don't recall having a conversation about that. We
22 have a large department.

23 Q. I understand that. You've talked a couple of times,
24 you know, your primary responsibility was declaring the
25 emergency, right?

1 **A. Right.**

2 Q. And so, this gets right to, did you think it was an
3 emergency regarding alternative nicotine products; yes
4 or no?

5 **A. I don't recall what I thought on September 4th. I'm**
6 **going to stick to what we put in our final emergency**
7 **rules.**

8 Q. Okay. Thank you.

9 Have you considered ways that you can protect
10 Michigan youth that would not have adverse effects on
11 adults who want to use flavored vapor products?

12 **A. Can you explain what you mean by -- you said adverse**
13 **effects to adults. Can you explain what you mean by**
14 **that?**

15 Q. Well, one example of adverse effects to adults are the
16 adults who are depending on flavored vapor products,
17 nicotine vapor products to avoid going back to the
18 smoking of combustible tobacco.

19 **A. I have not seen data that proves that E-cigarettes are**
20 **an effective smoking sensation tool, and I believe that**
21 **tobacco flavor vaping products are still available**
22 **under this rule and they are one of the most common**
23 **flavors used by adults who use vaping products.**

24 THE COURT: I'm going to go straight to what
25 I think he really wants to ask you.

1 THE WITNESS: Okay.

2 THE COURT: At any point in time within the
3 department, was there serious consideration of limiting
4 these bans in a way that still would allow adults to
5 have access to the product?

6 THE WITNESS: We -- I would say we did
7 consider that, but specifically, again, the way you
8 make a public health declaration, you look at what's in
9 front of you, all of the data, and you weigh risks and
10 benefits. And there's undeniable -- undeniably
11 evidence that there is an epidemic of youth in
12 particular, using --

13 THE COURT: Honestly, just answer the
14 question of was there serious consideration of it. You
15 said there was.

16 A. Yes. Yes.

17 THE COURT: It was registered, but there was.

18 BY MR. BLAIR:

19 Q. Can you explain to me what that serious consideration
20 was, what alternatives you considered?

21 A. I can say what I did. We looked at the epidemic of
22 youth using these products, the numbers of youth that
23 continued to sky rot -- skyrocket in these products,
24 the use of these products across the country.

25 We looked at the data that showed why youth

1 may be using these products. And then, we considered
2 that adults may also want to use these products, and we
3 weighed those risks and benefits.

4 But again, the data that proves that
5 E-cigarettes are an effective and safe smoking
6 sensation tool, I did look for that. I did not see
7 that they were one of the FDA approved smoking
8 sensation tools or that they were actually effective as
9 smoking sensation tools. And that is my role as a
10 doctor, is to look at and consider all of that.

11 So I thought specifically about youth being
12 addicted to nicotine today and an entire generation
13 that is going to have a health issue, not just as
14 youth, but as the adults of tomorrow as well.

15 And the fact that many youth who use these
16 products also go on to use combustible cigarettes as
17 well. Those were things that I considered.

18 Q. My question again was: Did you consider other
19 alternatives other than an outright ban of flavored
20 nicotine vaped products?

21 MR. POTCHEN: Your Honor, it's been asked and
22 answered.

23 MR. BLAIR: It's been asked. I'm not sure
24 it's been -- excuse me. I didn't mean to be
25 argumentative.

1 THE COURT: Yeah, you did.

2 MR. BLAIR: I meant to do it politely,
3 though.

4 THE COURT: That's okay. You managed.

5 Here's the idea, the fact that you don't get
6 the answer you want, consideration, I've got children
7 in my family and they'll say if I didn't give them what
8 they wanted, I didn't hear them. I heard them, I just
9 disagreed. That's what she has repeatedly said.

10 MR. BLAIR: Thank you.

11 BY MR. BLAIR:

12 Q. Did you consider the type of product that youth are
13 using?

14 **A. When you say type, can you explain a little more?**

15 Q. Type of flavored vapor -- excuse me, flavored nicotine
16 vapor product. Did you consider the type of product
17 used by youth?

18 **A. I would say no. I considered youth broadly getting
19 exposed to nicotine.**

20 Q. Okay. Would you say that there's an epidemic of
21 teenagers using devices like this?

22 **A. I'm not an expert in vaping devices, per se, but that
23 may be one.**

24 THE COURT: Did you consider the different
25 kind of vaping devices in the course of your rule

1 making?

2 **THE WITNESS:** I personally did not look at
3 the types of devices.

4 **THE COURT:** Do you have any data regarding
5 which type of devices are used by persons within
6 certain demographics?

7 **THE WITNESS:** I do recall seeing information
8 about youth using -- well, people. I don't remember if
9 it was youth or not to be honest, but people using open
10 systems. And them using more flavors. I do recall
11 seeing that type of data. I don't know if that's
12 answering your question.

13 BY MR. BLAIR:

14 Q. I'm sorry, could you repeat it? I didn't catch it.
15 You recall seeing data?

16 A. I recall -- I recall seeing in a study, that people who
17 use the open devices are, I think they're more likely
18 to use multiple flavors. I have to look at it. It's
19 what I recall in thinking about the question in
20 considering the types of devices. I do recall seeing
21 that.

22 **THE COURT:** The question quite specifically
23 was: Do you have any data describing the demographics?
24 Meaning, the age, geography, gender, any of those
25 demographic characteristics regarding use of different

1 kinds of vaping devices?

2 **THE WITNESS: I have not seen that.**

3 MR. BLAIR: I forget what this is called. Is
4 this D2?

5 MR. POTCHEN: Yes.

6 BY MR. BLAIR:

7 Q. Do you have D2 in front of you, Dr. Khaldun?

8 **A. Yes.**

9 Q. I know it's the headline of that chart there, it
10 includes the words Juul market data. Do you see that?

11 **A. Yes.**

12 Q. And we talked about before, Juul is these kind of
13 smaller --

14 THE COURT: Vaping system, more like a
15 cigarette.

16 MR. BLAIR: Well, to be more precise, the
17 first generation looked like a cigarette and the second
18 generation is the one that's more sophisticated now,
19 but started with a flashlight attached to an atomizer,
20 and the third generation is this kind of mass marketed,
21 almost the size of a USB, yes?

22 **A. That's what it looks like, yeah.**

23 Q. Okay. And do you know when Juul was first introduced
24 to the market?

25 **A. I believe it was 2015, 2014. I will have to look to be**

1 honest. But I believe it was roughly 2014.

2 Q. Okay. And the rise in youth usage of vapor, vapor
3 products, do you think it's some correlation to the
4 prevalence of Juul to the market, the smaller products
5 that can be hidden and are available in any gas
6 station?

7 A. I can't make that call on the association about -- I
8 mean, I see this, I can talk about this. I don't know
9 that Juul specifically did that. I mean, in science,
10 they tell you don't -- you know, association does not
11 imply causality.

12 Q. Understood. Understood.

13 A. I mean, it's possible. It's possible.

14 Q. But you're not aware of any data that there's any
15 teenagers, let alone, an epidemic using open systems
16 like this?

17 A. I do -- again, I recall seeing the data that shows
18 people -- if that's an open system, so whatever an open
19 system is, that they use multiple -- they're more
20 likely to use multiple flavors is what I recall seeing.

21 Q. Do you know who Scott Gottlieb is?

22 A. No.

23 Q. The former FDA official is --

24 A. Oh, I'm sorry. Yes, I know who he is. Thank you.

25 Q. And he was at the FDA during, you know, the period when

1 the FDA was tackling these issues as well, right?

2 Would you say that Mr. Gottlieb was a fairly respected
3 authority in this field?

4 **A. I can't speak to -- I've never seen his resume. I know**
5 **he had that title. I've never met him. He did have**
6 **that title. If I make some assumptions -- if I have to**
7 **make some assumptions about him, but I've never seen**
8 **his resume.**

9 Q. Okay. Would it surprise you to know that he -- can you
10 be more specific about the data you're referring to
11 about the open systems? You said that there is data
12 you've seen somewhere that --

13 **A. Yeah, I don't -- I honestly don't recall. I mean, you**
14 **asked if I considered -- I think I did consider, but**
15 **that's all I recall in my mind. If I went back and**
16 **looked, I can try and provide that data. But I cannot**
17 **-- I don't -- I'm not sure of the specific study it was**
18 **in.**

19 Q. Do you know the difference between the type of nicotine
20 and closed pod systems like Juul versus open systems?

21 **A. No.**

22 Q. Do you know the difference between the amount of
23 nicotine and closed pod-like systems, like Juul versus
24 open systems?

25 **A. I do know that different systems, different pods can**

1 **have different amounts of nicotine in them.**

2 Q. Do you understand the difference between an open system
3 and a closed pod system relative to the amount of
4 nicotine that a user ingests?

5 A. **No. I'm not an expert in those, this specific device,**
6 **so no.**

7 Q. Are you aware, for example, that with a closed pod
8 system --

9 MR. POTCHEN: Your Honor, she's already
10 testified she is not aware of this and then he's going
11 on further asking her questions about it.

12 MR. BLAIR: I can move on, Your Honor. I
13 don't want to go over --

14 BY MR. BLAIR:

15 Q. You mentioned before, in your experience of dealing
16 with prior public health crises, your experience with
17 the measles, right? And I believe you mentioned the
18 unrest in Baltimore.

19 If I'm saying anything incorrectly, I'm just
20 trying to summarize your prior testimony.

21 The opioid epidemic and hepatitis A, were
22 those four examples you gave of prior public health
23 crisis that you've helped respond to?

24 A. **Yes.**

25 Q. In each of those responses, was the government response

1 -- did the government's response have the effect of
2 wiping out an entire industry?

3 **A. I don't understand your question.**

4 MR. POTCHEN: Objection. It mischaracterizes
5 any testimony here and it doesn't adequately represent
6 what she's testified to already.

7 THE COURT: It is, of course, your argument,
8 and you will be able to argue it. You want to rephrase
9 the question so it isn't as argumentative?

10 MR. BLAIR: Yes. Thank you.

11 BY MR. BLAIR:

12 Q. Your response to the measles outbreak crisis, what were
13 the adverse effects to other aspects of society that
14 you deemed necessary in order to respond to the public
15 health crisis of the measles outbreak? Were there any
16 adverse effects to other aspects of society?

17 **A. What do you mean by other aspects of society?**

18 Q. So let's start with, what was the result of the measles
19 outbreak?

20 **A. So in my example that I used, it was a potential. A**
21 **potential outbreak of a case of the measles in a child.**
22 **And I had to determine what to do and how quickly to do**
23 **it. My lane, why people hire me is to provide public**
24 **health and medical guidance. That is the aspect of**
25 **society that I'm hired to speak to.**

1 Q. Is it your -- again, I'm not trying to mischaracterize.
2 I want to understand. Are you saying that considering
3 the other alternatives or considering the aspects that
4 wouldn't affect other people was someone else's job at
5 the Department of Health and Human Services?

6 **A. I focus on public health, specifically the health**
7 **aspects. Anything that is outside of public health,**
8 **health medicine, for example, legal matters or economic**
9 **matters, that is not what I'm an expert in and that is**
10 **not what I can provide guidance on.**

11 Q. Okay. So your specialty is declaring the emergency?
12 Is that a fair --

13 **A. Public health emergency.**

14 Q. Okay. Is that a fair generalization of your testimony?

15 **A. I did declare the public health emergency.**

16 Q. Okay. And did you have input on the specifics of the
17 emergency rules beyond just the declaration of the
18 emergency?

19 MR. POTCHEN: Your Honor, I do not know why
20 we're revisiting the beginning of the testimony, the
21 middle of the testimony, and now we're going over it
22 again and again. At some point, this has to wrap up.
23 But I don't know why we're doing this.

24 THE COURT: You are traversing areas that you
25 have uncovered before.

1 MR. BLAIR: Your Honor, if I can briefly
2 explain. The reason that I just went back that time is
3 I thought I heard the witness say that wasn't even
4 within her realm of considerations and if there's
5 someone else's job at the department who it is to
6 consider other alternatives, I was going to ask who
7 that was so that I could ask those questions.

8 THE COURT: Please ask that, because when I
9 hear the word "again," it assumes we've asked that
10 before.

11 MR. BLAIR: Okay.

12 BY MR. BLAIR:

13 Q. Was it someone else's job at the department to consider
14 the alternatives to the -- what became the final
15 emergency rules?

16 A. I would not say so. I was a part of and provided the
17 consultation for the public health -- why it's a public
18 health emergency. And I was involved in the drafting
19 of the final rules.

20 Q. Okay. If we could separate the declaration of
21 emergency, let's just focus on the rules --

22 A. Okay.

23 Q. -- and the specifics of the rules.

24 A. Okay.

25 Q. You said you did weigh in on that, yes?

1 A. Correct.

2 Q. Who else did weigh in on that and was part of the
3 discussion and deliberation of alternatives?

4 A. There were many people. I don't recall. But in public
5 health, it's a team effort. So I would have talked to
6 people within the department.

7 Are you asking me for specific names?

8 Q. Yes, whatever names you can remember, if any.

9 A. So, let's see, Molly Cotant who is here as a public
10 health associate to the Department of Public Health and
11 Human Services. There's Orlando Todd who is my duo
12 director for health and wellness. We have Brittany
13 Campbell who is one of our public health lawyers.

14 Q. Are those the names you can recall as you sit here
15 today?

16 A. Yeah. I'm sure there might be more. I would have to
17 go back and look at my e-mails, but.

18 Q. What role did Molly Cotant play? Am I pronouncing that
19 correctly?

20 MR. POTCHEN: Again, Your Honor, we're going
21 beyond the scope of what this hearing is about. This
22 is now becoming a discovery deposition of this witness.
23 And we're only hear testifying as to the basis of the
24 rules, why the decision -- why the department made the
25 decision it did and their challenges to that.

1 Now, this guy, this individual, this counsel
2 is engaging in a discovery deposition of this witness
3 and we don't intend to call -- at this point, we
4 weren't intending to call Molly Cotant, but the other
5 individuals, for sure, we weren't intending to call.

6 THE COURT: Counsel, at this point, you have
7 gone beyond the reasonable scope of this hearing.

8 MR. BLAIR: Thank you, Your Honor.

9 May I ask for a quick minute to consult with
10 my co-counsel?

11 THE COURT: Yes.

12 MR. BLAIR: Thank you.

13 THE COURT: Okay. Stretch.

14 (Off the record at about 2:54 p.m.)

15 (On the record at about 2:58 p.m.)

16 BY MR. BLAIR:

17 Q. Dr. Khaldun, would you agree that if there was data
18 establishing that the youth epidemic is traceable to
19 one product versus another, that would have been
20 relevant to consider before banning all of these
21 products?

22 A. I can't say that I've looked at any data. I haven't
23 seen that data, but I would look at.

24 MR. BLAIR: All right. I think that's all we
25 have at this time.

1 THE COURT: Do you have any further? Are you
2 standing to say no, or moving to say yes?

3 MR. POTCHEN: I'm sorry, I'm waiting for him
4 to move. Yes, I have something, Your Honor.

5 RE-EXAMINATION BY MR. POTCHEN:

6 Q. Dr. Khaldun, as the Chief Medical Executive for the
7 State of Michigan and the individual who declared the
8 public health crisis of youth vaping, what do you
9 anticipate that the net public health impact of these
10 emergency's rules will be, going in place?

11 **A. I believe that the net health impact will be positive,**
12 **meaning you will be stopping youth from getting access**
13 **to these products and an entire generation from**
14 **becoming addicted to nicotine and the consequence of**
15 **that. And I believe the positives are far and large of**
16 **the impact of what the ban will be.**

17 MR. POTCHEN: No further questions, Your
18 Honor.

19 THE COURT: I can't imagine how that would
20 lead to another line of inquiry, so you may step down,
21 ma'am. Return to your seat. Thank you, very much.

22 MR. POTCHEN: Your Honor, we have no other
23 witnesses.

24 THE COURT: Okay. Is there anything further
25 from the Plaintiffs?

1 MR. BLAIR: Your Honor, if I could just have
2 a brief moment to make the offer of proof of what the
3 studies --

4 At another hearing, at another time, we will
5 be able to establish that there are learned treatises,
6 several of them, that establish that the hazards of
7 vaping are much less than tobacco, that well-respected
8 scientists and public health specialists in this field
9 have acknowledged that, including officials at the FDA,
10 itself. And that adults need flavors and variety of
11 flavors in order to use vaping as an effective smoking
12 sensation effort.

13 And that's my offer of proof at this time.

14 THE COURT: Thank you.

15 Yes, sir?

16 MR. DAVIS: From the Plaintiff of Clean
17 Cigarette, we have nothing further at this time. We
18 are prepared to make arguments on the legal factor on
19 the issuance of a preliminary injunction if Your Honor
20 wants to hear them today.

21 THE COURT: Let's proceed.

22 MR. DAVIS: Okay.

23 THE COURT: Counsel, I do not know if this is
24 going to work for you, but you have no more than 20
25 minutes per advocate. Are you prepared to conform to

1 that standard?

2 MR. DAVIS: Yes, Your Honor. I will
3 absolutely conform to that standard.

4 THE COURT: Are you prepared, sir, to conform
5 to that standard at this moment?

6 MR. BLAIR: Yes, Your Honor.

7 MR. DAVIS: With that, Your Honor, will you
8 prompt me if I'm anywhere close to that?

9 THE COURT: I will.

10 MR. DAVIS: I appreciate it.

11 All right. Your Honor, I appreciate your
12 indulgence in having sat through two days of testimony
13 at this point, having heard from lawyers from both
14 sides.

15 And where I'd like to start, Your Honor, is
16 recognizing that the irreparable harm is an
17 indispensable requirement of the issuance or for the
18 showing of --

19 Or for the issuance of a preliminary
20 injunction. I would like to start with the un rebutted
21 testimony you heard yesterday from my clients about the
22 irreparable harms that my clients will suffer if this
23 ban is not lifted, Your Honor.

24 We've -- as I've counted them, there are at
25 least 13 separate irreparable harms, un rebutted

1 testimony that you heard yesterday, that my clients
2 will suffer if this ban is not listed -- lifted.

3 Mona and David testified that 20 stores --
4 they had 20 stores in September. By the end of
5 October, there's going to be at least half of the
6 number of stores that they had.

7 Mona and David both also testified that they
8 had 53 employees. That number is going to be cut in
9 half within the month.

10 Mona David and Delicia testified unrebutted
11 testimony, Your Honor, that there will be a precipitous
12 drop in their sales.

13 Delicia testified based on her knowledge and
14 ex -- her knowledge and experience with running the
15 online platform, that there are virtually no online
16 sales anymore. Of course, I'll touch on that in a
17 moment, but the reason for that is they're not able to
18 advertise anymore. And I'll talk about specifically
19 why they can't advertise.

20 Mona and Delicia also talked about the total
21 loss of their out-of-state market because they cannot
22 market to anyone out of state anymore. Despite what
23 the state may say, that there is nothing preventing
24 people from selling out of state, there is no way for
25 out-of-state folks to actually figure out whether or

1 not our clients actually have that product to even ship
2 to them. They can't market it. That's what the rules
3 say.

4 My clients also point out that 740,000
5 cartomizers cannot be sold and will expire before the
6 end of the ban. Again, that is unrebutted testimony.

7 My client, David, has testified that the name
8 used in commerce for the past ten years, a "Clean
9 Cigarette" is now illegal under the rule, Rule Three,
10 says you can't use "clean." My clients can no longer
11 trade on their good name. Again, David testified to
12 that.

13 Mona and David both testified that my client
14 will lose all its customer goodwill. So it's not about
15 sales so much, Your Honor, with respect to the
16 goodwill. What we're talking about is my client cannot
17 use "A Clean Cigarette," its products, its shirts, its
18 marketing, its advertisement, its signage. It can't
19 use anything under these rules with "clean" in the
20 name.

21 They spent ten years, Your Honor, getting to
22 where they are today, establishing goodwill in the
23 marketplace. And they can no longer use "clean" in the
24 name. This rule will essentially ruin them. To this
25 point, my clients also testified they will lose all

1 customers goodwill.

2 My clients testified, David, Delicia, and
3 Dawn also testified they may still have a job but
4 they'll probably lose their fringe benefits.

5 My client's employee, Dawn, testified about
6 the store closing in Muskegon, that she's going to end
7 up moving her family away from Muskegon, away from her
8 family, away from her support network, changing schools
9 as a result of this ban and being forced to close the
10 store.

11 The un rebutted evidence served testimony
12 heard yesterday also says that my clients report, will
13 report, or have reported to you, Your Honor, that they
14 will go back to combustible tobacco products once they
15 cannot get the Menthol cigarette -- or menthol vapor
16 that they need.

17 Both Alicia and Dawn testified without any
18 doubt, without any question in their mind that they're
19 going to go to the nearest 711, I believe, was the
20 testimony, put money on the table or money on the
21 counter and buy a pack of combustible tobacco products.

22 I don't think there's -- in fact, I believe
23 the stipulation is there are studies that show
24 combustible tobacco products are more harmful than
25 flavored vapor products.

1 Under this rule, all products that bear my
2 client's name are now illegal under the ban. 1.4
3 million, I believe, was the testimony, all illegal,
4 can't sell, can't move, can't advertise, must be
5 changed.

6 I believe, Your Honor, those 13 things
7 certainly show and satisfy our showing of irreparable
8 harm that it's not just financial loss, it's loss of
9 customer goodwill, it's loss of health, it's loss of my
10 client's ability to market their products. They're
11 going to have expired product by the time this ban is
12 done. It's not quantifiable that they can then expect
13 a money damage at the end of the -- eventually, if a
14 preliminary injunction is not issued, they could expect
15 a money damage that would make them whole.

16

17 We have cited to you a number of cases, Your
18 Honor, in our brief. And I do not intend to talk about
19 every argument in our brief. I know Your Honor has
20 read the papers. But we've cited to you, a number of
21 Sixth Circuit Case Law that we believe shows that the
22 irreparable harm that we've referenced actually, there
23 is legal support from the Sixth Circuit in recognizing
24 that the Sixth Circuit, you know, case law that we've
25 cited, specifically, the Warren v. City of Athens Case

1 that's 411F3697 says that the right to continue a
2 business in which one was engaged is not measurable
3 entirely in monetary terms. The Plaintiff wants to
4 sell automobiles, not to live on the income from a
5 damages order.

6 So in this case, my client wants to sell
7 flavored nicotine tobacco -- or flavored nicotine vapor
8 products to adults of legal age as they've done for the
9 past ten years. They've never sold to a minor, and
10 continue their business model as they have prior to
11 these rules taking effect.

12 What you've got or what you'll have, Your
13 Honor, is financial ruin that cannot be rebutted by the
14 State. And I think what you heard just a moment ago
15 from Dr. Khaldun was, well, we considered the health
16 effects, but there's nothing to suggest that she
17 considered the business effects of this. There's
18 nothing to suggest that she considered the loss of
19 employment, loss of careers, loss of fringe benefits.
20 All of that is to say that normally, this process,
21 going through the APA, normally this process requires
22 very, very substantive, and we've said it in our
23 complaint, a preparation of regulatory impact statement
24 that identifies the businesses, groups, or individuals
25 who will be directly affected by, bear the cost, or

1 directly benefit from the proposed rule.

2 That wasn't done. Obviously, that's been
3 bypassed because of the rule being declared an
4 emergency. They didn't also prepare -- that's
5 MCL 24.245 (3)(f). They also didn't prepare this
6 regulatory impact statement that provides the
7 information about alternatives to the proposed rules.
8 That would be 24.245 (3)(g) and (h).

9 They also didn't -- I didn't hear any
10 testimony from her that they considered the compliance
11 cost of each rule on businesses and other groups as
12 required by 24.245 (3)(1).

13 Also, recognizing that they failed to
14 consider the regulatory impact statement that contains
15 a small business impact analysis. Well, that would
16 have been key in this situation considering you've got
17 hundreds, if not thousands of vapor retailers across
18 the state that can no longer make a living. You've
19 heard from two, over the last two days, that says
20 they're going to be put out of businesses, or at least
21 majority of the business.

22 Mr. Slis said he's going to be filing for
23 bankruptcy and he's already closed the store. My
24 client has testified that at least ten stores will
25 close, with the idea that a lot more will close with

1 the idea this ban is not lifted. Again, none of that
2 was considered. It was only the health effects of a
3 subset of the population.

4 Four claims, Your Honor, or four counts that
5 we've plead in our complaint. I'll try to move through
6 them very, very quickly.

7 Number one being the commerce loss claim. We
8 believe that the no rigorous standard should apply and
9 that's not the pike, as it's been referred to,
10 standard. The violation of interstate commerce,
11 specifically Rule Two of the -- it's 2 (1)(b), says
12 beginning 14 days after these rules are filed with the
13 Secretary of State, any retailer or reseller shall not
14 -- and this is B, use imagery explicitly or implicitly,
15 representing the characterizing flavor to sell, offer
16 for sale, give or otherwise distribute the vapor
17 product.

18 I made the point, Your Honor, in the opening
19 statement that the vapor product is not defined within
20 these emergency rules.

21 Mr. Potchen got up here and told you that
22 vapor product is defined within the Youth Tobacco Act.
23 Within the Youth Tobacco Act, it is defined. I will
24 concede that.

25 Rule H, it says, means a non-combustible

1 product that employs a heating element, power source,
2 electronic circuit or other electronic, chemical, or
3 mechanical means regardless of shape or size that can
4 be used to produce vapor from nicotine or any other
5 substance, Your Honor.

6 So it doesn't limit it just to flavored
7 nicotine vapor substance. It actually says any other
8 substance.

9 So a plain reading of rule 2 (1)(b), if there
10 is to be one, shows that vapor products, including any
11 other substance, including those that the state is
12 conceding are illegal to sell in Michigan, arguably
13 under these rules, they can't advertise then. They
14 can't market them. They can't have them on their
15 website.

16 How do you get internet sales? How can you
17 sell to out-of-state customers if you can't advertise
18 that you have, and in both cases, nicotine flavored
19 products; apple? My client has testified about the six
20 or seven flavors that they sell. How can you advertise
21 to sell those products out of state in the event that
22 someone wanted to come along and go to your website?
23 They would have no way of knowing or fulfilling that
24 order. They have no knowledge that you have those
25 products for sale.

1 What they've done is, essentially rendered
2 those products. We cannot market them. We cannot
3 advertise them. That is a plain reading of Rule Two,
4 Your Honor.

5 With respect to -- with respect to the other
6 argument regarding the constitutional taking, I
7 believe, Your Honor, the testimony is pretty clear that
8 we now have product that we cannot move. All of our
9 product is engraved with our logo, that as of September
10 2nd, became illegal in the State of Michigan.

11 So "clean" bares that name, is on every
12 single product that we try to sell. And regardless of
13 whether or not the product contains nicotine, under
14 Rule Three, we can't sell that product. So these rules
15 certainly are a constitutional taking, in so much as,
16 they are taking property. The rules have taken
17 property from my client without just compensation.

18 I believe, Your Honor, that there is an ample
19 evidence in this record that my client's product cannot
20 be sold as its currently -- as the product is currently
21 labeled.

22 Your Honor, we've also made the argument
23 under the Michigan AFLCIO case that they have not met
24 the definition of a public health emergency because
25 they considered only a subset of the population in

1 declaring the public health emergency.

2 Your Honor heard ample testimony from
3 Dr. Khaldun that she considered the youth crisis and
4 thus, issued the public health emergency based
5 exclusively on the youth crisis.

6 What you didn't hear her say was she
7 considered all those other factors that I talked about
8 a moment ago, to say there are adults of legal age that
9 do use this product that work in these shops, that own
10 these shops, that depend on their paycheck, that depend
11 on the fringe benefits.

12 So it is our position, Your Honor, that they
13 have not met the definition of a public health
14 emergency as that term is defined within the AFLCIO
15 case, to bypass the APA, which would allow them to
16 bypass all those regulatory impact statements that I
17 talked about.

18 So based on that, Your Honor, we believe that
19 the rules should be stricken, that Your Honor has the
20 ability to strike the rules that do not comply with the
21 APA.

22 The last argument, Your Honor, that we make
23 is the idea that these rules are arbitrary. They are
24 -- June 4th, I believe, the Governor put out a letter
25 to the Senate and it's attached as Exhibit 2 to our

1 papers. And she cites the same study that, I believe
2 it's Defendant's Exhibit 2, Your Honor, where she cites
3 -- and this is the same sentence.

4 Youth use of E-cigarettes have become a
5 public health crisis. In 2018, 21 percent of American
6 high school students, children as young as 12 reported
7 having used E-cigarettes or other vape products in the
8 last 30 days.

9 So those are the same numbers that
10 Dr. Khaldun cited in Defendant's Exhibit 2. This, of
11 course, is in response to Public Act 18. Public Act
12 18, my colleague went through all of the things that
13 Public Act 18 accomplished. That went into effect
14 September 2nd.
15 By September 4th, we had these emergency rules that
16 essentially do the exact same thing

17 Now, the testimony heard from Dr. Khaldun
18 was, well, we don't believe that that would have been
19 affected. But of course, two days is not enough time
20 to figure out whether or not the law that was passed
21 with near unanimous support by bipartisan -- it was
22 supported by bipartisan legislation, would have the
23 effect that the legislature intended. It's just too
24 early to say.

25 And Dr. Khaldun is saying gee, I don't think

1 it has enough time -- well, it doesn't have the effect.
2 Again, two days is not enough time to make that
3 determination.

4 We believe given the showing of likelihood of
5 success on the merits of our four claims, Your Honor,
6 we believe that we've shown the likelihood of success
7 on those things. Balancing of the public interest,
8 you've heard, Your Honor, from other -- or our
9 witnesses about the -- their public health will be --
10 or, excuse me, their health will be impacted by this.
11 Their financial health will be impacted by this. The
12 precipitous drop in their sales. We believe that that
13 certainly weighs heavily in favor of my client and the
14 prejudice that the State would suffer in the event that
15 this ban was to be lifted.

16 Well, at this point, I don't think they can
17 point to any prejudice as we have shown that there will
18 be dire consequences for the entire marketplace if this
19 ban is not lifted.

20 The prejudice to the State would be to go
21 through the normal APA process following the same rules
22 and procedures outlined in the APA process. The time
23 frame, do the impact statements to find a reasonable
24 alternative as to the simple ban of the entire product.

25 So we believe, Your Honor, having shown the

1 four elements in favor of Plaintiff, A Clean Cigarette,
2 we believe that a preliminary injunction should issue,
3 the ban should be lifted and our clients should be
4 afforded the opportunity to sell their products to
5 adults of legal age.

6 I am happy to use the rest of my time for any
7 questions Your Honor may have of me. Otherwise, I will
8 defer to my co-counsel.

9 THE COURT: Thank you.

10 MR. DAVIS: Thank you, Your Honor.

11 MR. BLAIR: Good afternoon, Your Honor,
12 again. Sorry, I said again, again.

13 I want to first start off by thanking this
14 Court once more for the extraordinary efforts to
15 expedite this as fast as possible, accommodating us up
16 in Petoskey last week, and squeezing us in for two days
17 of hearing testimony today.

18 I'm going to start in a different area. I'm
19 going to start with the likelihood of success. And I
20 think that we've shown on the briefs, a very strong
21 showing of likelihood of success. And I'm going to
22 start with ultra vires.

23 So we've cited controlling precedent, the
24 Verizon case where Court of Appeals in a published
25 opinion found that language is identical to the

1 language in MCL 333.2233, identical language prohibited
2 another agency from promulgating rules. That, I don't
3 think that case is distinguishable. It's controlling
4 precedent. We've cited it two weeks ago in our first
5 complaint and motion papers.

6 Opposing counsel has had more than enough
7 time to explore arguments to try to distinguish that
8 case, to try to argue why it's not controlling
9 precedent. It is not -- opposing counsel has not even
10 made an attempt to distinguish that case.

11 There is one argument in their most recent
12 brief that MCL 333.2233 is unconstitutional because it
13 cannot -- when that amendment was enacted, it did not
14 republish other aspects of the law that were arguably
15 affected by it.

16 I would say one, again, it's notable that
17 they didn't even attempt to distinguish controlling
18 precedent. Two, we disagree that the cases cited
19 actually support the proposition that provision 2233 is
20 actually unconstitutional.

21 We've cited cases, several case where courts
22 have reiterated the general principle that a later more
23 specific statute trumps an earlier more general
24 statute. In fact, those cases wouldn't even exist if
25 the later more specific statute was unconstitutional

1 for not republishing all of the pre-existing more
2 general statutes.

3 So just intuitively, it doesn't make sense
4 that those cases even exist if it's true that anything
5 that trumps an earlier more general statute is
6 unconstitutional.

7 Another example, an easy example that comes
8 to mind is the Court of Claims Act itself. The Court
9 of Claims Act arguably affected many provisions
10 throughout the code. If this court were to adopt
11 Defendant's reasoning that Section 2233 is
12 unconstitutional for not republishing Section 2226,
13 under that same reasoning, the entire Court of Claims
14 Act is also unconstitutional.

15 The law that enacted the Court of Claims Act
16 did not republish any of the other provisions and in
17 briefing at the Court of Appeals, Defendants took the
18 position that the Court of Claims Act trumped the
19 provisions that we believe gave us a basis to file suit
20 in Holten.

21 So either there's controlling precedent that
22 these rules are ultra vires, or if they are
23 unconstitutional, then we need to be in Holten

24 I don't see a way to reconcile those two
25 arguments the Defendants have made here. That's the

1 ultra vires aspect. That is just one attack on the
2 very strong likelihood of success.

3 And again, it's unrebutted that there's
4 controlling precedent that the department did not have.
5 The department was directed in unambiguous terms from
6 the legislature, shall not promulgate the rules under
7 the Public Health Code.

8 Second component is that the emergency rules
9 are procedurally invalid. One, there was no emergency.
10 My co-counsel addressed this a bit and I addressed it
11 in my cross-examination of Dr. Khaldun. The emergency
12 rules cite studies and findings that were months, if
13 not years old. It also relied heavily on the
14 declaration of an epidemic from the U.S. Surgeon
15 General that was in December of 2018, and the rules
16 here were not implemented until almost a year later in
17 September of 2019.

18 We've cited case law from analogous cases in
19 the federal context, that stand for the
20 well-established principle, that the claimed urgency
21 cannot result from the agency's own delay. And here,
22 the delay from the declaration of the epidemic from the
23 U.S. Surgeon General to almost a year later, in such an
24 urgency that we have to skip notice and comment, et
25 cetera, that -- there's case law that we cited in the

1 brief that that can't be the rule. Otherwise, agencies
2 would just wait until the last minute until they were
3 up against the deadline and would skip notice and
4 comment.

5 As an alternative, we also argued that even
6 if the circumstances required some urgent response,
7 there was no justification for skipping all of the
8 requirements, the usual requirements in the procedural
9 safeguards in the APA.

10 The provision at issue for emergency rules
11 say that some or all of those provisions can be
12 skipped. There was no finding. There was no
13 explanation about why they skipped all of them and why
14 they couldn't use any of that, a lot of time, between
15 the declaration of emergency, for example, in August,
16 and the issuance of the emergency rules to allow, at
17 least a limited public comment.

18 Next argument, Your Honor, is that the -- the
19 rules are procedurally valid because the rules are not
20 necessary to preserve public health.

21 Again, my co-counsel mentioned the Michigan
22 State AFLCIO case. That case primarily concerned
23 public welfare. What we've cited in our briefs, that
24 the definitions of public health are analogous and run
25 very parallel to the definitions of public welfare.

1 And so, the reasoning in that case, the
2 AFLCIO applies equally here that when we're talking
3 about protecting, admittedly, a very small subset of
4 society, that cannot be the justification for declaring
5 an emergency and skipping all of the normal APA
6 procedural safeguards.

7 Again, we mentioned this and elaborated on it
8 in our footnote in one of our briefs, the only people
9 protected by these emergency rules are the 10 to 17
10 year olds who would only try nicotine if they could get
11 it in a flavored vapor format in a store. It does not
12 protect the 10 to 17 year olds that would not try
13 nicotine anyway. It does not protect the 10 to 17 year
14 olds that would try it anyway, whether it's a
15 combustible cigarette or a vapor product. It does not
16 protect the 10 to 17 year olds who would try a tobacco
17 flavored vapor product. It does not protect the 10 to
18 17 year olds who are resourceful enough to find a
19 friend or find a Black Market source or to find it
20 online or to drive or catch a ride out of the state.

21 So we're only talking about the 10 to 17 year
22 olds who would only try nicotine if they could buy
23 flavored vape products in a store in Michigan.

24 And again, there was testimony that --
25 un rebutted testimony that Plaintiff, Mr. Slis and 906

1 Vapor card and check IDs for any individual that looks
2 like they're under 30. He's confident and swore under
3 oath that they've never sold to a minor.

4 And so, the Mr. Slises of the world are not
5 the problem that even if it was an urgent situation to
6 respond to, I believe the testimony today establishes
7 that there was no real consideration of the collateral
8 effects on people like that. There were no
9 consideration of the collateral effects on adults who
10 need flavored vapor products to continue their battle
11 to avoid combustible tobacco.

12 We also argue that the emergency rules are
13 substantively invalid. They do not adhere to the
14 enabling statutes. They're also arbitrary capricious.
15 One fundamental attempt of administrative law is that
16 agencies must explain and articulate a satisfactory
17 explanation for the action they took, the data and
18 facts that they considered, and explain why they did
19 what they did.

20 On a couple of instances in the briefs,
21 Defendants are asking for this Court to defer to agency
22 discretion, but they conspicuously ignore the other
23 aspects of administrative law that's the basis for
24 that. To fault discretion is the fundamental principle
25 that the agencies have to explain what they're doing

1 when they're exercising that incredible power of
2 regulating that's unaffected by political or more
3 indirectly affected by political choices at the ballot
4 box.

5 Under irreparable harm, I believe there was
6 strong testimony last week and there was additional
7 testimony this week about irreparable harm. Mr. Slis
8 testified that his business has been closed since
9 Tuesday, as we testified last week that what happened,
10 he testified that only five percent of his sales are
11 tobacco flavored and he simply cannot justify keeping
12 the door open and the lights on for selling only five
13 percent of his inventory.

14 He testified that he has about 20,000 dollars
15 of business debt and about 60,000 dollars of personal
16 debt and he expects to be filing for bankruptcy
17 eminently if he does not have the opportunity to reopen
18 his business and sell 95 percent of his inventory.

19 We've cited cases where irreparable harm was
20 found to exist with the loss of a business. And there
21 was one case in particular that has been endorsed by
22 the Court of Appeals in a decision that was later
23 reversed on other grounds. But there is -- it's not
24 only Sixth Circuit Case Law that recognizes that the
25 loss of a business is an irreparable -- can be an

1 irreparable harm and cannot be adequately compensated
2 with damages.

3 The Michigan Court of Appeals has endorsed
4 that view as well, albeit, in a case that it's been
5 since reversed on alternative grounds.

6 We also talked about the irreparable harm to
7 Mr. Slis's goodwill, the customers he has already lost.
8 I believe he testified last week that he expected to
9 lose customers. And he testified yesterday that he
10 has, in fact, lost customers. He knows there are
11 customers that have driven to Wisconsin to pick up
12 flavored vapor products. He knows there are customers
13 that have resorted to Black Market sources of vapor
14 products. And he knows that there are some customers
15 that have resorted to internet.

16 It is true that the rules purport to prohibit
17 purchasing via internet as well, but that's no solace
18 to Mr. Slis who is losing customers every minute that
19 these rules are in effect because his customers may be
20 willing to try online and hope not to get in trouble
21 rather than driving an hour to Wisconsin, hour and a
22 half to Wisconsin.

23 We also talked about the fear of prosecution.
24 And, Your Honor, correctly noted last week, that there
25 is no monetary remedy for wrongful imprisonment,

1 wrongful prosecution.

2 Mr. Slis testified that on an out-of-town
3 trip for three days, he uses a lot of these vapor
4 products and he brought five bottles with him for
5 personal use.

6 I understand that the Court's opinion
7 interpreted the rules such that transporting flavored
8 nicotine vapor products is not in violation of the
9 rules. I have respectfully suggested that that belies
10 the plain language of the rules. I understand that the
11 department has issued an interpretive statement last
12 week on this very issue.

13 Again, trying -- in my opinion, trying to
14 water down the rules to save them. That is
15 impermissible. I also have cited to MCL 24.232
16 subsection 5 which specifies that quote, a court shall
17 not rely upon a guideline operational memorandum
18 bulletin interpretive statement or form of instructions
19 to uphold an agency decision to act or refuse to act.

20 In other words, this Court cannot rely on the
21 interpretive statement and the department's efforts to
22 water down the rule in order to save the rule.

23 We also heard irreparable harm from Clean
24 Cigarette being forced to change their name that
25 they've worked to the vet and develop over ten years.

1 I can't think of a more quintessential example of a
2 loss of goodwill.

3 Also talked about closing stores and
4 employees, et cetera. And co-counsel addressed that
5 sufficiently.

6 The bounds of harm factor, we've cited in
7 case law, that there's no harm, in this analysis,
8 there's no harm to the government to require them to
9 follow the proper procedures. So this pleads into the
10 likelihood of success factor in some respects, because,
11 again, we've had unrebutted arguments that there's
12 controlling precedent, that these rules are ultra vires
13 and we've also made very strong shows of likelihood of
14 success and procedural and substantive invalidity.

15 And forcing the department to follow the
16 proper procedures is no harm if there's actually a
17 public interest in forcing agencies to follow the
18 proper procedure. That is relevant for the public
19 interest part as well.

20 Again, there's a public interest in the cited
21 case. And for the proposition, there is a public
22 interest in ensuring the agencies follow proper
23 procedures and that the public is informed in the rule
24 making process. There's also a public interest in
25 protecting the adults who need these flavored vapor

1 products to stay off of cigarettes.

2 At this time, I would be happy to answer any
3 questions, but just in closing, I would say that I
4 think we've more than satisfied the requirements for
5 the issuance of a preliminary injunction. If the Court
6 is not prepared to issue a preliminary injunction
7 today, we respectfully renew our request for a TRO.

8 THE COURT: Okay. I can tell you, I'm not
9 issuing anything today. I can't even process all of
10 this to do that today.

11 MR. BLAIR: Okay. May I make a record?

12 THE COURT: I will do it as quickly as I can.
13 I assume that everybody -- that you want a TRO, he
14 wants a TRO, you both want a preliminary injunction,
15 that's why we're here.

16 MR. BLAIR: Correct.

17 THE COURT: I know they don't want one.

18 MR. BLAIR: Yes.

19 THE COURT: I know I cannot process six hours
20 of testimony, five today, three yesterday, and two the
21 day before. I have not a single transcript from
22 anyone. Don't know when I'm going to get one. I've
23 got notes.

24 So I'm telling you very respectfully, I will
25 not be issuing anything today because I cannot issue

1 anything that was moderately respectful and considerate
2 of the issues in this case, today.

3 MR. BLAIR: Okay. Thank you, Your Honor.

4 THE COURT: Thank you.

5 MR. BLAIR: Do you have any questions for me,
6 or I'll sit down?

7 THE COURT: No, sir, I do not. Thank you.

8 Yes, sir?

9 MR. POTCHEN: Thank you, Your Honor. I can
10 appreciate that this has been difficult. We thank you
11 for your time, just like counsel. We thank counsel for
12 plaintiffs and we thank the witnesses for coming out of
13 their way to come here. Thank Dr. Khaldun. Thanks my
14 co-counsel James Long for the efforts he's put into
15 this case.

16 This is a very difficult situation. We know
17 that there have been hardships on businesses as a
18 result of these emergency rules. Running a business is
19 hard. It takes a lot of work and puts a tremendous
20 stress on people. People who run any small business
21 should be applauded for the work and effort they put
22 into that business.

23 The reality is that state officials need to
24 make very tough decisions and not everyone's going to
25 be happy. People are going to second guess. They're

1 going to say there's something else you should do.

2 People are going to disagree. People are going to say
3 look at this study versus this study.

4 We can appreciate that Plaintiffs are
5 concerned about the impact the emergency rules will
6 have and already have had on their businesses. But the
7 fact is, Your Honor, that no one presented any evidence
8 to dispute that we have a crisis with youth and vaping.

9 No one disputes that nicotine is addicting.
10 Nicotine is a powerful hook. One can only imagine that
11 if a grade schooler gets hooked like Dawn Every did on
12 cigarette butts, when she picked them off the ground
13 when she was in grade school. What happens when
14 children are presented with nicotine products that
15 taste like bubble gum or Skittles or Fruit Loops?

16 Now, the Plaintiffs argue there's no need for
17 emergency rules because the Youth Tobacco Act prevents
18 the selling to minors. But the sad reality is that's
19 not enough.

20 Delicia Trice, representative of Clean
21 Cigarettes says she started smoking when she was 15.
22 Yet, she assumed that the law said she needed to be 18.

23 Mona Lee, Clean Cigarettes owner, doesn't
24 discount that there's a problem with the vaping and is
25 fully aware of the age restrictions on vaping products.

1 But according to her, kids are going to do something
2 stupid anyway.

3 Now, Michigan was one of the last states to
4 pass legislation restricting the sale of vaping
5 products to minors. And even a ban on vaping products
6 to minors is not sufficient to address this crisis.
7 This is seen on the National Youth Tobacco Survey data.

8 Dr. Khaldun said that studies show kids are
9 getting these products through peers and other social
10 avenues. States that have had bans on vaping,
11 age-restriction on vaping products for years have seen
12 an increase, an alarming increase in youth and their
13 use of vaping products.

14 While the age limit is one way to address it,
15 it's not sufficient in light of the crisis we're
16 facing. We need to do something to stop the pipeline
17 of these products getting into the hands of youth. And
18 Michigan has looked to additional avenues to protect
19 kids.

20 Ms. Howard even testified that the vaping
21 technology has higher levels of nicotine and she
22 doesn't dispute today, that the State relied upon in
23 making its rules, that the flavors are a reason for
24 this alarming use -- increased use in youth and vaping.

25 Now, go to the elements that Plaintiffs need

1 or have the burden of proving, Your Honor, to grant
2 their motion, irreparable harm.

3 Mr. Slis has nothing additional that would
4 warrant the Court to change its previous opinion. As
5 to Plaintiff, Clean Cigarettes' irreparable harm,
6 again, these rules are only in place for six months.
7 And during that time, the legislature can take action
8 on bills that are pending or can introduce other bills.

9 We recognize these rules will have an impact
10 on their business. But not all vaping products are
11 prohibited from sale or distribution. They -- the
12 sale, Rule Two, 1(a) only applies to flavored nicotine
13 vapor products. It only applies to in-state sales.
14 Plaintiffs can still sell, transport, and distribute
15 flavorless and tobacco nicotine products.

16 David Yates, Clean Cigarette's warehouse
17 manager said tobacco-flavored nicotine products make up
18 about 50 percent of Clean Cigarette's inventory.

19 And similarly, Mona Lee testified that
20 there's a less than 50-percent reduction in sales since
21 the ban.

22 Will it be difficult? Will it be
23 challenging? Yes. They said they may have to close
24 stores. They said they may have to lay off employees.
25 Is that hard? Yes. But that's not the type or the

1 irreparable harm that's required to grant the
2 preliminary injunction here.

3 These rules do not require any business to
4 totally stop selling all vaping products, nor do they
5 require the destruction of the product.

6 To the extent they have flavored nicotine
7 products, they can store or return or sell them to
8 out-of-state residents.

9 As to the loss of goodwill, this Court has
10 already addressed it in its previous opinion and order
11 that goodwill is a comparable advantage over others in
12 the same or similar market. These rules apply to all
13 Michigan retailers and those online retailers who
14 intend to deliver flavored nicotine vapor products to
15 in-state residents.

16 No one, Michigan retailer or online retailer,
17 can gain any advantage over the Plaintiffs. It applies
18 with equal force and does not discriminate.

19 As to the fear of criminal prosecution that
20 also has been addressed by this Court. Retailers can
21 store the product and transport the product for sale in
22 other states without fear. And again, last week, to
23 the extent anyone was unclear as to the scope of the
24 rule, DHHS did issue a clarifying statement.

25 As far as detriment to health, the Plaintiff

1 is Clean Cigarette, not the people who work there. The
2 individuals have not filed a cause of action. Those
3 rules don't ban the flavored vaping products for
4 adults, again, only those containing nicotine with
5 flavors. And the tobacco flavored nicotine products
6 are still available. In fact, that's the specific
7 flavor that Mr. Lee prefers.

8 While it's significant diminution of the
9 health status may be recognized as an irreparable harm,
10 it must be just that, significant. A mere
11 inconvenience and speculation is not enough. We're not
12 talking about any loss of health insurance or denial or
13 delay in receiving health benefits like the federal
14 case cited by Clean Cigarette.

15 They talk about branding. One point I want
16 to make about that is that Clean Cigarette hasn't even
17 sought to trademark their name, Clean Cigarette. So
18 that's absent from their claim of this goodwill that
19 they claim they have. They haven't even taken efforts
20 or any steps to restrict the use of their name or
21 branding.

22 The deprivation they allege in their
23 pleadings of constitutional rights. Yes, that could be
24 considered an irreparable harm, but that's not what's
25 occurring here. There's no violation of the dormant

1 commerce clause, which I will address when I get to the
2 merits.

3 And they assert no ability to seek damages
4 because the State will claim immunity, and that's
5 sufficient for irreparable harm. Again, the cases they
6 cite in support of this argument are federal cases.
7 And in those cases, they're talking about claims in
8 federal court and 11th amendment immunity.

9 While I'm not in the position to waive any
10 amendment immunity the State may make, but as this
11 Court is aware, the Michigan Supreme Court has
12 concluded that constitutional tort claims for money
13 damages are viable under certain circumstances, and
14 certain state court actions are not barred by
15 governmental immunity. That's the Smith case.

16 So Plaintiff may have some recourse in the
17 event they can establish constitutional violations.
18 I'm not saying they do, but that may exist out there,
19 which really brings us to other aspects of what the
20 Court needs to determine for granting of the
21 preliminary injunction.

22 The balancing of the harms. Again, as I
23 stated at the beginning of the hearing yesterday, in
24 our constitution, public health is declared to be a
25 matter of primary public concern. And Defendants are

1 tasked with protecting the public's health. We know
2 that youth are the primary users of flavored vaping
3 products and that youth primarily start nicotine use
4 with flavored vaping products, not combustible
5 cigarettes. That was actually not refuted by
6 Plaintiffs' claimed expert, Ms. Howard.

7 The CDC clearly concluded that the use of
8 E-cigarettes is unsafe for kids, teens, and young
9 adults. The nicotine is harmful to their developing
10 brains as Dr. Khaldun testified. Ms. Howard doesn't
11 dispute the data.

12 And this argument that it's not as bad as
13 cigarettes or that adults may return to cigarettes or
14 that it's big business in Michigan doesn't override the
15 efforts that DHHS and the State of Michigan has taken
16 to save lives and to curb the adverse health effects
17 that these products have on our youth.

18 The medical community is struggling to
19 understand the impact of these products. This warrants
20 a temporary restriction on selling just one aspect of
21 it, to save our children from getting hooked on
22 nicotine.

23 When balancing the harm, Your Honor, it
24 weighs in favor of Defendant's actions to protect our
25 children. Implementing measures to protect access to

1 addicting substances that cause delayed brain
2 functioning, known illness and death. It outweighs the
3 temporary restriction on selling just one aspect of
4 these products.

5 In fact, Clean Cigarette doesn't even use
6 imagery to sell their product. They testified to that.
7 So that aspect of the rule doesn't apply to them at
8 all. So in considering the factors there, Your Honor,
9 clearly protecting the public health and protecting our
10 youth takes precedent.

11 Turning to the merits and potential
12 likelihood of success. And I apologize, Your Honor, if
13 I'm taking longer, but I have to address both side's
14 arguments there. So I'll address that if I can

15 The Defendants met all three criteria in
16 promulgating the emergency rules in APA. They
17 identified a public health crisis and determined that
18 the emergency rules were needed to address the vaping
19 crisis among children and young adults.

20 DHHS articulated its reasoning for the rules
21 and Governor Whitmer concurred in the emergency
22 finding. Now, Plaintiffs want to challenge the finding
23 of the emergency. The initial point is that while the
24 AFLCIO case does allow this court to review an
25 executive agency's emergency declaration. Judge

1 O' Connell, in his dissent, has suggested that it
2 should be done in very limited circumstances, if at
3 all. The legislature --

4 THE COURT: And it is dissent.

5 MR. POTCHEN: It is a dissenting opinion. I
6 fully recognize that. Aside from separation of powers
7 issue there.

8 The department clearly had a sufficient basis
9 for declaring an emergency. Children, again, are
10 getting hooked on nicotine, from the use of these
11 products. The citations, the attachments, the reports
12 to our brief, the testimony of Dr. Khaldun outlines the
13 scope of this problem among our youth and our children
14 to the extent they're claiming delay.

15 Again, Dr. Khaldun started in April of 2019.
16 I submit that the delay from her starting work at DHHS
17 and the calling of a crisis to address -- the calling
18 of an emergency to address the youth vaping crisis is
19 reasonable.

20 As to Plaintiff Slis' argument that DHHS
21 lacked authority to promulgate the rules, these rules
22 were promulgated under 33.2226, 2221, and 2233 as well
23 as the APA 24.248. Now, they want to focus on one of
24 those rules, 2233. Now, they want to argue that for
25 the past two decades since Blank, DHHS is somehow

1 engaged in administrative rule making, presumably, all
2 the rule making that DHHS has engaged in for two
3 decades is invalid. Plaintiff is wrong for a number of
4 reasons.

5 First, the Blank decision did not rule all
6 sections of 45 and 46 of the APA were unconstitutional.
7 Rather only certain parts of those sections were
8 unconstitutional. But it also stated that the
9 remaining parts remain effective.

10 Importantly, the court in Blank left in those
11 portions of section 45 and 46 that provide for
12 legislative review of rules. Now, he said that we
13 haven't fully addressed this in our briefs, and it's
14 actually caused us to look back at the history of
15 what's going on and what happened in those situations.

16 Again, we don't believe that DHHS has been
17 improperly promulgating administrative rules for the
18 past two decades. And looking at the legislative
19 history of the section that Plaintiff Slis relies so
20 heavily upon, 333.2233, DHHS remains fully empowered to
21 promulgate the rules under the public health code.

22 The trial court in Blank, that occurred in
23 1995 and that was appealed to the Michigan Court of
24 Appeals. While it was pending in the Court of Appeals,
25 Section 2 of 2233 was added under 1996 PA 67. A year

1 later, in 1997, the Court of Appeals in Blank, affirmed
2 the Court of Appeals decision. That went to the
3 Michigan Supreme Court. While the decision was pending
4 in the Michigan Supreme Court, the legislature amended
5 Sections 45 and 46 of the APA. Then the Blank decision
6 came out and the Michigan Supreme Court declared
7 unconstitutional, those parts of section 45 and 46 that
8 actually had already been legislatively eliminated. So
9 today, on the books, we have Sections 45 and 46 and
10 they are not unconstitutional.

11 In any event, another issue with Plaintiff's
12 argument is when the legislature passed that PA 67 in
13 1996, it only re-enacted and published one of the
14 relevant sections of the public health code. It did
15 not re-enact or publish Sections 2221 and 2226 which
16 gave DHHS independent authority to promulgate rules.
17 And as such, the department retained its ability to
18 promulgate rules under those sections.

19 And I cite to the Court, the case of Midland
20 Township versus State Boundary Commission 401-Mich-641.
21 So DHHS has the authority to promulgate administrative
22 rules. And the legislature did not deprive DHHS of its
23 rule making authority.

24 They mentioned the Verizon case, Your Honor,
25 and I respectfully submit those are public service

1 commission rules and we're not putting in any law
2 regarding the public service commission. But here,
3 we're talking about DHHS authority under the public
4 health code.

5 As to their claim of no public health
6 emergency, we respectfully disagree. The protection of
7 our youth is a public health concern. It affects
8 everyone when youth are being hooked and harmed by
9 nicotine. That's a public health emergency that our
10 entire community and society should be concerned with.

11 The commerce clause violations, the rules
12 don't directly discriminate against interstate
13 commerce, they don't favor interstate interest versus
14 out-of-state interest. The rules apply equally to
15 retailers or sellers in Michigan and out of state --
16 and out of Michigan regarding the sale and distribution
17 of these products. We've demonstrated that the
18 benefits of these rules outweigh the incidental burdens
19 that may impose on interstate commerce. In other
20 words, Your Honor, we've satisfied the Pike test.

21 As far as the Tobacco Control Act, it doesn't
22 prevent Michigan from regulating flavored vaping
23 products and, specifically, in Section 387 (p), it
24 states the states can impose more stringent
25 legislation. And it also indicates that states are

1 explicitly authorized to regulate the advertising and
2 promotion of tobacco products. And again, more
3 importantly, the emergency rules don't contain a limit
4 on labeling a product. Its focus is advertising.

5 As to the taking argument, and the last one
6 here, the State is not taking any product from anyone
7 nor are they taking it for public use. Plaintiffs can
8 still sell their product out of state and there's no
9 prohibition of possessing the product either. There's
10 no categorical taking.

11 In conclusion, Your Honor, we want to thank
12 the Court again for the time it put into this important
13 case. As the framers of the Michigan Constitution
14 declared in Article 4, Section 51, the public health
15 and general welfare of the people of the state are
16 matters of the primary public concern.

17 Webster's define primary to be of first rank,
18 importance or value.

19 Your Honor, with the public health crisis we
20 are facing with vaping and our youth and when looking
21 at all the factors that must be considered with issuing
22 a preliminary injunction, the item of first rank, the
23 public health of our state is primary. And Defendants
24 respectfully maintain that Plaintiffs' motion should be
25 denied.

1 THE COURT: Thank you. Do you have anything
2 additional?

3 MR. DAVIS: Your Honor, if I may, very, very
4 briefly.

5 THE COURT: Sure.

6 MR. DAVIS: Your Honor, just as to the issue
7 of the trademark and not having taken the action of
8 registering the trademark, as Your Honor, I'm sure,
9 knows, you don't have to register a trademark. If it's
10 used in commerce, it is trademarked. So their logo,
11 Clean Cigarette, is a trademark that they use in the
12 marketplace. And certainly, this stows goodwill in the
13 marketplace. It is recognizable in the marketplace.

14 You've heard testimony from their employees,
15 their owners, that this is 100 percent a product -- or
16 a logo that they've used for the past ten years
17 continuously. So while they may have not registered it
18 with the Patent and Trademark Office, they certainly
19 use it in commerce and thus, it is trademarked.

20 So as to that issue, I believe that's kind of
21 a red herring and certainly something that's -- that
22 the Court shouldn't concern itself with.

23 The other issue that I believe I just want to
24 clarify. Goodwill, and as Your Honor pointed out in
25 its order last week, is a comparable advantage over

1 others in the same or similar business or market.

2 Well, in our case, we're not able to market
3 our products using our company name. We're not able to
4 sell any of our products because they bear the logo
5 clean. What you heard from Mr. Potchen a moment ago
6 was -- it didn't dispute that. We can't use clean in
7 our name. Rule Three prohibits us from using clean in
8 our name.

9 So we can't -- even the product that the
10 State says well, that's not illegal under this ban, we
11 can't market that under this name because it says
12 "clean." These rule prohibits us using our name that
13 has established goodwill in the marketplace for
14 purposes of selling our products either in Michigan,
15 the ones that don't contain nicotine, or out of state
16 which, I would submit to Your Honor, is not even
17 possible at this point because under Rule Two, they
18 can't market online, so nobody knows that they have it.

19 So again, clean is banned. Rule Three, we
20 believe that it certainly is a deprivation of our right
21 to use the goodwill we've established in the
22 marketplace.

23 With that, Your Honor, I'm happy to answer
24 any questions Your Honor may have of me.

25 THE COURT: I have none.

1 MR. DAVIS: Thank you, Your Honor.

2 MR. BLAIR: Your Honor, I just have 30
3 seconds on substance and then I have a housekeeping
4 question.

5 On the substance, I would respectfully submit
6 that if Your Honor is satisfied that we've met the
7 standard and it may take a few days or a week to write
8 a PI opinion, the standard for TRO is supposed to be
9 lower because it's temporary. And I think we've shown
10 that every minute is causing additional irreparable
11 harm. And I'll just leave it at that.

12 My housekeeping question is can we confirm
13 which exhibits are in and if they all were admitted
14 before we adjourn today?

15 THE COURT: Okay.

16 MR. BLAIR: Okay. I think that's it.

17 THE COURT: So for the record, you admitted
18 Exhibit 1, picture of a T-shirt; Exhibit 2, a battery
19 and a car switch; Exhibit 3, pictures of an open tank;
20 picture 4, clean -- A Clean Cigarette cigarette; and
21 Exhibit 5, which I do not remember what it was.

22 MR. BLAIR: The Juul closed pod system.

23 THE COURT: The Juul closed pod system.

24 And 6?

25 MR. BLAIR: Was 6 the rules, perhaps? I

1 think we might have marked it as an Exhibit.

2 THE COURT: I think you marked six as that.

3 The Defendant, I would indicate -- let me
4 start with the Plaintiff. While you've had a
5 discussion about Ms. Howard's curriculum vitae, it was
6 never moved into the record.

7 MR. BLAIR: Your Honor, may I move that into
8 evidence now, Exhibit 6?

9 THE COURT: Which one are you talking about?

10 MR. BLAIR: Exhibit 6 is Ms. Howard's CV.

11 THE COURT: He's moving something.

12 MR. POTCHEN: I'm sorry, if they want to get
13 in her CV, she talked extensively about it, I'm okay.

14 THE COURT: Okay.

15 MR. POTCHEN: Yeah.

16 PLAINTIFF'S EXHIBIT 6

17 AMELIA HOWARD, B.A., M.A. CV

18 WAS MARKED BY THE REPORTER

19 FOR IDENTIFICATION

20 MR. BLAIR: And then, I believe 7 was marked,
21 but maybe not admitted as those, the final rules. You
22 indicated you already have that several times.

23 THE COURT: About four or five times, yeah.

24 MR. BLAIR: Yep.

25 THE COURT: Okay. And the Defendant offered

1 Exhibits 1 through 3, I've got.

2 MR. POTCHEN: I'm sorry?

3 THE COURT: Defendant offered Exhibits 1
4 through 3.

5 MR. POTCHEN: One through Two. We have two
6 exhibits.

7 THE COURT: Okay. You marked two surveys,
8 but you also -- you did introduce Doc's CV.

9 MR. POTCHEN: Doctor -- her CV is 1.

10 THE COURT: So the two pages were one
11 exhibit?

12 MR. POTCHEN: No. Dr. Khaldun's is
13 Defendant's Exhibit 1.

14 THE COURT: Weren't there two of those?

15 MR. POTCHEN: Only one CV and then --

16 THE COURT: No. Weren't there two charts?

17 MR. POTCHEN: No, there was only one chart.

18 THE COURT: Oh, okay.

19 MR. POTCHEN: Sorry.

20 THE COURT: I thought there was two charts.

21 MR. POTCHEN: No.

22 THE COURT: Did that settle that for you?

23 MR. BLAIR: Yes.

24 THE COURT: Counsel, I would ask that you all
25 submit proposed findings and fact of conclusions to

1 this Court by Friday morning. Okay. Friday at noon.

2 MR. BLAIR: Thank you, Your Honor.

3 THE COURT: If you can do it faster, I'm all
4 for it.

5 MS. REED: We are good, Your Honor, thank
6 you.

7 MR. DAVIS: I'm sorry, yes, thank you.

8 THE COURT: Okay. Thank you, very much. We
9 are in recess.

10 (The proceeding was concluded at 4:03 p.m.)

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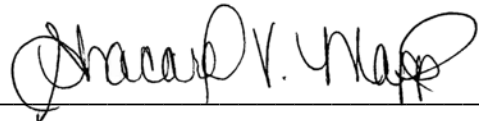
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CERTIFICATE OF NOTARY

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STATE OF MICHIGAN)
) SS
COUNTY OF MACOMB)

I, Shacara V. Mapp, Certified Shorthand Reporter, a Notary Public in and for the above county and state, do hereby certify that the above deposition was taken before me at the time and place hereinbefore set forth; that the witness was by me first duly sworn to testify to the truth, and nothing but the truth; that the foregoing questions asked and answers made by the witness were duly recorded by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor of counsel to either party, nor interested in the event of this cause.



Shacara V. Mapp, CSR-9305
Notary Public,
Macomb County, Michigan

My Commission expires: 07-25-2024

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