STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
Hons. M. J. Kelly, P.J., and Hoekstra and Stephens, JJ.

SC# 146791-3

CITY OF LANSING and DICKINSON PRESS INC.,

Plaintiffs-Appellees/Cross-Appellants,

v.

RITE AID OF MICHIGAN INC. and PERRY DRUG STORES INC.,

Defendants-Appellants/Cross-Appellees.

Docket No. 146792

CITY OF LANSING, DICKINSON PRESS INC., and SCOTT MURPHY, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees/Cross-Appellants,

v.

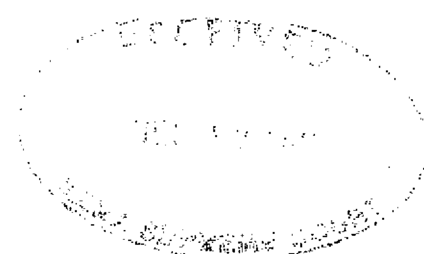
CVS CAREMARK CORPORATION; CVS PHARMACY, INC.; CAREMARK, LLC; CAREMARK MICHIGAN SPECIALTY PHARMACY, LLC; CAREMARK MICHIGAN SPECIALTY PHARMACY HOLDING, LLC; CVS MICHIGAN, LLC; WOODWARD DETROIT CVS, LLC; REVCO DISCOUNT DRUG CENTERS, INC.; KMART HOLDING CORPORATION; SEARS HOLDINGS CORPORATION; SEARS HOLDINGS MANAGEMENT CORPORATION; SEARS ROEBUCK AND CO.; TARGET CORPORATION; THE KROGER CO. OF MICHIGAN; THE KROGER CO.; WALGREEN CO.; and WAL-MART STORES INC.,

Defendants-Appellants/Cross-Appellees.

Docket No. 146793

COMBINED BRIEF ON APPEAL OF ALL CROSS-APPELLEES IN DOCKET NOS. 146792 & 146793

ORAL ARGUMENT REQUESTED



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COUNTER-STATEMENT OF JURISDICTION

Plaintiffs' jurisdictional statement incorrectly describes the Court's September 18, 2013 order as granting both defendants' application and plaintiffs' cross-application for leave to appeal. Although the Court granted defendants' application in full, it *partially* granted plaintiffs' cross-application, limiting it to only one of the three issues on which plaintiffs sought review. In other respects, plaintiffs' jurisdictional statement is correct and complete.

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals correctly determine that a provision of the Michigan Public Health Code, MCL 333.17755 (the "Substitution Statute"), contains no private right of action, and none can be inferred, when the Legislature provided that the board of pharmacy, not the courts, will adjudicate violations of that provision, which has no common-law analog?

Plaintiffs respond:	No
Defendants respond:	Yes
The Court of Appeals responded:	Yes

INTRODUCTION

The Substitution Statute is part of a carefully-designed, comprehensive regulatory framework set forth in Michigan's Public Health Code and administered by the Michigan board of pharmacy. And yet, plaintiffs persist in their attempt to turn the Substitution Statute into a vehicle for civil lawsuits against virtually the State's entire retail pharmacy industry. In doing so, they upend not only the doctrine of implied rights of action but also the principle of separation of powers enshrined in the Michigan Constitution. This Court should once and for all put an end to plaintiffs' attempts to read into the Substitution Statute a private right of action.

Under this Court's well-established doctrine, when a statute contains no express private right of action for violations of one of its provisions, none may be inferred unless the text of the act demonstrates an intent to provide for one. Where, as here, the Legislature provides specific administrative remedies for an alleged violation, especially if the provision has no common-law counterpart, those remedies are exclusive and foreclose inference of a private right of action. The Substitution Statute fits this description to a tee. Plaintiffs do not dispute that the Substitution Statute contains no express private right of action, the statutory requirements are unknown to common law, and the Legislature provided enforcement of the statutory provisions through various administrative procedures. On that basis, the Court of Appeals correctly held that no private right of action may be inferred. This Court need go no further before affirming that holding.

Plaintiffs nonetheless ask this Court to arrogate more power for the courts at the Legislature's expense. They argue that this Court should set up a *presumption* in favor of inferring a private right of action whenever statutory text reveals some right that is intended to benefit a group of people or entities that includes a plaintiff before the court. The presumption, under plaintiffs' argument, can be overcome only by some indication of legislative intent to the

contrary. That would mean that the Legislature can no longer assume that its inaction will be accorded as much respect by the courts as its action. No longer will it be enough to simply say nothing about a private right of action if none is intended. The Legislature, under plaintiffs' test, must also add some indication that it meant to exclude a private right of action when it did not provide for one. This approach would disregard the separation of powers principle and substitute a judicial presumption for a validly enacted statute entitled to all the respect a co-equal branch of government deserves. There is no good reason to move the law in that direction, and plaintiffs supply none.

For these reasons, defendants respectfully request that this Court affirm the Court of Appeals' holding that the Substitution Statute contains no private right of action.

COUNTER-STATEMENT OF FACTS

Defendants rely on the Statement of Facts in their Combined Brief on Appeal in Docket Nos. 146791, 146792 & 146793. In addition, while they do not intend to make an argument in the factual background section, defendants note that their opening brief presents an interpretation of the Substitution Statute that defeats plaintiffs' putative class actions. (See *id.* at 23-29.) Under defendants' construction, the Substitution Statute "simply requires that where a lower cost generic drug is dispensed in lieu of a higher priced brand drug originally prescribed, the *existing* cost savings realized as a result of that substitution—in other words, the difference between what the customer pays for the brand name drug and its generic equivalent—must be passed on to the purchaser." (*Id.* at 25 (emphasis in original).) The Substitution Statute, as defendants construe it, does not call for the re-pricing that plaintiffs advocate. Thus, if the Court adopts defendants' interpretation of the Substitution Statute, it need not inquire whether a private right of action exists because plaintiffs have not stated a claim under the Substitution Statute, as construed by defendants. Only for purposes of the argument related to whether a private right of action should

be inferred under the Substitution Statute do defendants accept plaintiffs' interpretation contained in their Statement of Facts—"that the profit to the pharmacy on the sale of the generic drug cannot exceed the profit to the pharmacy on sales of the brand-name equivalent drug." (Cross-Aplts' Br 3.)

STANDARD OF REVIEW

Plaintiffs failed to include the applicable standard of review in their opening brief. The Court reviews the Court of Appeals' ruling at issue here *de novo*, the standard of review for rulings on motions for summary disposition, issues of statutory interpretation, and questions of law. See, e.g., *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

ARGUMENT

In keeping with the separation of powers doctrine embedded in the Michigan Constitution and according proper respect to the Legislature's policy choices, this Court recognizes that the Legislature is well within its power to enact requirements that have no common-law analogs and to then specify that such requirements are to be enforced through an administrative procedure. In such instances, no private right of action can be inferred because the statutorily-prescribed administrative remedies are exclusive. The Substitution Statute fits precisely within this paradigm. It sets up requirements unknown at common law, does not expressly create a private right of action, and supplies an administrative scheme for its enforcement. No private right of action can or should be inferred under these circumstances. Plaintiffs' arguments to the contrary are unavailing because they call on this Court to replace the Legislature's judgment with its own. This Court should decline plaintiffs' invitation.

A. Michigan Law Provides For Implied Private Rights Of Action Only In Narrow Circumstances.

When determining whether to infer a private right of action, the courts of this State remain mindful of the foundational separation of powers principles enshrined in the Michigan Constitution. "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 except as expressly provided in this constitution." Const 1963, art 3, § 2. This, of course, means a clear apportionment among the branches: "'To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts.'" *Kyser v Kasson Twp*, 486 Mich 514, 535; 786 NW2d 543 (2010) (quoting *Massachusetts v Melon*, 262 US 447, 488; 43 S Ct 597; 67 L Ed 1078 (1923)). Thus, "'[t]he general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other.'" *Id.*

This Court has long recognized and accorded proper respect to the supremacy of the Legislature's judgment in making laws. To that end, it has firmly held that courts may not substitute the judicial role for the legislative, "thus . . . usurp[ing] legislative authority," by creating a cause of action without the Legislature's unambiguous expression of intent to provide such action. *Office Planning Group, Inc v Baraga-Houghton-Keweenaaw Child Dev Bd*, 472 Mich 479, 505; 697 NW2d 871 (2005). Clear legislative intent that a private right of action should be inferred is the absolute minimum. See *Lash v Traverse City*, 479 Mich 180, 191-93; 735 NW2d 628 (2007) (collecting authorities). Where no such right is expressly provided in the statute, one may be created only if "the text of the act demonstrates an implicit intent to provide

for a private cause of action." *Office Planning, supra* at 504. Michigan courts rarely, if ever, find such intent in regular statutory pronouncements that contain no express right of action.

"It is well settled that when a statute provides a remedy, a court should enforce the legislative remedy rather than one the court prefers." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 66 n 5; 642 NW2d 663 (2002). In particular, courts generally do not second-guess the Legislature's choices where statutory schemes already provide administrative remedies, but not a private right of action. See *Lash, supra* at 191-92; *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 78; 503 NW2d 645 (1993) ("As a general rule, the remedies provided by statute for violation of a right having no common-law counterpart are exclusive, not cumulative." (citing *Pompey v Gen Motors Corp*, 385 Mich 537, 552-53; 189 NW2d 243 (1971))), overruled in part on other grounds by *Brown v Mayor of Detroit*, 478 Mich 589; 734 NW2d 514 (2007).[1] This rule further underscores the Court's recognition of the difference between the judicial and legislative roles in the Michigan constitutional design. The Legislature has many good reasons to prefer an administrative regime for dispute resolution:

> Subjection to private suit would be a major addition to the statute; its punitive effect would often exceed the governmental fine or sanction. Moreover, it would take responsibility for suit out of the hands of public officials, who will presumably exercise their discretion in the public interest, and place it in the hands of those who would use it for private gain. [Scalia & Garner, Reading Law: The Interpretation of Legal Texts, p 316.]

[1] In *Pompey*, the Court stated in dictum and in a footnote that a "statutory remedy is not deemed exclusive if such remedy is plainly inadequate." *Pompey, supra* at 552-53 n 14. Although plaintiffs have relied on this dictum in their argument before the Court of Appeals, they have now abandoned it, and for good reason. As this Court explained in *Lash, supra* at 192 n 19, the *Pompey* dictum "has never since been cited in any majority opinion of this Court" and "appears inconsistent with subsequent caselaw" where the Court has refused to create private rights of action without resort to analyzing the adequacy of statutory remedies. Indeed, the clear principle that follows from this Court's decisions is that statutory remedies are exclusive, not cumulative.

Courts defer to these legislative choices because "a degree of caution must be exercised in fashioning civil remedies where a balance struck by a comprehensive regulatory scheme could be undermined." *Gardner v Wood*, 429 Mich 290, 304; 414 NW2d 706 (1987); see also *id.* at 304 n 7 (cautioning against overenforcement, which may undermine statutory objectives, "upsetting the delicate balance created by the Legislature").

In sum, it is not at all an aberration that some statutory rights will be enforced administratively, rather than in the courts (for example, by way of sweeping class action allegations against virtually entire industries). The Legislature often has good cause to mandate that industry-impacting decisions be made by executive-branch agencies, not the courts.

B. The Court Of Appeals Correctly Held That No Basis Exists For Inferring A Private Right Of Action Under The Substitution Statute.

There is no dispute that the Substitution Statute contains no express private right of action. Nor may one be created consistent with fundamental principles of separation of powers found in the Michigan Constitution. There is no common law analog for the substitution requirements facing pharmacists in Michigan, and that makes any remedies provided in the statutory scheme exclusive. See *Dudewicz, supra* at 78. The statutory scheme—the Public Health Code, where the Substitution Statute resides—provides a panoply of remedies for violations of its provisions. Indeed, the Code sets up a carefully-balanced administrative framework for pharmacy regulation. Within that framework, the pharmacy board's disciplinary arm may "fine, reprimand, or place on probation, a person licensed under this part, or deny, limit, suspend, or revoke a person's license or order restitution or community service for a violation of this part or rules promulgated under this part." MCL 333.17768(1); see also MCL 333.17763.

With these tools already on the books, there is no basis for the courts to create an additional remedy in the form of a private right of action. An analogous case is instructive. In

Orzel v Scott Drug Co, 449 Mich 550, 575; 537 NW2d 208 (1995)—a tort lawsuit based on an alleged violation of a statutory provision regulating pharmacies—this Court explained that remedies under MCL 333.17763 and 333.17768 must be pursued, if at all, through the pharmacy board, not the courts. The board's power to award restitution under those provisions "shows that the Legislature did not have in mind a malpractice award or judgment or settlement stemming from a civil cause of action for damages when it authorized subcommittees to order 'restitution.'" *Orzel*, *supra* at 575; see also *Fisher v WA Foote Mem Hosp*, 261 Mich App 727, 730-31; 683 NW2d 248 (2004) (holding that no private right of action for violation of the Public Health Code could be created when the Code already provided administrative remedies).

The Court of Appeals' holding that the Substitution Statute contains no implied right of action flows directly out of the above authorities. Pointing specifically to the complaint procedures under Michigan's Department of Licensing and Regulatory Affairs, the court recognized that "it would be an exercise of will, rather than judgment . . . to conclude that the class action plaintiffs have a private cause of action to enforce defendants' duties under MCL 333.17755(2)." (Jan 22, 2013 Opinion ("Op") 10, JA 557a.) "[T]he statutory remedy for violation of § 17755(2) is the exclusive remedy." (*Id.*) This is the only possible conclusion that respects the Legislature's judgment expressed in the Substitution Statute, and thus is the only holding that comports with the fundamental separation of powers principles expressed in the Michigan Constitution.

C. Plaintiffs' Arguments Are Unavailing.

1. A Presumption in Favor of Inferring a Private Right of Action Would Upend the Separation of Powers Doctrine by Turning Legislative Silence into Action.

Unable to prevail under this Court's test for inferring private rights of action, plaintiffs demand a new test. Under their approach, "where a statute *does* create a direct, beneficial right

for a defined class of persons of which the plaintiff is a member, a right of action should be inferred in order to effectuate the legislature's intent—absent an indication of legislative intent to the contrary." (Cross-Aplts' Br 12 (emphasis in original).) In effect, this proposed standard calls for a presumption in favor of inferring rights of action in certain circumstances. Under plaintiffs' test, if a statute confers some "beneficial right" on a plaintiff and the Legislature has not written a private right of action into the statute, it is only when the Legislature supplies some indication that it *really meant* not to provide for a private right of action that its judgment will be respected.

That is not separation of powers. That is judicial intrusion on the province of the Legislature, and this Court should not countenance it. The Legislature's omission of a private right of action must be presumed to be deliberate rather than accidental, such that the burden remains on the proponent of a private right of action to prove, via indicia of legislative intent, that the Legislature simply ran out of ink and wants the Court's help. Indeed, to go in the opposite direction, where plaintiffs wish to take this Court, would be to forget that this issue has already been vigorously debated in Michigan, and plaintiffs' judicial supremacy model lost. See, e.g., Markman, *An Interpretivist Judge and the Media*, 32 Harv J L & Pub Pol'y 149, 149 (2009) (noting that "there is no state judiciary in which this debate [over the role of the judiciary] has been more directly engaged than in Michigan"); *Terrien v Zwit*, 467 Mich 56, 65-68; 648 NW2d 602 (2002) (especially when it is important to balance competing interests "in a society as complex as ours," "making social policy is a job for the Legislature, not the courts").

That plaintiffs' proposed test would drastically expand the implied right of action doctrine is clear from the authorities on which plaintiffs rely. As they have done all along during this litigation, plaintiffs cite extensively to civil rights cases and outdated cases that apply the long-defunct permissive approach to finding implied rights of action. As for the civil rights

statutes, they are the exception to the well-established rule that no private right of action may be inferred without clear legislative intent. See *Pompey, supra* at 553 ("[C]ourts have forged exceptions to the[] general rules [of finding implied private rights of action] when the statutory rights infringed were civil rights."). But plaintiffs' lawsuits are not civil rights cases, and these authorities and the exception they embody are inapposite.[2]

Plaintiffs' remaining Michigan cases rely on an approach long-since abandoned. It is telling that plaintiffs have to reach back nearly half a century to *BF Farnell Co v Monahan*, 377 Mich 552, 555; 141 NW2d 58 (1966), for the proposition that "[w]hen a statute provides a beneficial right but no civil remedy for its securance, the common law on its own hook provides a remedy, thus fulfilling the law's pledge of no wrong without a remedy" (quoted in Cross-Aplts' Br 14). The no-wrong-without-a-remedy principle has long been discarded because, as this Court much more recently noted, "[n]ot every perceived wrong necessarily has a judicial remedy." *Grand Traverse Co v Michigan*, 450 Mich 457, 469; 538 NW2d 1 (1995). Instead of elevating judge-made common law above the Legislature's judgment, courts in Michigan recognize that "[i]t is the function of the Legislature, not the judiciary, to make laws, and legislatively enacted laws will always take precedence over judge-made common law." *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 544 n 5; 683 NW2d 200 (2004) (Zahra, J.) (citing *O'Brien v Hazelet & Erdal*, 410 Mich 1, 15; 299 NW2d 336 (1980)). Thus, instead of falling back on the common law, Michigan courts now require a showing that "the text of the act demonstrates an implicit intent to provide for a private cause of action." *Office Planning, supra* at 504. The United States Supreme Court, too, has "retreated from [its] previous willingness to

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[2] See *Cannon v Univ of Chicago*, 441 US 677, 690; 99 S Ct 1946; 60 L Ed 2d 560 (1979) (civil rights); *Ferguson v Gies*, 82 Mich 358, 365; 46 NW 718 (1890) (same); *Bolden v Grand Rapids Operating Corp*, 239 Mich 318, 328; 214 NW 241 (1927) (same); *St John v Gen Motor Corp*, 308 Mich 333, 336; 13 NW2d 840 (1944) (same).

imply a cause of action where Congress has not provided one." *Correctional Services Corp v Malesko*, 534 US 61, 67 n 3; 122 S Ct 515; 151 L Ed 2d 456 (2002); see also *id.* at 75 (Scalia, J., concurring and noting, without mourning, the passing of the "heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition"); *Alexander v Sondoval*, 532 US 275, 287; 121 S Ct 1511; 149 L Ed 2d 517 (2001) (Scalia, J.) ("Respondents would have us revert in this case to the understanding of private causes of action that held sway 40 years ago . . . [—]that it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose expressed by a statute." (internal quote marks omitted)).[3]

Some state courts follow an approach to the issue of implied private rights of action that is less respectful of separation of powers principles and more conducive to judicial second-guessing of legislative choices. These courts invoke "public policy" and the "adequacy" of remedies in the course of their analyses, which provides a clear path to the substitution of individual judges' policy preferences over those of the legislature. Plaintiffs invite this Court to join those jurisdictions. To that end, plaintiffs rely on cases from New Mexico and New York state courts. (Cross-Aplts' Br 15-17.) The Court should not follow decisions that, contrary to this State's precedent, places the courts above the legislatures.

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[3] The most recent Michigan case plaintiffs cite in support of their approach, *Longstreth v Gensel*, 423 Mich 675, 692-94; 377 NW2d 804 (1985), is irrelevant here because it did not involve an alternative regulatory remedy. Rather, the question there was whether the provisions of a penal statute governing the regulation of liquor within Michigan was limited to licensees or was intended to include social hosts, such that an alleged violation of the statute was prima facie evidence of negligence. Indeed, *Longstreth* does not hold that the statute created an implied private right of action. *Longstreth* involved a negligence claim, and the narrow issue before the Court was whether violation of the statute created a rebuttable evidentiary presumption of negligence in that common law tort action. See *id.* at 693 ("We hold today only that a violation of § 33 creates a rebuttable presumption of negligence."). The only noteworthy part of *Longstreth* is its year of issuance—1985—which is the most recent case plaintiffs cite as purportedly supporting their argument.

In the New Mexico decision, *Starko, Inc v Presbyterian Health Plan, Inc*, 276 P3d 252 (NM Ct App 2011), the court noted several times that its private right of action doctrine is informed not just by interpreting legislative intent but also by divining what the court termed "public policy." *Id.* at 264 ("[W]e examine whether a cause of action may be implied through the common law based on an interpretation of legislative intent or public policy"); see also *id.* at 265 (noting that, "a state's public policy, independent of [factors aimed at interpreting legislative intent], may be determinative in deciding whether to recognize a cause of action" (internal quotation and alteration marks omitted)). In Michigan, it is just the opposite; common law-based search for good public policy, if it exists at all, is limited to cases where courts are not interpreting statutes. As this Court often states, including in a recent case that plaintiffs cite, "this Court may not substitute its policy preferences for those policy decisions that have been clearly provided by statute." *Smitter v Thornapple Twp*, 494 Mich 121, 139; 833 NW2d 875 (2013).

The New York decision plaintiffs cite, *Maimonides Medical Ctr v First United Am Life Ins Co*, 941 NYS2d 447 (NY Sup Ct 2012), is no more helpful to their position, for it notes that courts in New York are invited to second-guess legislative pronouncements if courts determine that the administrative remedies provided in a statute "do not adequately address the harm that a particular individual may suffer." *Id.* at 453 (internal quotation omitted). Such second-guessing would be ill-suited for Michigan, where "the adequacy of a specified remedy is a judgment for the Legislature, not for this Court." *City of South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 530-31 n 17; 734 NW2d 533 (2007); (see also Op 10, JA 557a (quoting *South Haven*)).

To shift the Michigan doctrine of implied private right of action toward some loosely-framed "public policy" approach or an inquiry into the adequacy of what the Legislature has already deemed adequate would drive Michigan's balance of powers from the Legislature and towards the courts. Plaintiffs do not, and cannot, explain why such a move is warranted.[4]

2. Even if this Court Adopts Plaintiffs' Proposed Test, a Private Right of Action Still Would Not Be Inferred Because the Substitution Statute Lacks the Requisite Rights-Creating Language.

Plaintiffs admit that, even under their proposed test for inferring private rights of action, "where a statute *does not* confer a beneficial right on a defined class of persons of whom the plaintiff is a member, then no cause of action should be inferred." (Cross-Aplts' Br 12.) The Substitution Statute does not confer a beneficial right on a defined class of persons. Thus, plaintiffs' freshly minted test—even if applicable (which it is not, as discussed above)—does not help them.

The Substitution Statute directs "a pharmacist," in transactions where a generic drug is substituted in place of the prescribed brand name drug, to "pass on the savings in cost to the purchaser or to the third party payment source if the prescription purchase is covered by a third party pay contract." MCL 333.17755(2). The "savings in cost" is defined as "the difference between the wholesale cost to the pharmacist of the 2 drug products." *Id.*

Plaintiffs' attempt to glean rights-creating language from the Substitution Statute faces an insurmountable problem. Because the focus of the Substitution Statute is on the pharmacist, and not on the consumers, see *id.*; see also MCL 333.17755(1) ("the pharmacist may" and "the

[4] Indeed, if the implied right of action doctrine needs changing, there are substantial arguments for dispensing with it altogether. See *Thompson v Thompson*, 484 US 174, 191; 108 S Ct 513; 98 L Ed 2d 512 (1998) (Scalia, J., concurring) ("[I]f the current state of the law were to be changed, it should be moved in precisely the opposite direction—away from our current congressional intent test to the categorical position that federal private rights of action will not be implied."). In any event, defendants prevail here under the existing doctrine.

pharmacist shall"), 333.17755(3) ("The pharmacist shall"), 333.17755(4) ("A pharmacist may not"), this is simply not the sort of language courts describe as rights-creating. See *Alexander*, *supra* at 289 ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" (quoting *California v Sierra Club*, 451 US 287, 294; 101 S Ct 1775; 68 L Ed 2d 101 (1981))). Contrast the Substitution Statute's pharmacist-focused language with the phrasing in one of the cases on which plaintiffs heavily rely, *Cannon*, where the Court concluded that the statutory pronouncement "no person shall be denied the right to vote" was rights-creating. *Cannon v Univ of Chicago*, 441 US 677, 690; 99 S Ct 1946; 60 L Ed 2d 560 (1979). The Legislature here did not, for example, write that the "purchaser or the third party payment source, if the prescription purchase is covered by a third party pay contract, is entitled to receive X." Such a statute at least might have signaled that the Legislature was focused on the individuals or entities conceivably protected by the statute, not the regulated professionals.[5]

The Substitution Statute contains no rights-creating language that satisfies plaintiffs' own test. Thus, no private right of action may be inferred.

[5] Plaintiffs also do not explain how the Substitution Statute can be rights-creating when, even on plaintiffs' interpretation, there is no guarantee of any savings. Under plaintiff's formula, "[t]he mathematical result of the statute is that the profit to the pharmacy on the sale of the generic drug cannot exceed the profit to the pharmacy on sales of the brand-name equivalent drug." (Cross-Aplts' Br 13.) Because the Substitution Statute mandates only the difference between the two prices (i.e., it does not set one price without the other), there is no such thing as "specific monetary savings" that plaintiffs should be able to recoup via a private right of action, as plaintiffs contend. (*Id.*) A pharmacist may comply with the substitution statute by either lowering the price of the generic or *raising the price of the brand-name equivalent drug*. Plainly, purchasers of generics would see no benefit if the pharmacist avoided the alleged violations of the Substitution Statute by charging more for the corresponding brands. The Substitution Statute, contrary to plaintiffs' argument, simply does not create a "right to receive . . . money." (*Id.*)

3. Even if the Substitution Statute Contained Rights-Creating Language, the Legislature Indicated by Providing Administrative Remedies That No Private Right of Action May Be Inferred.

Under their own test, plaintiffs acknowledge that the Legislature can supply some indicia of its intent not to imply a private right of action, even if a statute otherwise contains rights-creating language. (See Cross-Aplts' Br 12.) The Legislature did so here by providing the administrative scheme for the enforcement of the Public Health Code, of which the Substitution Statute is a part. (See *supra* at 6-7.) In light of the complaint procedures and general administrative remedies provided in the Public Health Code, "it would be an exercise of will, rather than judgment . . . to conclude that the class action plaintiffs have a private cause of action to enforce defendants' duties under MCL 333.17755(2)." (Op 10, JA 557a.)

Unsatisfied with the administrative remedies, plaintiffs respond that "purchasers have no *right* to recover their property from the disciplinary subcommittee through an order of restitution." (Cross-Aplts' Br 23.) This is nothing more than yet another variation on plaintiffs' tired, unsuccessful argument in this litigation that the available administrative remedies are "plainly inadequate."

The argument fails for two reasons. *First*, analysis of the adequacy of these remedies "is a judgment for the Legislature, not for this Court." *South Haven, supra* at 530-31 n 17. The Legislature made its decision—plaintiffs must pursue the administrative remedies, if they pursue any remedies at all. The courts' task is to effectuate the Legislature's decision.

Second, even if this Court was required to analyze the adequacy of any statutory remedy to determine whether a private right of action should be inferred despite such remedy, plaintiffs' explanations for the supposed inadequacy are unavailing. The administrative enforcement scheme in the Public Health Code undoubtedly resulted from legislative compromises, balancing many competing interests. The Legislature had good reason for vesting enforcement in a

professional regulatory body, the pharmacy board, which is closer to the complex issues surrounding pharmacy practice generally, and drug pricing specifically, than courts could ever be. Plaintiffs argue that the careful approach of administrative enforcement is called for only in instances of "technical issues of the practice of pharmacy, such as compounding of drugs, dispensing of narcotics, or evaluating drug interactions," and that this case involves nothing of the sort. (Cross-Aplts' Br 24.) But plaintiffs' ipse dixit, going so far as to assert that the board of pharmacy's expertise "is entirely irrelevant to compliance with" the Substitution Statute (*id.*), cannot replace the Legislature's choice of a remedy for all provisions of the Public Health Code, including the Substitution Statute.

Plaintiffs lament that the board will not entertain class action lawsuits, but statutory remedies do not become inadequate merely because plaintiffs' wishes are more expansive than what the Legislature provided. In fact, Michigan precedent cautions against upsetting the legislative balance through "overenforcement." *Gardner*, *supra* at 304 & n 7. There is good reason to respect the Legislature's choice. See Scalia & Garner, p 316. As much as plaintiffs might prefer a broadsword, the Legislature provided a scalpel and specified the surgeons authorized to wield it. It "is not within the authority of the judiciary to redetermine the Legislature's choice or to independently assess what would be most fair or just or best public policy." *Lash*, *supra* at 197 (internal quotation marks omitted).

Plaintiffs also make the even broader argument that "[r]esolving legal disputes over property rights is a core judicial function that takes place in courts." (Cross-Appeal Br 13.) By this statement they suggest that anything short of a private right of action would be inadequate. That argument, devoid of any supporting authority, also fails because counterexamples exist where property rights are enforced administratively. See, e.g., *Paragon Properties Co v City of*

Novi, 452 Mich 568, 573-74; 550 NW2d 772 (1996) (noting that relief from the application of a zoning ordinance is administrative); (Cross-Aplts' Br 22 (plaintiffs acknowledging that certain statutes, even though they create property rights, may be enforced only via an administrative procedure)).

Lastly, plaintiffs argue that the administrative remedy is inadequate because certain parts of it were added only in 1994. Specifically, plaintiffs quote House Legal Analysis for House Bill 5076 (1-25-94), Pls' Supp App 0151, as adding "certain penalties (fines, reprimands, community service or restitution, probation) for violations of . . . the health code." (Cross-Aplts' Br 25 (ellipsis in the original).) As a preliminary matter, plaintiffs misquote that publication. The section they quote dealt with amending a provision of the Controlled Substances Article of the Public Health Code, MCL 333.7311, as should have been clear if the omitted text were put back into the quote—"violations of *the drug licensing sections of* the health code" (emphasis added to highlight language replaced by the ellipsis in plaintiffs' quote). Prior to the 1994 amendments, MCL 333.7311 allowed only for denial, suspension, or revocation of a controlled substance license. That is why the amendment added a wide range of penalties; none had existed. But sections dealing with the pharmacy board's powers had already allowed the board to fine, reprimand, or place on probation pharmacists determined to be in violation of, for example, the Substitution Statute. 1978 PA 368 (§§ 17763 & 17768). The only two changes to the pharmacy board provisions were the replacement of the board's role with that of the disciplinary subcommittee and the addition of restitution and community service as possible penalties. 1993 PA 79.

Neither of these two changes undermines the conclusion that the Substitution Statute provides no implied right of action. The disciplinary subcommittee and its power to order

restitution is simply a subset of the board's preexisting expansive powers. At the time the Substitution Statute was enacted (1974), and subsequently consolidated and updated along with Michigan's public health laws into the Public Health Code (1978), the board of pharmacy was already a powerful entity, dating back to 1885. See 1885 PA 135. Its powers and duties included to "[i]nvestigate alleged violations of the provisions of this act," "conduct hearings," "subpoena witnesses for such hearings," and to bring any violations to the applicable prosecuting attorney or the Attorney General. 1970 CL 338.1106(d). The board also had "power to withhold, revoke or suspend any license" for violations of the law regulating pharmacists. 1970 CL 338.1115. And the board could seek injunctive relief in the courts for continuing violations, 1970 CL 1127, which confirms that the Legislature knew how to provide for rights of action in some places but not others.

In sum, the extensive administrative procedures for the enforcement of the Public Health Code, of which the Substitution Statute is one part, preclude finding an implied private right of action under the Substitution Statute.

RELIEF REQUESTED

In its holding that there is no private right of action under the Substitution Statute, the Court of Appeals' decision should be affirmed.

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Respectfully submitted,

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