STATE OF MICHIGAN
IN THE 46th JUDICIAL CIRCUIT COURT FOR OSTEGO COUNTY

MOORE MURPHY HOSPITALITY, LLC D/B/A IRON PIG SMOKEHOUSE,

Petitioner-Appellant,

v

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent-Appellee.
_____/

Case No.: 2021-18522-AE

HON. COLIN G. HUNTER

BRIEF OF APPELLEE-MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES

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STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal under MCR 7.103(A)(3). Appellee Michigan Department of Health and Human Services concurs in the basis of jurisdiction.

INTRODUCTION AND BACKGROUND

The seriousness of the COVID-19 pandemic is beyond dispute. It has claimed over 22,000 lives in Michigan alone and over 4.5 million worldwide since its onset. Unfortunately, it is not done taking its toll in the United States, where the virus has continued to spread in many states.

This appeal centers on the question of whether this Court should undermine a critical tool the Legislature has provided for a statewide response to events such as this, or any future epidemic, to spare Appellant Iron Pig Smokehouse (Iron Pig) from a $5,000 fine. Appellee Michigan Department of Health and Human Services (Department) has issued emergency orders throughout the pandemic in an effort to mitigate the spread of COVID-19, including the November 15, 2020 Emergency Order forming the basis of this appeal. Iron Pig restaurant opened to the public in flagrant violation of the indoor dining restrictions in that Order, proudly defying the Order that thousands of other restaurants followed. Iron Pig was assessed a $5,000 civil fine for its well-documented violations of this Order. For the reasons set forth below, this Court should affirm the Department's finding that Iron Pig violated the November 15, 2020 Emergency Order.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

The facts surrounding the COVID-19 pandemic are well-established. SARS-CoV-2 is similar to other coronaviruses (a large family of viruses that cause respiratory illnesses), but the strain is novel. Since December 2019, over 1.2 million Michigan residents have been diagnosed with COVID-19 and 22,864 Michigan residents have died from the disease.[1] It is widely known and accepted that COVID-19, the disease that results from the virus, is highly contagious, spreading easily from person to person via "respiratory droplets."[2] A person can spread the disease before even perceiving symptoms.[3]

On March 10, 2020, in response to the growing pandemic in Michigan, Governor Whitmer declared a state of emergency and invoked the emergency powers available to the Governor under Michigan law.[4] Soon thereafter, the Department Director began issuing emergency orders under Michigan's Public Health Code, MCL §§ 333.1101, *et seq*.[5] On November 15, 2020, the Director issued

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[1] Coronavirus Michigan Data, https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html.

[2] See, e.g., CDC, *Considerations for Restaurants and Bar Operators* (Dec. 16, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businessemployers/bars-restaurants.html.

[3] CDC, *Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic* (May 4, 2020), https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article (explaining that "[o]ne report suggested that up to 13% of infections may be transmitted during the presymptomatic period of illness").

[4] All executive orders can be found at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html.

[5] All MDHHS emergency orders related to COVID-19 are available at https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-533660--,00.html

an emergency order under MCL 333.2253—Gathering and Face Masks Order. ("Emergency Order").[6] This Order came amidst a dire surge in viral transmission and death in our state: between October 1 and November 15, 2020, Michigan's COVID-19 rate of positivity increased by 225% (despite only a 78% increase in administered tests), its per-capita case count increased fivefold, and its death rate increased fourfold.[7] Furthermore, while safe and effective vaccines for COVID-19 have now become widely available, that was not yet the case at that time.

The Emergency Order was issued to control this surging spread of COVID-19 and protect public health by establishing restrictions on gatherings, including temporarily prohibiting gatherings of patrons inside food service establishments—a type of gathering recognized as high-risk by public health experts, given the inability to mask consistently when eating or drinking and the heightened risk of transmission that attends sustained indoor gatherings more generally.[8] Section 2(a)(2) of the Emergency Order stated that indoor gatherings were "prohibited at non-residential venues." Thus, indoor dining at food service establishments like Iron Pig were prohibited, but such businesses were able to continue with take-out, outdoor dining, and delivery services under section 3(b).

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[6] (Motion for Summary Disposition, Exhibit A.)

[7] *Id.*

[8] (Footnote 2); CDC, *Community and Close Contact Exposures Associated with COVID-19 Among Symptomatic Adults ≥18 Years in 11 Outpatient Health Care Facilities – United States*, July 2020 (Sept. 11, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6936a5.htm?s_cid=mm6936a5_x.

On November 25, 2020, Gaylord Police Department Officer Stefan Crane visited Iron Pig, located at 143 West Main Street, Gaylord, Michigan 49735. Officer Crane observed that Iron Pig was open for indoor dining in violation of sections 2(a)(2) and 3(b)(1) of the Emergency Order. (Motion for Summary Disposition, Exhibit B.) Iron Pig was notified of this violation through an Order to Cease and Desist Food Service Operations by the Health Department of Northwest Michigan. (Motion for Summary Disposition, Exhibit C.)

On December 1, 2020, the Department issued Iron Pig a citation for additional violations of the Emergency Order. (Motion for Summary Disposition, Exhibit D.) Specifically, it was found that Iron Pig continued to allow indoor dining in violation of the Emergency Order for a total of five days. Iron Pig's defiance of the Emergency Order on those five days is clear and undisputed. Iron Pig's Facebook page was active with regular posts about being open despite orders to the contrary. For example, Iron Pig advertised a "Thanksgiving Eve Party!" occurring on Wednesday, November 25, 2020, a date included in the citation. (Motion for Summary Disposition, Exhibit E.) Iron Pig also posted on its Facebook page a new slogan to attract customers to its restaurant: "Risk it to get the brisket." *Id.* Further, when interviewed by local news on December 15, 2020, owner Ian Murphy reiterated the restaurant had no intentions of closing.[9] Iron Pig stayed open in

[9] 9&10 News, *Judge Issues Fines, Suspension of Iron Pig Smokehouse Liquor License* (Dec. 15, 2020), https://www.9and10news.com/2020/12/15/judge-issues-fines-suspension-of-iron-pig-smokehouse-liquor-license/

defiance of the Department's Order and there was no question it was in direct violation of such Order.

ADMINISTRATIVE PROCEEDINGS

Iron Pig timely appealed the Department's Administrative Citation to the Michigan Office of Administrative Hearings and Rules (MOAHR). The Department filed a Motion for Summary Disposition and Iron Pig filed a response. Iron Pig did not dispute it was open for indoor dining on the dates at issue, and offered only a cursory mootness argument in opposing the motion. (Motion for Summary Disposition; Response.) On March 3, 2021, Administrative Law Judge (ALJ) Kibit held a hearing on the Department's Motion for Summary Disposition. (ALJ Order dated March 10, 2021.) Neither party presented any witnesses. *Id.* ALJ Kibit issued and entered a decision and order dated March 10, 2021. (Motion for Summary Disposition.)

The ALJ's order granted the Department's Motion for Summary Disposition and affirmed the Department's Administrative Citation in its entirety. *Id.* In the decision and order, ALJ Kibit stated that the Department met its burden of proving no genuine issue of material fact existed as to whether Iron Pig was open for indoor dining in violation of the Emergency Order. *Id.* ALJ Kibit stated that Iron Pig failed to respond to any factual arguments made by the Department at the hearing or in its briefing. *Id.* Further, ALJ Kibit found that Iron Pig's claim of "mootness" of the Administrative Citation failed because Iron Pig offered no justification or

argument in support.[10] *Id.* ALJ Kibit found that the Department properly cited Iron Pig for its five violations of the November 15, 2020 Order. *Id.* On May 6, 2021, Iron Pig filed an "Appeal of Administrative Order and Complaint" with this Court raising six counts. (Claim of Appeal.)

This Court entered an Order on July 27, 2021, after stipulation of the parties, limiting this appeal to two issues.[11] First, "Does MCL 333.2253(1) violate the non-delegation clause of the Michigan Constitution?" (Stipulation, Attachment 1.) Second, "Are the MDHHS orders a 'rule' as defined in MCL 24.207 and did the MDHHS comply with the notice of public hearing requirements of MCL 24.241?" *Id.*

[10] ALJ Kibit expressly rejected the mootness argument and found "[Iron Pig] only offered unpersuasive allusions to uncited Michigan case law and unidentified factual issues on the record" at the hearing. *Id.*

[11] The parties also stipulated to the administrative record that would serve as the basis for this appeal.

STANDARD OF REVIEW

The Administrative Procedures Act (APA) provides the applicable scope of review for an agency's decision:

> (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
>
> (a) In violation of the constitution or a statute.
> (b) In excess of the statutory authority or jurisdiction of the agency.
> (c) Made upon unlawful procedure resulting in material prejudice to a party.
> (d) Not supported by competent, material and substantial evidence on the whole record.
> (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
> (f) Affected by other substantial and material error of law. [MCL 24.306(1).]

Circuit Court review of an administrative decision is limited to determining whether the decision was rendered in accordance with law and whether factual findings were supported by competent, material and substantial evidence on the record. *Dignan v Michigan Pub Sch Employees Ret Bd,* 253 Mich App 571, 576 (2002). There is no dispute in this appeal that the Department presented substantial evidence of Iron Pig's violations of the order, and Iron Pig thus frames its appeal entirely on legal grounds.

"Judicial review of an administrative agency's decision regarding a matter of law is limited to determining whether the decision was authorized by law." *Mericka v Dep't of Community Health*, 283 Mich App 29, 35 (2009). In reviewing questions of law, "[c]ourts—including trial courts reviewing an agency's decision—review de

novo issues of constitutional law and statutory construction." *Oshtemo Charter Twp v Kalamazoo Cty Rd Comm'n*, 302 Mich App 574, 583 (2013).

A reviewing court does not have equitable jurisdiction over an administrative decision. *Huron Behavioral Health v Dep't of Community Health*, 293 Mich App 491, 497-498 (2011).

ARGUMENT

I. MCL 333.2253(1) does not violate the non-delegation clause of the Michigan Constitution.

The first question before the Court is whether MCL 333.2253 constitutes an unlawful delegation of legislative authority. In raising this claim, Iron Pig invokes *In re Certified Questions*, 506 Mich 332 (2020), in which a 4–3 majority of the Michigan Supreme Court recently breathed new life into this state's nondelegation doctrine, extending it to strike down a statute, the Emergency Powers of the Governor Act (EPGA), MCL 10.31 *et seq*., that had provided a foundation for Governor Whitmer's response to the COVID-19 pandemic. (Claim of Appeal, p 4.) Iron Pig seeks to graft that same result onto the Director's distinct and independent authority under MCL 333.2253.

Setting aside whether *Certified Questions* was rightly decided,[12] the ruling itself makes clear that Iron Pig's reliance on it here is misplaced. The decision reflected what was, in the majority's view, a singularly exceptional intersection between "an extraordinary doctrine, not routinely to be invoked," and an "extraordinary" statute in the EPGA, which was incomparable to "any other law of this state" in the nature of its delegation. *Id.* at 372 n 21 (emphasis added). Indeed, the majority expressly stated that "[w]e do not believe that the conflation of circumstances giving definition to the delegated powers in this case . . . will soon

[12] While, for all the reasons set forth above, there is no need for this Court to consider the question here, the Department notes its position, for preservation purposes, that *Certified Questions* was wrongly decided.

come before this Court again," *id*. at 384, all while plainly aware of MCL 333.2253 and its use to combat the instant pandemic. See, e.g., *id.* at 405 (Viviano, J., concurring in part and dissenting in part), 432 (McCormack, C.J., concurring in part and dissenting in part).

The *Certified Questions* majority, in other words, anticipated claims such as Iron Pig's, and signaled they should be rejected. And on this point, at least, the majority was correct, as settled law makes clear that Iron Pig's nondelegation challenge to MCL 333.2253 is baseless.

The Michigan Constitution provides for the separation of powers among the three branches of state government:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch. [Const 1963, art 3, § 2].

But Michigan courts have never interpreted the separation of powers doctrine to mean there can never be any overlapping of functions between branches. See *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 752 (1982) ("while art. 3, § 2, of the constitution provides for strict separation of power, this has not been interpreted to mean that the branches must be kept wholly separate"), citing *People v Piasecki*, 333 Mich 122, 146 (1952); *In re Southard*, 298 Mich 75, 83 (1941).

The separation of powers doctrine "ha[s] led to the constitutional discipline that is described as the nondelegation doctrine." *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8 (2003). While the legislative power – the power "to make, alter,

amend, and repeal laws" – sits with the Legislature, *Harsha v City of Detroit*, 261 Mich 586, 590 (1933), both the U.S. and Michigan Supreme Courts "ha[ve] recognized that the separation of powers principle, and the nondelegation doctrine in particular, do not prevent [the legislative branch] from obtaining the assistance of the coordinate Branches." *Taylor*, 468 Mich at 8 (internal quotes omitted).

The Michigan doctrine of non-delegation has been expressed in terms of a "standards test." *Westervelt v Natural Resources Comm*, 402 Mich 412, 437 (1978) (Williams, J., lead opinion); *id*. at 454 (Ryan, J., concurring). In *Blue Cross & Blue Shield of Mich v Milliken*, the Michigan Supreme Court outlined the three core components of the test:

> (1) the act must be read as a whole;
>
> (2) the act carries a presumption of constitutionality; and
>
> (3) the standards must be as reasonably precise as the subject matter requires or permits. [422 Mich 1, 51–52 (1985).]

The analysis includes consideration of the safeguards existing to protect against abuses of discretion by those administrative officials exercising delegated power. *Id.* at 23; *Westervelt,* 402 Mich at 442–443.

A. The statute viewed in its legislative context.

The inquiry begins by considering the challenged statute in the context of the legislative enactment of which it is a part. By its plain language, MCL 333.2253 exists to address epidemics. The statute is included within Michigan's Public Health Code, which has constitutional origins. Through their Constitution,

Michiganders declared the public health and welfare to be matters of primary public concern and charged their Legislature with the duty to implement laws in furtherance of that directive. Const 1963, art IV, § 51. The Legislature acknowledged this constitutional obligation in ascribing duties to the Department headed by the Director. MCL 333.2221(1). And that Department was charged with making investigations and inquiries into the causes of disease, "especially epidemics." MCL 333.2221(2)(d). Reading MCL 333.2221 and MCL 333.2253 together it is clear the Legislature was putting special emphasis on the investigation of, and response to, epidemics as the quintessential threat to what Michiganders had constitutionally declared to be their primary concerns. And for good reason; the Spanish Flu epidemic of more than a century ago, and now COVID-19, have been among the deadliest events in our nation's history.[13]

Within the context of the Public Health Code, it is also significant that the unique and flexible authority under § 2253 was delegated specifically to the Director. The Legislature installed guardrails on this authority by requiring the Director to be qualified in public health administration. MCL 333.2202(1). And if the Director is not a physician, the Legislature ensured one would be installed within the Department as Chief Medical Officer to advise the Director. MCL 333.2202(2).

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[13] Jim Sergent & Ramon Padilla, *Americans dying faster of COVID-19 than our soldiers did in WWII* (Jan. 19, 2021), https://www.usatoday.com/in-depth/news/2021/01/19/covid-19-deaths-americans-dying-faster-than-our-soldiers-did-wwii/6602717002/

Further, these legislative safeguards are augmented by political ones. Michigan's Supreme Court has recognized safeguards exist when a delegation is made to officials appointed by the Governor as opposed to more remote governmental employees. *Westervelt*, 402 Mich at 448-449. Former Director Robert Gordon was a department head appointed by the Governor pursuant to Const 1963, art 5, § 2.[14] And the Chief Medical Officer advising former Director Gordon was appointed by the Governor pursuant to MCL 333.26369, which also makes her a part of the Governor's cabinet.[15] Structurally, this creates accountability through the political process. And the practical application of this principle is obvious today: how the electorate views Governor Whitmer is indisputably shaped by her administration's public health response to COVID-19.

B. The statute must be presumed constitutional.

By specifically listing it as a consideration, *Blue Cross* made clear that a delegation attack does nothing to abrogate the presumption of constitutionality enjoyed by Michigan statutes. The Legislature has generally sought to preserve the products of its deliberations through the interpretative guidance found in MCL 8.5. And it has put a special emphasis on shielding § 2253 and the other provisions of the Public Health Code from narrow or destructive readings by expressly requiring

[14] Current Department Director Elizabeth Hertel replaced former Director Robert Gordon effective January 21, 2021.

[15] See https://www.michigan.gov/mdhhs/0,5885,7-339-73970_73993-497860--,00.html.

them to be "liberally construed for the protection of the health, safety, and welfare of the people of this state." MCL 333.1111(2).

The historical context in which § 2253 arose also underscores the correctness of its presumed constitutionality. In 1918, as Michigan was in the midst of the Spanish Flu epidemic, Governor Albert Sleeper issued a broad order closing schools and businesses and prohibiting gatherings. Justice Viviano's partial concurrence in *Certified Questions* reflects this history, noting "the 1919 law passed in the wake of the influenza epidemic and Governor Sleeper's actions is still the law, albeit in slightly modified form". *In re Certified Questions*, 506 Mich 332, 404-405 (2020) (VIVIANO, J., concurring). And our Supreme Court has long endorsed the use of legislatively created tools against such scourges. *Hill v City of Lansing*, 224 Mich 388, 391 (1923) ("[A] community has the right to protect itself against an epidemic of disease which threatens the safety of its members."); *Rock v Carney*, 216 Mich 280, 290 (1921) (The health of the people is of supreme importance to the State, and measures reasonably calculated to promote the public health have with uniformity been sustained.").[16] The Legislature is deemed to have been aware of such precedents in 1978 when it established § 2253 and the rest of the Public Health Code. *Dean v Chrysler Corp*, 434 Mich 655, 665 (1990).

[16] Michigan is not unique in this regard. As the New Mexico Supreme Court recently observed the "delegation of substantial discretion and authority to the executive branch (including state or local health boards) to respond to health emergencies has a long history in the United States." *Grisham v Romero*, 2021-NMSC-009, ¶ 34, 483 P3d 545, 557 (NM 2021).

C. The standards in § 2253 are as reasonably precise as their subject permits.

The remaining consideration relates to the preciseness of the standards contained within MCL 333.2253. "The preciseness of the standard will vary with the complexity and/or the degree to which subject regulated will require constantly changing regulation." *State Conservation Dep't v Seaman*, 396 Mich 199, 210 (1976). There should be a commonsense construction aimed at carrying out legislative intent, with an eye toward "flexibility and practicality." *Mistretta v United States*, 488 US 361, 372 (1989).

By its plain language, § 2253 applies only in the single and unique context of epidemics. The past nineteen months have well illustrated that epidemics are both complex and constantly changing events, with the scientific understanding of both the disease and mitigation measures developing over time. The need for flexibility and nimbleness in responding to such circumstances is self-evident and paramount.

Section 2253 meets that critical need in a carefully tailored and targeted fashion. It authorizes the Director to issue emergency orders that take two discrete forms of action in response to epidemics—the prohibition of gatherings for any purpose, and the establishment of procedures to ensure the continuation of essential public health services—and only when the Director determines such action is "necessary to protect the public health" of Michiganders. This kind of necessity standard is a common legislative design, and it has withstood the test of time in Michigan, particularly when coupled with other standards as § 2253 provides. See, e.g., *Mich State Hwy Comm v Vanderkloot*, 392 Mich 159 (1974) (upholding

"necessity" as a standard for the exercise of Department of Transportation's authority to take property under eminent domain); cf *Certified Questions*, 506 Mich at 369 n 20, 371 (recognizing that, while the term "necessary" was not "by itself a sufficient standard . . . in the context of the remarkably broad powers conferred by the EPGA," it "might be sufficient" in other contexts).

The Legislature has thus vested the Director with power to take certain specified, appropriate actions to protect the health and lives of Michiganders when faced with a particular type of circumstance—an epidemic—and only so long as the action is necessary to control that epidemic. That Iron Pig is dissatisfied with the indoor dining limitations the Director imposed to mitigate the spread of COVID-19 does nothing to undermine the propriety of the discretion with which the Legislature vested the Director. The Director increased and relaxed restrictions based on the circumstances prevailing at the time the adjustments were made, including eliminating all restrictions on June 22, 2021.[17] These are the kinds of complex, fluid circumstances administrative officials with the requisite expertise are best equipped to handle. The Legislature rightly recognized this in enacting MCL 333.2253, and duly discharged its constitutional duty to pass laws that best protect the public health of the People. Const 1963, art 4, § 51. There is no basis to disrupt that law here.

[17] Recission of Emergency Orders, June 17, 2021, https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455_98456_103043-562057--,00.html

II. The Department's orders are not "rules" as defined in MCL 24.207 and, therefore, public hearing requirements are not applicable.

The second issue before this Court is whether the Department's Orders constitute "rules" under the APA, such that they were required to be promulgated under the procedures described in that act. Iron Pig alleges the Department's "orders are subject to administrative rulemaking requirements" and therefore "subject to reversal." (Claim of Appeal, pp 6-7.) But the Legislature has made perfectly clear, in both the APA and the Public Health Code, that this is not so. Correspondingly, the Court of Claims, in rulings from two different judges, has already—and rightly—rejected this very same line of attack against the Department's Orders. *Let Them Play v Hertel*, Court of Claims No. 21-60-MZ, Opinion and Order Denying Preliminary Injunction, pp 3-5, April 28, 2021 (Kelly, J.) (Attachment 2); *Let Them Play v Hertel*, Court of Claims No. 21-60-MZ, Opinion and Order, pp 5-10, June 1, 2021 (Gleicher, J.) (granting summary disposition to the Department) (Attachment 3).

To start, the Orders are not "rule[s]" as defined by the APA because they fall under the exception laid out in § 7(j) of the APA, which expressly provides that a "rule," for purposes of the APA, does not comprise "[a] decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." MCL 24.207(j).

The Orders were issued pursuant to MCL 333.2253(1), which specifically empowers the Department Director to issue *emergency orders* in a specific and discrete set of circumstances:

> "If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code." [MCL 333.2253(1)].

This is just the sort of "permissive statutory power" which the Legislature, in enacting MCL 24.207(j), decided to place outside of the rulemaking procedures and requirements set forth in the APA. The Legislature gave the MDHHS Director permission—"may"—to take certain forms of action when necessary to control an epidemic. And the Legislature made clear what the vehicle for this specific type of action under MCL 333.2253 is to be—not an APA-promulgated rule, but an "emergency order."

The Legislature, of course, knows full well how to provide for or require "rules" or rulemaking when it so intends, and it has generally vested rulemaking authority in the Department—but expressly *not* to the exclusion of other exercises of authority. See MCL 333.2226(d) (authorizing the Department to "*[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"); see also, e.g., MCL 333.2262 (authorizing penalties for violating "this code *or* a rule promulgated *or* an order issued under this code") (emphasis added). With MCL 333.2253, the Legislature did not purport to vest the Department with rulemaking authority; indeed, there would be no reason to do so, given the broad grant of authority already provided in MCL 333.2226(d) to "[e]xercise authority and

promulgate rules to safeguard properly the public health" and "to prevent the spread of diseases and the existence of sources of contamination."

To the contrary, the Legislature used MCL 333.2253 to vest the Department with the power to "[e]xercise authority" through a different mechanism—*emergency orders*—for certain, specified epidemic-control purposes. This legislative decision is plainly stated, and it makes good sense, given the urgency and fluidity of the circumstances § 2253's permissive statutory power is granted to address, the institutional expertise that renders the Department uniquely equipped to respond quickly and effectively to such circumstances, and the discrete response measures for which the emergency-order power was provided.

Iron Pig, in pursuit of its interests in this case, seeks to override this legislative decision and rewrite both the APA and the Public Health Code—to effectively read MCL 24.207(j)'s exception out of the former, and § 2253's emergency-order authority out of the latter. But these efforts directly contravene cardinal principles of statutory interpretation: that "[w]here the statutory language is clear and unambiguous, the statute must be applied as written"; that "[a] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself"; and that courts must not "rewrite the plain statutory language and substitute our own policy decisions for those already made by the Legislature." *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 212-213 (2019) (cleaned up). In enacting MCL 333.2253, the Legislature expressly chose to give the Department a specific tool—

emergency orders—for use in specific circumstances. This choice is clear and proper and must be given due effect.

Caselaw is in accord. Michigan Courts have recognized that "Subsection 7(j) excepts administrative action from the APA's definition of 'rule' when the Legislature has either explicitly or implicitly authorized the action in question," *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 47 (2005), and correspondingly have held that agency actions analogous to the Department's Orders are exempt from the formal rulemaking process under § 7(j)'s exception. In *Michigan Trucking Ass'n v Michigan Pub Serv Comm'n*, for instance, the Court held that the Public Service Commission could issue by order, rather than through APA rulemaking, a safety rating system, because the relevant statute "directly and explicitly authorizes the PSC to implement [that system] either by rule or order" and "[b]ecause the safety rating system is clearly an exercise of permissive statutory power, it is exempted from formal adoption and promulgation under the APA." 225 Mich App 424, 430 (1997). This was so even though the rating system was likely to be "hotly contested"—and in fact, that only further illustrated why it made good sense for the Legislature to have permitted its implementation through order rather than through a rulemaking process that was too lengthy and cumbersome to be a good fit in that context. *Id*.

And indeed, as noted, the Court of Claims recently upheld the Department's Orders against a rulemaking challenge of this same sort in *Let Them Play*, with Judge Michael J. Kelly first denying the plaintiffs' bid for a preliminary injunction

and then the successor to his seat on that court, Judge Elizabeth L. Gleicher, granting the Department summary disposition. (Attachments 2 & 3.) Both judges recognized that the Legislature made perfectly clear that the Director of the Department was authorized to issue emergency orders under MCL 333.2253, as had been done here, without engaging in formal rulemaking under the APA. (See Attachment 2, p 5 (concluding that MCL 333.2253(1)'s "permissive grant of authority expressly authorizes the very action taken in this case as it concerns emergency orders"); Attachment 3, p 10 (""The Legislature plainly afforded [the Director] the option of . . . issuing emergency orders—an explicit exception to the rule-making process. Regardless of whether the orders satisfy the APA's definition of 'rules,' MCL 333.2253(1) expressly permits the director of the MDHHS to deploy emergency orders during an epidemic."). And both judges found that result compelled not only by the plain language the Legislature had chosen, but also by common sense and the very purposes that the Legislature clearly intended to serve through its enactments. (See Attachment 2, p 5 ("[S]ubjecting defendant's emergency orders issued under MCL 333.2253(1) to the (time-consuming) procedural requirements of the APA, see, e.g., MCL 24.239; MCL 24.241; MCL 24.242; MCL 24.245, would render the emergency orders incapable of addressing an emergent situation in real-time and would seemingly defeat the purpose of defendant's emergency authority under MCL 333.2253(1)."); Attachment 3, p 9 (pointing to *Michigan Trucking* and observing that, "[c]onsidering the charged political atmosphere surrounding COVID-19 mitigation measures such as masking

and testing, it is equally unlikely that the rule-making process would proceed swiftly during an epidemic").

Iron Pig also contends that, pursuant to MCL 24.241, a public hearing was required prior to issuing the Order under MCL 333.2253, but that argument fails for the same reasons. Under MCL 24.241, a public hearing is required "before the adoption of a rule." MCL 24.241(1). But as discussed—and as the Court of Claims has already held twice— epidemic orders issued under MCL 333.2253 are not subject to APA rulemaking requirements such as this.[18] And for good reason: as duly recognized in those rulings, it would defeat the very purpose of the Legislature's emergency-order authorization under MCL 333.2253(1) to attach such

[18] Iron Pig has not claimed entitlement to a public hearing on any basis other than MCL 24.241, and per the stipulated and ordered scope of this appeal, no such claim is now before this Court. The Department notes, however, that a public hearing is not required as a matter of due process before the issuance of generally applicable health orders of the sort at issue here. See, e.g., *Neinast v Bd. of Trustees of Columbus Metro. Library*, 346 F3d 585, 596-97 (CA 6, 2003) ("Governmental determinations of a general nature that affect all equally do not give rise to a due process right to be heard."). And even where due process requirements would otherwise attach, they can be suspended in "emergency situations" such as a novel, deadly, and fast-moving pandemic. *Hodel v Virginia Surface Mining and Reclamation Assn, Inc*, 452 US 264, 300 (1981) (collecting cases and noting that "[p]rotection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action"). Given these fundamental principles, courts have routinely rejected procedural due process challenges to COVID-19 mitigation measures. See, e.g., *MetroFlex Oceanside LLC v Newsom*, No. 20-CV-2110-CAB-AGS, 2021 WL 1251225, at *4 (SD Cal Apr. 5, 2021) (noting approvingly that "[c]ourts have held that in the current COVID-19 crisis, temporary closures of a business do not implicate procedur[al] due process rights" and collecting illustrative cases) (cleaned up); *Let Them Play MN v Walz*, 517 F Supp 3d 870 (D Minn 2021) (rejecting procedural due process claim to COVID orders); *Hartman v Acton,* No 2:20-CV-1952, 2020 WL 1932896 (SD Ohio Apr 21, 2020) (same). Regardless, as noted, no such claim is before this Court here.

procedural requirements to those emergency orders and thereby severely undermine their utility as a tool for responding swiftly and nimbly to a deadly and fast-moving threat to public health. (See Attachment 2, p 5; Attachment 3, p 9.) Furthermore, it would do so not only for the current COVID-19 pandemic, but for all future epidemics that might strike Otsego County or elsewhere in Michigan, no matter how dangerous or fatal. Such an interpretation of the Legislature's enactments would be both contrary to their plain text and unreasonable. See *Michigan Trucking*, 225 Mich App at 430 ("unreasonable results are to be avoided wherever possible" when engaging in statutory construction) (quotation marks omitted).

Simply put, the Legislature has put in place a design consistent with the constitutional priority with which it has been charged, and Iron Pig has not shown, nor can it show, any legal basis by which it should be spared the consequences of a $5,000 civil fine for its deliberate decision to prioritize its interests over the public health concerns affecting the entirety of Michigan's population.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, this Court should uphold the ALJ's grant of the Department's motion for summary disposition and reject Iron Pig's appeal.

Respectfully submitted,

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Dated: October 14, 2021

STATE OF MICHIGAN
IN THE 46TH JUDICIAL CIRCUIT COURT FOR OSTEGO COUNTY

MOORE MURPHY HOSPITALITY LLC D/B/A IRON PIG SMOKEHOUSE,

Petitioner-Appellant,

v

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent-Appellee.
_____/

Case No. 2021-18522-AE

HON. COLIN G. HUNTER

PROOF OF SERVICE

To: David M. Delaney
Attorney at Law
113 N. Illinois Ave.
Gaylord, MI 49734

The undersigned certifies that a copy the Brief of Appellee-Michigan Department of Health and Services was served upon the above attorney of record by first class mail to their respective addresses thereon, on the 14th day of October, 2021.

/s/ Alexis E. Bittner
Alexis E. Bittner, Legal Secretary
Corporate Oversight Division
Michigan Dep't of Attorney General

Attachment 1

STATE OF MICHIGAN
46TH CIRCUIT COURT FOR THE COUNTY OF OTSEGO

In the matter of:

MOORE MURPHY HOSPITALITY, LLC
D/B/A IRON PIG SMOKEHOUSE,

Petitioner-Plaintiff,

v

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; GRETCHEN WHITMER, IN OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MICHIGAN,

Respondent-Defendant.
_____/

Circuit Court Case No.: 21-18522-AE

HON. COLIN G. HUNTER

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_____/

STIPULATION FOR ORDER REGARDING APPEAL AND DISMISSING RESPONDENT WHITMER WITHOUT PREJUDICE

Petitioner filed this appeal on May 6, 2021. A disagreement then arose between Petitioner and Respondents regarding this filing, which was structured as a hybrid document encompassing an appeal of an administrative decision, as well as causes of action against Respondents. To resolve this disagreement, the parties stipulate to the following:

1. The filing in the above-captioned matter shall be regarded solely as an appeal from an administrative agency decision and not as a lawsuit against any party. Counts III and IV in the appeal, which are structured as claims for uncompensated taking under the State and Federal Constitutions, are withdrawn by Petitioner and shall be deemed stricken from the appeal document. Also stricken from the appeal document are Counts V and VI related to procedural and substantive due process. Petitioner waives any challenge on appeal to the evidence on the grounds relating to competent, material and substantial evidence. The court will decide two legal issues:

    - Does MCL 333.2253(1) violate the non-delegation clause of the Michigan Constitution?

    - Are the MDHHS orders a "rule" as defined in MCL 24.207 and did the MDHHS comply with the notice of public hearing requirements of MCL 24.241?

2. Petitioner also withdraws relief request d, which shall also be deemed stricken.

3. Respondent Gretchen Whitmer is dismissed from this matter without prejudice. Nothing in this stipulation shall be deemed as waiving any ability Petitioner may have to file suit against the Governor or the Michigan Department of Health and Human Services in the Court of Claims.

4. The parties agree that the record presented to the Circuit Court shall include the Administrative Law Judge's decision being appealed, as well as the briefs and exhibits filed with the Administrative Tribunal on MDHHS' motion for summary disposition. The MDHHS shall be responsible for filing this record, consisting of its summary disposition motion and brief, Petitioner's Response, and its reply brief with the Court within thirty days of entry of an order upon this stipulation. Nothing in this stipulation shall preclude either party from asking this Court, or another Court on appeal, to take judicial notice of other information contained in the administrative record giving rise to this appeal, or in the records in the tribunal and circuit court relating to proceedings between Petitioner and the Michigan Department of Agriculture and Rural Development.

5. Within 60 days of filing the record the parties will file briefs on the legal issues identified in the stipulation. The matter will be scheduled for oral argument.

David Delaney (P43485)
Attorney for Petitioner

Darrin F. Fowler (P53464)
Attorney for Respondent

STATE OF MICHIGAN
46TH CIRCUIT COURT FOR THE COUNTY OF OTSEGO

In the matter of:

MOORE MURPHY HOSPITALITY, LLC
D/B/A IRON PIG SMOKEHOUSE,

Petitioner-Plaintiff,

v

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; GRETCHEN WHITMER, IN OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MICHIGAN,

Respondent-Defendant.
_____/

Circuit Court Case No.: 21-18522-AE

HON. COLIN G. HUNTER

FILED
AUG - 9 2021
OTSEGO COUNTY CLERK

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_____/

ORDER REGARDING APPEAL AND DISMISSING RESPONDENT WHITMER WITHOUT PREJUDICE

At a session of said court in held in the State of Michigan,
in the County of Otsego on the 27 day of July, 2021

HON. COLIN G. HUNTER

Upon the stipulation of the parties, and this Court being otherwise fully advised in the premises,

IT IS ORDERED that this matter shall proceed as an administrative appeal and shall not be regarded as a lawsuit against any party. Counts III through VI in the appeal document are deemed stricken, as is relief request d. This appeal shall proceed on the issues identified in the above stipulation.

IT IS FURTHER ORDERED that Respondent Gretchen Whitmer is dismissed from this appeal without prejudice.

IT IS FURTHER ORDERED that the MDHHS shall file the administrative record agreed upon between the parties in the above stipulation within thirty days of the entry of this Order. The parties will file briefs and schedule the matter for oral argument as provided in the stipulation.

Hon. Colin G. Hunter

Attachment 2

STATE OF MICHIGAN

COURT OF CLAIMS

LET THEM PLAY MICHIGAN, INC., et al.,

Plaintiffs,

OPINION AND ORDER DENYING PRELIMINARY INJUNCTION

v

Case No. 21-000060-MZ

ELIZABETH HERTEL, in her official capacity as Director of the Michigan Department of Health and Human Services,

Hon. Michael J. Kelly

Defendant.
_____/

Pending before the Court is plaintiffs' April 5, 2021 motion for preliminary injunction. The Court held a hearing on the motion on April 27, 2021, and the parties have complied with the Court's expedited briefing schedule. Having reviewed the parties' arguments and briefing, the motion for preliminary injunction is DENIED.

I. BACKGROUND AND PERTINENT FACTS

The plaintiffs in this case are a group of coaches, middle school and high school student athletes, parents, and a non-profit corporation. On or about March 19, 2021, the Michigan Department of Health and Human Services (MDHHS) issued an order that imposed many requirements on residents in this state. Pertinent to the instant matter, the March 19, 2021 order imposed requirements on participation in youth sports. The order declared that it was issued under the authority granted to Director of MDHHS Elizabeth Hertel under MCL 333.2253 of the Public

Health Code. On or about March 20, 2021, MDHHS issued a document entitled "Interim Guidance for Athletics" that addressed some of the same topics in the order.

After the pleadings and first round of briefing were filed in this case, MDHHS issued an updated order ("the Order") on or about April 16, 2021, that replaced the prior order. By all accounts, the most recent Order contains the same or similar provisions as the March 19, 2021 order that were put into issue by plaintiff's complaint and request for preliminary injunctive relief. Among other matters, the Order requires masking, social distancing, and COVID-19 testing for student athletes. Likewise, on or about April 16, 2021, MDHHS issued an updated "Interim Guidance for Athletics." The Order incorporated by reference some provisions of the Interim Guidance; however, some aspects of the Interim Guidance are not incorporated by reference into the Interim Guidance.

Plaintiffs filed a complaint and a motion for preliminary injunction in this Court in response to the earlier iterations of the MDHHS order and guidance. According to plaintiffs, defendant Hertel has statutory authority to issue orders related to the public health, but her exercise of that authority must nevertheless comply with the requirements of the Administrative Procedures Act, MCL 24.201 *et seq*. Plaintiffs contend that the Order and Interim Guidance are unlawful because they were issued in a manner that is contrary to the demands of the APA.

II. ANALYSIS

The motion before the Court is one for preliminary injunctive relief. A preliminary injunction ""represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Davis v Detroit Fin Review Team*,

296 Mich App 568, 613; 821 NW2d 896 (2012) (citation and quotation marks omitted). The Court utilizes four factors in determining whether to issue this extraordinary remedy:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Id*. (citation and quotation marks omitted).]

A. PLAINTIFFS HAVE NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS

In order to evaluate plaintiffs' ability to succeed on the merits, the Court must turn to the source of authority cited by defendant for issuing the orders and guidance at issue. The Order in question cites MCL 333.2253 as defendant's source of authority to issue orders to combat public health issues brought on by the current COVID-19 pandemic. In particular, defendant notes that MCL 333.2253(1) provides that:

> If the director determines that control of an epidemic is necessary to protect the public health, *the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic* to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code. [Emphasis added.]

Before diving into a discussion regarding plaintiffs' ability to succeed on the merits, it is worth noting what is not at issue. That is, plaintiffs are not generally disputing defendant's ability to take measures to regulate or set parameters relating to public health. The issue, according to plaintiffs, is how defendant went about the task of regulating matters affecting public health. Plaintiffs argue that the orders and guidance issued by defendant are "rules" as that term is defined in MCL 24.207 of the APA. Under the APA, a "rule" is defined as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure,

or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency." The APA's definition of "rule" contains a number of exceptions including, as is pertinent to the arguments presented in this case, "A form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory." MCL 24.207(h). In addition, the APA exempts from the ambit of the term "rule" "A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." MCL 24.207(j).

According to plaintiffs, defendant's orders and guidance regarding athletics were "rules" that should have been promulgated in accordance with the APA, particularly the APA's notice-and-comment procedures. See MCL 24.241. A rule promulgated without compliance with the APA is invalid. *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 238; 501 NW2d 88 (1993). Plaintiffs argue that, even though defendant has authority to issue orders under the Public Health Code, she is not exempt from the APA. And without compliance with the APA, they argue that defendant's orders are invalid.

The Court concludes that, at present, plaintiffs have not demonstrated an ability to succeed on the merits of their APA claim. Turning to the Order—and leaving aside the Interim Guidance for now—the Court agrees with defendant that, at this stage in the litigation, a compelling case can be made that the Order was issued pursuant to the exercise of a permissive statutory power. See MCL 24.207(j). To that end, MCL 333.2253(1) plainly gives the MDHHS Director authority to

issue emergency orders in order to control an ongoing epidemic.[1] This permissive grant of authority expressly authorizes the very action taken in this case as it concerns emergency orders. In that sense, the Court finds—at least at this stage of the litigation—this case is comparable to decisions that found a challenged agency action to be within the permissive-powers exemption to the APA. See *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 47; 703 NW2d 822 (2005). And the Court concludes that the instant case is distinguishable from recent decisions issued by the Court of Claims which featured generalized grants of authority to an agency. See *Genetski v Benson*, unpublished opinion and order of the Court of Claims, issued March 9, 2021 (Docket No. 20-000216-MM). Moreover, subjecting defendant's emergency orders issued under MCL 333.2253(1) to the (time-consuming) procedural requirements of the APA, see, e.g., MCL 24.239; MCL 24.241; MCL 24.242; MCL 24.245, would render the emergency orders incapable of addressing an emergent situation in real-time and would seemingly defeat the purpose of defendant's emergency authority under MCL 333.2253(1).[2]

Turning to the Interim Guidance issued in conjunction with the Order, it is worth noting that there are aspects of the Interim Guidance that have been incorporated into the Order, and aspects that have not been incorporated. For those aspects of the Interim Guidance that are incorporated into the Order, the Court declines to enjoin enforcement of the same, for the reasons stated above regarding plaintiffs' request to enjoin enforcement of the Order. For those aspects of

[1] The Court again notes that there is no dispute regarding whether defendant's actions are within the scope of MCL 333.2253(1); instead, the question at this stage is whether defendant was required to comply with the APA.

[2] Plaintiffs' citation to MCL 24.232(6) of the APA is unconvincing as well. That subsection applies to orders issued when an agency is required to conduct a "proceeding or contested case," neither of which is at issue with defendant's issuance of emergency orders under the Public Health Code.

the Interim Guidance that are not incorporated into the Order, counsel for defendant admitted at the April 27, 2021 hearing that the same were not binding. Where those aspects of the Interim Guidance are, by defendant's own concession, not binding or enforceable, they would appear to fall within MCL 24.207(h)'s exception to rulemaking. And where the guidance is simply guidance, i.e., not enforceable, plaintiffs have not presented a compelling reason for the Court to enjoin the same.

Before concluding on this factor, it should be noted that plaintiffs' briefing has raised additional challenges—which were not addressed at the hearing—to the Order and to the Interim Guidance. For instance, plaintiffs contend that the Order must be invalidated because it is arbitrary and capricious. In general, agency action is arbitrary or capricious "only if the agency had no reasonable ground for the exercise of judgment." *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 142; 807 NW2d 866 (2011) (citation and quotation marks omitted). Here, plaintiffs' briefing has done no more than point out that plaintiffs disagree with certain provisions of the Order. That disagreement, however, does not demonstrate an arbitrary or capricious decision. See *id*. at 145 (explaining that an agency action "is not arbitrary or capricious merely because it displeases the regulated parties" or because it "causes some inconvenience or imposes new or additional requirements.").

Plaintiffs also argue that the Order and Interim Guidance violate their right to procedural due process. Plaintiffs have not cited authority for the notion that they have a liberty interest or a property interest in participating in interscholastic athletics, and caselaw opposes the idea that such an interest exists. See, e.g., *Berschback v Gross Pointe Pub Sch Dist*, 154 Mich App 102, 119-120; 397 NW2d 234 (1986), remanded in part on other grounds 427 Mich 851 (1986); *Nevares v San Marcos Consol Independent Sch Dist*, 111 F3d 25, 27 (CA 5, 1997). Without this requisite

interest, the due process claim cannot succeed on the merits. See *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 209; 761 NW2d 293 (2008) (citation and quotation marks omitted) ("A threshold requirement to a substantive or procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution."). Accordingly, plaintiffs are unlikely to succeed on the merits of their due process claim at this time.

B. PLAINTIFFS HAVE NOT DEMONSTRATED IRREPARABLE HARM

In addition to failing to show a likelihood of success on the merits, plaintiffs have also fallen short with regard to demonstrating a particularized showing of irreparable harm. See *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008) (citation and quotation marks omitted) (describing irreparable harm as "an indispensable requirement to obtain a preliminary injunction."). Plaintiffs offered no proofs or evidence on this factor, nor did they address it at oral argument. Their briefing and pleadings meanwhile, assert that defendant has imposed "unlawful and burdensome restrictions," which plaintiffs' "fundamentally oppose," on competing in athletics. These generalized assertions of illegal conduct—which look doubtful in any event as it does not appear likely at this point that plaintiffs will prevail on the merits—do not satisfy plaintiffs' obligation to show irreparable harm. See *Hammel v Speaker of House of Representatives*, 2978 Mich App 641, 652; 825 NW2d 616 (2012). And without this "indispensable requirement" weighing in their favor, a preliminary injunction will not issue. See *Pontiac Fire Fighters Union Local 376*, 482 Mich at 9 (citation and quotation marks omitted).

C. REMAINING FACTORS

Given the Court's analysis on the first two factors, particularly the lack of an adequate showing of irreparable harm, it need not discuss the remaining factors for injunctive relief.

III. CONCLUSION

IT IS HEREBY ORDERED that plaintiffs' April 5, 2021 motion for preliminary injunction is DENIED.

This is not a final order and it does not resolve the last pending claim or close the case.

April 28, 2021

Michael J. Kelly
Judge, Court of Claims

Attachment 3

STATE OF MICHIGAN

COURT OF CLAIMS

LET THEM PLAY MICHIGAN, INC., a Michigan non-profit corporation; MICHELLE MORAN, on behalf of herself and as a parent and guardian of Easton Moran, a minor; MARCY MCCLELLAND, on behalf of herself and as a parent and guardian of Micayla McClelland and Timothy McClelland, minors; and SHANNON BADGERO, on behalf of herself and as a parent and guardian of Nataleigh Badgero, a minor.

Plaintiffs,

V

ELIZABETH HERTEL, in her official capacity as Director of the Michigan Department of Health and Human Services,

Defendant.

_____/

Case No. 21-000060-MZ

Hon. Elizabeth L. Gleicher

OPINION AND ORDER

Plaintiff Let Them Play is a non-profit organization dedicated to the advancement of high school sports. Joined by the parents of four student athletes, it brought this action challenging the authority of defendant Elizabeth Hertel, the Director of Michigan's Department of Health and Human Services (MDHHS), to issue orders regulating youth sports during the COVID-19 pandemic. The parties filed cross-motions for summary disposition under MCR 2.116(C)(8), and the Court entertained oral argument. Because MCL 333.2253(1) empowers the Director to issue orders to protect the public health during an epidemic, the MDHHS's motion for summary disposition is GRANTED.

I. BACKGROUND

A. THE MDHHS ORDERS

The individual plaintiffs are student-athletes, their parents, coaches, and school administrators. They are subject to the enforcement of emergency orders issued by the Director regulating many aspects of daily life, including participation in youth sports. When plaintiffs filed their complaint, an order governing student athletics, issued on March 19, 2021, was in effect. That order mandated masking, social distancing, and COVID-19 testing for all student athletes and spectators. The order and all subsequent orders include enforcement provisions. A violation constitutes a misdemeanor punishable by imprisonment for not more than six months, or by a fine of not more than $200, or both.

Prompted by changes in the trajectory of the pandemic and the evolution of health guidance offered by the federal Centers for Disease Control and Prevention, the MDHHS revised the March 19 order on April 19, 2021, May 6, 2021, May 14, 2021, and again on June 1, 2021. As the number of people in Michigan infected and hospitalized with COVID-19 has gradually declined and the percentage of vaccinated Michiganders climbed, the MDHHS has moderated the scope and limited the bounds of the ordered restrictions.

The order in effect when the summary disposition motions were argued was issued on May 14, 2021, and remained in effect until May 31, 2021. That order referenced and incorporated an MDHHS publication, "Interim Guidance for Athletics," issued contemporaneously with the order and replaced with a substantially similar document on May 24, 2021.[1] The May 24 "Interim Guidance" provided that in both contact and non-contact organized sports, "[a]ll individuals can

[1] Only the May 24 guidance document is now available on the MDHHS website.

gather outdoors for purposes of organized sports without wearing face masks." However, the order mandated that unvaccinated participants continue to wear face masks indoors and recommended that they do so outdoors as well. Fully vaccinated individuals were authorized to gather indoors without face masks to enjoy contact or non-contact sports.[2] Unvaccinated participants playing outdoors without face masks needed to test for COVID-19 weekly and had to present evidence of a negative diagnostic test. And unvaccinated participants, coaches, and other team personnel were directed to wear face masks at all times when indoors "unless a sports organizer has determined that wearing face masks would be unsafe and all participants have been tested and received negative tests. ..."

The "Executive Summary" included within the "Interim Guidance" explained that "[d]ifferent restrictions and mitigation measures may be needed for unvaccinated individuals based on the particular risk of each sport and current rates of transmission." Because contact sports such as football, lacrosse and wrestling pose higher risks than non-contact sports, additional mitigation measures were identified as obligatory. The same applied to sports in which a face mask cannot be worn, such as wrestling and water polo. The guidance also included a lengthy description of "recommended practices."

The May 14 order and "Interim Guidance" substantially loosened the masking and testing requirements in effect when this case was filed on April 1, 2021. At that time, the March 19, 2021 order required that *all* participants in youth sports remain masked unless it would be unsafe, all participants had to maintain six feet of distance when not engaged in play, and all youth sports

[2] The term "fully vaccinated persons" is defined in the order as "persons for whom at least two weeks has passed after receiving the final dose of an FDA-approved or authorized COVID-19 vaccine."

gatherings were prohibited unless the people involved participated in a testing program specified by the MDHHS. Under the May 14 order and Interim Guidance, in contrast, masking, social distancing, and testing requirements were eliminated for vaccinated individuals.

During oral argument, the parties advised the Court that the MDHHS would issue a new order on June 1, 2021, and that order is now in effect. The new order is available on-line here: https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-560465--,00.html. Regarding student athletics, the June 1 order appears to be identical to the May 24 order.

B. THE PLEADINGS AND PROCEEDINGS

Plaintiffs' complaint avers that the MDHHS orders are invalid because they qualify as "rules" under section 207 of Michigan's Administrative Procedures Act (APA), MCL 24.201 *et seq.*, and should have been issued in accordance with the APA's rulemaking requirements. Although not extensively briefed, plaintiffs allege that the orders are "arbitrary and capricious." Plaintiffs' complaint additionally raises a procedural due process claim, contending that the orders were issued without due process safeguards or any provisions for "post-deprivation review." In addition to seeking a preliminary injunction, plaintiffs request a declaratory judgment that the orders are violative of statutory and constitutional law and an order enjoining their enforcement.

This Court denied plaintiffs' motion for a preliminary injunction, finding that their rule-making claim stood little chance of success on the merits because "MCL 333.2253(1) plainly gives the MDHHS Director authority to issue emergency orders in order to control an ongoing epidemic." *Let them Play Michigan v Hertel*, opinion and order of the Court of Claims, issued April 28, 2021 (Docket No. 21-000060-MZ), pp. 4-5. Regarding plaintiffs' due process claim, this Court preliminarily determined that the student athletes, parents, and coaches lacked a constitutionally protected liberty or property interest in participating in interscholastic athletics.

Further, the Court ruled that the plaintiffs had not demonstrated a particularized showing of irreparable harm. These motions for summary disposition followed.

II. ANALYSIS

A. RULEMAKING CLAIM

In their third paragraphs, the orders issued by the MDHHS specifically cite MCL 333.2253(1) as authority for the MDHHS's ability to regulate the conditions under which people may gather to participate in student athletics. Here, the MDHHS echoes that reliance on the language of § 2253(1) for its argument that the orders issued by the Director are enforceable without resort to the rule-making process. MCL 333.2253(1) is located within the Public Health Code, MCL 333.1101 *et seq.*, and provides:

> If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code.

Plaintiffs counter that the orders issued by the MDHHS do not actually qualify as "orders," but instead are rules as that term is defined in the APA. The relevant definition of a "rule," plaintiffs posit, is found at MCL 24.207, which in relevant part states that " 'Rule' means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency[.]" Plaintiffs contend that applying that definition leads to the inescapable conclusion that the MDHHS "orders" are actually "rules."

The plain language of these statutes controls their construction. A court "must give effect to the Legislature's intent, and the best indicator of the Legislature's intent is the words used." *Pirgu v United Services Auto Ass'n*, 499 Mich 269, 278; 884 NW2d 257 (2016). The statute should

be interpreted as a whole, "reading individual words and phrases in the context of the entire legislative scheme." *People v Comer*, 500 Mich 278, 287; 901 NW2d 553 (2017). Courts "must give effect to every word, phrase, and clause and avoid an interpretation that would render any part surplusage or nugatory." *Id.*

An examination of statutory context is helpful in sorting out whether the MDHHS self-styled "orders" are actually "rules" in disguise.

There can be no doubt but that Michigan remains in the midst of an epidemic caused by the highly-contagious and potentially fatal COVID-19 virus. As of May 29, 2021, the MDHHS reported that our state has endured 887,719 confirmed cases of COVID-19, and 19,163 deaths. State of Michigan, *Coronavirus / Michigan Data*, <https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html> (accessed May 29, 2021). Despite the availability of vaccinations, during the month of May 2021, our State has seen more than 30,000 confirmed cases and slightly more than 1,000 deaths. State of Michigan, *Coronavirus / Michigan Data*, <https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html> (accessed May 29, 2021).

Similarly, there can be no doubt but that to protect the public health during an epidemic, §2253(1) authorizes the Director to issue "emergency order[s]" intended to prohibit people from gathering. By "emergency order" the Director also is empowered to "establish procedures" designed to "insure" the "continuation of essential health services and enforcement of health laws." *Id.* Plaintiffs take issue with the scope of the emergency orders issued by defendant Hertel, characterizing them as regulations of "all aspects of economic and social life … including social gatherings, entertainment, recreational activities, food service, school instruction, and sports."

Given their sweeping character and that they are "generally applicable" statewide, plaintiffs insist, the "orders" are more consistent with "rules" that must be issued in conformity with the APA.

The "orders" contemplated in §2253(1) of the Public Health Code differ in a fundamental way from the "rules" addressed in the APA. Orders issued during the time of an epidemic are aptly modified by the Legislature's use of the word "emergency." The statutory subsection's coda declares: "Emergency procedures shall not be limited to this code." In sharp contrast, our Supreme Court has described the rule-making process as "an elaborate procedure," describing its multiple steps as follows:

> [B]ecause the adoption of a rule by an agency has the force and effect of law and may have serious consequences for many people, the legislature prescribed an elaborate procedure for rule promulgation in Chapter 3 of the Michigan Administrative Procedures Act.... These provisions are calculated to invite public participation in the rule-making process, prevent precipitous action by the agency, prevent the adoption of rules that are illegal or that may be beyond the legislative intent, notify affected and interested persons of the existence of the rules, and make the rules readily accessible after adoption. [*Detroit Base Coal for Human Rights of Handicapped v Dep't of Soc Servs*, 431 Mich 172, 189-190; 428 NW2d 335 (1988) (citation omitted)].

The Court of Appeals has similarly portrayed the APA as containing "complex procedures governing, among other things, the development of rules." *Michigan State AFL-CIO v Sec'y of State*, 230 Mich App 1, 20; 583 NW2d 701 (1998). Rule-making under the APA is antithetical to issuing emergency orders in response to an epidemic, a fact that Legislature inherently recognized by neglecting to mention the rule-making process or the APA in MCL 333.2253(1).

The absence of a reference to rule-making supports that the Legislature enacted §2253(1) to endow the MDHHS Director to act swiftly and decisively in the face of epidemic emergencies,

and without recourse to "elaborate" procedures required under the APA.[3] The Legislature's failure to reference "rules" or the APA when granting emergency powers to the Director is unlikely to have been an accident or oversight. "The express mention of one thing in a statute implies the exclusion of other similar things." *In re MCI Telecom Complaint,* 460 Mich 396, 415; 596 NW2d 164 (1999). Had the Legislature intended that the director utilize the APA's rule-making process when crafting responses to an epidemic, it would have included that requirement rather than using the term "emergency *order*." (Emphasis added). The Public Health Code is replete with references to "rules," and specifically defines that word as "a rule promulgated pursuant to the administrative procedures act of 1969." MCL 333.1108(1). See also MCL 333.20115; MCL 333.16204; and MCL 333.26305 (all referencing the APA). The absence of any mention of "rules" or the APA in §2253(1) supports that the Legislature implicitly and explicitly anticipated that during an epidemic, the MDHHS director would instead use "emergency orders" to protect the public health.

The record does not include any information regarding the length of time that it would take to process a "rule" similar to the orders relevant to student athletics. In another case involving rule-making, *Michigan Trucking Ass'n v Michigan Pub Serv Comm (On Remand)*, 225 Mich App 424, 430; 571 NW2d 734 (1997), the Court of Appeals observed that the rule-making process was

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[3] See also Chief Justice Roberts' concurring opinion in *S Bay United Pentecostal Church v Newsom*, __ US __; 140 S Ct 1613; 207 L Ed 2d 154 (2020) (ROBERTS, C.J., concurring) ("The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement.").

likely to be lengthy and, in the context of the trucking regulations at issue, unreasonably cumbersome:

> [I]t is reasonable to assume that any safety rating system would be hotly contested by the regulated carriers and that subjecting the safety rating system to the formal hearing and promulgation requirements of the APA would make it impossible for the PSC to have the system in place within twelve months, the time frame prescribed by the statute. "In construing a statute, ... unreasonable results are to be avoided wherever possible." *In re Telecommunications Tariffs*, 210 Mich App 533, 541; 534 NW2d 194 (1995).

Considering the charged political atmosphere surrounding COVID-19 mitigation measures such as masking and testing, it is equally unlikely that the rule-making process would proceed swiftly during an epidemic.

In Michigan, the number of COVID-19 cases have waxed and waned over the last 14 months. Abundant information regarding the risks of transmission of virus has come to light over time. The federal CDC has issued hundreds and hundreds of public health "updates" since the epidemic began. See Centers for Disease Control and Prevention, *COVID-19*, <https://www.cdc.gov/coronavirus/2019-ncov/whats-new-all.html> (accessed June 1, 2021). And the introduction of effective vaccinations has now profoundly altered the landscape. All these factors, and certainly many more, have informed the MDHHS, as reflected in the fact that the content of the emergency orders has changed with each new scientific development and federally approved public health recommendation. The MDHHS's ability to nimbly respond to the challenge of protecting all segments of the public against COVID-19, including student athletes, has been enhanced by the emergency order pathway created by the Legislature in §2253(1).

Plaintiffs may be correct that the substance of the emergency orders renders them equivalent to "rules" under the APA. This observation elides that the director *could* have elected

to utilize the rule-making process had she believed it was consistent with the public health, during an epidemic, to do so. The Legislature plainly afforded her the option of instead issuing emergency orders—an explicit exception to the rule-make process. Regardless of whether the orders satisfy the APA's definition of "rules," MCL 333.2253(1) expressly permits the director of the MDHHS to deploy emergency orders during an epidemic. Accordingly, plaintiffs' rulemaking argument lacks merit.

B. "ARBITRARY AND CAPRICIOUS"

Without reference to legal authority, plaintiffs contend that the MDHHS's incorporation of the interim guidance documents within the emergency orders is an "arbitrary and capricious" process. Plaintiffs do not explain how or why they believe the process to have been either arbitrary or capricious. Nevertheless, the documents themselves refute plaintiffs' claim.

The interim guidance supplements generously reference scientific and governmental resources supporting their contents. For example, the May 24, 2021 interim guidance document includes links to "current CDC guidelines," "EPA's criteria for use against SARS-CoV-2," and a policy statement of the American Academy of Pediatrics concerning face masking requirements for contact sports. No evidence or legal theory supports that the interim guidance requirements were arbitrarily or capriciously drafted.

C. PROCEDURAL DUE PROCESS

Plaintiffs' procedural due process claim rests on the argument that student athletes enjoy a constitutionally protected right to bodily integrity, while their parents have a right to make decisions regarding the care, custody, and control of their children. Mandatory vaccination and

testing requirements, plaintiffs urge, violate those rights. Absent utilization of the APA's formal rule-making process, plaintiffs continue, procedural due process protections have fallen by the wayside.

The procedural due process guarantee "requires that an individual must be accorded certain procedures before a protected interest is infringed, including notice of the proceedings against him, a meaningful opportunity to be heard, as well as the assurance that the matter will be conducted in an impartial manner." *Bonner v City of Brighton*, 495 Mich 209, 224 n 34; 848 NW2d 380 (2014) (citation omitted). Plaintiffs have not identified any authority supporting that they have a constitutionally protected interest in engaging in student athletics. Several courts have determined that the "privilege of participating in interscholastic activities" falls outside of the protections of the due process clause. *Davenport by Davenport v Randolph Co Bd of Ed*, 730 F2d 1395, 1397 (CA 11, 1984). See also *Brindisi v Regano*, 20 Fed Appx 508, 510 (CA 6, 2001) ("Merissa has neither a liberty nor a property interest in interscholastic athletics subject to due process protection); and *Mancuso v Massachusetts Interscholastic Athletic Ass'n, Inc*, 453 Mass 116, 117–118; 900 NE2d 518 (2009) ("We conclude that the plaintiff has no property interest in participating in interscholastic athletics, and thus no due process rights in the circumstances."). Plaintiffs have not identified a single case establishing a due process right to play, and the court has not located one. Accordingly, defendant is entitled to summary disposition of plaintiffs' due process claim.

III. CONCLUSION

IT IS HEREBY ORDERED that defendant's motion for summary disposition under MCR 2.116(C)(8) is GRANTED.

This is a final order that resolves the last pending claim and closes the case.

June 1, 2021

Elizabeth L. Gleicher
Judge, Court of Claims