STATE OF MICHIGAN

IN THE SUPREME COURT

MARC SLIS and 906 VAPOR,

Plaintiff-Appellees,

v.

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

Defendant-Appellants.

Supreme Court Case No. 160431

Court of Appeals Case No. 351211

Court of Claims Case No. 2019-000152-MZ

A CLEAN CIGARETTE CORPORATION, a Michigan Corporation,

Plaintiff-Appellee,

v.

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

Defendant-Appellants.

Court of Appeals Case No. 351212

Court of Claims Case No. 2019-000154-MZ

BRIEF OF AMICUS CURIAE PROFESSOR NICHOLAS BAGLEY

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STATEMENT OF QUESTION PRESENTED

Did the Court of Claims properly enjoin an emergency rule that prohibited the sale of flavored vaping products?

STATEMENT OF INTEREST OF AMICUS CURIAE PROFESSOR NICHOLAS BAGLEY

Nicholas Bagley is a professor of law at the University of Michigan Law School and is a nationally recognized expert in both administrative law and health law. The interest of amicus is in the sound development of the law governing judicial review of agency action in the domain of public health.

SUMMARY OF ARGUMENT

In this case, a single judge on the Michigan Court of Claims enjoined an emergency rule addressing a public health crisis because she believed the crisis was insufficiently acute. As a result, highly addictive flavored vaping products that are designed to appeal to teenagers are now back on the shelves. The slow pace of court review means these products may continue to be sold for weeks or months, potentially imperiling the health and lives of thousands of Michiganders.

Of graver ongoing concern, the judge's decision undermines the separation of powers and jeopardizes the state's ability to move with dispatch to protect the public health. If left undisturbed, the decision will embolden lower courts to enjoin future emergency rules based on nothing more than their inexpert sense that the crisis in question is not a "real" emergency.

The district court's decision rests on three independent errors. First, the Michigan law governing the issuance of emergency rules precludes a court from second-guessing the state's decision that an emergency warranted immediate action. Second, the court failed to defer at all to the Michigan health agency's expert judgment in conducting its review. Third, the court held the state to a rigid evidentiary standard that does not account for the complexity of the decision to exercise the state's authority to issue emergency rules.

ARGUMENT

I. Michigan Law Precludes Judicial Review of the Decision to Adopt an Emergency Rule.

The Michigan legislature recognized that cumbersome procedural obligations might impair state officials' ability to respond swiftly to urgent threats to public health. And so, when the Michigan Department of Health and Human Services (DHHS) "finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule," the agency "may dispense" with time-consuming notice and participation procedures and issue a rule with immediate effect. MCL 24.248(1).

To prevent abuses, the legislature placed several safeguards on emergency rulemaking authority. First, emergency rules can only last for six months, subject to one six-month extension. *Id*. The strict time limit assures that any procedural hoops that the agency skips today will be jumped through tomorrow. Second, the agency must state its "reasons for that finding" to assure that the public understands the basis for its action. *Id*. Third, the governor must "concur[] in the finding of emergency," which forces her to take public responsibility for issuing an emergency rule. *Id*.

The legislature could also have conditioned the exercise of emergency authority on judicial review. But it chose not to. Instead, the law is quite plain. It says that the rule "remains in effect *until a date fixed in the rule or 6 months after the date of its filing, whichever is earlier*." *Id*. (emphasis added). *See Morales v Mich Parole Bd*, 260 Mich App 29, 36; 676 NW2d 221, 227 (2003) (holding that review of a parole board decision could not be appealed by a prisoner because "[t]he Legislature is presumed to have intended the clear meaning it expressed").

Allowing courts to enjoin emergency rules would make a hash of this carefully drawn statutory scheme. *See Miller v Allstate Ins Co*, 481 Mich 601, 611; 759 NW2d 463, 469 (2008)

(relying on the principle of "*expressio unius est exclusio alterius*" to hold that the legislature precluded judicial review by a private party); *Block v Community Nutrition Inst*, 467 US 340, 345 (1984) ("Whether . . . a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved."). As the legislature appreciated, courts are not well-suited to render decisions on complex public health matters on such a compressed timeframe. Indeed, a single injunction—like the one here—could potentially run out the entire six-month clock on the existence of an emergency rule. *Cf. Morris v Gressette*, 432 US 491, 504 (1997) (inferring the legislature's intent to preclude review of an agency action when allowing for review "would unavoidably extend" a fixed statutory period). So while judicial review of the emergency rule's *substance* can proceed in the normal course, the legislature foreclosed review of the state's decision to use emergency powers to bypass notice-and-participation procedures.

Confirming the point, the legislature required the governor to personally approve each and every emergency rule. Historically, Michigan courts have declined to review factual findings reserved by statute to the governor because review would upset the separation of powers. "[T]o all the authority specially confided to the governor . . . reasons of a conclusive nature must be presumed to have been found, requiring the particular authority to be confided to the chief executive as one properly and peculiarly, if not exclusively pertaining to the department which [s]he represents." *People ex rel Sutherland v Governor*, 29 Mich 320, 329 (1874); *see also Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 197; 631 NW2d 733, 740 (2001) ("A

question of 'primary jurisdiction' arises when a claim may be cognizable in a court but initial resolution of issues within the special competence of an administrative agency is required.").[1]

By stitching the governor into the statutory scheme, the legislature signaled that the courts were not to superintend her joint decision with DHHS that an emergency warrants immediate action. *See* Const 1963 art 3, § 2 (guaranteeing the separation of powers); *Mich State AFL-CIO v Sec'y of State*, 230 Mich App 1, 36; 583 NW2d 701, 716–17 (1998) (O'CONNELL, J., dissenting).

II. The Trial Court Failed to Defer to the Decision to Adopt an Emergency Rule.

Even if the law did allow for judicial review, the lower court erred in treating the decision to use emergency rulemaking authority as "'an issue of statutory construction'" and reviewing that decision de novo. Op. at 9 (quoting *Mich State AFL-CIO v Sec'y of State*, 230 Mich App 1, 21 583 NW2d 701, 710 (1998)).

Whether a public health crisis constitutes an emergency sufficient to ground an emergency rule is not a pure question of law. It depends, instead, on the facts on the ground. *See* Don LeDuc, Mich Administrative Law § 4:38. Here, agency decisionmakers had to answer a number of factual and predictive questions. How many teenagers are vaping? How many use flavored vaping products? How often do they transition to cigarettes? If flavored vaping products are not immediately banned, how many additional teenagers will become addicted to nicotine? How many will eventually die as a result?

[1] Though the Michigan Constitution guarantees judicial review of agency actions that are "judicial or quasi-judicial," Const 1963, art 6, § 28, the right to review does not apply to "general rulemaking." *See Midland Cogeneration Venture Ltd P'ship v. Naftaly*, 489 Mich 83, 91–92; 803 NW2d 673, 680 (2011). The Michigan Administrative Procedure Act authorizes judicial review of an agency rule, but not where, as here, "*an exclusive procedure* or remedy is provided by a statute governing the agency." MCL 24.264 (emphasis added). The Revised Judicature Act, MCL 600.631, is similarly inapplicable because the Act "does not impair the Legislature's ability to preclude judicial review" and the legislature here has "precluded review . . . by implication." *Martin v Stine*, 214 Mich App 403, 411; 542 NW2d 884, 887 (1995).

A generalist judge lacks the expertise to decide for herself whether decisive action is needed to guard the public health. That is why the legislature asked the experts within DHHS to make the call. DHHS, like other administrative agencies, is a "repositor[y] of special competence and expertise uniquely equipped to examine the facts and develop public policy within a particular field." *Attorney General v Blue Cross Blue Shield of Mich*, 291 Mich App 64, 86; 810 NW2d 603, 615 (2010) (quoting *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 197; 631 NW2d 733, 740–41 (2001)). Accordingly, judicial review "must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views." *Mich Emp't Relations Comm v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 124; 223 NW2d 283, 287–88 (1974).

The court thus erred in refusing to defer *at all* to the agency's decision. *See Baltimore Gas & Elec Co v Natural Resources Defense Council, Inc*, 462 US 87, 103 (1983) ("[A] reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, . . . a reviewing court must generally be at its most deferential.").

III. The Court Improperly Dismissed DHHS's Evidence as "Stale."

The court also held the state to a rigid evidentiary standard that does not account for the realities of public health decisionmaking in exigent circumstances. Specifically, the court held that scientific research that "was available to DHHS *at the latest* in February 2019"—a mere seven months before issuing the emergency rule—was too "stale" to "support the finding that an ongoing emergency exists." Op at 11.

The court appeared to believe that DHHS could and should have issued a proposed rule within days of the release of the most recent study upon which it relied. Between then and now,

the court believed, "the APA procedures largely could have run their course, had they been initiated." Op at 11. But the mere publication of data—however alarming the data may be—does not, by itself, demonstrate the need for an emergency rule.

Here, public health experts within DHHS had to evaluate dozens of studies and their research designs in an effort to get a complete picture of the existing body of evidence. They had to consider the public health consequences of emergency action—not only the likelihood that fewer teenagers might become addicted to nicotine if flavored products are banned, but also the possibility that the ban on vaping products might drive a shift to cigarette smoking. And they had to consult widely within the executive branch—within DHHS, with other agencies, and with the governor's office. All of this takes time. Agencies should not be encouraged to cut corners because a court might later believe they acted too slowly.

Indeed, the court's rule would hollow out the very notice-and-participation procedures that it insisted upon. A hasty proposal issued without internal deliberation and consultation would almost certainly have to be revised substantially prior to its adoption. The proposal would therefore do little to "notify affected and interested persons of the existence of the rules." *Am. Fed'n of State, Co & Muni Employees (AFSCME), AFL-CIO v Dep't of Mental Health*, 452 Mich 1, 14; 550 NW2d 190, 195 (1996) (internal quotation omitted). And any final rule would also be vulnerable to challenge on the ground that it diverged too much from the initial proposal. *See Long Island Care at Home v Coke*, 551 US 158, 174 (2007) (holding that final rules must be a "logical outgrowth" of proposed rules).

CONCLUSION

The Court of Claims should never have reviewed DHHS's and the governor's joint decision to issue an emergency rule. Having done so, the court should not have compounded its mistake by substituting its own judgment for the agency's.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Nicholas Bagley certifies that on October 25, 2019, he filed the foregoing brief and this certificate of service with the Clerk of the Court using the Court's electronic filing system, which will electronically serve all counsel of record.

/s/ Nicholas Bagley
Nicholas Bagley