IN THE COURT OF APPEALS OF THE

STATE OF OREGON

No Moke Daddy, LLC, d/b/a Division Vapor, an Oregon limited liability company; and Paul Bates, an individual, Petitioners, v. STATE OF OREGON, acting by and through the OREGON HEALTH AUTHORITY; KATE BROWN, in her official capacity as Governor of Oregon and as Chief Executive of the Oregon Health Authority; PATRICK ALLEN, in his official capacity as Director of the Oregon Health Authority, Respondents.	Appellate Court No.:

PETITIONERS' EMERGENCY MOTION TO STAY ENFORCEMENT OF RULE PENDING REVIEW (ORAP 7.35)

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Petitioners request that the Court grant a temporary stay herein by October 18, 2019, pending a response from the State, and a reply from Petitioners. The Petitioners have filed an emergency motion because Petitioners, along with approximately 4,000 similarly situated businesses will be forced to shutter their businesses due to the temporary administrative order (OAR 333-015-1000) adopted as a result of Executive Order 19-09. Petitioner contacted the Oregon Department of Justice at 503-947-4700 to notify the State of this motion but was told that no attorney was available, and that no attorney had yet been assigned. On October 16, 2019, Petitioner mailed a true and accurate copy of this motion to 1162 Court St. NE Salem, OR 97301.

Pursuant to ORAP 7.35, Petitioners move the Court for an emergency stay of Temporary Administrative Order 333-015-1000 ("the Emergency Rule"). The Emergency Rule was made effective on October 15, 2019.

Effective October 15, 2019, retailers are precluded by temporary rule from selling any type of flavored nicotine vapor. OAR 333-015-1000. Within the last month, several states have attempted substantially similar types of bans through an emergency rulemaking process. As of October 15, 2019, both Michigan and New York have enjoined enforcement of blanket "vaping bans" almost identical to the ban adopted in Oregon. *See, In the Matter of Vapor Technology Association et al v. Cuomo*, 2019 WL 4891868 (NYAD 3 Dept.), 2019 NY Slip Op. 80970(U) and *Marc*

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Slis, et. al v. Whitmer, et. al., Case No. 19-000152-MZ (Mich. Ct. Cl.). These courts found, *inter alia*, that the harm to business and livelihood outweighed blanket state emergency regulation, and that in the absence of a stay, Petitioners were likely to suffer irreparable harm. The states also found that Petitioners in those cases had made a colorable claim that the rule was invalid. *Id*.

Petitioners in this case are an Oregon business and an individual that will both be directly affected by enforcement of the Emergency Rule. Indeed, Petitioners, like nearly all businesses in Oregon involved with the marketing and sale of vape products, will be irreparably harmed by the Emergency Rule's imminent enforcement, as they will be forced to shut down their business operations entirely[1]. Moreover, Petitioners seek only to preserve the status quo of current vaping regulations in Oregon.

Lastly, the Emergency Rule will directly affect members of the General Public who utilize flavored e-liquids as part of their combustible tobacco cessation efforts.

For these reasons, Petitioners make this request for emergency relief directly to this Court because time is of the essence.

BACKGROUND

This action derives from the adopting of Temporary Administrative Order

[1] Petitioners do not do business outside of the state of Oregon.

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PH21-2019/OAR 333-015-1000 by the Oregon Health Authority ("the Authority"). The Authority was instructed to adopt the Emergency Rule following the Governor's Executive Order No. 19-09 (EO 19-09) which seeks to ban the sale flavored nicotine and medical cannabinoid vaping products for 180 days pursuant to ORS 183.335(5). The Emergency Rule also specifies penalties for violations of the temporary rules.

Vapor devices, also known as "electronic cigarettes," "e-cigarettes," or "electronic nicotine delivery systems (ENDS)" are handheld electronic devices that are used to heat and aerosolize a liquid mixture ("e-liquid") that contains nicotine. Once the e-liquid is aerosolized, the user of the vapor device inhales the aerosolized "vapor" in a manner similar to that of inhaling actual tobacco smoke, but without the fire, flame, tar, carbon monoxide, ash, stub, or smell associated with traditional combustible cigarettes.

The e-liquids used in vapor devices are typically made with a mixture of propylene glycol and/or vegetable glycerin, flavorings, and pharmaceutical grade nicotine.

E-liquids can be found in both "open system" and "closed system" vapor products. In an "open" system, the device does not come pre-filled; rather, the user will separately buy bottled e-liquid(s) and use them to fill the device's e-liquid reservoir, or "tank." In contrast, in a "closed" system, either the device itself or interchangeable pods or cartridges intended for use with the device will come pre-

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filled with a particular type of e-liquid. E-liquids are sold to consumers in a variety of flavors, bottle sizes (for open systems), and nicotine concentrations, including zero nicotine products, and users thus have the option to reduce their nicotine intake and/or wean themselves from nicotine use entirely.

Vapor products have been studied extensively, with a consensus that they pose far lesser risk than combustible cigarettes and hold great potential as a public health harm reduction tool. The impact of the availability of a wide variety of vapor products, including nontobacco and non-menthol e-liquids, on consumer demand for traditional combustible cigarettes has been significant. As of 2017, 14.0% of all adults (34.3 million people) were current cigarette smokers.[2] This is a 20.9% decrease since 2005.[3] It should not be considered a coincidence that such a decrease is caused, in part, by the increase in alternative products such as vaping.

Nevertheless, the Authority seeks to halt access to alternatives to smoking combustible cigarettes. These regulations are excessive when considering that the

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[2] *Smoking & Tobacco Use: Fast Facts and Fact Sheets*, Centers for Disease Control and Prevention (Oct. 15, 2019) https://www.cdc.gov/tobacco/data_statistics/fact_sheets/index.htm.

[3] *Smoking & Tobacco Use: Current Cigarette Smoking Among Adults in the United States*, Centers for Disease Control and Prevention (Oct. 15, 2019) https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm.

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federal government already regulates vaping products. *See, e.g.*, 21 U.S.C. §§ 387 d(a)(4), f(e), 387g. The Emergency Rule will not only harm Petitioners and similarly situated businesses in Oregon, but it will directly affect members of the General Public who utilize flavored e-liquids as part of their combustible tobacco cessation efforts. Moreover, enactment and enforcement of the rule is an affront to the constitutional and administrative protections afforded to citizens of the State of Oregon. For these reasons, as explained in greater detail below, the Court should temporarily preliminarily enjoin enforcement of the Emergency Rule.

POINTS AND AUTHORITIES

The legal standard for the Court of Appeals granting a stay is similar to that of a preliminary injunction. Pursuant to ORS 19.350(5), the court will normally consider:

(a) The likelihood of the appellant prevailing on appeal;

(b) Whether the appeal is taken in good faith and not for the purpose of delay;

(c) Whether there is any support in fact or in law for the appeal; and

(d) The nature of the harm to the appellant, to other parties, to other persons and to the public that will likely result from the grant or denial of a stay.

(A) The Petitioners have a high likelihood of prevailing on appeal.

Petitioners are highly likely to prevail on appeal because it is ambiguous at best that the Executive Branch and, by extension, the agency are given the authority

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to enact this Emergency Rule. Yet even if the Court were to determine that the Authority did possess this power, the Emergency Rule itself is void and facially invalid because the rule is *ultra vires.*

I. The Emergency Rule is invalid because it fails to comply with ORS 183.335(5).

ORS 183.335(5) provides agencies with the authority to circumvent the normal rule making process if the following four relevant factors are present within the rule: (a) A statement of its findings that its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice; (b) A citation of the statutory or other legal authority relied upon and bearing upon the promulgation of the rule; (c) A statement of the need for the rule and a statement of how the rule is intended to meet the need; (d) A list of the principal documents, reports or studies, if any, prepared by or relied upon by the agency in considering the need for and in preparing the rule, and a statement of the location at which those documents are available for public inspection. ORS 183.335(5)(a-d).

A. The Authority has not satisfied procedural factors.

ORS 183.335(c) necessitates two factors: 1) a statement of the need for the rule; and 2) how the rule meets the need. Here, the Authority satisfies only one of those prongs. Specifically, the Emergency Rule states only the need; it does not, by

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its plain reading, provide for how the rule meets that need. In other words, the Authority seemingly perceives a need that requires agency rulemaking but does not state how the need will be satisfied by the rule itself. Instead, the Emergency Rule in its current form amounts to nothing more than a statement of a problem, without including the solution. Thus, the Authority has failed to comply with ORS 183.335(c). For this reason alone, a stay should issue.

B. The Authority has failed to show how "serious prejudice to the public interest" will occur in the absence of this rule.

In order to establish the authority to bypass the normal rule making process, the Authority must show that a failure to act promptly will result in serious prejudice to the public interest. Ostensibly, the Authority adopted this temporary rule to protect Oregon's youth, however, the justification of the rule is disjointed at best. Although the Authority claims nine injuries and two vaping related deaths in Oregon, it is not alleged that these injuries and deaths were persons under 21 years of age. Indeed, no injuries from nicotine related vapor have been reported. Moreover, the Authority readily admits that "no specific types of e-cigarettes, vaping devices, or liquids have been conclusively identified as a cause of the illnesses at this time."

The result is that the Authority has failed to satisfy its burden that "serious prejudice to the public interest" will occur in the absence of this rule. Indeed, although the authority cites to several studies, all the Authority purports to rely upon

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is the text of the Executive Order itself.

II. The Emergency Rule is a violation of the separation of powers doctrine provided for in the Oregon Constitution.

In its crudest form, the separation of powers doctrine provides that each branch of government is confined to exercising those powers within its particular sphere, and any attempt by one branch to exercise a power properly belonging to another branch violates the separation of powers.

Article III, § 1 of the Oregon Constitution provides that "[t]he powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided." As a result, the constitutional separation of powers in Oregon mandates that the Legislative branch be entrusted with policy decisions, while the Executive branch's responsibility is in implementing the policies enacted.

In Oregon, there are "two inquiries to determine whether there is a separation of powers violation." *Rooney v. Kulongoski (Elections Division # 13)*, 322 Or 15, 28 (1995). The first is whether one branch of government has unduly burdened the action of another "in an area of responsibility or authority committed to that other department." *Rooney*, 322 Or 15, 28; *State ex rel. Dewberry v. Kitzhaber*, 259 Or

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App 389, 408 (2015). The second is whether one branch is "performing the functions committed to" another branch. *Rooney*, 322 Or 15, 28.

In conducting those inquiries, courts must bear in mind that the "roles that governmental actors are asked to play not infrequently interact in material ways" and that "the separation of powers does not require or intend an absolute separation" between the branches of government. *Id*. Yet, as here, the Executive Branch and, by extension the Authority, are acting outside their power and engaging in a clear legislative act. This is improper and specifically prohibited by the Constitution. *See State v. Davilla*, 234 Or App 637, 645 (2010) ("Three provisions of the Oregon Constitution, taken together, prohibit the delegation of legislative power to make laws.").

First, Article I, § 21, provides, among other things, that no law shall "be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." Second, Article III, § 1, provides that the "powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided." And, third, Article IV, § 1(1), provides that the "legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly,

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consisting of a Senate and a House of Representatives." *See generally*, *City of Damascus v. Brown*, 266 Or App 416, 440 (2014).

The Executive branch does not possess the authority to legislate policy decisions. A rule adopted outside an agency's authority is invalid. *Oregon Newspaper Publishers Asso. v. Peterso*n, 244 Or 116, 123–124 (1966). This is simply because the citizens of Oregon, by adopting the state Constitution, granted the Legislative branch the power to legislate; therefore, the power to enact legislation "is not by implication to be delegated to nonelective officers." *Peterson*, 244 Or 116, 124. Moreover, the tendency of administrative action to expand beyond the scope of any delegable authority is "perhaps as natural as nature's well-known abhorrence of a vacuum." *Peterson*, 244 Or 116, 124. If such an undelegated expansion is determined, the result is, of course, a violation of the delegation of powers articulated in the Constitution.

Further, the Legislative branch, and not the Executive, is in the best position to weigh the concerns of affected businesses and the general public, and an Executive, and by extension an administrative agency may not, without any legislative guidance, reach its own conclusions about the proper accommodation among those competing interests.

Branches of government can only act within the parameters specifically granted to them by the Constitution. *Board of Com'rs of Clackamas County v.*

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Department of Land Conservation and Development, 35 Or App 725 (1978) (holding that Agencies are creatures of the government; their authority goes only as far as their enabling acts provide). To that end, the Emergency Rule amounts to a policy that can be, and should be, only enacted via the legislative process. It is a gross overstep of constitutional principles for the Executive to enact the Emergency Rule and it should be struck down as a violation of Article III, § 1 of the Oregon Constitution.

III. Even if this Court determines the Executive and the Authority possessed the power to enact the Emergency Rule, the Emergency Rule is invalid because it is arbitrary and capricious.

The Emergency Rule is invalid because it does not have a rational basis, and is unreasonable, arbitrary and capricious. "The terms 'arbitrary and capricious action,' … must mean willful and unreasoning action, without consideration and in disregard of the facts and circumstances of the case. *Jehovah's Witnesses v. Mullen et al*, 214 Or 281, 296 (1958), *cert. den.*, 359 US 436 (1959); *see also Motor Vehicle Mfrs. Assn. v. State Farm Mut.*, 463 US 29, 43 (1983). An agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. *Bradley v. State ex rel. Dept. of Forestry*, 262 Or App 78, 94 (2014). No such determination was

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made here. Indeed, any action taken by the Authority can only be classified as unreasonable.

For example, the Emergency Rule is unlawfully "arbitrary and capricious" because it allows for the continued sale of combustible tobacco cigarettes—which are also illegally used by youth—while banning a significant swath of substantially less harmful vapor products. It even goes so far as to exclude "tobacco" flavored vapor products from the flavor ban. Despite asserting multiple claims regarding the supposed health risks of vapor products and "flavored" e-liquids, the Authority provided little citation or evidentiary basis for its claims or statements. Instead, the Authority relied on unsupported conclusory allegations.

Other than, half-handedly, observing that users of vapor products can continue to access tobacco-flavored e-liquids, the Emergency Rule entirely fails to address the potential detrimental impact of the ban of "flavored" e-liquids on adult vapor product users, including former smokers who rely heavily on such products, or the potential negative public health impact on these individuals with the sudden removal of all flavored e-liquids from the market.[4] Moreover, Respondents repeatedly cite a

[4] The term "tobacco" flavor is a misnomer; there is no tobacco in these products. The products are artificially flavored. Requiring that a product be "tobacco" flavored according to the perception of the "ordinary person" makes little sense. For instance, many tobacco users who smoke pipes may sense notes of vanilla, honey, or spice. This is comparable to wine, the by-product of the grape. Sommeliers may get notes of plum, black cherry, blackberry, blueberry, warm spice, vanilla, black pepper,

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"public health crisis" yet ignore a substantially more dangerous product: tobacco. *See, e.g.*, *Estate of Schwartz v. Phillip Morris, Inc.*, 206 Or App 20 (2006).

Respondents assert that it is "imperative for the State to take immediate action in and evidence-based manner, to protect Oregonians, particularly Oregon's youth, from the harms associated with vaping products," yet produce incomplete evidence for reaching this determination. For example, the Authority cites a CDC study taken as recently as October 10, 2019 which states that there have been "more than 1,200 vaping-related lung injury cases and 26 deaths nationally, with nine vaping related injuries and two deaths in Oregon." What the Authority does not note is that as of 2017, there has been a 21% decrease in cigarette smokers nationwide based, at least in part, on alternative avenues, including substantially healthier products such as vaping, for American consumers to use.

Still further, The National Academies of Science, Engineering, and Medicine have found that "across a range of studies and outcomes, e-cigarettes pose less risk to an individual than combustible tobacco cigarettes," and that there is "conclusive evidence that completely substituting e-cigarettes for combustible tobacco cigarettes

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tobacco and sometimes leather aromas from a standard bottle of cabernet sauvignon. However, the same sommelier may get notes of apples, apricots, peaches and pears from a bottle of Riesling. Notwithstanding the differentiation of subjective flavors, all wine comes from the grape. To limit a retailer to stating only that a product is "tobacco" flavored would be equivalent to limiting the sommelier to saying that wine is "wine" flavored.

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reduces users' exposure to numerous toxicants and carcinogens present in combustible tobacco cigarettes." *Nat'l Academies of Sciences, Engineering, and Medicine, Et. Al., Public Health Consequences of E-Cigarettes* 4, 13 (David L. Eaton, et. al. eds., 2018).

The term "vaping" is misleading. As a term of art, it conflates too many vastly different products. For example, THC vaping (from which it appears most if not all injuries have arisen) is vastly different than nicotine-based vaping. THC vapor is an oil-based product, and cut with lipophilic substances and flavors, while nicotine vapor is a purely water-based product. Conflating the two of these products together to solve a perceived problem is not appropriate, and is an arbitrary "shot in the dark."

If there is such an "imperative" for "immediate action" to "protect Oregonians, particularly Oregon's youth," the Authority should be as concerned with restricting the manufacturing, possession, or sale of combustible flavored cigarettes.

Moreover, the length of the Emergency Rule is arbitrary and capricious to the extent that it presents a length of time for the ban itself. Petitioners posit that Respondents would not be able to learn any additional information in the next 180-days. Indeed, what the Emergency Rule purports to be is a run-out-the-clock measure until the next legislative session. The Emergency Rule is misleading to the public and its enactment is certainly arbitrary and capricious.

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As a result of Respondents arbitrary and capricious actions, Petitioners are suffering ongoing and irreparable harm as compliance will cause them significant financial losses. Petitioners are faced with a choice: close your business or face significant financial penalties for noncompliance.

IV. Notwithstanding the arbitrary and capricious nature of the Emergency Rule, the Authority did not follow rulemaking procedures in accordance with the Oregon Administrative Procedure Act.

As state agencies and actors, Respondents are subject to the requirements of the Oregon Administrative Procedures Act (APA), including the notice and comment requirements imposed by the APA. ORS 183.335.

Pursuant to the APA, Respondents must fulfill minimum notice-and-comment requirements, including publishing the proposed rules sufficiently in advance to allow interested parties to comment on the proposed rulemaking. An exception arises if an agency finds that the immediate adoption of a rule is necessary in emergency situations. ORS 183.355(5).

To do so, the agency seeking emergency rule adoption must fully articulate in writing 1) A statement of its findings that its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice; 2) A citation of the statutory or other legal authority relied upon and bearing upon the promulgation of the rule; 3)

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A statement of the need for the rule and a statement of how the rule is intended to meet the need; and 4) A list of the principal documents, reports or studies, if any, prepared by or relied upon by the agency in considering the need for and in preparing the rule, and a statement of the location at which those documents are available for public inspection. ORS 183.335(5)(a-d).

Put another way, the onus is on the agency to explain why the emergency rule is necessary and to provide appropriate reasoning why the rulemaking procedures should not be followed. As such, the APA should be waived only when delay would do real harm. ORS 183.335(5)(a). Respondents have failed to establish this threshold here.

Instead, Respondents seemingly utilize an approach wherein they do not have a viable solution to the perceived problem and so seek to ban the product itself. As noted above, if there is such an "imperative" for "immediate action" to "protect Oregonians, particularly Oregon's youth," then the Authority should concern itself with restricting all dangerous smoking products, and not just limiting the ban to flavored vaping products. Indeed, there are already laws that prohibit persons 21 years of age or younger from purchasing nicotine products, and the Authority has not even attempted to explain how this rule will help further its interest.

Nevertheless, Respondents relied upon statistics that are, at best, only one-half of the story and at worst, grossly misleading. The Emergency Rule contains

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absolutely no evidence of any consideration by Respondents that flavored vaping products are associated with the perceived public health risk that Respondents perceive. Instead, Respondents admit the opposite, noting that "no specific types of e-cigarettes, vaping devices, or liquids have been conclusively identified as a cause of [] illnesses at this time."

Respondents are seemingly creating an issue which is much ado about nothing and, despite opposition from consumers and the industry, as well as concerns listened to and acknowledged in other jurisdictions, the Emergency Rule was adopted without an actual emergency that warranted the emergency rulemaking process.

Yet even assuming arguendo that Respondents *were* relying on reliable information and *were* forthcoming with all opposing viewpoints, such statements and conclusions could only be determined if the Authority appropriately used Notice-Comment procedures articulated by the APA. Respondents foreclosed the opportunity for advocates, consumers, and Oregon business owners to share information that would dispute the information for which the Authority so willingly relied upon. This is an affront to the protections from government overreach that all Oregonians are entitled to enjoy.

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V. The Emergency Rule is an affront to the privileges and immunities afforded Petitioner Bates.

The Emergency Rule violates the privileges and immunities granted to Petitioner Bates under the Oregon Constitution. *See,* Or. Const. Art 1, § 20; *see also, State ex rel. Luckey v. James*, 189 Or 268 (1950). The Privileges and Immunities Clause in the Oregon Constitution provides that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." Or. Const. Art 1, § 20. The classes here are those who engage in an enterprise involving flavored vaping devices, and those that do not. The Emergency Rule amounts to a restriction on the privileges and immunities guaranteed by the Constitution; it treats those who do not deal with vape products, but may engage in equally or, in fact, more dangerous products, differently than those that do.

Moreover, the right to pursue any legitimate trade, occupation or business is a natural, essential and inalienable right protected by the state Constitution. *General Elec. Co. v. Wahle*, 207 Or 302 (1956); *State v. Randolph*, 23 Or 74 (1892); *Baker v. Daly*, 15 F.2d 881 (1926). Enactment and subsequent application of this Emergency Rule would force the closure of Petitioner Bates business and preclude Petitioner Bates from exercising his right to pursue a legitimate trade or engage in a

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legitimate business enterprise. Such a result is contra to the protections afforded the citizens of the State of Oregon under Article 1, § 20.

VI. The Emergency Rule amounts to a violation of Petitioners free speech rights.

Article I, § 8, of the Oregon Constitution states: "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever…"

The Oregon constitutional standard provides that all expression is equal and equally protected. *Bank of Oregon v. Indep. News, Inc.*, 298 Or 434, 439–40 (1985), meaning that, with very few and limited exceptions, all speech and expressive conduct are constitutionally protected. *Moser v. Frohnmayer*, 112 Or App 226 (1992); *City of Eugene v. Powlowski*, 116 Or App 186 (1992). Such protections are guaranteed whether the speech or expression be written, spoken, verbal, or nonverbal. *See, e.g., State v. Stoneman*, 323 Or 536 (1996).

Indeed, "the sweeping protection of [the] clause extends to all forms of speech, regardless of the social acceptability or offensiveness of the content, *State v. Robertson*, 293 Or. 402, 416 (1982), and regardless of the context of the communication." *Merrick v. Board of Higher Education*, 116 Or App 258, 265 (1992).

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Under the Oregon Constitution, commercial speech is afforded same protection as noncommercial speech. *Northwest Advancement, Inc. v. State, Bureau of Labor, Wage and Hour Div.*, 96 Or App 133 (1989); *Ackerley Communications, Inc. v. Mult. Co.*, 72 Or App 617 (1985).

As the U.S. Supreme Court has consistently noted, free speech and expression protections extend to corporations. *Citizens United v. Federal Election Commission*, 558 U.S. 310, 342, 130 S Ct 876, 899-900 (2010); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778, n. 14, 98 S Ct 1407 (1978); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 S Ct 1614 (1977); *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S Ct 958 (1976); *Doran v. Salem Inn, Inc*., 422 U.S. 922, 95 S Ct 2561 (1975); *New York Times Co. v. United States*, 403 U.S. 713, 91 S Ct 2140 (1971) (per curiam); *Time, Inc. v. Hill*, 385 U.S. 374, 87 S Ct 534 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S Ct 710 (1964).

The Emergency Rule seeks to limit the speech rights of both vaping businesses and individuals. *See* OAR 333-008-4000(3); OAR 333-015-1000(3). It provides that any "public statement or claim, whether express or implied, made or disseminated by [those in the vaping industry]" regarding the flavor, or potential flavor of the vaping product, will be used as presumptive evidence by the Authority against the speaker. This is a direct affront to constitutional free speech protections and results

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in a ban on expressive conduct relating to flavored vaping products.[5] Under a reading of this provision, those involved in the vaping industry will be unable to even discuss flavored vaping products of any kind for fear that if they do, they will be subject to sharp penalties from the State. For example, if an employee at a vaping shop advertises on social media that his employer has vape products that may "taste" or "smell" substantially similar to something else, the State can utilize that statement and place a thumb on the scale in penalizing the business.

Such measures are not protected by the Oregon Constitution. If they were, it would then be permissible for the state to enact laws that prohibit exposing Oregon citizens to other forms of advertising content such as for tobacco or alcohol. Nothing in the Constitution provides for the government to make such sweeping determinations. As a result, the Emergency Rule chills the speech of those in the vaping industry.

Moreover, it results in a content-based restriction on speech. Such restrictions are presumptively unconstitutional because it amounts to the government placing a burden on speech simply because of its content. Laws that focus on the content of speech or writing and are written in terms directed to the substance of any opinion or any subject of communication are unconstitutional under Article I, § 8. *Robertson*,

[5] *See* infra, fn. 4.

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293 Or 402 (1982), *City of Eugene* 318 Or 480, 488 (1994); *State v. Plowman*, 314 Or 157, 164 (1992).

Here, the Emergency Rule purports to restrict those in the vaping industry from speaking to flavored vaping products; if one does, then that statement will be directly used against them and will result in a fine being imposed. This is in direct conflict with the broad protections afforded Oregonians, both individually and as corporations, under the Constitution.

A. First Amendment implications also arise under the Emergency Rule.

The Emergency Rule also infringes upon commercial speech protected by the U.S. Constitution. U.S. Const. amend. I. There is little doubt that a state has an interest in preventing the use of tobacco products by minors. *Lorillard Tobacco Co. v. Reilly*, 533 US 525, 564, 121 S Ct 2404, 2446 (2001) ("The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity").

However, the state may only limit commercial speech in certain circumstances. In *Cent. Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 US 557, 100 S Ct 2343 (1980) the U.S. Supreme Court constructed a four-part test for analyzing commercial speech regulations. Under the *Central Hudson* approach, a restriction upon commercial speech is valid if: (1) The regulation restricts communication that concerns lawful activity and is not misleading; (2) The asserted

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government interest is substantial; (3) The regulation directly advances the asserted government interest; and (4) The regulation is not more extensive than necessary to serve that interest. *Cent. Hudson Gas & Elec. Corp.*, 447 US 557, 566, 100 S Ct 2343, 2351.

In *Lorillard*, the Court further narrowed the *Central Hudson* test saying that a state must demonstrate that the harms it recites are real, and that the restriction will materially alleviate them, rather than just speculate, or conjecture. *Lorillard Tobacco Co.*, 533 US 525, 555, 121 S Ct 2404, 2421.

Here, the first question is whether there is a restriction upon commercial speech. The text of the rule restricts speech and, at a minimum, places a chilling effect thereon because it restrains a speaker from stating a vapor is anything other than "tobacco."

The second question is whether the State has failed to meet the third and fourth prongs of the *Central Hudson* test. The State must show that the restriction directly advances its interests in preventing minors from using vapor related products. While there is little question that an outright ban may accomplish this interest, the State has failed to show that the harm alleged is anything more than conjecture or speculation.

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Indeed, the justification itself is just that; conjecture and speculation.[6] Thus, the rule does not pass muster under the third prong of *Central Hudson*.

Finally, and most problematic for the State, the Emergency Rule is more extensive than necessary to serve the State's interest. Rather than proceeding with the normal rulemaking process and taking comment from the public, the State has adopted the most restrictive avenue of approach—banning all flavored vaping products and precluding retailers from stating that a vaping product has any flavor other than "tobacco" under threat that the state will use the statement as evidence in levying a fine of $500 per violation.

The State has not considered any less restrictive means and has not made any statement to show that this Emergency Rule will do anything other than harm the economic and constitutional interest of Petitioners and those similarly situated. For these reasons, this Court should take action to stay the rule.

(B) This appeal is taken in good faith and not for the purpose of delay.

Petitioners make this appeal on the second date available. Petitioners are

[6] The justification in support of the temporary rule states: "No specific types of e-cigarettes, vaping devices, or liquids have been conclusively identified as a cause of the illnesses at this time; the FDA is testing vaping products from cases around the United States to determine which specific products or ingredients may be the cause. Until a cause has been identified, the Authority must act promptly, in accordance with the Governor's Executive Order, to protect Oregonians, and failure to act promptly will result in serious prejudice to the public interest, particularly Oregon's youth."

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attempting to expedite the decision and not delay this matter. With that in mind, Petitioners seek a determination which would force the Authority to engage in the valid and constitutional rulemaking procedures found in the APA.

(C) There is support in both fact and in law for the appeal.

The appeal being made to this Court is perfectly ripe and brought in the proper forum for an appeal of the material issues. ORS 183.400. Petitioners incorporate the arguments as to the merits of the appeal here for brevity but those same arguments go to the support in fact and law for the appeal.

(D) The nature of the harm to the Petitioners, to other parties, to other persons and to the public that will likely result from the grant or denial of a stay.

Vaping products provide a safer alternative to smoking combustible cigarettes. Studies have consistently shown that vaping products are indeed safer than combustible cigarettes and help assist those with nicotine addictions in their cessation efforts. The Emergency Rule will not only irreparably harm Petitioners and similarly situated businesses in Oregon, but it will directly affect members of the General Public who utilize flavored e-liquids as part of their combustible tobacco cessation efforts. Moreover, enactment and enforcement of the rule is an affront to the constitutional and administrative protections afforded to citizens of the State of Oregon. To satisfy the substantial or irreparable harm requirement, a person must make a showing that he or she will suffer more than just purely economic loss or

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incur more than costs and delay that would result merely from having to participate in the administrative process. *See Or. Rest. Servs. v. Or. State Lottery*, 199 Or App 545, 563 (2005); *Anderson v. Public Employes Retirement Bd.*, 134 Or App 422, 430–431 (1995). Here, Petitioners will not only suffer economic harm (especially because the business does not operate outside of Oregon), in addition to economic harm, Petitioners will suffer constitutional harm as delineated above. Finally, Petitioners will suffer the loss of the property interest in his business, because it is not viable that the business will be able to simply resume operations at the expiration of the ban.

CONCLUSION

Petitioners understand the ramifications of this request. However, when circumstances so warrant, stay of a temporary administrative rule is necessary. If the Court grants this stay, the Court will have prevented hundreds of Oregon businesses from closing down, preserved thousands of jobs, and will give the State the opportunity to follow the appropriate process. There are very legitimate public health concerns when it comes to smoking combustible cigarettes. Thousands of Oregonians rely on and utilize flavored e-liquids and vaping products to ease their combustible tobacco dependence. Foreclosing their opportunity to continue these admirable efforts is not warranted and is unnecessary. As such, these are circumstances warranting a stay of this rule's application. Thus, the Court should

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stay this rule pending the response and reply of the parties, and the Court's determination on whether this rule will be held invalid.

DATED this 16th day of October, 2019

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CERTIFICATE OF FILING AND SERVICE

I certify that on the 16th day of October, 2019, I caused a true copy of the EMERGENCY MOTION UNDER ORAP 7.35 to be filed with the Appellate Court Administrator by electronic filing.

I further certify that on the 16th day of October, 2019, I caused a true copy of the EMERGENCY MOTION UNDER ORAP 7.35 to be served on the following parties at the addresses set forth below:

Oregon Health Authority, Public Health Division
800 NE Oregon Street
Portland, OR 97232

Attorney General of the State of Oregon
1162 Court Street NE
Salem, Oregon 97301-4096

Service was made by eFiling and by first class mail.

DATED this 16th day of October, 2019

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