

**EXPEDITE**  
 No hearing set  
 Hearing is set:  
Date: \_\_\_\_\_  
Time: \_\_\_\_\_  
Judge/Calendar: \_\_\_\_\_

SUPERIOR COURT OF THE STATE OF WASHINGTON  
THURSTON COUNTY

VAPOR TECHNOLOGY ASSOCIATION;  
and BARON ENTERPRISES d/b/a THE  
VAPORIUM,

Petitioners,

v.

STATE OF WASHINGTON BOARD OF  
HEALTH; and STATE OF WASHINGTON  
DEPARTMENT OF HEALTH,

Respondents.

No.19-2-05196-34

**PETITION FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

COME NOW Petitioners, and allege as follows for their Petition against Respondents/Defendants:

**STATEMENT OF THE CASE**

1. Vapor Technology Association (“VTA”) and one of its members, Baron Enterprises LLC, bring this petition to declare invalid the Washington State Board of Health’s October 9, 2019 ban on flavored vaping products, WAC 246-80 (the “Emergency Rule,” attached as Exhibit 1). The Rule will destroy Washington’s \$484 million nicotine vapor-products industry and ruin the livelihoods of the 3,400 workers that it employs. So too will it likely precipitate a public-health crisis, as vapor-products users turn either to combustible cigarettes or to black-market sources to obtain vapor products. The Emergency Rule exceeds the Board’s statutory authority, is arbitrary and capricious, and violates free-speech guarantees.



1 administrative remedies or take any other action prior to bringing this petition, and venue is  
2 proper in the Court. *See* RCW 34.05.570(2).

3 6. VTA and Baron Enterprises have standing to bring this declaratory-judgment  
4 action. The Board of Health’s Emergency Rule has prejudiced, and will continue to prejudice,  
5 VTA and Baron Enterprises, the latter which owns multiple vapor-products shops in Pierce  
6 County, Washington—as well as vapor-products retailers across the state (many of whom are  
7 VTA’s members). VTA and Baron Enterprises’ interests are among those that the Board of  
8 Health were required to consider when it promulgated the invalid Emergency Rule. And a  
9 judgment in favor of VTA and Baron Enterprises would substantially eliminate or redress the  
10 prejudice that the Emergency Rule’s adoption and enforcement has caused.

11 7. VTA’s members would have standing to sue in their own right, and because the  
12 interests VTA seeks to protect are germane to the organization’s purpose of ensuring the  
13 availability of high-quality vapor products to adult consumers in the United States and  
14 Washington. VTA also includes members who advertise vapor products for sale online in  
15 jurisdictions where the sale of vapor products is lawful.

16 8. This case is ripe for adjudication because it presents an actual, justiciable  
17 controversy between VTA and Baron Enterprises on the one hand, and the Board of Health and  
18 the Department of Health on the other hand, that requires a declaration of rights by the Court,  
19 as well as temporary and permanent injunctive relief prohibiting the Board and Department  
20 from enforcing the invalid Emergency Rule.

21 **PARTIES**

22 9. VTA is a national non-profit industry trade association with a principal place of  
23 business at 1201 Pennsylvania Avenue NW, Suite 530, Washington, DC, 20004. The VTA is  
24 the industry’s leading national trade association, and has more than 1,000 members, including  
25 members in Washington. Nationwide, VTA’s members include nicotine-vapor-device  
26 manufacturers; manufacturers of nicotine-containing e-liquids, flavorings, and components;  
27 and wholesalers, importers, and e-commerce and brick-and-mortar retailers. VTA represents

1 the needs and concerns of its members in promoting public policies and safety standards for the  
2 vapor industry. VTA has a vital interest in ensuring that any regulation of nicotine vapor  
3 products imposed by Washington is consistent with constitutional and statutory requirements.

4 10. Baron Enterprises, a Washington limited-liability company, is a VTA member.  
5 Prior to the Emergency Rule’s enactment, Baron Enterprises operated three vapor-products  
6 retail locations in Pierce County, Washington. Baron Enterprises now faces financial ruin as a  
7 result of the Emergency Rule, as it already has been forced to close one of its locations; it  
8 imminently will close its remaining locations. The mailing address for Baron Enterprises is  
9 10626 Bridgeport Way SW, Lakewood, Washington 98499.

10 11. VTA and Baron are represented by Steven Caplow of Davis Wright Tremaine,  
11 LLP, whose mailing address is 920 Fifth Avenue, Suite 3300, Seattle, WA 98104, and Joseph  
12 M. Terry and David Randall J. Riskin of Williams & Connolly LLP, whose mailing address is  
13 725 Twelfth Street, N.W., Washington, DC 20005.

14 12. The Washington State Board of Health is an agency of the State of Washington  
15 and is responsible for developing rules and policy recommendations on a broad range of health  
16 issues. The mailing address for the Board is PO Box 47990, Olympia, Washington 98504.

17 13. The Washington State Department of Health is an agency of the State of  
18 Washington that is part of Washington’s public-health system. The mailing address for the  
19 Department is 111 Israel Road SE, Tumwater, Washington 98501.

## 20 **STATEMENT OF FACTS**

### 21 **I. VAPING PRODUCTS ARE AN ALTERNATIVE TO MORE DANGEROUS** 22 **PRODUCTS, LIKE CIGARETTES**

23 14. Vaping devices (known also as “e-cigarettes,” “electronic cigarettes,” or  
24 “electronic nicotine delivery systems”) are handheld electronic devices that are used to heat  
25 and aerosolize a liquid mixture containing nicotine. Once the liquid is aerosolized into a  
26 “vapor,” the user inhales the vapor as he or she would inhale actual tobacco smoke—but  
27

1 without the fire, flame, tar, carbon monoxide, or ash associated with traditional “combustible”  
2 cigarettes.

3 15. Vaping products, which first gained popularity in the United States around 2009,  
4 present an alternative to combustible cigarettes. Indeed, many users of vaping products are  
5 current or former smokers.

6 16. Research indicates that vaping poses substantially less risk than combustible  
7 cigarettes and may significantly reduce the public health harms associated with smoking. For  
8 example:

9 (a) A study conducted by the National Academies of Sciences, Engineering  
10 and Medicine, commissioned by FDA, found that evidence suggests that “across a  
11 range of studies and outcomes, e-cigarettes pose less risk to an individual than  
12 combustible cigarettes.”<sup>1</sup>

13 (b) The United Kingdom’s Royal College of Physicians advised that “the  
14 hazard to health arising from long-term vapour inhalation from the e-cigarettes  
15 available today is unlikely to exceed 5% of the harm from smoking tobacco.”<sup>2</sup>

16 (c) A Georgetown University study concluded that switching from traditional  
17 cigarettes to vaping products would prevent millions of premature deaths over 10  
18 years in the United States.<sup>3</sup>

19 (d) A randomized clinical study published in the New England Journal of  
20 Medicine found that cigarette smokers were more likely to quit smoking when  
21 using e-cigarettes than when using nicotine-replacement therapies.<sup>4</sup>

22 <sup>1</sup> Kathleen Stratton et al., *Public Health Consequences of E-Cigarettes*, Nat’l Acad. Sci., Eng’r &  
23 Med. 12 (2018), available at [https://www.ncbi.nlm.nih.gov/books/NBK507171/pdf/Bookshelf\\_](https://www.ncbi.nlm.nih.gov/books/NBK507171/pdf/Bookshelf_NBK507171.pdf)  
[NBK507171.pdf](https://www.ncbi.nlm.nih.gov/books/NBK507171/pdf/Bookshelf_NBK507171.pdf).

24 <sup>2</sup> Royal College of Physicians Tobacco Advisory Group, *Nicotine Without Smoke: Tobacco Harm*  
25 *Reduction* (2009), available at [https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-](https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0)  
[smoke-tobacco-harm-reduction-0](https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0).

26 <sup>3</sup> David T. Levy et al., *Potential Deaths Averted in USA by Replacing Cigarettes with E-Cigarettes*,  
27 *Tobacco Control* 1 (2017), available at <https://tobaccocontrol.bmj.com/content/27/1/18>.

<sup>4</sup> Peter Hajek et al., *A Randomized Trial of E-Cigarettes Versus Nicotine-Replacement Therapy*,

1           17. The availability of vaping products has coincided with a drop in demand for  
2 traditional cigarettes. The Centers for Disease Control and Prevention reports that the number  
3 of adult smokers as a percentage of the United States population dropped from 20.6% in 2008  
4 to 14% as of 2017.<sup>5</sup>

5           18. Flavored nicotine vapor products are widely used by adults. For example, a  
6 cross-sectional study of current or former adult smokers in the United States who used e-  
7 cigarettes found that that 82.8 percent used flavored nicotine vaping products, while only 17.2  
8 percent used tobacco-flavored nicotine vaping products.<sup>6</sup> The authors of that study noted:  
9 “[W]e found that the use of non-tobacco flavors was associated with lower likelihood of  
10 current smoking. This introduces the possibility that non-tobacco flavors may aid the  
11 transition from smoking to vaping.”<sup>7</sup>

12           19. Another study of American adults who frequently used e-cigarettes found that  
13 “[c]urrent e-cigarette use among participants was dominated by use of non-tobacco flavors,  
14 mainly fruit/fruit beverage, dessert/pastry, and/or candy/chocolate, sweets flavors.”<sup>8</sup> The  
15 authors concluded that their findings “suggest that access to a variety of non-tobacco flavored  
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18 380 New Eng. J. Med. 629–37 (2019), available at  
19 <https://www.nejm.org/doi/10.1056/NEJMoa1808779>.

20 <sup>5</sup> CDC, Morbidity & Mortality Weekly Report, *Cigarette Smoking among Adults & Trends in*  
21 *Smoking Cessation—United States, 2008* (Nov. 13, 2009),  
22 <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5844a2.htm> (Exhibit 2); CDC, *Current*  
*Cigarette Smoking Among Adults in the United States* (last revised Feb. 4, 2019),  
[https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/adult\\_data/cig\\_smoking/index.htm](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm)  
(Exhibit 3).

23 <sup>6</sup> Paul T. Harrell et al. *E-Cigarettes and Expectancies: Why Do Some Users Keep Smoking?*, 110  
24 *Addiction* 1833–43 (2015), available at  
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4609252/pdf/nihms707991.pdf>

25 <sup>7</sup> *Id.*

26 <sup>8</sup> Christopher Russell et al., *Changing Patterns of First E-Cigarette Flavor Used and Current*  
27 *Flavors Used by 20,836 Adult Frequent E-Cigarette Users in the USA*, 15 *Harm Reduction*  
*Journal* 1–14 (2018).

1 e-liquid may be important for encouraging and assisting adults to use e-cigarettes in place of  
2 conventional cigarettes.”<sup>9</sup>

3 **II. NICOTINE VAPING PRODUCTS ARE REGULATED AT THE FEDERAL AND**  
4 **STATE LEVEL**

5 20. The Food and Drug Administration regulates nicotine vaping products. For  
6 instance, as of August 8, 2016, it became illegal to sell vaping products and other related  
7 products to people under the age of 18.<sup>10</sup> As of June 2019, FDA required manufacturers of  
8 vaping products to comply with certain requirements, including submitting lists of products,  
9 including labeling and advertisements, as well as submitting ingredient listings.<sup>11</sup> FDA also  
10 conducts inspections of certain vaping-products manufacturers and retailers, and it has created  
11 education and enforcement programs to prevent children and teens from using vaping  
12 products.<sup>12</sup> Finally, acknowledging that vaping products are “still relatively new,” FDA  
13 supports and funds research to evaluate the public health impact of these products at both the  
14 population and individual level.<sup>13</sup>

15 21. No such federal regulatory oversight exists for THC-based vaping products or  
16 other cannabis-related products. Thus, for example, manufacturers of THC-vaping devices,  
17 unlike the manufacturers of electronic nicotine delivery systems, do not provide FDA with an  
18 ingredients list.

19 22. Washington also imposes requirements for the purchase and sale of vaping  
20 products. For example, Washington prohibits the sale or provision of nicotine vaping products  
21 to individuals under 21 years of age. *See* RCW 26.28.080(1). It prohibits vapor products in

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22 <sup>9</sup> *Id.*

23 <sup>10</sup> FDA, *How FDA Is Regulating E-Cigarettes* (updated Sept. 10, 2019),  
24 <https://www.fda.gov/news-events/fda-voices-perspectives-fda-leadership-and-experts/how-fda-regulating-e-cigarettes> (Exhibit 4).

25 <sup>11</sup> *Id.*

26 <sup>12</sup> *Id.*

27 <sup>13</sup> *Id.*

1 and on grounds of childcare facilities, schools, playgrounds, school buses, elevators, and within  
2 500 feet of schools. *See* RCW 70.345.150. And it prohibits delivery sales of vapor products  
3 unless the deliverer holds a valid delivery sale license and can verify the age of the purchaser  
4 through a third-party database. *See* RCW 70.345.090(1)-(7).

5 23. The Washington legislature has considered a bill, HB 1932, to ban flavored  
6 vaping products. Introduced on February 6, 2019, the bill remains in committee.

7 **III. THE VAPING INDUSTRY IS A DYNAMIC PART OF THE WASHINGTON**  
8 **STATE ECONOMY**

9 24. The national vaping-products industry, which employs approximately 166,000  
10 people, is a “dynamic part of the U.S. economy, accounting for \$24.46 billion annually in  
11 economic output.” (Decl. of John Dunham (Oct. 21, 2019), ¶ 5 (Exhibit 5).)

12 25. Of that, approximately \$484 million is traceable to Washington, where the vapor-  
13 products industry directly or indirectly employs 3,475 people. (Dunham Decl. ¶ 6.) Those  
14 individuals include the 1,594 employees of 35 vapor-products manufacturers, 12 vapor-liquid  
15 manufacturers, and 347 vape shops. (Dunham Decl. ¶ 7.)

16 26. The wages and benefits earned annually by those 1,594 employees total almost  
17 \$45 million, and the direct economic output attributable to retail vape shops and vapor-liquid  
18 manufacturing exceeds \$125 million. (Dunham Decl. ¶ 8.)

19 27. The Washington vapor industry also is an important state fiscal contributor:  
20 vapor-product companies and their employees pay over \$40 million in state taxes, with vapor-  
21 product consumers generating a further \$16 million in state sales taxes. (Dunham Decl. ¶ 9.)

22 **IV. THC AND BLACK-MARKET VAPING PRODUCTS HAVE BEEN LINKED TO**  
23 **A MULTISTATE OUTBREAK OF LUNG INJURIES**

24 28. Federal and state health officials have identified and are investigating a multistate  
25 outbreak of lung injury, linked to products containing THC.

26 29. For example, on September 5, 2019—before the Board of Health issued the  
27 Emergency Rule—the New York Department of Public Health reported that it had received

1 “34 reports from New York State physicians of severe pulmonary illness among patients  
2 ranging from 15 to 46 years of age who were using at least one cannabis-containing vape  
3 product before they became ill.”<sup>14</sup> It also reported that laboratory test results found “very high  
4 levels” of vitamin E acetate—an oil included in THC vapor products to address some of the  
5 attributes of cannabis wax—in “nearly all cannabis-containing samples” analyzed.<sup>15</sup> The  
6 Department found that “[a]t least one vitamin E acetate containing product has been linked to  
7 each patient who submitted a product for testing.”<sup>16</sup>

8 30. The next day, the CDC reported that its “[i]nitial findings” showed that “many of  
9 the patients ... reported recent use of THC-containing products.”<sup>17</sup>

10 31. The CDC also said that five North Carolina patients presented with lung injury  
11 believed to be associated with vaping product use during July and August, all of whom “shared  
12 a history of recent use of marijuana oils or concentrates in e-cigarettes” and had used vaping  
13 devices “that had refillable chambers or interchangeable cartridges with tetrahydrocannabinol  
14 (THC) vaping concentrates or oils, which were purchased on the street.”<sup>18</sup>

15 32. On September 27, 2019, the CDC reported that “[t]he latest findings from the  
16 investigation into lung injuries associated with e-cigarette use, or vaping, suggest products  
17 containing THC play a role in the outbreak.”<sup>19</sup> The CDC reported that the vast majority of

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18 <sup>14</sup> N.Y. Dep’t of Health, *New York State Department of Health Announces Update on*  
19 *Investigation into Vaping-Associated Pulmonary Illnesses* (Sept. 5, 2019),  
[https://www.health.ny.gov/press/releases/2019/2019-09-05\\_vaping.htm](https://www.health.ny.gov/press/releases/2019/2019-09-05_vaping.htm).

20 <sup>15</sup> *Id.*

21 <sup>16</sup> *Id.*

22 <sup>17</sup> CDC, *Initial State Findings Point to Clinical Similarities in Illnesses among People Who Use*  
23 *E-Cigarettes or ‘Vape’* (Sept. 6, 2019), [https://www.cdc.gov/media/releases/2019/p0906-](https://www.cdc.gov/media/releases/2019/p0906-vaping-related-illness.html)  
[vaping-related-illness.html](https://www.cdc.gov/media/releases/2019/p0906-vaping-related-illness.html) (Exhibit 6).

24 <sup>18</sup> Ken Davidson et al., *Outbreak of Electronic-Cigarette-Associated Acute Lipoid Pneumonia—*  
25 *North Carolina, July—August 2019* (Sept. 6, 2019),  
<https://www.cdc.gov/mmwr/volumes/68/wr/mm6836e1.htm>.

26 <sup>19</sup> CDC, *Outbreak of Lung Injury Associated with E-Cigarette Use, or Vaping* (Sept. 27, 2019),  
27 [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/severe-lung-disease.html](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html) (Exhibit  
7).

1 persons affected with a lung injury—about 77 percent—reported using THC-containing  
2 products.<sup>20</sup>

3 33. Moreover, the CDC has noted that most of the patients in Illinois and Wisconsin  
4 presenting such lung injury reported using illicit THC-containing products sold as prefilled  
5 cartridges and obtained from informal sources.<sup>21</sup> It also observed the likelihood that some  
6 patients may have failed to disclose to health officials their use of THC because of its legal  
7 status.<sup>22</sup>

8 34. Although the CDC has not definitively identified a single brand or product as the  
9 cause of illness, it has found that a high percentage of patients have reported using cartridges  
10 from “Dank Vapes,” a prominent counterfeit brand, which contain THC.<sup>23</sup> The CDC  
11 emphasized that “the high level of use of prefilled THC cartridges, used in a range of different  
12 devices, suggests that the cartridges might play an important role.”<sup>24</sup>

13 35. And on October 17, 2019, CDC reported that “[t]he latest national and state  
14 findings suggest products containing THC, particularly those obtained off the street or from  
15 other informal sources (e.g. friends, family members, illicit dealers), are linked to most of the  
16 cases and play a major role in the outbreak.”<sup>25</sup>

17 36. FDA has stated that “[t]hrough [its] investigation, we have also found most of the  
18 patients impacted by the[] illnesses reported using THC-containing products, suggesting THC

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19 <sup>20</sup> *Id.*

20 <sup>21</sup> Isaac Ghinai et al., *Morbidity & Mortality Weekly Report, E-Cigarette Product Use, or*  
21 *Vaping, Among Persons with Associated Lung Injury—Illinois & Wisconsin, April–September*  
22 *2019*, CDC, *Morbidity & Mortality Weekly Report* (Sept. 27, 2019), <https://www.cdc.gov/mmwr/volumes/68/wr/mm6839e2.htm>.

23 <sup>22</sup> *Id.*

24 <sup>23</sup> *Id.*

25 <sup>24</sup> *Id.*

26 <sup>25</sup> CDC, *Outbreak of Lung Injury Associated with E-Cigarette Use, or Vaping* (revised Oct. 17,  
27 2019), [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/severe-lung-disease.html](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html)  
(Exhibit 8).

1 vaping products play a role in the outbreak.”<sup>26</sup> Indeed, “[a] majority of the samples tested by  
2 states or by the FDA as part of this ongoing investigation have been identified as vaping products  
3 containing THC.”<sup>27</sup>

#### 4 **V. WASHINGTON BANS NON-TOBACCO-FLAVORED VAPING PRODUCTS**

5 37. On September 27, 2019, Governor Jay Inslee issued an executive order titled  
6 “Addressing the Vaping Use Public Health Crisis.” Exec. Or. 19-03 (Exhibit 10.)

7 38. The order began by discussing use of vaping products among minors, and  
8 included citations to statistics on youth vaping from 2018. *Id.* at 1.

9 39. The order also referenced “an outbreak of a lung injury ... [among] previously  
10 healthy individuals who had recently vaped THC and/or nicotine vapor products.” *Id.* at 2. It  
11 went on to say that although “no one substance has been identified as the cause of these  
12 vaping-related lung injuries, “even if/when the specific ingredient(s) or compound(s) causing  
13 this vaping-related lung injury were to be identified, the state has no viable means to identify  
14 which vapor products for sale in Washington contain the injury-inducing substances(s).” *Id.*  
15 The Governor provided no support for that statement.

16 40. The Governor continued that “it is imperative that the state respond in a  
17 comprehensive and *evidence-based* manner to address this public health crisis.” *Id.* (emphasis  
18 added).

19 41. The Governor therefore directed the Board of Health to “use its emergency  
20 rulemaking authority to impose a ban on all flavored vapor products, including flavored THC  
21 vapor products, at the Board’s next meeting on October 9.” *Id.* at 3.

22 42. At its October 9, 2019 meeting, the Board of Health promulgated the Emergency  
23 Rule, which the Board stated was “necessary to prevent and reduce youth and young adult  
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25 <sup>26</sup> FDA, *Lung Illnesses Associated with Use of Vaping Products* (revised Oct. 16, 2019),  
26 [https://www.fda.gov/news-events/public-health-focus/lung-illnesses-associated-use-vaping-  
products](https://www.fda.gov/news-events/public-health-focus/lung-illnesses-associated-use-vaping-products) (Exhibit 9).

27 <sup>27</sup> *Id.*

1 exposure” to lung injury related to use of vaping products. WAC 246-80-001.

2 43. In support, the Rule referenced the 2019 “multistate outbreak” of that injury,  
3 along with statistics relating to youth vaping. *Id.* Specifically, the Rule explained that “[t]he  
4 2018 Washington State Healthy Youth Survey indicates that the prevalence of vapor product  
5 use within the past 30 days by 8th, 10th, and 12th graders in Washington has increased by 69,  
6 67, and 49 percent, respectively, since 2016.” *Id.* The Rule did not explain how that finding,  
7 purportedly drawn from the survey, could be logically true.

8 44. The Emergency Rule also noted that the Board’s Health Impact Review of HB  
9 1932 “found strong evidence that prohibiting the sale of flavored vapor products will likely  
10 decrease initiation and use of vapor products among adolescents and young adults.” *Id.* The  
11 Rule did not note that HB 1932, which as discussed above was a legislative effort to ban  
12 flavored vaping products, remains in the legislature.

13 45. Among other things, the Emergency Rule states that “[n]o person ... may sell,  
14 offer for sale, or possess with the intent to sell or offer for sale flavored vapor products.”  
15 WAC 246-20-020.

16 46. The Emergency Rule defines “flavored vapor product” as “any vapor product that  
17 imparts a characterizing flavor,” itself defined as “a distinguishable taste or aroma, or both,  
18 other than the taste or aroma of tobacco or marijuana or a taste or aroma derived directly and  
19 solely from marijuana or hemp plants that have been grown and tested as required by state  
20 law.” WAC 246-80-010(4), (5).

21 47. In adopting the Emergency Rule, the Board of Health relied on a handful of  
22 presentations and a memorandum from the Secretary of Health. Based on the record, it does  
23 not appear that the Board considered the significant evidence establishing that vaping products  
24 present a safer alternative to combustible cigarettes. Nor does it appear that the Board  
25 considered evidence showing that THC products were the predominant cause of the lung-injury  
26 outbreak. And because the Board acted so quickly, it promulgated the Emergency Rule  
27

1 without the most up-to-date information regarding the outbreak of lung injuries among vapor-  
2 product users.

3 **VI. THE BAN HAS DEVASTATED THE VAPOR INDUSTRY AND WILL**  
4 **CONTINUE TO DO SO, ABSENT RELIEF**

5 48. Following the Emergency Rule’s promulgation, retailers had no choice but to  
6 close their operations in light of the potential penalties. (Decl. of Kimberly Thompson (Oct.  
7 20, 2019), ¶ 9 (Exhibit 11).)

8 49. The Emergency Rule has rendered Washington’s vaping industry largely illegal.  
9 In the days since the ban took effect, it has ravaged the vaping industry by forcing business  
10 owners to shut their doors and order their employees to stay home.

11 50. Though the Rule purportedly only bans the subset of *flavored* vapor products, it  
12 effectively bans the vapor industry in its entirety. Non-tobacco flavors make up the vast  
13 majority of the vaping industry, both in popularity amongst adult consumers<sup>28</sup> and revenues for  
14 vapor-product retailers and manufacturers. (Thompson Decl. ¶ 8.) Retailers cannot turn a  
15 profit by selling only tobacco-flavored vapor products. (Thompson Decl. ¶ 8.)

16 51. Each day that the ban remains in effect, business owners lose income and  
17 employees miss out on paychecks. The effects of the ban—still in its infancy now—will be  
18 utterly devastating for this industry and the almost 1,600 people it directly employs.

19 52. For example, Baron Enterprises operated three retail stores in Pierce County.  
20 Following the ban, Baron Enterprises was left with no choice but to close the doors to one of  
21 its stores. (Thompson Decl. ¶ 4.) And absent relief, the other two stores will be closed within  
22 weeks. (Thompson Decl. ¶ 9.)

23 53. Baron Enterprises, like many vapor-products companies, is a small business. Its  
24 owner personally guaranteed long-term leases at its different store locations—leases for which  
25 she will be held personally liable because Baron Enterprises can no longer generate revenue.

26 <sup>28</sup> Christopher Russell et al., *Changing Patterns of First E-Cigarette Flavor Used and Current*  
27 *Flavors Used by 20,836 Adult Frequent E-Cigarette Users in the USA*, 15 *Harm Reduction*  
*Journal* 1–14 (2018).

1 (Thompson Decl. ¶ 13.) As a result, absent any preliminary relief, Baron Enterprises will  
2 likely shut its operations permanently. It will also be required to lay off all of its employees.

3 (Thompson Decl. ¶ 11.)

4 54. This story is being replicated in shop after shop across Washington. As long as  
5 the ban remains in place, the damage will only grow as employees and businesses, deprived of  
6 any income, are increasingly unable to meet their financial obligations. With retail stores  
7 remaining closed, the entire supporting ecosystem of wholesalers, distributors, and  
8 manufacturers may collapse as well.

9 55. If the statewide ban on the sale of flavored nicotine vapor products in Washington  
10 continues in effect, for a large number of retailers of vapor products, the forced closure will  
11 prove fatal to their businesses.

12 56. By denying Washington residents access to vaping products from established  
13 retailers, the ban may force users to turn to the black market or to combustible cigarettes.

14 (Thompson Decl. ¶ 14.)

15 57. The Emergency Rule and its enforcement create well-grounded fears for VTA and  
16 its members, including Baron Enterprises: Fear that they will be unable to keep the vapor-  
17 product market open and competitive; fear that vapor-products businesses will go extinct; and  
18 fear that the Rule will create a public-health crisis by pushing vapor-products users to the black  
19 market and combustible cigarettes

20 **BASES FOR THE EMERGENCY RULE'S INVALIDITY**

21 58. The Court “shall declare” a rule invalid “if it finds that: The Rule violates  
22 constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was  
23 adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and  
24 capricious.” RCW 34.05.570(2)(c).

25 59. The Court should invalidate the Emergency Rule for at least three reasons:  
26  
27

**COUNT I**  
**(The Emergency Rule Violates RCW 43.20.050)**

60. VTA and Baron Enterprises restate and reallege the allegations in paragraphs 1 through 59.

61. The Board of Health relied on RCW 43.20.050(2)(f) as authority to promulgate the Emergency Rule:

In order to protect public health, the state board of health shall ...[a]dopt rules for the prevention and control of infectious and noninfectious diseases, including food and vector borne illness, and rules governing the receipt and conveyance of remains of deceased persons, and such other sanitary matters as may best be controlled by universal rule.

62. Because the Emergency Rule does not address “the receipt and conveyance of remains of deceased persons,” the Board must have been relying on the statute’s language about “infectious and noninfectious diseases” as authority for the Rule.

63. As an initial matter, that is curious, give that the Board of Health’s own website refers to the outbreak as “vaping associated lung injury.”<sup>29</sup>

64. Putting that aside, RCW 43.20.050(2)(f) does not given the Board the authority to promulgate the Emergency Rule.

65. The Court’s role in interpreting an enabling statute is to “ascertain and carry out the Legislature’s intent.” *Washington Rest. Ass’n v. Wash. State Liquor & Cannabis Bd.*, 448 P.3d 140, 147 (Wash. Ct. App. 2019).

66. The phrase “noninfectious diseases” is not defined in the statute, but it has meaning in the medical community. For example, the World Health Organization states that “[n]oncommunicable diseases ... tend to be of long duration and are the result of a combination of genetic, physiological, environmental and behaviours factors [sic],” and include “cardiovascular diseases ... cancers, chronic respiratory diseases ... and diabetes.”<sup>30</sup> Similarly, Wikipedia notes that “non-communicable disease[s]” include Parkinson’s disease,

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<sup>29</sup> Wash Stat Dep’t of Health, *Vaping Associated Lung Injury* (last updated Oct. 16, 2019), <https://www.doh.wa.gov/Emergencies/VapingAssociatedLungInjury> (Exhibit 12).

<sup>30</sup> World Health Org., *Noncommunicable Diseases* (last updated June 1, 2018) <https://www.who.int/news-room/fact-sheets/detail/noncommunicable-diseases>.

1 autoimmune diseases, strokes, most heart diseases, most cancers, diabetes, chronic kidney  
2 disease, osteoarthritis, osteoporosis, Alzheimer’s disease, [and] cataracts.” In other words, the  
3 term “noninfectious diseases” would encompasses a host of genetic, environmental, and  
4 lifestyle diseases.

5 67. If RCW 43.20.050(2)(f)’s reference to “noninfectious disease” really  
6 encompassed every noninfectious disease, it would be an unconstitutional delegation as it  
7 would cede to the Board of Health the power to determine finally the social objectives or  
8 programs that are worthy of pursuit. It thus must be more limited. And the statute itself  
9 suggests that limiting construction: RCW 43.20.050 empowers the Board of Health to “[a]dopt  
10 rules for the prevention and control of infectious and noninfectious diseases, *including food  
11 and vector borne illness.*” (Emphasis added.) The clause “including food and vector borne  
12 illness” provides the context to understand “infectious and noninfectious diseases.”

13 68. Applying that principle (along with the canon of constitutional avoidance) here,  
14 the outbreak of lung injuries among vaping-products users are not of a piece of food- or vector-  
15 borne illnesses, and thus RCW 43.20.050(2)(f) does not authorize the Board of Health to  
16 promulgate rules banning vaping products.

17 69. VTA and Baron Enterprises have no adequate remedy at law.

18 70. The Board of Health’s conduct and the Emergency Rule have and will cause  
19 substantial and irreparable injury to VTA (and its members) unless the Emergency Rule is  
20 restrained and enjoined.

21 **COUNT II**  
22 **(The Emergency Rule Is Arbitrary and Capricious)**

23 71. VTA and Baron Enterprises restate and reallege the allegations in paragraphs 1  
24 through 70.

25 72. The Emergency Rule is arbitrary and capricious in violation of the Administrative  
26 Procedure Act.

1           73. An agency’s action is arbitrary and capricious if it “is willful and unreasoning and  
2 taken without regard to the attending facts or circumstances.” *Rios v. Wash. Dept. of Labor &*  
3 *Indus.*, 145 Wn. 2d 83, 501 (2002).

4           74. As to the Board of Health’s concern about youth vaping, the Emergency Rule  
5 does nothing to change the regulatory landscape already in effect with respect to youth access  
6 to vaping products. It contains no provision specifically targeting youth vaping, and ignores  
7 the many recently enacted laws in Washington designed to prevent underage vaping:

- 8           • Use of vapor products prohibited in and on grounds of child care facilities, schools,  
9 playgrounds, school buses, elevators, and within 500 feet of schools. RCW  
10 70.345.150.
- 11           • Sale/distribution of vapor products to persons under age 21 prohibited. RCW  
12 26.28.080.
- 13           • Purchase/possession of vapor products by persons under age 18 prohibited. RCW  
14 70.345.140.
- 15           • Self-service displays of vapor products prohibited except in retailers inaccessible to  
16 persons under age 21. RCW 70.345.080.
- 17           • Samples of vapor products must take place within licensed retail premises that is  
18 restricted to those over the age of 21 years, contain no nicotine (unless “customer  
19 explicitly consents”), and use a disposable mouthpiece. RCW 70.345.100.
- 20           • Free vapor product distribution prohibited without contemporaneous purchase of  
21 vapor product. RCW 70.345.110.
- 22           • Delivery sales of vapor products prohibited unless seller has a valid delivery sale  
23 license, verifies the age of the purchaser through a third-party database, and only  
24 accepts payment through a credit or debit card in the purchaser’s name. RCW  
25 70.345.090.

26           75. Rather than consider the effect of these new and fully implemented statutes, the  
27 Board imposed an over-inclusive ban on selling a lawful product to adults.

          76. As to the Board of Health’s concern about vaping-related injuries, the Emergency  
Rule does not track the evidence gathered by health officials, which details the link between  
THC vaping products and lung injuries. Nor has the Board of Health, or Washington

1 generally, done anything to address the black-market availability of THC (or even to  
2 specifically confront THC as the cause of the lung injuries).

3 77. In addition, the Emergency Rule undermines, rather than furthers, public health  
4 by permitting combustible cigarettes, a more dangerous alternative to nicotine vaping products,  
5 to remain on store shelves, and by promoting a black market for upregulating vaping products.  
6 The Board ignores the likely negative consequences of the ban: adult vapor users' substitution  
7 of flavored vapor products with more harmful products.

8 78. VTA and Baron Enterprises have no adequate remedy at law.

9 79. The Board of Health's conduct and the Emergency Rule have and will cause  
10 substantial and irreparable injury to VTA (and its members) unless the Emergency Rule is  
11 restrained and enjoined.

12 **COUNT III—By VTA Only**  
13 **(The Emergency Rule Violates the First Amendment of the United States**  
14 **Constitution and Article I, § 5 of the Washington Constitution)**

15 80. VTA and Baron Enterprises restate and reallege the allegations in paragraphs 1  
16 through 79.

17 81. Advertising, including the online or other display of products, is a form of  
18 commercial speech protected by the free-speech clauses of the United States Constitution,  
19 Amendment 1, and the Washington Constitution, Article 1, §5.

20 82. The Emergency Rule violates the rights of VTA's members by prohibiting anyone  
21 from "offer[ing] for sale ... flavored vaping products" in Washington. WAC 246-80-020.  
22 Offering for sale is a form of advertising.

23 83. By the plain terms of the Emergency Rule, VTA's members in states where  
24 flavored vaping products are lawful are now precluded from advertising in Washington.

25 84. The Rule's advertising ban on flavored vaping products imposes an  
26 unconstitutional restriction on speech by prohibiting the display of products that are lawful in  
27 other states, in violation of the free-speech clauses of the United States and Washington

1 Constitutions. Washington lacks a substantial interest in precluding all advertisements of  
2 vaping products within its borders.

3 85. The Emergency Rule does not permissibly advance the purported health and  
4 safety interest asserted by Washington, in light of the state's existing restrictions on the sales of  
5 vaping products to youth. The state's wholesale ban is far more restrictive than necessary to  
6 advance any legitimate state interest.

7 86. VTA has no adequate remedy at law.

8 87. The Board of Health's conduct and the Emergency Rule have and will cause  
9 substantial and irreparable injury to VTA (and its members) unless the Emergency Rule is  
10 restrained and enjoined.

11 **REQUEST FOR RELIEF**

12 WHEREFORE, VTA and Baron Enterprises pray for relief as follows:

13 (a) The Emergency Rule should be declared invalid and its implementation  
14 enjoined on the following grounds: (1) the Rule exceeds the Board of Health's statutory  
15 authority; (2) the Rule is arbitrary and capricious; and (3) the Emergency Rule violates  
16 the U.S. Constitution's and Washington Constitution's free-speech clause;

17 (b) Awarding VTA and Baron Enterprises their costs and expenses, including  
18 attorneys' fees and experts' fees, incurred in this action; and

19 (c) For such other and further relief as the Court may deem just and proper.

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1 DATED this 21st day of October 2019.

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3 **Davis Wright Tremaine LLP**

4 By s/ Steven P. Caplow  
5 Steven P. Caplow, WSBA #19843  
6 Jordan Harris, WSBA #55499  
7 920 Fifth Avenue, Suite 3300  
8 Seattle, WA 98104  
9 Telephone: (206) 622-3150  
10 Fax: (206) 757-7700  
11 E-mail: [stevencaplow@dwt.com](mailto:stevencaplow@dwt.com)  
12 [jordanharris@dwt.com](mailto:jordanharris@dwt.com)

13 **Williams & Connolly LLP**

14 Joseph M. Terry (*pro hac vice* forthcoming)  
15 David Riskin (*pro hac vice* forthcoming)  
16 725 Twelfth Street, N.W.  
17 Washington, D.C. 20005  
18 Telephone: (202) 434-5000  
19 Fax: (202) 434-5029  
20 Email: [jterry@wc.com](mailto:jterry@wc.com)  
21 [driskin@wc.com](mailto:driskin@wc.com)

22 *Attorneys for Vapor Technology Association and*  
23 *Baron Enterprises LLC*