STATE OF MICHIGAN
IN THE COURT OF APPEALS

ADELINE HAMBLEY,

Plaintiff-Appellee,

v

OTTAWA COUNTY; OTTAWA COUNTY BOARD OF COMMISSIONERS; and **JOE MOSS, SYLVIA RHODEA, LUCY EBEL, GRETCHEN COSBY, REBEKAH CURRAN, ROGER BELKNAP,** and **ALLISON MIEDEMA,** Ottawa County Commissioners in their individual and official capacities,

Defendants-Appellants.
_____/

Court of Appeals No. 365918

Ottawa County Circuit Court
No. 23-7180-CZ

BRIEF OF PROPOSED *AMICI CURIAE* MICHIGAN ASSOCIATION FOR LOCAL PUBLIC HEALTH, NATIONAL ASSOCIATION OF COUNTY AND CITY HEALTH OFFICIALS, THE ACT FOR PUBLIC HEALTH INITIATIVE AT THE NETWORK FOR PUBLIC HEALTH LAW, AND PETER JACOBSON IN SUPPORT OF PLAINTIFF-APPELLEE

GOODMAN ACKER, P.C.
MARK BREWER (P35661)
ROWAN CONYBEARE (P86571)
17000 W. Ten Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com

Attorneys for Proposed *Amici Curiae*

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Constitutional Provisions

Rules

Michigan Compiled Laws

Public Acts

Treatises

Executive Orders

Other Authorities

DEDICATION

For Toby Citrin, 1934–2020

Adjunct Professor of Public Health Policy
at the University of Michigan's
School of Public Health

Chair, Michigan Governor's Commission on
Public Health Statute Review which played a
key role in the development of the 1978 Public
Health Code

Generous Supporter of Harvard College Students

STATEMENT OF JURISDICTION

This Court has jurisdiction under MCR 7.203(B) and MCR 7.205.

STATEMENT OF QUESTIONS INVOLVED

1. Did the trial court properly grant—upon Appellants' Motion for Summary Disposition, pursuant to MCR 2.116(I)(2)—judgment to Appellee Hambley confirming that Hambley is the duly-appointed Health Officer in Ottawa County?

   Trial Court's Answer: Yes

   Appellants' Answer: No

   Appellee's Answer: Yes

   Amici Answer: Yes

2. Did the trial court properly grant a Preliminary Injunction to Appellee Hambley preventing Appellants from terminating her as Ottawa County's Health Officer pending a trial?

   Trial Court's Answer: Yes

   Appellants' Answer: No

   Appellee's Answer: Yes

   Amici Answer: Yes

INTERESTS OF *AMICI CURIAE*[1]

The Michigan Association for Local Public Health ("MALPH") is an association organized to represent city, county, and district health departments throughout Michigan. As a defender of the Public Health Code, MALPH works to strengthen Michigan's system of local public health departments and advocates for local public health departments and jurisdictions. MALPH also serves as the recognized liaison between the Michigan Department of Health and Human Services ("MDHHS") and local health departments throughout the state. MALPH therefore has a significant interest in this case because the legal issue raised—whether a county commission can peremptorily terminate a duly appointed and qualified county health officer in violation of the just cause requirements of Michigan law—will affect local public health departments and public health officials throughout the state. MALPH has participated in litigation concerning the application of the Public Health Code affecting public health officials. *See People v Lyon*, Genesee County Circuit Court, No. 21-47378-FH (*amicus*).

The National Association of County and City Health Officials ("NACCHO") is the premier partner and voice for the country's nearly 3,000 local health departments ("LHD's") at the county and city level of governmental public health and has demonstrated success in fulfilling its mission to improve the health of communities by strengthening and advocating for LHD's. NACCHO has over 30 years' experience successfully supporting the work of health departments—including state, territorial, and tribal health agencies—in building the partnerships, systems, and infrastructure to address public health challenges. In collaboration with federal, national, state, and local partners, NACCHO develops comprehensive programming to meet the needs of health departments and has

[1] Counsel for *amici curiae* are the sole authors of this entire brief which was funded entirely by *amici curiae*. Neither undersigned counsel nor any other party or *amici curiae* made a monetary contribution to fund the preparation or submission of this brief.

an expansive portfolio of over 30 programs across topic areas, including workforce and leadership development; performance improvement, including building health department capacity to meet national standards (*e.g.*, 10 Essential Public Health Services, Foundational Capabilities, PHAB Accreditation, Healthy People 2030); data modernization, including informatics, data standards, and use; public health preparedness and infectious diseases; social determinants of health and health equity; maternal, child, and adolescent health; injury and violence prevention; research and evaluation; and more. NACCHO is among the foremost leaders in public health in the United States, working to ensure the end goal of creating a stronger, more dynamic public health system that is able to respond to future public health challenges. NACCHO's interest in this brief directly supports its overall workforce and infrastructure strategies to provide support for local health officials to be able to perform their duties, based on their professional training, skills, and experiences, and to do so in an environment focused on improved community health outcomes and protection of the public's health rooted in science and evidence, and free from political or other interference and influence. The outcome of this case could have broader implications for the field of public health across the country and the ability of local health officials in other jurisdictions to perform their roles without fear of unjustified consequences, including separation without cause where there are existing laws and protections in place to prohibit such behavior.

The Act for Public Health Initiative at the Network for Public Health Law is a collaborative effort of the Network and four other public health law partners. Act for Public Health provides direct support through consultation, training, legal technical assistance, research, and resources to help protect and promote the ability of public health officials and practitioners to take actions to protect the health of their communities. Its interest in the specific legal issues underlying this litigation is directly related to its mission of ensuring the professional independence of local health

officers throughout the United States, not just in Michigan. The outcome of this litigation could cause irreparable harm nationally to local health officers' ability to protect the public's health free from undue political interference and illegal personnel actions. The outcome of the litigation could also compromise the effectiveness of state public health codes across the country. The law's capacity to protect the public's health depends on a stable professional work force dedicated to using the best available science and applying it judiciously and appropriately to the state's public health code. At stake in this litigation is the professionalism of state and local public health officials and the scientific basis of public health practice.

For more than three decades, Professor Emeritus Peter Jacobson has been actively engaged in public health law research and policy. From 1996-2017, he taught public health law at the University of Michigan School of Public Health. From 2011 until 2023, he was the Principal Investigator, Mid-States Region of the Network for Public Health Law. During that time, he worked closely with Michigan's state and local health officials to assist them in understanding and applying the Michigan Public Health Code to a wide variety of public health challenges. This work included providing technical assistance and training on public health law. Based on his experience, the outcome of this litigation could cause irreparable harm to Michigan's local health officers' ability to protect the public's health free from undue political interference and illegal personnel actions. At stake in this litigation is the professionalism of state and local public health officials and the scientific basis of public health practice.

The brief of Proposed *Amici Curiae* will provide the Court with historical and other factual information, and additional legal arguments that will aid the Court in deciding the appeal.

INTRODUCTION

This case is about much more than a single county public health officer. It is about whether Michigan's successful public health system—built on county public health officers—will be able to continue protecting the public health based on science and facts, free from political and ideological interference. The Michigan Public Health Code and other Michigan laws demonstrate Michigan's commitment at both the state and local levels to science-based public health decisions without such interference. At the local level, this freedom from political interference with public health decisions is provided by robust just cause protections from discharge for local public health officers. The action of the Ottawa County Board of Commissioners in attempting to fire Adeline Hambley as Ottawa County Health Officer without just cause is antithetical to the purposes of the Public Health Code. If allowed, this action would overturn a century of just cause protection for county public health officers, jeopardizing the work of all local public health officers in Michigan.

The trial court correctly confirmed Hambley's position as Ottawa County Health Officer protected by a just cause standard, and shielded her from discharge pending trial. Those decisions should be affirmed.

STATEMENT OF FACTS AND PROCEEDINGS

A. Facts And Proceedings Below

Proposed *Amici Curiae* adopt the Counter-Statement of Facts of Plaintiff-Appellee.

B. A Brief History Of The Michigan Public Health Code

The history of Michigan public health law at the state and local levels demonstrates an evolution away from decision making by elected officials and boards with no public health expertise influenced by politics and ideology, to decisions made by credentialed public health professionals based on facts and science—professionals who are insulated from political pressure and

interference.

1. State Level

In 1873, the Legislature created a State Board of Health, giving it "general supervision of the interests of the health and life" of Michigan's people but very few specific powers.[2] None of its members were required to have expertise in any health field.[3] This law was periodically amended and slightly strengthened.[4] However, this structure failed during the Spanish influenza pandemic of 1918, thus requiring other government officials to act. Specifically, Governor Albert Sleeper closed "all places of public amusement and congregation" except schools,[5] and local officials throughout Michigan enacted similar orders.[6]

Following that pandemic, the Legislature in 1919 repealed the act authorizing a State Board of Health and passed a new law establishing an individual state health commissioner with "general charge and supervision of the enforcement of the health laws," along with those powers and duties previously held by the abolished State Board of Health.[7] The commissioner was required to have public health credentials[8] and supervised a wide array of public health services—local health boards, hospitals, preventing and treating communicable and mental diseases, and so forth.[9] The commissioner could only be removed for cause.[10]

---

[2] *See* 1873 PA 81, § 2.
[3] *See id* § 1.
[4] *See, e g,* 1893 PA 47; 1909 PA 293.
[5] University of Michigan Center for the History of Medicine, *Influenza Encyclopedia: Detroit, Michigan*, https://www.influenzaarchive.org/cities/city-detroit.html# (accessed August 2, 2023).
[6] *See, e g*, *id*; University of Michigan Center for the History of Medicine, *Influenza Encyclopedia: Grand Rapids, Michigan*, https://www.influenzaarchive.org/cities/city-grandrapids.html# (accessed August 2, 2023).
[7] 1919 PA 146, §§ 1, 2, 4.
[8] *Id* § 1.
[9] *See, e g, id* §§ 7–9, 11.
[10] *Id* § 2.

This revolutionary transformation in public health law from elected officials and a board having "general supervision of the interests of health and life" to a single, credentialed, and professional commissioner having "general charge and supervision of the enforcement of the health laws" reflected a significant change in the Legislature's view of how to protect public health. The Legislature recognized that public health decisions should not be made by politicians with no public health training and influenced by politics and ideology. So, it depoliticized and professionalized public health in Michigan by explicitly granting the professional state health commissioner the power to protect the public health with insulation from politics and ideology.

Subsequently, the Executive Organization Act of 1965 transferred the powers and duties of the state health commissioner to the Department of Public Health,[11] led by a director of public health.[12] The Public Health Code, Act 368 of 1978 ("PHC"), continued the department and director of public health,[13] requiring that they be an experienced, credentialed public health or health administration professional.[14] Significantly, the commentary accompanying the 1978 PHC indicates that the broad grant of authority to public health professionals was intended to continue from the previous code:

> *Commentary*
>
> For years the department has had broad powers to take whatever action is necessary where there is an imminent danger, § 2251, to the public health. This section makes clear the intention to continue this broad power.[15]

[11] MCL 16.527; MCL 16.529.
[12] MCL 16.526.
[13] MCL 333.2201.
[14] *See* MCL 333.2202(1).
[15] Strichartz, *Commentary on the Michigan Public Health Code* (Ann Arbor: The Institute of Continuing Legal Education, 1982), p 109, available at https://babel.hathitrust.org/cgi/pt?id=mdp.39015020571702&view=1up&seq=5 (accessed August 2, 2023) (emphasis added). Strichartz was a Professor of Law at Wayne State University and the Executive Director of the Public Health Statute Review Project which drafted the 1978 PHC.

A 1996 Executive Order transferred the relevant duties and powers of the Department of Public Health to the director of the Department of Community Health.[16] In 2015, the Department was transferred into today's Department of Health and Human Services ("MDHHS").[17]

Thus, for over a century the Legislature has repeatedly recognized that the expertise, speed, and flexibility required to protect the public health on a statewide basis requires vesting decision-making responsibility in a single expert in the executive branch not subject to second-guessing by a political body, such as the Legislature. The Legislature prudently recognized that protecting the public's health is best achieved through reliance on state and local public health professionals to assess and respond to disease threats. Granting authority to MDHHS via the Public Health Code enables a response based on public health expertise the Legislature does not have and could not easily exercise in a timely manner. Put simply, the Legislature is not in a position to micromanage the public health, statewide or locally, because it would have difficulty issuing, monitoring, and enforcing any regulations or orders in real time, especially in an emergency. Consequently, the Legislature has properly delegated statewide public health decisions to the director of MDHHS in the executive branch, a position with the authority and mandate to act. No other governmental body or private entity has the skills and knowledge to protect the public health throughout the state.

2. Local Level

A similar transfer of public health authority from elected officials with no public health credentials to credentialed public health professionals with protection from politics and ideology has occurred at the local level.

Beginning shortly after statehood, the elected officials in each local jurisdiction constituted

[16] Executive Order No. 1996-1.
[17] Executive Order No. 2015-4.

a board of health.[18] Those boards exercised all local public health authority.[19] The boards could, but did not have to, appoint a physician as health officer.[20] Even if appointed, a health officer served at the pleasure of the board and had no independent authority, being required to carry out the board's regulations.[21] This structure was continued in subsequent laws, notably including the fact that local health officers served at the pleasure of local boards of health and had no independent authority.[22]

In 1917, the state began moving toward a unified local public health structure, authorizing townships and villages to create health districts.[23] Districts were required to employ physicians as health officers who served at the pleasure of the district board.[24] In 1927, the 1917 Act was repealed and county health departments with county health officers were created.[25] The health department had countywide jurisdiction except in cities with health departments,[26] and was under the direction of the state health department.[27] Counties could consolidate and create multi-county districts.[28] In a significant change continued to the present-day, the appointed local health officers could only be removed under a just cause standard, for incompetence or misfeasance after a hearing.[29] Subsequent amendments mandated that the health officer have the professional qualifications established by the state.[30]

---

[18] 1857 CL 37.1337 (townships); 1857 CL 37.1385 (cities and villages).
[19] *See, e g,* 1857 CL 37.1339–37.1346.
[20] 1857 CL 37.1338.
[21] *Id*.
[22] *See, e g,* 1873 PA 178, ch XIV, §§ 1–8 (city council acts as board of health in absence of an appointed board of health); 1877 PA 56, § 1 (continuing the township structure).
[23] 1917 PA 130.
[24] *Id* § 5.
[25] 1927 PA 306.
[26] *Id* § 5.
[27] *Id* § 6.
[28] *Id* § 7.
[29] *Id* § 4.
[30] 1970 CL 327.203.

In 1978, the new Public Health Code ("PHC") updated and brought consistency to Michigan public health law but continued the basic structure of local public health officers with professional credentials authorized to make public health decisions protected by a just cause standard.

Under the 1978 PHC, each county must maintain a health department run by a health officer.[31] While the county health officer is appointed by the county, that officer must have all of the professional credentials required by the state.[32] That officer has broad authority to protect the public health—authority not subject to the control of the county government.[33] As one expert commentator described it, "substantially the same powers are delegated to the local health officers as the state director enjoys."[34] Those powers must be "liberally construed for the protection of the health, safety, and welfare of the people of this state,"[35] a provision labeled:

> [T]he single most important statement of legislative intent and a guide to the courts in interpreting its provisions to ensure the protection of the health of the citizens of the state.[36]

County commissions have very limited authority in the protection of public health: they can only approve or disapprove health department regulations, but those regulations cannot fall below state standards and "[r]egulations of a local health department supersede inconsistent or conflicting local ordinances."[37] Just cause protections for county health officers in earlier laws were continued under MCL 46.11(n), which provides just cause protections for appointees of county governments, such as county health officers.

---

[31] MCL 333.2413; MCL 333.2428.
[32] MCL 333.2428(1).
[33] *See, e g,* MCL 333.2428(2); MCL 333.2433; MCL 333.2435; MCL 333.2441; MCL 333.2446; MCL 333.2451; MCL 333.2455; MCL 333.2465.
[34] *Commentary on the Michigan Public Health Code*, p 122.
[35] MCL 333.1111(2).
[36] *Commentary on the Michigan Public Health Code*, p 63.
[37] MCL 333.2441.

In addition, the state maintains considerable oversight and control of local public health, further restricting the role of county commissions.[38] Indeed, it can be argued that county health departments are more an extension of the state than creatures of county government.[39] The 2023–2024 state budget provides even more state oversight of local attempts to restrict the duties of local health officers, mandating throughout that "local governments shall report any action or policy that attempts to restrict or interfere with the duties of the local health officer."[40]

3. The Success of Michigan's Public Health Structure

Michigan's public health structure has successfully protected the public health.

From 1900 to 1999, life expectancy in the United States increased by 30 years, 25 of which can be attributed to public health interventions.[41] Public health efforts have led to cleaner air, purer water, healthier food, and safer housing. They have helped reduce the amount of money society needs to spend on health care, and the amount of time residents need to miss school or work due to chronic or infectious diseases.

Since the creation of the State Board of Health in 1873, the state and local health departments have actively taken many steps to protect public health by identifying and addressing widespread issues that diminish lifespan and impair quality of life.[42] For example, it was Michigan public health experts who, in the 1920s, examined the prevalence of goiter in adults and realized that adding iodine to table salt could cure the condition.[43] To this day, makers of table salt add iodine to table

[38] *See, e g,* MCL 333.2428(1); MCL 333.2431(1)(a) and (2).
[39] *See* MCL 333.2235(2) (local health departments as primary providers of services).
[40] *See* 2023 PA 119.
[41] Katz, Byrnes & Castrucci, *Talking Health: A New Way to Communicate About Public Health* (Oxford: Oxford University Press, 2022), p 1.
[42] Michigan Department of Public Health, *The First 100 Years* (Lansing: Michigan Department of Public Health, 1973), p 9.
[43] *See* Leung, Braverman & Pearce, *History of U.S. Iodine Fortification and Supplementation*, 4 Nutrients 1740, 1742 (2012).

salt everywhere.[44] In the 1930s, lawmakers gave Michigan public health departments oversight of water systems in new construction, ensuring that water and sewer system plans were submitted to the state health department before construction commenced.[45] This oversight, along with other public health interventions, such as food safety and public health education regarding hygiene, led to substantial progress in the prevention of foodborne and waterborne diseases.[46] In 1940, Michigan Department of Public Health researchers Dr. Pearl Kendrick and Dr. Grace Eldering developed a vaccine for whooping cough that was safer and more effective than previous vaccines.[47]

A more recent example of public health success comes from July 26, 2018. On that date, the public water supply system in Parchment became the first in Michigan with detected polyfluoroalkyl substances ("PFAS") results over the U.S. Environmental Protection Agency's ("EPA") Lifetime Health Advisory level.[48] The Kalamazoo County Health and Community Services Department promptly issued a "Do Not Drink" advisory and immediately began providing bottled water.[49] A state of emergency was declared, leading to the flushing of the entire water system and extensive discussions involving local officials, residents, and government agencies, including the EPA.[50] Additionally, measures were implemented to install drinking water filters in residences with private wells affected by PFAS contamination.[51] Within a month, the City of Parchment successfully

[44] *Id* at 1742–43.
[45] 1931 PA 123.
[46] Centers for Disease Control and Prevention, *Achievements in Public Health, 1900–1999*, 48 Morbidity and Mortality Weekly Report 621, 622 (1999).
[47] Zarrelli, *Whooping Cough Killed 6,000 Kids a Year Before These Ex-Teachers Created a Vaccine*, History (April 16, 2019), https://www.history.com/news/whooping-cough-vaccine-pertussis-great-depression.
[48] *Parchment/Cooper Township Drinking Water Response*, Michigan PFAS Action Response Team, https://www.michigan.gov/pfasresponse/drinking-water/statewide-survey/parchment (accessed August 2, 2023).
[49] *Id*.
[50] *Id*.
[51] *Id*.

connected to the City of Kalamazoo's water supply, allowing the "Do Not Drink" advisory to be lifted.[52]

The state's public health system has evolved its focus to address changing community and societal threats. Historic dangers were often ameliorated with improved sanitation or vaccines, but today's top threats are chronic medical conditions, often related to lifestyle and social conditions, and complex environmental threats. Local public health agencies today are often focused on addressing maladies like heart disease, obesity, depression, and substance use. Michigan's decentralized local public health structure allows local public health officials to focus their attention on the most pressing threats to their local populations, with support from state and federal health agencies.

[52] *Id*.

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THAT APPELLEE HAMBLEY IS THE DULY APPOINTED HEALTH OFFICER IN OTTAWA COUNTY WHO CAN ONLY BE REMOVED FOR JUST CAUSE UNDER MCL 46.11(N) AND IN ACCORDANCE WITH HER DUE PROCESS RIGHTS.

A. County Local Health Officers Can Only Be Terminated For Just Cause.

Since at least 1927, county local health officers ("LHO's") have been protected from arbitrary discharge by a just cause standard, first under the public health laws and since 1978 by general county law:

> A county board of commissioners, at a lawfully held meeting, may . . . [s]ubject to subdivision (o), remove an officer or agent appointed by the board if, in the board's opinion, the officer or agent is *incompetent* to execute properly the duties of the office or if, on charges and evidence, the board is satisfied that the officer or agent is guilty of *official misconduct, or habitual or willful neglect of duty*, and if the *misconduct or neglect* is a *sufficient cause* for removal. However, an officer or agent shall not be removed for *that misconduct or neglect* unless charges of *misconduct or neglect* are presented to the county board of commissioners or the chairperson of the county board of commissioners, notice of the hearing, with a copy of the charges, is delivered to the officer or agent, and a full opportunity is given the officer or agent to be heard, either in person or by counsel.

MCL 46.11(n) (emphasis added). Michigan courts have repeatedly interpreted the emphasized terms found in MCL 46.11(n) to create a just cause standard.

For example, the Veterans' Preference Act ("VPA"), MCL 35.401 *et seq*., provides that:

> No veteran . . . holding an office or employment in any public department . . . shall be removed or suspended, or shall, without his consent, be transferred from such office or employment except for *official misconduct, habitual,* serious or *willful neglect in the performance of duty*, extortion, conviction of intoxication, conviction of felony, or *incompetency* . . . .

MCL 35.402 (emphasis added). This Court has held several times that this language "protects veterans holding at-will public employment positions by converting those position to ones that are

terminable only for just cause." *Jackson v Detroit Police Chief*, 201 Mich App 173, 176; 506 NW2d 251 (1993); *see also, e g, Sherrod v City of Detroit*, 244 Mich App 516, 523; 625 NW2d 437 (2001) (same, *citing Jackson*, 201 Mich App at 176); *Vayda v Lake Co*, 321 Mich App 686, 693; 909 NW2d 874 (2017) (same, *quoting Sherrod*, 244 Mich App at 523, *citing Jackson*, 201 Mich App at 176); *see also O'Donnell v Liquor Control Comm*, 288 Mich 377, 380; 284 NW 915 (1939) (a discharge for political reasons violates the VPA).

Reinforcing the conclusion that MCL 46.11(n) creates a just cause standard is MCL 46.11(o), which creates a narrow exception to that just cause requirement by allowing a county commission to have only three specific appointees who can serve "at the pleasure" of the commission:

> If the county has *an appointed county manager or other appointed chief administrative officer or county controller*, the county board of commissioners may enter into an employment contract with that officer. . . . *If the officer serves at the pleasure of the county board of commissioners*, the contract must so state and may provide for severance pay or other benefits in the event the employment of the officer is terminated *at the pleasure of the county board of commissioners*.

MCL 46.11(o) (emphasis added). The Legislature explicitly chose to give county commissions the option to make only three appointees at-will employees—a group that does *not* include county LHO's.

If more be needed to confirm the just cause status of county LHO's—and more is not needed—the Legislature explicitly made the state public health director an at-will appointee of the Governor:

> The governor shall appoint the director of public health by the method and for a term prescribed by section 508 of Act No. 380 of the Public Acts of 1965, being section 16.608 of the Michigan Compiled Laws.

MCL 333.2202(1). MCL 16.608 expressly states that an appointee of the Governor serves at her pleasure:

> When a single executive is the head of a principal department, unless elected as provided in the constitution, he shall be appointed by the governor by and with the advice and consent of the senate and he shall serve at the pleasure of the governor.

MCL 16.608. Again, the Legislature knows how to create at-will positions and, unlike the state public health director, it explicitly chose *not* to make county LHO's serve at the pleasure of county commissions. They are instead protected by a just cause standard and have been so protected for nearly a century.[53]

At a minimum, Hambley can be removed from her position as Ottawa County Health Officer only in compliance with the just cause standard found in MCL 46.11(n).

B. County Local Health Officers Can Only Be Terminated In Accordance With Their Constitutional Due Process Rights.

The text of MCL 46.11(n) not only provides a just cause standard for county LHO's such as Hambley, but it also gives her a property right in continued employment subject to constitutional

---

[53] The at-will status of local public health officers in Colorado also reinforces Michigan's just cause standard for county LHO's. In Colorado, LHO's expressly serve at the pleasure of the county boards of health and can be discharged at will:

> An employee who serves "at the pleasure" of his employer generally may be discharged at any time without cause or formal procedure. The legislature in section 25-1-505 has expressed its judgment that this same degree of authority should apply to county boards of health in relation to public health officers. . . . The board's power to discharge at will the public health officer, who by statute is the administrative and executive head of the county health department, assures that changing policies and priorities of the board may be immediately implemented, if necessary, by replacement of the person who is clearly responsible for their implementation.

Johnson v Jefferson Co Bd of Health, 662 P2d 463, 471 (Colo, 1983) (citations omitted).

Unlike Colorado, Michigan gives county government neither control over local health policy nor the authority to fire LHO's at will. Instead, Michigan LHO's protected by just cause are responsible for local health policy development, implementation, and enforcement.

protections. As this Court held in *Sherrod v City of Detroit*, 244 Mich App 516; 625 NW2d 437 (2001), construing the identical Veterans' Preference Act just cause language, it

> converts at-will public employment positions into ones that are terminable only for just cause. . . . The failure of a defendant to comply with the procedures contained in the VPA may support a due process claim. See *Egan v Detroit*, 150 Mich. App. 14, 21; 387 N.W.2d 861 (1986). A plaintiff's due process claim in a case such as this depends on him having a property right in continued employment. *Cleveland Bd of Ed v Loudermill*, 470 U.S. 532, 538; 105 S. Ct. 1487; 84 L. Ed. 2d 494 (1985). In *Loudermill*, the Court determined that an Ohio statute providing that classified civil service employees could not be dismissed except for misfeasance qualified as a property interest in continued employment. *Loudermill*, 470 U.S. at 538-39. The VPA is in the nature of civil service law, *Brand v Common Council of Detroit*, 271 Mich. 221, 227; 261 N.W. 52 (1935), and because it converts at-will public employment into just-cause employment, *Jackson, supra* at 176, it granted the plaintiff a property right in continued employment. Once a state legislature confers a property interest in public employment, the employer may not deprive the employee of the interest without "appropriate procedural safeguards." *Cleveland Bd of Ed*, 470 U.S. at 541.

Id at 523.

In addition to her just cause rights, Hambley also cannot be discharged except in accordance with her constitutional due process rights.

II. THE TRIAL COURT CORRECTLY GRANTED A PRELIMINARY INJUNCTION PREVENTING HAMBLEY'S PRETEXTUAL OR RETALIATORY DISCHARGE PENDING TRIAL.

A just cause standard includes consideration of an employer's motive in making employment decisions, such as whether they are pretextual, a subterfuge, or done for purposes of retaliation or evasion of the just cause standard. *See, e g, Hammond v United of Oakland*, 193 Mich App 146, 153; 483 NW2d 652 (1992) (just cause analysis requires consideration of an employer's motive); *Ewers v Stroh Brewery Co*, 178 Mich App 371, 378; 443 NW2d 504 (1989) (pretextual claims cannot be used to evade a just cause requirement); *McCart v J Walter Thompson, Inc*, 437 Mich 109, 118 n 2;

469 NW2d 284 (1991) (opinion by LEVIN, J.) (same, citing *Ewers*, 178 Mich App at 378); *Cook v Caterpillar Tractor Co*, 85 Ill App 3d 402, 405–06; 407 NE2d 95 (1980) ("[R]etaliatory discharge is subsumed within [a] just-cause provision."); *Drnek v City of Chicago*, 192 F Supp 2d 835, 845 (ND Ill, 2002) ("A subterfuge analysis . . . necessarily requires the trier of fact to look beyond the defendant's statement of purpose or intent to see whether it is just an excuse or an 'artifice of evasion' to cover-up otherwise prohibited conduct.").

Thus, once the trial court correctly concluded that Hambley was protected by a just cause standard, it was necessary to consider whether her just cause rights were threatened by a future retaliatory or pretextual discharge while the case was pending. If so, the remedy was to protect her from discharge until trial by issuing a preliminary injunction.

The purpose of a preliminary injunction is to preserve the *status quo ante* and prevent harm to a plaintiff until a decision on the merits. *See, e g,* 42 Am Jur 2d, Injunctions, §§ 2, 9, pp 607–08, 620; 43A CJS, Injunctions, § 2, pp 20–21; *Mich Coalition of State Employee Unions v Mich Civil Serv Comm'n*, 465 Mich 212, 236–37; 634 NW2d 692 (2001) (CAVANAGH, J, dissenting) ("[T]he point of a preliminary injunction is to preserve the status quo ante and prevent the harm from occurring until a decision may be rendered on the merits."). Put another way, preliminary injunctive relief is a prophylactic measure designed to meet the threat of a future wrong. *See, e g,* CJS, § 12, pp 28–29; *Mich Coalition of State Employee Unions*, 465 Mich at 237 ("[P]reliminary injunctive relief is designed to meet the threat of a future wrong."); *Mich v Sault Ste Marie Tribe of Chippewa Indians*, Opinion of the United States District Court for the Western District of Michigan, issued March 5, 2013 (Case No. 12-cv-962), pp 27–28, *rev'd on other grounds* 737 F3d 1075 (CA 6, 2013) ("Th[e] prophylactic function is a routine feature of a preliminary injunction. . . . The point . . . is to prevent future harm from happening before it occurs."). Here, that future wrong is a pretextual or

retaliatory termination of Hambley before trial.

In determining whether to issue a preliminary injunction, the trial court correctly applied the four-factor test under Michigan law for granting injunctive relief to Hambley: (1) "the moving party showed that it is likely to prevail on the merits"; (2) "the moving party made the required demonstration of irreparable harm"; (3) "the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party"; and (4) "there will be harm to the public interest if an injunction is issued." *Detroit Fire Fighters Ass'n IAFF Local 344 v City of Detroit*, 482 Mich 18, 34; 753 NW2d 579 (2008).

Hambley established that all four factors favored injunctive relief.

First, Hambley was plainly going to prevail on the merits. Under all of the authorities in Section I and above, *e g, Ewers*, 178 Mich App at 378, she was protected by a just cause standard as well as by her constitutional due process rights.

Second, the trial court concluded that, as Hambley alleged, the Defendants-Appellants were looking for a pretext to discharge her prior to trial and were likely to do so, causing her irreparable harm:

> The Board's actions in its first meeting, by calling Plaintiff "interim" and by appearing to hire another individual, indicate they are likely taking adverse action against her.

Hambley v Ottawa Co Bd of Comm'rs, Opinion of the Ottawa Circuit Court, issued April 14, 2023 (Docket No. 23-7180-CZ), p 7. Not only were the Defendants-Appellants looking for a pretext to fire her, but Hambley's success at obtaining a temporary restraining order and preliminary injunction also significantly heightened the risk of retaliation, a claim she had already raised in her Complaint under the Whistleblower Protection Act. Pl-Appellee 1st Am Compl, pp 23–24. Hambley was in real and imminent danger of retaliatory or pretextual discharge unless a preliminary injunction issued.

Hambley's discharge would also cause irreparable harm to the public health in Ottawa County and statewide, further justifying injunctive relief. *See, e g, Attorney General v Thomas Solvent Co*, 146 Mich App 55, 59; 380 NW2d 53 (1985), *lv den*, 425 Mich 880 (1986) (threat of irreparable harm to public health justifies issuance of preliminary injunction). Her discharge would undermine the professional independence of LHO's in Ottawa County and throughout the state as well as threaten the fundamental advances in protecting the public health since the 1978 enactment of the Public Health Code. That Code has led to an increased professionalization of LHO's with consequential improvements in public health. Her discharge would cause irreparable harm to that progress in Ottawa County.

Next, the harm to Hambley and the public health if she was discharged clearly outweighed any harm to the Defendants-Appellants, who are significantly constrained in their conduct toward her by the just cause discharge standard of MCL 46.11(n), constitutional due process, and the strict requirements of the PHC as to whom they can appoint, *see, e g,* MCL 333.2428(1).

Finally, it cannot be gainsaid that the public interest would be protected by a preliminary injunction. Not only is the public interest served by enforcing laws such as MCL 46.11(n), *see, e g, Kelly Servs, Inc v Noretto*, 495 F Supp 2d 645, 660–61 (ED Mich, 2007) ("It is axiomatic that the public has an interest in the enforcement of the legislatively enacted laws."), but it is in the public interest to protect the public health, *see, e g,* Const 1963, art 4, § 51 ("The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern."); *Rock v Carney*, 216 Mich 280, 290; 185 NW2d 798 (1921) ("The health of the people is of supreme importance to the State"). Throughout the Public Health Code and in MCL 46.11(n) the Legislature has decided that it's emphatically in the public interest for county PHO's like Hambley to be credentialed professionals insulated from politics so they can make vital public health decisions

based on facts and science.

Hambley thus satisfied all four prongs necessary to obtain a preliminary injunction.

The trial court's grant of injunctive relief is reviewed for an abuse of discretion. *Mich Coalition of State Employee Unions*, 465 Mich at 217. This is a very high standard: "an abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007); *see also Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008). The trial court's factual findings are reviewed under a clearly erroneous standard—also a very high standard. *Herald Co v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 467; 719 NW2d 19 (2006); *see also Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Michigan*, 231 Mich App 549, 551; 587 NW2d 821 (1998).

On the record before the trial court, it was not an abuse of discretion to issue a preliminary injunction because that decision satisfied the four-factor test and was not "outside the range of reasonable and principled outcomes." Nor were the trial court's findings that the Defendants-Appellants were likely to take adverse action against Hambley before trial clearly erroneous since the record demonstrated that they had been planning to do so for months.

The trial court correctly granted a preliminary injunction, a decision which should be affirmed in full.

CONCLUSION AND RELIEF SOUGHT

Michigan's very successful public health system, built on the professionalism and independence of county public health officers, is threatened in this case. Allowing the arbitrary discharge of Hambley in violation of her just cause rights would undermine every local public health

officer in Michigan, with adverse consequences for public health throughout the state. The trial court correctly recognized that and its decision should be affirmed.

Respectfully submitted,

/s/ Mark Brewer

GOODMAN ACKER, P.C.
MARK BREWER (P35661)
ROWAN CONYBEARE (P86571)
17000 W. Ten Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com

Attorneys for Proposed *Amici Curiae*

Dated: August 22, 2023

Certificate of Compliance

I certify that this brief complies with the word volume limitation set forth in MCR 7.212(B)(1) and with the format requirements of MCR 7.212(B)(5). I am relying on the word count of the word-processing system used to produce this document. The word count is 5,260.

Respectfully submitted,

/s/ Mark Brewer

GOODMAN ACKER, P.C.
MARK BREWER (P35661)
ROWAN CONYBEARE (P86571)
17000 W. Ten Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com

Attorneys for Proposed *Amici Curiae*

Dated: August 22, 2023

Proof of Service

The undersigned certifies that on August 22, 2023 the foregoing instrument(s) electronically filed the foregoing papers with the Clerk of the Court using the Electronic Filing System which will send notification of such filing to all attorneys of record.

/s/ Elizabeth M. Rhodes
Elizabeth M. Rhodes