STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

RPF OIL COMPANY,
a Michigan corporation,

Plaintiff,

Case No. 17-109107-CZ

v.

Hon. Judith A. Fullerton

GENESEE COUNTY and GENESEE COUNTY HEALTH DEPARTMENT,
Individually, jointly and severally,

Defendants.

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BRIEF IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

A party seeking the "extraordinary remedy" of a preliminary injunction must satisfy a demanding standard. *Pontiac Fire Fighters Union Local 376 v. City of Pontiac*, 482 Mich. 1, 8 (2008). Not only must a challenger establish that it is likely to succeed on the merits of its claim—a task that requires at least *some* developed argumentation in support of its claims—but it must also

produce a "particularized showing of irreparable harm"—which the Michigan Supreme Court has explained is an "indispensible requirement" for obtaining a preliminary injunction. *Id.* at 9. Even doing this, though, will not earn the challenger its requested remedy; it must also prove that entering a preliminarily injunction would serve the public interest and would, on balance, cause less harm than if the injunction were denied. *Id.* at 5 n.6.

RPF Oil has failed to carry this burden. The standard for a preliminary injunction is demanding precisely because the remedy is preliminary—it allows a court to grant relief "before a case is even decided on the merits." *Mich. Coal. of State Employee Unions v. Mich. Civil Serv. Comm'n*, 465 Mich. 212, 219 (2001). As a result, Michigan courts have long required parties seeking such relief to support their claim with facts and argument commensurate with the "extraordinary nature" of the relief. *Pontiac Fire Fighters*, 482 Mich. at 8. RPF Oil's sparse, three-page brief in support of its bid for a preliminary injunction fails at the threshold. It consists almost entirely of *ipse dixit*—bare assertions that "the public interest" will be "protected" by the issuance of an injunction and that "there can be little doubt" that the company will suffer "irreparable harm in the absence" of the requested relief. Br. at 3. The company attached no documents or affidavits to support these statements. And, aside from citing (on page 2) the basic standard for a preliminary injunction, RPF Oil has cited no case to support the claims that "it is almost certain" that the company "will succeed on the merits of its claims." Br. at 2. Because this presentation comes nowhere close to satisfying the rigorous four-part test required to justify the entry of a preliminary injunction, the company's claim for that relief must be denied.

In any event, even taken at face value, RPF Oil's main theory for its requested relief—that Michigan's Age of Majority Act directly conflicts with Genesee County's regulation prohibiting the sale of tobacco products to individuals under 21 years of age—is meritless. The Act, by its own terms, establishes a background definition for "the age of majority or legal age,"

but does not prohibit localities from imposing heightened age restrictions in specific circumstances. Under Michigan's strict requirements for conflict preemption, the Act does not preempt the County's regulation.

REGULATORY BACKGROUND

A. Genesee County's regulation prohibits the sale of tobacco products to individuals under 21 years of age.

Genesee County's "Regulation to Prohibit the Sale of Tobacco Products to individuals under 21 years of age" provides that "No person shall sell, give, or furnish any tobacco product . . . to an individual under 21 years of age." § 1005.1. It further mandates that "a person who sells tobacco products . . . at retail shall post a sign which includes the following statement: 'Genesee County prohibits the sale of tobacco products to any person under 21 years of age.'" § 1006.2. And it imposes monetary civil penalties of between $50 and $200 per violation, allows health officials to pursue injunctions against violators, and also provides that a person "who violates any provision of this Regulation is guilty of a misdemeanor." §§ 1009, 1010.

On January 24, 2016, after laying out its detailed findings regarding the public health implications of the regulation, the Board of Health held a public hearing to allow county residents an opportunity to participate in the decision-making process and to "receive public comment on the regulation." Ex. A to Compl. at 12. The Board of Health then "unanimously endorsed" the regulation and passed it along to the Genesee County Board of Commissioners for consideration. *Id.* On February 14, 2017, the Board of Commissioners adopted the regulation in full, and it went into effect 90 days later, on May 15, 2017. *Id.*

B. Michigan's Age of Majority Act

Michigan's Age of Majority Act provides that "a person who is at least 18 years of age on or after January 1, 1972 is an adult of legal age for all purposes whatsoever and shall have the

same duties, liabilities, responsibilities, rights, and legal capacity as persons heretofore acquired at 21 years age." MCL 722.52. The statute "dealt with the legal capacity of adulthood," by (1) establishing a background definition for "the age of majority or legal age," and (2) revising any preexisting state laws on the books that "prescribe[d] duties, liabilities, responsibilities, rights and legal capacity of persons 18 years of age through 20 years of age different from persons 21 years of age." *Mich. Dep't of Civil Rights ex rel. Smilnak v. City of Warren*, 136 Mich. App. 103, 112 (1984).

Nothing in the text of the Act or its legislative history suggests that the Legislature intended the law to focus on, target, or otherwise preempt local city and county regulations. Instead, the Legislature's debate centered on the bill's effect on voting rights, the appropriate age for alcohol consumption, and certain individual state statutes, but included no discussion of, or reference to, municipal codes and regulations. Nowhere in any of these statutes did the Legislature include, or make any reference to, local ordinances or regulations.

ARGUMENT

I. RPF Oil is unlikely to succeed on the merits.

The right to a preliminary injunction necessarily depends on "the strength of the moving party's showing that it is likely to prevail on the merits." *Pontiac Fire Fighters*, 482 Mich. at 6 n.6. In its complaint (though not in its brief), RPF Oil offers two theories that, it says, are "almost certain" to succeed in striking down the County's Tobacco 21 regulation. First, it claims that the regulation is in "direct conflict" with the Age of Majority Act, MCL 722.51. *See* Compl. ¶ 14. Second, even if those two provisions do not conflict, RPF Oil contends that, because the County's regulation directly conflicts with "the sign requirement of the Youth Tobacco Act, MCL 722.641," the local regulation must give way. *See* Compl. ¶ 15. Neither of these arguments establishes that RPF is entitled to the "extraordinary remedy" it seeks.

A. Michigan's Age of Majority Act does not preempt the County's Tobacco regulation.

1. Michigan's Age of Majority Act does not preempt the County's Tobacco regulation because it fails to meet Michigan's basic conflict-preemption standard—the only theory of preemption pressed by RPF Oil. A direct conflict between a local regulation and a state statute requires *first*, that the conflicting provisions "cover[] the same subject," *Rental Property Owners Ass'n of Kent Co. v. Grand Rapids*, 455 Mich. 246, 262 (1997), and *second*, that the local regulation "permit[] what the statute prohibits or prohibit[] what the statute permits." *People v. Llewellyn*, 401 Mich. 314, 322 n.4 (1977). Because Michigan's Age of Majority Act does not satisfy either element of the conflict preemption test, "both laws stand." *Walsh v. City of River Rouge*, 385 Mich. 623, 636 (1971) (quotation marks and citation omitted).

The first conflict-preemption requirement is a longstanding part of Michigan law: A "direct conflict" exists only when the two allegedly conflicting regulations address the same subject matter. More than fifty years ago, the Michigan Supreme Court explained that a municipal ordinance may directly conflict only "with a statute covering the same subject." *Miller v. Fabius Twp. Bd.*, 366 Mich. 250, 256–57 (1962); *see also Palmer v. Superior Twp.*, 60 Mich. App. 664, 677 (1975) (noting that *Miller* "set out [the] guide" for conflict preemption).

That rule defeats any claim that the Age of Majority Act preempts the County's regulation here. First, the Act, by its terms, does not specifically regulate tobacco sales. Instead, it provides, as a general matter, that "a person who is at least 18 years of age on or after January 1, 1972, is an adult of legal age for all purposes whatsoever, and shall have the same duties, liabilities, responsibilities, rights, and legal capacity as persons heretofore acquired at 21 years of age." MCL 722-52. That falls well short of the preemption threshold: Where a state statute's "plain language" contains "no guidance regarding the sale of goods" addressed by the local

ordinance, "there is no direct conflict between the statute and the [local] ordinance." *Z&Z Fireworks v. Roseville*, 2017 WL 2302587, at *2 (Mich. Ct. App. May 25, 2017) (unpublished, attached as Exhibit 2). Second, the Age of Majority Act does not regulate local law. As explained above, although the Act superseded certain preexisting *state laws* that prescribed legal rights and responsibilities of 18 to 20 year-olds "different from persons 21 years of age," it was silent on the question and effect on local regulation. *See, e.g.*, *John's Corvette Care, Inc. v. City of Dearborn*, 204 Mich. App. 616, 620 (1994) (concluding that, where the statute does not "expressly preempt the municipal regulation" and there is no "express legislative history" indicating that a "state statute preempts [an] ordinance," conflict preemption is unwarranted).

Michigan courts have faithfully refused to conclude that a regulation is preempted where it regulates a different subject matter than the allegedly conflicting statute. In *Frens Orchards, Inc. v. Dayton Twp. Bd.*, for example, a farmer sought to invalidate a municipal zoning ordinance prohibiting (absent a special exception permit) the construction of migrant-labor housing on his property. 253 Mich. App. 129, 131 (2002). The farmer argued that portions of the Michigan Public Health Code (and related administrative rules) governing the health and safety of agricultural labor camps directly conflicted with the town's zoning limitations. *Id.* at 131, 134. The court rejected this theory of preemption. "[N]o conflict exists," the court explained, because the state regulations—which regulated health and safety matters—"do not address the subject of the zoning ordinance." *Id.* at 137.

This rule applies even where there is some overlap between the two allegedly competing regulations. In *Rodriguez v. Township of Delta*, a fireworks dealer challenged a town ordinance prohibiting any vendor from selling any goods between the hours of 9:00 p.m. and 9:00 a.m. 2016 WL 520011 at *1 (Mich. Ct. App. Feb. 9, 2016) ((unpublished, attached as Exhibit 3). In his view, that law was preempted by a Michigan state statute that "prohibits localities from

regulating fireworks sales." *Id.* The court disagreed. "For direct preemption to exist, the conflicting provisions must address the same subject." *Id.* Because the local ordinance was not a fireworks-specific regulation, the court ruled, there was no direct conflict and thus no preemption. *See id.*; *compare with Ter Beek v. Wyoming*, 495 Mich. 1 (2014) (holding that a city ordinance penalizing possession of marijuana was preempted by Michigan's Medical Marihuana Act, which immunized qualifying patients' marijuana use).

The upshot of this rule is clear: unless a state law and the challenged local ordinance specifically regulate the same subject matter, there is no preemption. Because Michigan's Age of Majority Act sets forth only a general determination of the age of legal capacity (amending preexisting state law), and does not touch on local regulation at all, it does not trigger preemption.

2. The County's regulation also does not prohibit anything that the Age of Majority Act permits—the second required element for conflict preemption. Instead, the County's regulation "enlarges upon the provisions of a statute by requiring more than the statute requires." *City of Detroit v. Qualls*, 434 Mich. 340, 385 (1990) (quoting 56 Am.Jur.2d, Municipal Corporations, § 374). But that "creates no conflict" because the County's regulation simply sets a higher age, above the state's floor, for the purchase of tobacco—and "[t]he mere fact that the state . . . has made certain regulations does not prohibit a municipality from exacting additional requirements." *Id.*

Qualls illustrates the point. There, a state statute "allow[ed] storage of *greater than one hundred pounds* of class C or class B fireworks" by businesses "upon compliance with all of the requirements under the statute." *Id.* at 361 (emphasis added). Detroit's city ordinance restricted the "storage of fireworks in a place of retail sales. . . to a gross weight of *less than one hundred (100) pounds*." *Id.* at 364 n.44 (emphasis added) (emphasis added). After discovering that a retailer had

been storing more than 100 pounds of fireworks on its premises, the city confiscated the merchandise because it had been "stored on [the] premises in violation of the ordinance." *Qualls*, 434 Mich. at 345. The retailer argued that "the ordinance conflicted with state law." *Id.* But the Supreme Court disagreed, reasoning that "the storage limitation provision for retailers in the ordinance did not conflict with state law" even though it imposed a more restrictive requirement than was allowed under state law. *Id.*

The outcome in *USA Cash #1, Inc. v. City of Saginaw*, 285 Mich. App. 262 (2009), follows the same rationale. There, a state statute, MCL 445.405, required merchants of secondhand goods to "report transactions on a weekly basis only." *Id.* at 276. But Saginaw passed an ordinance "requiring secondhand merchants to report transactions to local law enforcement within 48 hours of the transaction." *Id.* A merchant challenged Saginaw's ordinance as directly conflicting with the state law. Again, the court disagreed. The two regulations do "not directly conflict," because the "city ordinance simply requires more" than the state law. *Id.* Because there "is no question that the laws can 'coexist and be effective,'" the challenge failed. *Id.*

Conversely, when state law "expressly forecloses" what a local ordinance permits, the local ordinance must give way. *Associated Builders and Contractors v. City of Lansing*, 305 Mich. App. 395, 414–15 (2014), *affirmed in relevant part*, 499 Mich. 177 (2016). For instance, a local ordinance prohibiting real estate commerce on Sundays is unenforceable in light of a state statute specifically allowing real estate commerce for those persons who observed the Sabbath on Saturday rather than Sunday. *Builders Ass'n v. Detroit*, 295 Mich. 272, 275–76 (1940). But where an "ordinance essentially 'goes further' than the statute," there is "no direct conflict between the provisions." *Newell v. Otter Lake*, 2011 WL 5555818, at *2 (Mich. Ct. App. Nov. 15, 2011) ((unpublished, attached as Exhibit 4).

Michigan's Age of Majority Act does not expressly forbid additional, heightened age restrictions imposed through local regulation. Genesee County's regulation is among the dozens of local laws and regulations that "enlarge[] upon the provisions of a statute by requiring more than the statute requires," *Grand Rapids*, 455 Mich. at 257, with respect to age. Detroit and Lansing, for example, immunize possession of small amounts of marijuana on private property from penalties under their respective municipal controlled substances ordinances—but only for individuals over 21 years of age. *See* Detroit Code § 38-11-50 (safe harbor for possession of small amounts of marijuana on private land for those over 21); Lansing Code § 8-501 (same). And Michigan localities have imposed similar heightened age requirements in many contexts where the reason for doing so went "far beyond considerations of mere legal capacity." *Smilnak*, 136 Mich. App. at 114; *see, e.g.*, Dearborn Code § 12-518 (supervision of amusement devices); Kalamazoo Code § 6-113 (E) (public dance permits); Southfield Code § 7-711 (managing a smoker's lounge); Detroit Code § 19-1-46(b)(2) (operating fireworks). Under the challenger's theory, these regulations would also be preempted. But no court has ever embraced such a sweeping view of preemption that would wipe all these regulations off the books. RPF Oil has offered no compelling reason to do so now.

3. The challenger here resists these basic principles. Relying exclusively on the analysis contained in the non-binding[1] Attorney General Opinion No. 7294, RPF Oil contends that the County's regulation directly conflicts with the Age of Majority Act. That reasoning is unsound.

First, the Attorney General opined that because the text of the Act is "written in the broadest possible terms by stating that a person who is 18 years of age 'is an adult of legal age *for all purposes whatsoever,*'" it forbids any future local regulation that might raise the age for purchasing tobacco. *See* Ex. A to Mot. ISO of Temporary Restraining Order at 6 ("TRO Ex.

[1] *See Beer & Wine Ass'n v. Attorney Gen.*, 142 Mich App 294, 300 (1985).

A"). But the state's demarcation of who has met the age of majority does not foreclose a locality's (or the state's) ability to place greater limitations on which "adults" are subject to different laws.

Importantly, "nothing in the plain language" of the Act "expressly forecloses" a county from "set[ting] a higher standard"—the *sine qua non* of conflict preemption—for the purchase of tobacco products. *Associated Builders and Contractors*, 305 Mich. App. at 414-15. That makes sense. As the Court of Appeals has explained, the Age of Majority Act's "clear purpose" was both narrow and specific. *Smilnak*, 136 Mich. App. at 103. In passing the Act, the Legislature sought only "to establish 18 as the age at which a minor loses the disabilities and protections of his minority and gains the legal status of an adult." *Id.*

But legal capacity of adulthood is a background presumption, not an unyielding command. Laws that impose higher age restrictions based on an "aim . . . far beyond considerations of mere legal capacity," do not implicate the Age of Majority Act. *Id.* (explaining that the Act "was not intended to preclude the Legislature from making distinctions based on the age of 21"). That explains why, when it restricted the drinking age to those over the age of 21, the Legislature did not need to repeal the Age of Majority Act. And it explains why the Court of Appeals has held that the Act "did not intend to confer" upon 18-year-olds any inalienable rights "notwithstanding [heightened] statutory age requirements" to the contrary. *Id.* at 113. Under the Age of Majority Act, therefore, the state, counties, and cities still remain free to draw age-based distinctions in specific circumstances that require more than just that an individual have reached the age of majority (18 years of age).[2]

[2] Although the Attorney General opined (without citing any authority) that the Act's statement that a person who is 18 years of age "is an adult of legal age *for all purposes whatsoever,*" should be given the "broadest possible" sweep, courts have said just the opposite. TRO Ex. A at 6. For instance, analyzing identical language employed by New Mexico's Age of Majority Act, the New Mexico Supreme Court found "no analogical or interpretive basis for the contention that 'for all purposes' means that a person 18 years of age is an adult in every phase of law."

Second, the Attorney General concluded that a local regulation restricting the purchase of tobacco products to 21-year olds would age would "overturn[]" the Act's "elimination of 'different' treatment of the legal capacity" between 18-year-olds and 21-year-olds. TRO Ex. A at 5. That view similarly conflicts with the text and purpose of the Act—which was designed to revise past age distinctions drawn in preexisting state laws, not preempt future regulations imposing heightened requirements for specific reasons.

The Act's plain language provides only that "a person who is at least 18 years of age . . . shall have the same duties, liabilities, responsibilities, rights, and legal capacity as persons *heretofore acquired* at 21 years of age." MCL 722.52 (emphasis added). The key limiting phrase "heretofore acquired" refers back in time to only those laws that had previously adopted minimum age requirements of 21 years because it was then the age of majority. *See* Black's Law Dictionary 726 (6th ed. 1990) (explaining that the term "denotes time past, in distinction from time present or time future"). It is a fundamental principle of statutory interpretation that courts "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas. Co. v. Old Republic Ins. Co.*, 466 Mich. 142, 146 (2002). And courts interpreting similar laws in other jurisdictions have reached just this conclusion. *See, e.g.*, *Peterson v. Romero*, 542 P.2d 434, 485 (N.M. 1975) (concluding that New Mexico's "similar" Age of Majority Act was intended to "substitute the age of 18 for the age of 21 *when any prior law fixed an adult age of 21 years*") (emphasis added).

The legislative history, too, reinforces this point. The Governor's Commission established to investigate the Age of Majority (as well as the Legislature) focused exclusively on preexisting state laws already on the books—its appendix of targeted laws contained not a single local city or

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Peterson v. Romero, 542 P.2d 434, 436 (N.M. 1975). To the contrary, the phrase "for any purpose" is "not all-encompassing, but is restricted to a reasonable construction by the context of the entire statute and the purposes of the act." *Id.*

county ordinance or regulation. Ex. 1, Add. at 15-17. And throughout the legislative process, the focus was exclusively directed toward specific, then existing state laws. *See id.* at 18 (targeting the proposed legislation at those state "provisions of law currently prescribing" an age of majority of 21 years); *id.* at 13 (specifically directing that the law identify any "inconsistencies or inadequacies in the present laws").

Because neither the text nor purpose of Michigan's Age of Majority Act forecloses future regulations imposing heightened age requirements where the aim of the age requirement goes "far beyond considerations of mere legal capacity," the County's regulation does not directly conflict.

B. The County's regulation is not in direct conflict with the Youth Tobacco Act.

In a single sentence in the complaint (though, again, not in its argument) RPF Oil claims that the County's regulation also is in "direct conflict with the sign requirements of the Youth Tobacco Act." Even the Attorney General disagrees. As it explained in the same opinion on which the challenger relies, when "examining the Youth Tobacco Act, . . . the fact that [a local] ordinance imposes a greater restriction on the sale or furnishing of tobacco does not appear to be a direct conflict" with the Youth Tobacco Act. TRO Ex. A at 5. RPF Oil cites no authority (and develops no theory) for its contrary view. Because the right to a preliminary injunction necessarily depends on "the strength of the moving party's showing that it is likely to prevail on the merits," the absence of any argument in support of this claim is reason enough for it to be denied. *Pontiac Fire Fighters*, 482 Mich. at 6 n.6.

In any event, the claim is meritless. "As a general rule, additional regulation to that of a State law does not constitute a conflict therewith." *Walsh,* 385 Mich. at 636 (quotation marks and citation omitted). The "enactment and enforcement of similar [public health and safety] goals . . .

at the local level is not precluded by the preemption doctrine." *Grand Rapids*, 455 Mich. at 261. So municipalities may enact ordinances that are more restrictive than state law: the mere fact that it involves "[p]arallel subject matter" does "not require a finding of preemption." *Id.* Under that rule, there is no preemption here. *See, e.g.*, A.G. Op. No. 6665 (Nov. 15, 1990) (concluding that the Youth Tobacco Act does not "expressly preempt[] local ordinances" that restrict sales of tobacco products).

II. RPF Oil has completely failed to carry its burden to show that it will suffer irreparable harm or that an injunction would serve the public interest.

Not only has RPF Oil failed to show a likelihood of success on the merits, but it cannot demonstrate that there is (1) "a real and imminent danger of irreparable injury," (2) a risk that, absent an injunction, it will suffer more harm than the County would if the preliminary relief were denied, and (3) that the injunction would clearly serve the public interest—as is required for this Court to even consider awarding the company the extraordinary relief it seeks. *Pontiac Fire Fighters*, 482 Mich. at 6. This exacting standard reflects the fact that "[a]n injunction represents an extraordinary and drastic act of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *AFSCME v. City of Detroit*, 252 Mich. App. 293, 314 n.5 (2002) (citing *Senior Accountants Assoc. v. City of Detroit*, 218 Mich. App. 263 (1996)).

A. RPF Oil will not suffer irreparable harm absent an injunction.

In a single sentence—and without any record support—RPF Oil asserts that, absent a preliminary injunction, there is "little doubt" that it will suffer irreparable harm because it will face "criminal prosecution" and "criminal and civil fines" if the County's regulation is enforced. RPF Br. 3. There is no immediate or certain harm that RPF will face other than perhaps economic harm—which is incapable of justifying a grant of the injunctive relief sought here. *See Pontiac Fire Fighters*, 482 Mich. at 10. RPF Oil has made no showing that any potential monetary

loss warrants the extraordinary remedy of an injunction. And if RPF Oil ultimately succeeds in its challenge it can permanently resume its normal course of business. *See M&S, Inc. v. Attorney Gen.*, 165 Mich. App. 301, 308 (1987). Not only does that defeat any claim to a threat of irreparable injury, but it also demonstrates why RPF Oil cannot show that there is any risk that it "would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief." *Alliance for the Mentally Ill v. Dep't of Cmty. Health*, 231 Mich. App. 647, 665 (1998).

Even with regard to potential criminal sanctions, RPF Oil has "alleged nothing more than an apprehension of future injury or damage." *Pontiac Fire Fighters*, 482 Mich. at 11. A "verified complaint, standing alone," like RPF's here, is insufficient as a matter of law to satisfy the irreparable harm standard because it "fail[s] to make a particularized showing" that the challenger "face[s] *real* and *imminent* danger." *Id.*; *see also Thermatool Corp. v. Borzym,* 227 Mich. App 366, 377 (1998) (explaining that any alleged irreparable injury "must be both certain and great, and it must be actual rather than theoretical"). Nor is apprehension of a potential sanction, even a criminal one, sufficient to satisfy the irreparable harm requirement. *See Younger v. Harris*, 401 U.S. 37, 46 (1971) (explaining that "[c]ertain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term"). RPF Oil has made no effort to show that it *will almost certainly* face criminal sanctions even if it were to violate the County regulation: the regulation itself is designed to avoid this potential outcome by authorizing health officers to pursue injunctive relief "against any person to restrain or prevent a violation." § 1012. The challenger's concerns are speculative, not imminent. Based on RPF Oil's presentation alone, its request for a preliminary injunction must be denied. *See Michigan Coal. of State Employee Unions*, 465 Mich. at 223–24 (holding that, where a party seeks a *preliminary* injunction, "in that situation

and that situation alone, the petitioner must demonstrate" that, absent the entry of an injunction "*before* the parties have had their day in court," it will "imminently suffer irreparable harm").

B. A preliminary injunction would disserve the public interest.

Denying the requested preliminary injunction is all the more appropriate given the public interest equities. As RPF Oil concedes, the County passed this regulation to address a crucial "public health issue"—the "consequences of tobacco use" on our youth. RPF Br. 3. That "laudable" goal, as RPF Oil has put it, deserves deference in the absence of any showing that the public interest would benefit if this regulation were enjoined.

In adopting this regulation, the County responded to an "urgent public health challenge" within the County—30% of Genesee County residents reported smoking every day and almost every smoker (close to 95%) reported starting by age 21. The Genesee County Board of Health engaged in a substantial effort to study and analyze the public health implications of cigarette smoking under its broad, state-delegated authority to adopt "necessary and appropriate" regulations to "properly safeguard the public health," MCL 333.2441, 333.2435. Under this authority, county health departments have an "affirmative duty" to "take measures to safeguard human health." *McNeil v. Charlevoix City*, 484 Mich. 69, 85 (2009) (citing MCL 333.2433(1)). That duty includes a requirement that these departments must "continually and diligently endeavor to prevent disease, prolong life, and promote the public health," including "particularly" the "prevention and control of health problems" of "vulnerable population groups." MCL 333.2433(1).

Within the state, as the Board's uncontroverted evidence revealed, more than 16,000 adults die every year from smoking-related diseases and nearly "one in ten Michigan youth who are alive today will die early from smoking-related diseases." § 1003. The Board's findings also

made clear that the cost of smoking is not limited to the loss of lives. Annually, smoking cost the state approximately $9.4 billion dollars in "direct healthcare expenses and lost productivity." *Id.*

Many of these problems are only magnified in Genesee County. The County houses the fifth highest number of public schools in the state, and nearly half of all high school students in the County reported that it was "easy to access cigarettes." *Id.* As the Board found, this is in part because "young adults between ages 18 and 20 are more likely than adults over the age of 21 to purchase tobaccos for minors." *Id.* Because most smokers "transition from experimental to regular smoking before age 21," raising the minimum legal age of access not only "delays initiation and reduce[s] tobacco prevalence" across the board, but also likely delivers "the largest proportionate reduction in initiation" among smokers between the age of 15–17 because it cuts off their main source of supply—those between the ages of 18–20. *Id.* As the Board observed, identical regulations in other localities successfully dropped the "prevalence of youth smoking" by nearly half within five years. *Id.* All told, more than 200 localities in fourteen states have enacted regulations restricting the sale of tobacco products to those over the age of 21. *See id.*

At its core, RPF Oil's challenge here seeks to vindicate its private interest in selling more tobacco products. But private interests "are not tantamount to the public interest." *Michigan AFSCME Council 25 v. Woodhaven-Brownstown School Dist.*, 293 Mich. App. 143, 157 (2011). Enjoining the regulation, at this stage, would only serve to undermine the important public health goals on which it rests.

CONCLUSION

RPF Oil's claim for a preliminary injunction should be denied.

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