

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MARC SLIS and 906 VAPOR,

Plaintiffs-Appellees,

v

STATE OF MICHIGAN and DEPARTMENT OF  
HEALTH AND HUMAN SERVICES,

Defendants-Appellants.

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A CLEAN CIGARETTE CORPORATION,

Plaintiff-Appellee,

v

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

Defendants-Appellants.

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Before: MARKEY, P.J., and JANSEN and BOONSTRA, JJ.

BOONSTRA, J. (*concurring*).

FOR PUBLICATION  
May 21, 2020

No. 351211  
Court of Claims  
LC No. 19-000152-MZ

No. 351212  
Court of Claims  
LC No. 19-000154-MZ

I fully concur in the majority opinion. I write separately because this case highlights for me a growing concern about governmental overreach, both in this case specifically and also more generally, and because sometimes we as Americans need a wake-up call. This case—particularly in the context of other recent governmental actions—provides one.

Totalitarianism<sup>1</sup> has no place in America. Has it arrived? Well, that's a question for another day. It's not a question that I will endeavor to answer, at least not yet, not in this case. But recent events in Michigan and beyond, which are unfolding by the minute and which no doubt will overtake what I am able to describe in this opinion, provide a backdrop for our consideration of the question that is presented in this case. I fear that a pattern may be emerging.

So, let's start with the general, and then I will circle back to the specifics of this vaping case and to how the general relates to the specific.

After nearly 250 years, it is easy to take our liberty for granted. We shouldn't. Our founding fathers fought and died so that we could be free from tyranny. They knew—and declared—that we are “endowed by [our] Creator”—not by government—“with certain unalienable Rights, and among them are Life, Liberty, and the pursuit of Happiness.”<sup>2</sup> It isn't like that everywhere—indeed, historically, despots, tyrants, and monarchs were the rule, not the exception. America became the exception—hence the idea of “American exceptionalism.” Upon the founding of the Massachusetts Bay colony in 1630, Gov. John Winthrop declared, “For we must consider that we shall be as a city upon a hill. The eyes of all people are upon us.”<sup>3</sup> Centuries later, President Ronald Reagan frequently spoke of America as a “shining city upon a hill,” and in his farewell address to the American people described her as “still a beacon, still a magnet for all who must have freedom, for all the Pilgrims from all the lost places who are hurtling through the darkness, toward home.”<sup>4</sup>

We live in strange times. Never in our history has virtually all of America been on lock-down. And never before has our government dared to presume that it had the authority to impose such a lock-down upon us. To be fair, we live in the midst of what has been deemed to be a “pandemic”—thanks to the COVID-19 virus. We are all naturally fearful of the resulting unknowns.<sup>5</sup> And few doubt, as a result, that we needed to take measures to protect ourselves and

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<sup>1</sup> “Totalitarian” is defined as “of or relating to a centralized dictatorial form of government requiring complete subservience to the state” or “a person advocating such a system.” *Oxford American Dictionary of Current English*, p 859.

<sup>2</sup> Declaration of Independence (1776).

<sup>3</sup> Sermon of John Winthrop, *City Upon a Hill* (or, *A Model of Christian Charity*) (1630), available at [http://www.digitalhistory.uh.edu/disp\\_textbook.cfm?smtID=3&psid=3918](http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=3918) (last accessed April 15, 2020).

<sup>4</sup> See transcript of President Ronald Reagan's Farewell Address to the American People, available at <https://www.nytimes.com/1989/01/12/news/transcript-of-reagan-s-farewell-address-to-american-people.html> (last accessed April 15, 2020).

<sup>5</sup> But keep in mind:

- John Adams once said, “Fear is the foundation of most governments; but it is so sordid and brutal a passion, and renders men in whose breasts it predominates so stupid and miserable, that Americans will not be likely to approve of any political institution which is founded on it.” See Adams,

our fellow Americans.<sup>6</sup>

This is not the time or place to judge the appropriateness of the measures that have been taken. This case isn't even about COVID. It's about vaping, and about the government's (actually, the executive branch of Michigan state government's) decision to impose emergency rules banning the sale of certain vaping products in Michigan.

But, you might ask, what does COVID have to do with vaping? Well, maybe nothing. Our Governor has herself linked the two, however. See, e.g., Shamus, *Whitmer speculates vaping could cause young people to get COVID-19. We fact checked it.*, Detroit Free Press (March 24,

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*Thoughts on Government* (April 1776). Available at <http://www.masshist.org/publications/adams-papers/index.php/view/PJA04dg2> (last accessed May 2, 2020).

- Since then, entire books have been written about how both tyrannical despots and modern-day politicians have used fear—and a culture of fear—to control the masses, to cause people to look to government to protect them, and to consolidate their own power and accomplish their own political objectives. See, e.g., Boyack, *Feardom: How Politicians Exploit Your Emotions and What You Can Do to Stop Them*, Libertas Press (2014), p 8-9 *et seq.* (“[D]espots and authoritarians have historically studied and utilized [fear] to pursue their goals. . . . What do history's most notorious despots have in common with many of the flag-waving, patriotic politicians of our day? Both groups rise to power through the exploitation of fear. Sometimes the fear derives from a pre-existing threat. At other times, crises are created or intensified to invoke a sense of panic and anxiety where none previously existed. This pattern is as predictable as it is destructive. The end result is the same: a loss of liberty. Policies that are costly, oppressive, and harmful are supported by people who abandon any interest in freedom or personal responsibility in hopes of feeling safe.”).
- Long before modern-day despots learned to use the tool of fear, it was written, “Fear thou not; for I am with thee.” Isaiah 41.10 (King James Version). See <https://www.kingjamesbibleonline.org/Isaiah-41-10/> (last accessed May 2, 2020).

<sup>6</sup> I would suggest, however, that we as Americans should think long and hard about what are our individual, personal responsibilities to protect ourselves and our fellow citizens, and what government's proper role should be. Perhaps we can rationally address that which instills fear without relinquishing our liberties.

2020);<sup>7</sup> Shamus, *Michigan governor suggested possible link between vaping and coronavirus. What do doctors say?*, USA Today (March 24, 2020).<sup>8</sup>

So, it's worth pondering. And it's worth pondering in the larger context of what is at stake generally when government acts to impose its will upon us—it is, of course, *our very liberty*. That is not something that should ever be taken—or taken away—lightly. That is why core notions of due process are so fundamental to our existence as a nation. That is why we have three separate and co-equal branches of government. That is why we have elections, and why our elected officials are accountable to us—to “We the People.”<sup>9</sup> That is why legislatures enact laws, and why it is up to the executive to sign them (or not). And it is why the judiciary defers to the legislature on matters of public policy.

Properly or not, government officials have taken unprecedented measures in the wake of COVID-19. Michigan is no exception. Without question, those measures have seriously impeded the exercise of our basic and fundamental—and oft-taken-for-granted—liberties, even, for example, our ability to gather with family members or attend religious services this past Easter or, for a perhaps more trivial but still impactful example, to buy paint from the local hardware store.

I do not pass judgment about any of those matters in this opinion.<sup>10</sup> As I said, there may be a time and place for that, but this is not it. I note only that there has been a chorus of increasingly expressed concerns emanating from wide corners of our society. I am not endorsing any particular views in this opinion, and I am sure that there are others who see things differently. At least some of the expressed concerns without question come from reputable sources. And even for those you may think are not reputable, the First Amendment has not (at least yet) been abolished, and it applies to all of us. Indeed, it's good that we are expressing our views. We as a society ought to

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<sup>7</sup> Available at <https://www.freep.com/story/news/health/2020/03/24/coronavirus-vaping-michigan-whitmer-stay-home-order/2899048001/> (last accessed April 15, 2020).

<sup>8</sup> Available at <https://www.usatoday.com/story/news/health/2020/03/24/coronavirus-vaping-michigan-whitmer-stay-home-order/2908032001/> (last accessed April 15, 2020).

<sup>9</sup> US Const, Preamble.

<sup>10</sup> I do suggest, however, that these are serious issues that deserve serious scrutiny by all Americans. The state of America today was unthinkable yesterday. The mere suggestion of it would have been cast aside as nonsense, a reactionary conspiracy theory. But here we are. Is America being taken for a test drive? If we bend today to the will of the authoritarians amongst us, what will they dare come for tomorrow? Our guns and churches? And anything else we might cling to? Rahm Emanuel recently reprised his famous line, “Never allow a good crisis go to waste. It’s an opportunity to do the things you once thought were impossible.” See Emanuel, “*Let’s make sure this crisis doesn’t go to waste*,” The Washington Post (March 25, 2020), available at: <https://www.washingtonpost.com/opinions/2020/03/25/lets-make-sure-this-crisis-doesnt-go-waste/> (last accessed May 8, 2020). The current crisis has America at a tipping point. Will we demand the liberties that have stood as the very foundation of our nation from its inception? Or will we live under the thumb of autocrats in the hope that they will keep us safe? The world of our children and grandchildren hangs in the balance.

be debating these things. That's what we do in a democracy. Particularly when the issues go to the fundamental nature of our rights as a free people.

I highlight some recent publications only to give context to the issue before us in this vaping case. The first one I quote in full.

The Wall Street Journal Editorial Board had this to say in an April 13, 2020 editorial entitled, *It's Still America, Virus or Not: Draconian orders and enforcement will undermine public support for social distancing*:

Americans by and large have willingly obeyed the government's shelter-in-place and social-distancing orders, but *that doesn't seem to be enough for some public officials. They're indulging their inner bully* in ways that over time will erode public support for behavior that can reduce the spread of the coronavirus.

*One problem is excessive enforcement.* Some state and local officials tasked with implementing shelter-at-home orders appear either to misunderstand the edicts they are meant to carry out or to suffer from a lack of discernment. Police officers in Brighton, Colo., handcuffed a man for playing with his wife and six-year-old daughter on a nearly empty softball field—though the order police claimed he had violated barred only groups of five or more. In public parks in Washington, D.C., and elsewhere, police officers are prohibiting locals from sitting on park benches, even if they are alone. In Philadelphia, police officers dragged a man from a public bus for not wearing a mask. He had evidently refused to exit the bus when asked, but the officers' conduct—given the offense—appears excessive. In their defense these officers are carrying out the orders of elected officials, and in many cases those orders are unclear or worse. In Louisville, Ky., Mayor Greg Fischer prohibited Christian believers from gathering on Easter Sunday—including in “drivethru” services in which worshippers remained in their vehicles. The mayor's position was neither constitutionally nor epidemiologically sound. A local congregation sued, arguing the mayor had violated their right to free exercise of religion. Federal Judge Justin Walker, in a cogent decision issued over the weekend, stayed the mayor's hand. President Trump recently nominated Judge Walker to the D.C. Circuit Court of Appeals, as noted in these columns. His defense of religious liberty won't endear him to Senate Democrats.

*Perhaps the most excessive decrees have come from Michigan Gov. Gretchen Whitmer.* In addition to shutting down “non-essential” businesses, as many other governors have done, Gov. Whitmer has barred Michiganders from traveling to each other's homes. “All public and private gatherings of any size are prohibited,” the Governor explained at a press conference. “People can still leave the house for outdoor activities,” she generously allowed, and outdoor activities “are still permitted as long as they're taking place outside of six feet from anyone else.”

*Michigan state officials also have imposed a series of heavy-handed restrictions,* including bans on supposedly “non-essential” sections of supermarkets, which have accordingly been cordoned off. Under Gov. Whitmer's order a Michigander can

buy a bag of candy or a lottery ticket, but not a pack of seeds or a can of paint. He can enjoy a boat ride by himself or with his dog—but not if his boat has a motor. *The logic of these seemingly arbitrary distinctions must elude most Americans.*

*As these limits on liberty drag on, the courts will be asked with growing frequency to rule on whether mayors and governors have the authority to decide which businesses must shut down and which may remain open, what products the latter may sell, and whether religious believers may be barred from gathering in a parking lot while remaining in their cars. Public-health emergencies give government officials wide latitude. But the First Amendment still bars government from prohibiting the free exercise of religion and still guarantees the right to free assembly.*

*Government officials would be better advised to govern with a lighter hand. The coronavirus threat isn't going away until we have a vaccine or better treatments, and Americans will have to practice some form of social distancing and self-quarantine for many more months once the government allows the economy to reopen. Decrees like those from the Michigan Governor's office and their capricious enforcement run the risk of encouraging mass civil disobedience that will undermine the point of the orders. Better—for reasons of public health and American constitutionalism—to treat Americans as responsible citizens.* [Editorial Board, *It's Still America, Virus or Not: Draconian orders and enforcement will undermine public support for social distancing*, The Wall Street Journal (April 13, 2020) (emphases added).<sup>11</sup>]

Surely, by the time this opinion is published, the proliferation of events and news articles will have overtaken what is compiled here by way of example. But at the risk of already being out of date, here are some other, early samplings. I won't quote them in full, but encourage you to read them. See, e.g.:

- Porteus, *The Tyrannical Soul of Gretchen Whitmer*, American Greatness (May 3, 2020) (“The state of Michigan will be governed by Whitmer’s unlimited, arbitrary will until she deigns to allow the rule of law to resume. In usurping power, Whitmer merely is revealing her nature, and it is far from unique in our history. . . . Paternal rule, unlimited power exercised by one over another, when applied to adults, under whatever guise, is simply despotic rule—it is tyranny. . . . For Whitmer, it’s her way or no way. . . . She has a tyrannical soul, and a tyrannical soul will yield to nothing but

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<sup>11</sup> Available at <https://www.wsj.com/articles/its-still-america-virus-or-not-11586718091> (last accessed April 15, 2020).

superior force. Somehow Whitmer, and others like her, will have to be compelled to respect the rule of law and the rights of the people.”).<sup>12</sup>

- The Detroit News Editorial Board, *Editorial: Lawmakers must fight gov's power grab*, The Detroit News (April 30, 2020) (“That’s a stunning power grab. Whitmer is declaring she can run the state as she pleases, for as long as she pleases, with no oversight or checks on her power. This affront to democracy must be undone by the courts. . . . From the beginning of her tenure, Whitmer has shown disdain for both the law and regular-order governing, looking for every loophole to avoid dealing with the Legislature. This time, she’s taken the state to a very dangerous place. There’s no reasonable defense, in a representative democracy, for a governor to strip the legislative branch of its constitutional authority and assume dictatorial powers in perpetuity.”).<sup>13</sup>
- Finley, *Finley: A dictator in Lansing, plus a debt we'll never repay*, The Detroit News (April 27, 2020) (“Here’s what’s changed in Michigan’s response to the COVID-19 crisis: Instead of a government that adheres to the state Constitution, it has a governor who has claimed dictatorial authority. . . . [S]he will act unilaterally to give herself total control, with no checks on her actions. This is a dangerous place to be, particularly when no one can say for certain when the crisis will end. She’s already abused her powers for political purposes by hiring a firm tightly bound to the Democratic Party to track virus data.”).<sup>14</sup>
- Gingrich, *Coronavirus Crisis Makes Some Leaders Believe They Have God-Like Decision-Making Capacity*, Fox News (April 19, 2020) (“One of the side effects of fighting the coronavirus pandemic has been the effort of some politicians to take power and run amok. Lord Acton was right when he said: ‘Power tends to corrupt, and absolute power corrupts absolutely.’ The problem isn’t leaders taking money, but rather them losing all connection to reality and beginning to believe that they have a god-like capacity to make brilliant decisions for the stupid masses. We are witnessing this effect to a troubling degree amid the coronavirus – especially among the political left, where there is a pattern of people in positions of authority believing they are superior, both intellectually and morally, to the people they are supposed to serve. . . . Michigan’s Democratic Gov. Gretchen Whitmer has

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<sup>12</sup> Available at <https://amgreatness.com/2020/05/03/the-tyrannical-soul-of-gretchen-whitmer/> (last accessed May 4, 2020).

<sup>13</sup> Available at <https://www.detroitnews.com/story/opinion/editorials/2020/04/30/editorial-lawmakers-must-fight-govs-power-grab/3056576001/> (last accessed May 1, 2020).

<sup>14</sup> Available at <https://www.detroitnews.com/story/nletter/2020/04/27/dictator-lansing-plus-debt-never-repay/3031259001/> (last accessed April 28, 2020).

provided us with a perfect case study of politicians imposing Orwellian measures supposedly to combat the coronavirus.”)<sup>15</sup>

- Davidson, *The Coronavirus Is Exposing Little Tyrants All Over The Country*, *The Federalist* (April 13, 2020) (“The response of some mayors and governors to the coronavirus pandemic in recent days has made it clear they think they have unlimited and arbitrary power over their fellow citizens. . . . Pandemic or not, this stuff has no place in American society. Petty tyranny of the kind these mayors and local officials are scheming is wholly alien to our customs and way of life, and destructive to the social contract on which our nation is built. Thankfully, the Department of Justice has taken notice of this fledgling authoritarian streak among the country’s mayors and governors. . . . Now more than ever, we need leaders who don’t just care about protecting us from the pandemic, but also care about preserving liberty in a time of crisis.”) (and further characterizing the experience in Michigan as “an object lesson in the absurdity and inconsistency of arbitrary power and rule by fiat.”).<sup>16</sup>
- McCain, *The Worst Governor in America: Gretchen Whitmer imposes insane policies on Michigan*, *The American Spectator* (April 13, 2020) (“References to Whitmer as a ‘dictator’ proliferated on social media over the weekend as Michigan residents came to grips with the consequences of the governor’s draconian order.”).<sup>17</sup>
- Blackmon, *Gretchen Whitmer: A Dangerous Object Lesson for all Americans*, *DB Daily Update* (April 12, 2020) (“[N]one of those governors and mayors can hold a candle to Michigan’s Democrat Governor, Gretchen Whitmer. Whitmer has been such a despot in exercising her nebulous emergency powers during the Wuhan Virus crisis that she is now the subject of an online recall petition that had collected over 80,000 signatures within a few hours of its being issued on Saturday.”).<sup>18</sup>

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<sup>15</sup> Available at <https://www.foxnews.com/opinion/newt-gingrich-coronavirus-crisis-makes-some-leaders-believe-they-have-god-like-decision-making-capacity> (last accessed April 19, 2020).

<sup>16</sup> Available at <https://thefederalist.com/2020/04/13/the-coronavirus-is-exposing-little-tyrants-all-over-the-country/> (last accessed April 15, 2020).

<sup>17</sup> Available at <https://spectator.org/the-worst-governor-in-america/> (last accessed April 15, 2020).

<sup>18</sup> Available at <https://dbdailyupdate.com/index.php/2020/04/12/gretchen-whitmer-a-dangerous-object-lesson-for-all-americans/> (last accessed April 15, 2020).



- Jacques, *Jacques: Whitmer disses Michigan biz community*, The Detroit News (April 11, 2020) (“Whitmer hasn’t budged. She would rather be obeyed than compromise.”).<sup>19</sup>
- Arama, *MI Dem Gov Wins the Prize for Orwellian Overreach, Banning What Citizens Can Do During Pandemic*, RedState (April 11, 2020) (“Whitmer is earning the reputation through the pandemic, as one of the worst governors for restrictions on civil liberties, without sense behind some of the actions. Whitmer gives new meaning to control and Orwellian regulations.”).<sup>20</sup>
- Wu, *AG Barr calls coronavirus restrictions “draconian,” says they should be reevaluated next month*, Ionia Sentinel-Standard (April 9 2020) (reprinted from USA Today), (“Officials, [Attorney General William] Barr said, should be ‘very careful to make sure . . . that the draconian measures that are being adopted are fully justified, and there are not alternative ways of protecting people.’ ”).<sup>21</sup>
- Lennox, *Opinion: Absent martial law, state must follow constitution in coronavirus response*, The Detroit News (March 16, 2020) (“Without martial law, the Democratic governor’s actions have been seen by some as legally suspect at best and deeply unconstitutional at worst. . . . Where are the civil libertarians, particularly the American Civil Liberties Union? If there were ever a time to affirm the rights and liberties of Michigan residents, it’s now.”).<sup>22</sup>

A perusing of other publications would reveal further characterizations of government officials as “tyrannical,” “Mussolinis,” “authoritarian,” “dictatorial,” and worse. Protests have been held, and calls for impeachment or recall have been heard. And criticisms have been leveled at our executive branch officials from legislators and everyday Michiganders alike. Lawsuits have now been filed.

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<sup>19</sup> Available at <https://www.detroitnews.com/story/opinion/columnists/ingrid-jacques/2020/04/11/jacques-whitmer-disses-michigan-biz-community/5130279002/> (last accessed April 15, 2020).

<sup>20</sup> Available at <https://www.redstate.com/nick-arama/2020/04/11/mi-dem-gov-wins-the-prize-for-orwellian-overreach-with-her-overreach-on-what-citizens-are-banned-from-doing/> (last accessed April 15, 2020).

<sup>21</sup> Available at <https://www.sentinel-standard.com/zz/news/20200409/ag-barr-calls-coronavirus-restrictions-draconian-says-they-should-be-reevaluated-next-month> (last accessed April 15, 2020).

<sup>22</sup> Available at <https://www.detroitnews.com/story/opinion/2020/03/16/opinion-whitmer-just-declare-martial-law/5058127002/> (last accessed April 15, 2020).

Back to vaping. On December 18, 2018, United States Surgeon General Vice Adm. Jerome M. Adams released an Advisory on E-cigarette Use Among Youth, describing an “epidemic of youth e-cigarette use” and stating that “[w]e must take action now to protect the health of our nation’s young people.”<sup>23</sup> I have little doubt that the Surgeon General has identified a serious public health concern that may warrant a governmental response, just as his predecessor identified one in 1964 regarding cigarette smoking generally.<sup>24</sup>

So, what did Michigan do in response to the Surgeon General’s 2018 vaping advisory? Did the Legislature enact a law for the Governor’s signature? Yes, it did, just as the United States Congress had earlier done in response to the Surgeon General’s 1964 advisory.<sup>25</sup> As the majority opinion describes, the Legislature enacted (and the Governor signed) 2019 PA 18, effective September 2, 2019, amending the youth tobacco act, MCL 722.641 *et seq.*, and extending the existing prohibition on sales of tobacco products to minors to further prohibit the sale of “vapor products” and “alternative nicotine products” to minors.

But the Legislature had also already done what legislatures near and far now commonly do—it had delegated quasi-legislative authority to an executive agency, in this case the Department of Health and Human Services (DHHS).<sup>26</sup> See MCL 333.2226(d) (authorizing DHHS to

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<sup>23</sup> See *Surgeon General’s Advisory on E-cigarette Use Among Youth*, available at <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf> (last accessed April 15, 2020).

<sup>24</sup> According to the U.S. National Library of Medicine, the 1964 report, which highlighted the serious public health consequences of cigarette smoking, was issued “on January 11, 1964, choosing a Saturday to minimize the effect on the stock market and to maximize coverage in the Sunday papers,” and it “hit the country like a bombshell. It was front page news and a lead story on every radio and television station in the United States and many abroad.” See the *Surgeon General’s 1964 Report on Smoking and Health*, citing *Smoking and Health: Report of the Advisory Committee to the Surgeon General*, available at <https://profiles.nlm.nih.gov/spotlight/nn/feature/smoking> (last accessed April 15, 2020).

<sup>25</sup> Congress responded to the Surgeon General’s 1964 report by passing the Federal Cigarette Labeling and Advertising Act of 1965 and the Public Health Cigarette Smoking Act of 1969.

<sup>26</sup> James Madison, one of the principal authors of the United States Constitution, famously wrote that the “accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny.” *The Federalist* No. 47 (Madison) (Cooke ed., 1961), p 324. Indeed, the administrative state “wields vast power and touches almost every aspect of daily life.” *Free Enterprise Fund v Public Company Accounting Oversight Bd*, 561 US 477, 499, 130 S Ct 3138, 3156; 177 L Ed 2d 706 (2010). As Chief Justice Roberts has observed, “[t]he framers could hardly have envisioned today’s ‘vast and varied federal bureaucracy’ and the authority administrative agencies now hold over our economic, social, and political activities. *City of Arlington, Texas v Federal Communications Comm*, 569 US 290, 313; 133 S Ct 1863; 185 L Ed 2d 941 (2013) (Roberts, C.J., dissenting), citing *Free Enterprise Fund*, 130 S. Ct at 499. And as Justice David Souter noted of the framers, “the administrative state with its reams of regulations would leave them rubbing their eyes.” *Alden v Maine*, 27 US 706, 807; 119 S Ct 2240; 144 L Ed

“[e]xercise authority and promulgate rules to safeguard properly the public health; to prevent the spread of diseases and the existence of sources of contamination; and to implement and carry out the powers and duties vested by law in the department”).

So DHHS took its delegated quasi-legislative authority and promulgated rules that, among other things, banned the sale of flavored nicotine vapor products in Michigan.

Not to worry, right? Surely there must be safeguards to ensure that agencies like DHHS do not run amok. And, indeed, agency rule-making is subject to the administrative procedures act of 1969 (APA), MCL 24.201 et seq. MCL 24.243 of the APA provides, generally, that “a rule is not valid unless it is processed in compliance with section 66, if applicable, section 42, and in substantial compliance with section 41(2), (3), (4), and (5)” (citations omitted).<sup>27</sup>

But there is a built-in exception within the APA to an agency’s obligation to comply with the otherwise-applicable safeguards. MCL 24.248(1) authorizes an agency to promulgate “emergency rules” in certain circumstances. Specifically, it states:

If an agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice and participation procedures required by [MCL 24.241 and MCL 24.242] and states in the rule the agency's reasons for that finding, and the governor concurs in the finding of emergency, the agency may dispense with all or part of the procedures and file in the office of the secretary of state the copies prescribed by section [MCL 24.246] endorsed as an emergency rule, to 3 of which copies must be attached the certificates prescribed by section [MCL 24.245] and the governor's certificate concurring in the finding of emergency. The emergency rule is effective on filing and remains in effect until a date fixed in the rule or 6 months after the date of its filing, whichever is earlier. The rule may be extended once for not more than 6 months by the filing of a governor's certificate of the need for the extension with the office of the secretary of state before expiration of the emergency rule . . . .

That is how we got to where we are today. The Legislature delegated rule-making authority to DHHS, authorized it to promulgate emergency rules under certain circumstances without following the usual safeguards, DHHS invoked that authority and obtained the concurrence of the

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2d 636 (1999) (Souter, J., dissenting). See also, e.g., Cooper, *Confronting the Administrative State*, National Affairs (Fall 2015), available at <https://www.nationalaffairs.com/publications/detail/confronting-the-administrative-state> (last accessed April 15, 2016).

<sup>27</sup> MCL 24.421 provides for notice and a public hearing, a “statement of the terms or substance of the proposed rule, a description of the subjects and issues involved, and the proposed effective date of the rule,” and a “statement of the manner in which data, views, questions, and arguments may be submitted by a person to the agency.” MCL 24.242 provides requirements for the publication of a notice of public hearing. And MCL 24.266 relates to environmental issues.

Governor (to which the agency itself reported),<sup>28</sup> and, *voila*, Michigan had banned the sale of flavored e-cigarettes. And on the eve of the scheduled 6-month expiration of the emergency rules, the Governor decreed that the emergency rules be extended for an additional six months,<sup>29</sup> i.e., until September 18, 2020.<sup>30</sup>

Now, that isn't how we teach our kids about how laws are made.<sup>31</sup> And it's not what our founding fathers envisioned—this is a far cry from that.

So, why was it necessary for DHHS to act on an “emergency” basis, bypassing the usual notice and comment safeguards otherwise mandated by the APA? After all, the Surgeon General's report included specific sections identifying the actions that he believed should be taken by parents, teachers, and health professionals, as well as by states and other governmental actors like the state of Michigan. In a section of the report entitled, “Information for States, Communities, Tribes, and Territories,” Dr. Adams provided the following specific recommendations for states like Michigan:

#### **Information for States, Communities, Tribes and Territories**

- **You have an important role to play in addressing this public health epidemic.**
- Implement evidence-based population-level strategies to reduce e-cigarette use among young people, such as including e-cigarettes in smoke-free indoor air policies, restricting young peoples' access to e-cigarettes in retail settings, licensing retailers, implementing price policies, and developing educational initiatives targeting young people.

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<sup>28</sup> I note that DHHS promulgated the emergency rules on September 18, 2019, and that they went into effect on October 2, 2019, after the Governor gave her consent. However, the New York Times reported on September 4, 2019—before the rules were promulgated—that “Gov. Gretchen Whitmer of Michigan said Wednesday that she would outlaw the sale of flavored e-cigarettes in her state, part of a national crackdown on vaping amid a recent spike in illnesses tied to the products.” See Smith, *Amid Crackdown, Michigan to Ban Sale of Flavored E-Cigarettes*, New York Times (Sept 4, 2019), available at <https://www.nytimes.com/2019/09/04/us/michigan-vaping.html> (last accessed April 15, 2016).

<sup>29</sup> MCL 24.248(1) allows such an extension upon the filing of a certificate of need by the Governor.

<sup>30</sup> Although the trial court's injunctive order entered on October 15, 2019, the Governor waited until March 11, 2020 to issue her diktat extending the emergency rules for an additional six months, albeit without DHHS in the interim pursuing normal rule-making through the still-available procedures of the APA, including its typically-mandated notice and comment safeguards.

<sup>31</sup> See, e.g., How a Bill Becomes a Law, available at <https://kids-clerk.house.gov/grade-school/lesson.html?intID=17> (last accessed April 15, 2020).

- Implement strategies to curb e-cigarette advertising and marketing that are appealing to young people.
- Implement strategies to reduce access to flavored tobacco products by young people. [Surgeon General’s Advisory on E-cigarette Use Among Youth, p 3.]

Notably, Dr. Adams said *nothing* about a need for emergency bans.

Because DHHS skipped the usual notice and comment procedures, there was no public discussion of the merits or demerits of the proposed rules. And even in the trial court, defendants offered only vague generalities, and presented no evidence or rationale for why the circumstances required that the normal rulemaking process be abandoned, why the extreme measure of banning *all* flavored nicotine vaping products was necessary, why lesser measures were not adequate, or why the actions outlined by the Surgeon General would not suffice during a limited interim time period during which the usual notice and comment procedures could be followed.<sup>32</sup>

The trial court in this case issued a preliminary injunction enjoining the enforcement of the emergency rules. Like the majority, I question some of the trial court’s rationale. But, like the majority, I also conclude that defendants have overstepped their authority in this case. Preliminary injunctions should not be granted lightly. But neither should liberty be taken from us lightly.

As the adage goes, “give them an inch and they’ll take a mile.” Amidst the COVID-19 pandemic, that adage has new meaning. It even applies to vaping.

For these additional reasons, I concur.

/s/ Mark T. Boonstra

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<sup>32</sup> Defendants did not, for example, discuss the difference between cartridge-based products favored by youth, such as JUUL, which the Surgeon General stated had experienced a 600% surge in sales in 2016-2017 and had the greatest market share in 2017, as opposed to other flavored vaping products used by adults in order to quit smoking, and why a ban on all flavored products was required, or why it was not following the lead of the United States Food and Drug Administration in targeting its enforcement efforts toward cartridge-based flavored vaping products. See United States Food and Drug Administration, *FDA finalizes enforcement policy on unauthorized flavored cartridge-based e-cigarettes that appeal to children, including fruit and mint* (January 2, 2020), available at <https://www.fda.gov/news-events/press-announcements/fda-finalizes-enforcement-policy-unauthorized-flavored-cartridge-based-e-cigarettes-appeal-children> (last accessed April 15, 2020).