

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

VAPOR TECHNOLOGY ASSOCIATION, DONNA
DIONNE, and RI E-CIG & VAPES,

Plaintiffs,

v.

GINA RAIMONDO, in her official capacity as
GOVERNOR OF THE STATE OF RHODE ISLAND,
RHODE ISLAND DEPARTMENT OF HEALTH, and
NICOLE ALEXANDER-SCOTT, MD, in her official
capacity as DIRECTOR OF THE RHODE ISLAND
DEPARTMENT OF HEALTH,

Defendants.

C.A. No.: _____

VERIFIED COMPLAINT
FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Vapor Technology Association (“VTA”), and Donna Dionne and her company RI e-Cig & Vapes, bring this complaint to enjoin and declare invalid the Rhode Island Department of Health’s October 4, 2019 ban on flavored vaping products (the “Emergency Regulations”). The Rule will destroy Rhode Island’s \$54 million nicotine-vapor-products industry and ruin the livelihoods of the 460 small-business owners and 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 Regulations violate the separation of powers, are procedurally and substantively invalid under the Department of Health’s enabling act, and violate constitutional free-speech guarantees.

NATURE OF THE ACTION

1. This is an action seeking a declaratory judgment, a temporary restraining order, an injunction, and all other appropriate relief to set aside the Emergency Regulations promulgated

by the Rhode Island Department of Public Health (“RIDOH”) and its director, Dr. Nicole Alexander-Scott, on October 4, 2019, and approved by Governor Gina M. Raimondo.¹

2. Among the provisions is a complete ban on flavored vaping products:

The manufacture, distribution, sale, or offer for sale of, or the possession with intent to manufacture, distribute, sell, or offer for sale flavored electronic nicotine-delivery system products to consumers is hereby prohibited in the State of Rhode Island.²

3. RIDOH’s action came nine days after Governor Raimondo issued an Executive Order directing RIDOH to, among other things, “promulgate emergency regulations to prohibit the sale of flavored [electronic nicotine-delivery system products].”³

4. The Emergency Regulations took effect immediately upon their issuance and will remain in effect for 120 days, absent further action by Defendants. RIDOH has suggested that it may extend its ban on flavored vaping products for another 60 days.⁴

5. The sudden enactment of this far-reaching ban has upended the vaping industry—including small-businesses like RI e-Cig & Vapes, and owner Donna Dionne—and has caused confusion, anxiety, and panic among consumers and retailers alike.

6. Plaintiffs have been and will be irreparably harmed by the Emergency Regulations and their continued enforcement; among other things, they require Dionne and RI e-

¹ Rhode Island Department of Public Health, *Emergency Electronic Nicotine-Delivery System Regulations*, Parts 6.1–6.11, (Oct. 4, 2019), available at <https://drive.google.com/file/d/1nwmVIvFnue2cJFuWpTlrItSRsPT6GHa7/> (Exhibit 1).

² *Id.*

³ Office of the Governor, *Executive Order 19-09, Protecting Rhode Island Youth Against the Harms of Vaping* (Sept. 25, 2019), available at <http://www.governor.ri.gov/documents/orders/Executive-Order-19-09.pdf> (Exhibit 2).

⁴ Rhode Island Department of Health, *Press Releases: Emergency Health Regulations Ban the Sale of Flavored E-Cigarettes in Rhode Island* (Oct. 4, 2019), available at <https://www.ri.gov/press/view/36850> (Exhibit 3).

Cig & Vapes to cease selling a class of products responsible for the bulk of their income and threatening the extinction of their business.

PARTIES

7. VTA is a national non-profit industry trade association with a principal place of business at 1201 Pennsylvania Avenue NW, Suite 530, Washington, DC, 20004. VTA is the industry's leading national trade association, and has more than 1,000 members, including members in Rhode Island. Nationwide, VTA's members include nicotine-vapor-device manufacturers; manufacturers of nicotine-containing e-liquids, flavorings, and components; and wholesalers, importers, and e-commerce and brick-and-mortar retailers. VTA represents the needs and concerns of its members in promoting public policies and safety standards for the vapor industry. VTA has a vital interest in ensuring that any regulation of nicotine vapor products imposed by Rhode Island is consistent with constitutional and statutory requirements.

8. Donna Dionne is a former smoker, current consumer of flavored nicotine vaping products, and the owner of nicotine-vaping-products stores in Warwick and Coventry called RI e-Cig & Vapes. Until the Emergency Regulations went into effect, Dionne sold flavored nicotine vaping products to adult customers in her stores and through their website.

9. RI e-CIG & Vapes is a Rhode Island corporation owned by Dionne, through which Dionne owns and operates her stores. Its principal place of business is 735 Bald Hill Road, Warwick, Rhode Island, 02886.

10. Governor Raimondo is the Governor of the State of Rhode Island and Providence Plantations. Upon information and belief, Governor Raimondo maintains a usual place of business at 82 Smith Street, Providence, Rhode Island, 02903.

11. RIDOH is a state agency. Upon information and belief, RIDOH maintains a usual

place of business at 3 Capitol Hill, Providence, Rhode Island, 02908.

12. Dr. Alexander-Scott is the Director of RIDOH. Upon information and belief, Dr. Alexander-Scott maintains a usual place of business at 3 Capitol Hill, Providence, Rhode Island, 02908.

JURISDICTION AND VENUE

13. The Court has subject-matter jurisdiction under Rhode Island General Laws § 42-35-7, which allows for the “validity or applicability of any rule” to be determined in an action for declaratory judgment in the Superior Court of Providence County. A “rule” is the “whole or a part of an agency statement of general applicability that implements, interprets, or prescribes law or policy or the organization, procedure, or practice requirements of an agency and has the force of law.” R.I. Gen. Laws § 42-35-1(19). The Emergency Regulations fit this definition.

14. The Court also has subject-matter jurisdiction under Rhode Island General Laws § 9-30-1, the Uniform Declaratory Judgments Act, which allows for the Superior Court “to declare rights, status, and other legal relations.”

15. Venue is proper in the Superior Court of Providence County under Rhode Island General Laws §§ 9-4-3 and 42-35-7.

16. VTA has standing to bring this action because its members would otherwise have standing to sue in their own right, and because the interests VTA seeks to protect are germane to the organization’s purpose of, among other things, ensuring the continued availability of high-quality nicotine vapor products to adult consumers in Rhode Island.

17. This case is ripe for adjudication because it presents an actual, justiciable controversy between Plaintiffs and Defendants, which requires a declaration of rights by this Court as well as injunctive relief to prohibit Defendants from their enforcement of the unlawful

Emergency Regulations.

FACTUAL BACKGROUND

I. VAPING PRODUCTS ARE AN ALTERNATIVE TO MORE DANGEROUS PRODUCTS, LIKE CIGARETTES

18. Vaping devices (known also as “e-cigarettes,” “electronic cigarettes,” or “electronic nicotine delivery systems”) are handheld electronic devices that are used to heat and aerosolize a liquid mixture containing nicotine. Once the liquid is aerosolized into a “vapor,” the user inhales the vapor as he or she would inhale actual tobacco smoke—but without the fire, flame, tar, carbon monoxide, or ash associated with traditional “combustible” cigarettes.

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

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

(a) A study conducted by the National Academies of Sciences, Engineering and Medicine, commissioned by the Food and Drug Administration, found that evidence suggests that “across a range of studies and outcomes, e-cigarettes pose less risk to an individual than combustible cigarettes.”⁵

(b) The United Kingdom’s Royal College of Physicians advised that “the hazard to health arising from long-term vapour inhalation from the e-cigarettes available today is unlikely to exceed 5% of the harm from smoking tobacco.”⁶

(c) A Georgetown University study concluded that switching from traditional

⁵ Kathleen Stratton et al., *Public Health Consequences of E-Cigarettes*, Nat’l Acad. Sci., Eng’r & Med. 12 (2018), available at https://www.ncbi.nlm.nih.gov/books/NBK507171/pdf/Bookshelf_NBK507171.pdf.

⁶ Royal College of Physicians Tobacco Advisory Group, *Nicotine Without Smoke: Tobacco Harm Reduction* (2016), available at <https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0>.

cigarettes to vaping products would prevent millions of premature deaths over 10 years in the United States.⁷

(d) A randomized clinical study published in the *New England Journal of Medicine* found that cigarette smokers were more likely to quit smoking when using e-cigarettes than when using nicotine-replacement therapies.⁸

21. Indeed, the CDC advises the public that “[e]-cigarettes have the potential to benefit adult smokers who are not pregnant if used as a complete substitute for regular cigarettes and other smoked tobacco products.”⁹ And RIDOH agrees.¹⁰

22. The availability of vaping products has coincided with a drop in demand for traditional cigarettes. The Centers for Disease Control and Prevention reports that the number of adult smokers as a percentage of the United States population dropped from 20.6% in 2008 to 14% as of 2017.¹¹

23. Flavored nicotine vapor products are widely used by adults. For example, a cross-sectional study of current or former adult smokers in the United States who used e-

⁷ 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>.

⁸ Peter Hajek et al., *A Randomized Trial of E-Cigarettes Versus Nicotine-Replacement Therapy*, 380 *New Eng. J. Med.* 629–37 (2019), available at <https://www.nejm.org/doi/10.1056/NEJMoa1808779>.

⁹ CDC, *About Electronic Cigarettes (E-Cigarettes)* (last revised Nov. 15, 2018), available at https://www.cdc.gov/tobacco/basic_information/e-cigarettes/about-e-cigarettes.html (Exhibit 4).

¹⁰ Rhode Island Department of Health, *There’s Nothing Harmless About Teen Tobacco Use, Electronic Cigarettes, What’s the Bottom Line?*, available at <http://health.ri.gov/healthrisks/tobacco/about/teentargeting/> (accessed Oct. 21, 2019) (Exhibit 5).

¹¹ CDC, *Morbidity & Mortality Weekly Report, Cigarette Smoking among Adults & Trends in Smoking Cessation—United States, 2008* (Nov. 13, 2009), available at <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5844a2.htm> (Exhibit 6); CDC, *Current Cigarette Smoking Among Adults in the United States* (last revised Feb. 4, 2019), available at https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm (Exhibit 7).

cigarettes found that that 82.8 percent used flavored nicotine vaping products, while only 17.2 percent used tobacco-flavored nicotine vaping products.¹² The authors of that study noted: “[W]e found that the use of non-tobacco flavors was associated with lower likelihood of current smoking. This introduces the possibility that non-tobacco flavors may aid the transition from smoking to vaping.”¹³

24. Another study of American adults who frequently used e-cigarettes found that “[c]urrent e-cigarette use among participants was dominated by use of non-tobacco flavors, mainly fruit/fruit beverage, dessert/pastry, and/or candy/chocolate, sweets flavors.”¹⁴ The authors concluded that their findings “suggest that access to a variety of non-tobacco flavored e-liquid may be important for encouraging and assisting adults to use e-cigarettes in place of conventional cigarettes.”¹⁵

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

25. FDA regulates nicotine vaping products. For instance, as of August 8, 2016, it became illegal to sell vaping products and other related products to people under the age of 18.¹⁶ As of June 2019, FDA required manufacturers of vaping products to comply with certain

¹² Paul T. Harrell et al. *E-Cigarettes and Expectancies: Why Do Some Users Keep Smoking?*, 110 *Addiction* 1833–43 (2015), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4609252/pdf/nihms707991.pdf>

¹³ *Id.*

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

¹⁵ *Id.*

¹⁶ FDA, *How FDA Is Regulating E-Cigarettes* (updated Sept. 10, 2019), available at <https://www.fda.gov/news-events/fda-voices-perspectives-fda-leadership-and-experts/how-fda-regulating-e-cigarettes> (Exhibit 8).

requirements, including submitting lists of products, including labeling and advertisements, as well as submitting ingredient listings.¹⁷ (Affidavit of Michael Siegel (Oct. 22, 2019), ¶ 12 (Exhibit 9).) FDA also conducts inspections of certain vaping-products manufacturers and retailers, and it has created education and enforcement programs to prevent children and teens from using vaping products.¹⁸ Finally, acknowledging that vaping products are “still relatively new,” FDA supports and funds research to evaluate the public health impact of these products at both the population and individual level.¹⁹

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

27. Rhode Island also regulates the purchase and sale of vaping products, including by prohibiting the sale or provision of nicotine vaping products to individuals under the age of 18, and prohibiting the use or possession of such products by persons under the age of 18. *See* R.I. Gen. Laws §§ 11-9-13, 11-9-13.8, 11-9-14.

28. Additionally, the Rhode Island Department of Behavioral Healthcare, Developmental Disabilities and Hospitals is tasked with monitoring and enforcing state regulations regarding the sale of tobacco products and nicotine vaping products. *E.g.* R.I. Gen. Laws §§ 11-9-13.5, 11-9-13.6.

29. State lawmakers have considered, or are actively considering, additional nicotine-

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

vaping-product regulations. *See* H.B. 5603, R.I. Gen. Assembly (2019) (proposal to raise the minimum age of persons who may purchase electronic nicotine delivery systems to 21); S.B. 0462 (2019) (same).

III. THE VAPING INDUSTRY IS A DYNAMIC PART OF THE RHODE ISLAND ECONOMY

30. The vaping-products industry, which employs approximately 166,000 people, is a “dynamic part of the U.S. economy, accounting for \$24.46 billion annually in economic output.” (Affidavit of John Dunham (October 18, 2019), ¶ 5 (Exhibit 10).)

31. Of that, approximately \$54 million is traceable to Rhode Island, where the vapor-products industry generates jobs for approximately 460 individuals. (Dunham Aff. ¶ 6.) Those individuals include the employees of 2 vaping-products manufacturers, 1 vaping-liquid manufacturer, and 43 retail vape shops. (Dunham Aff. ¶ 7.)

32. Rhode Island vaping companies and their employees contribute \$3,915,900 in Rhode Island state taxes; consumers of vaping products generate an additional \$2,369,200 in sales taxes. (Dunham Aff. ¶ 9.)

IV. THC AND BLACK-MARKET VAPING PRODUCTS HAVE BEEN LINKED TO A MULTI-STATE OUTBREAK OF LUNG INJURIES

33. Federal and state health officials have identified and are investigating a multi-state outbreak of lung injury associated with vaping products. The evidence points to vaping THC products as the predominant cause of the outbreak.

34. For example, on September 5, 2019, the New York Department of Public Health reported that it had received “34 reports from New York State physicians of severe pulmonary illness among patients ranging from 15 to 46 years of age who were using at least one cannabis-

containing vape product before they came ill.”²⁰ It also reported that laboratory tests results found “very high levels” of vitamin E acetate—an oil included in THC vapor products to address some of the attributes of cannabis wax—in “nearly all cannabis-containing samples” analyzed.²¹ The Department found that “[a]t least one vitamin E acetate containing product has been linked to each patient who submitted a product for testing.”²²

35. The next day, the CDC reported that its “[i]nitial findings” showed that “many of the patients . . . reported recent use of THC-containing products.”²³

36. The CDC also said that five North Carolina patients presented with lung injury believed to be associated with vaping product use during July and August, all of whom “shared a history of recent use of marijuana oils or concentrates in e-cigarettes” and had used vaping devices “that had refillable chambers or interchangeable cartridges with tetrahydrocannabinol (THC) vaping concentrates or oils, which were purchased on the street.”²⁴

37. On September 27, 2019, the CDC reported that “[t]he latest findings from the investigation into lung injuries associated with e-cigarette use, or vaping, suggest products

²⁰ N.Y. Dep’t of Health, *New York State Department of Health Announces Update on Investigation into Vaping-Associated Pulmonary Illnesses* (Sept. 5, 2019), available at https://www.health.ny.gov/press/releases/2019/2019-09-05_vaping.htm (Exhibit 11).

²¹ *Id.*

²² *Id.*

²³ CDC, *Initial State Findings Point to Clinical Similarities in Illnesses among People Who Use E-Cigarettes or ‘Vape’* (Sept. 6, 2019, at 1:00 PM), available at <https://www.cdc.gov/media/releases/2019/p0906-vaping-related-illness.html> (Exhibit 12).

²⁴ Ken Davidson et al., *Outbreak of Electronic-Cigarette-Associated Acute Lipoid Pneumonia—North Carolina, July—August 2019* (Sept. 6, 2019), available at <https://www.cdc.gov/mmwr/volumes/68/wr/mm6836e1.htm> (Exhibit 13).

containing THC play a role in the outbreak.”²⁵ The CDC reported that the vast majority of persons affected with a lung injury—about 77 percent—reported using THC-containing products.²⁶

38. Moreover, the CDC has noted that most of the patients in Illinois and Wisconsin presenting such lung injury reported using illicit THC-containing products sold as prefilled cartridges and obtained from informal sources.²⁷ It also observed the likelihood that some patients may have failed to disclose to health officials their use of THC because of its legal status.²⁸

39. Although the CDC has not definitively identified a single brand or product as the cause of illness, it has found that a high percentage of patients have reported using cartridges that contain THC.²⁹ It has not reported the same for any nicotine vaping products.

40. On October 17, 2019, CDC reported that “[t]he latest national and state findings suggest products containing THC, particularly those obtained off the street or from other informal sources (e.g. friends, family members, illicit dealers), are linked to most of the cases and play a major role in the outbreak.”³⁰

²⁵ CDC, *Outbreak of Lung Injury Associated with E-Cigarette Use, or Vaping* (Sept. 27, 2019), https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html (Exhibit 14).

²⁶ *Id.*

²⁷ Isaac Ghinai et al., *Morbidity & Mortality Weekly Report, E-Cigarette Product Use, or Vaping, Among Persons with Associated Lung Injury—Illinois & Wisconsin, April–September 2019*, CDC, *Morbidity & Mortality Weekly Report* (Sept. 27, 2019), available at <https://www.cdc.gov/mmwr/volumes/68/wr/mm6839e2.htm> (Exhibit 15).

²⁸ *Id.*

²⁹ *Id.*

³⁰ CDC, *Outbreak of Lung Injury Associated with E-Cigarette Use, or Vaping* updated Oct. 17, 2019), https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html

41. The CDC currently recommends that people do not: “[u]se e-cigarette, or vaping, products that contain THC”; “[b]uy any type of e-cigarette, or vaping, products, particularly those containing THC, off the street”; nor “[m]odify or add any substances to e-cigarette, or vaping, products that are not intended by the manufacturer, including products purchased through retail establishments.”³¹

42. In addition, the CDC states that in light of the ongoing investigation into the cause of vaping-related illnesses, persons “*consider* refraining from use of **all** e-cigarette or vaping products.”³²

43. FDA has stated that “[t]hrough [its] investigation, we have also found most of the patients impacted by the [] illnesses reported using THC-containing products, suggesting THC vaping products play a role in the outbreak.”³³ Indeed, “[a] majority of the samples tested by states or by the FDA as part of this ongoing investigation have been identified as vaping products containing THC.”³⁴

V. RHODE ISLAND BANS NON-TOBACCO FLAVORED NICOTINE VAPING PRODUCTS

44. On September 25, 2019, Governor Raimondo issued an Executive Order titled “Protecting Rhode Island Youth Against the Harms of Vaping.” (Executive Order at 1.)

45. Governor Raimondo’s Executive Order began by noting that “approximately

(Exhibit 16).

³¹ *Id.*

³² *Id.* (first emphasis added).

³³ FDA, *Lung Illnesses Associated with Use of Vaping Products* (revised Oct. 18, 2019), available at <https://www.fda.gov/news-events/public-health-focus/lung-illnesses-associated-use-vaping-products> (Exhibit 17).

³⁴ *Id.*

480,000 deaths each year are attributed to smoking and other tobacco use in the United States, with 1,800 in Rhode Island—killing more people than alcohol, AIDS, car accidents, illegal drugs, murders, and suicides combined.” (Executive Order at 1.)

46. The Governor commented that vaping products are marketed, packaged, and flavored in ways meant “appeal to the tastes and interest of young people.” (Executive Order at 1–2.)

47. Governor Raimondo then recited national statistics from 2017 and 2018 about youth usage of vaping products, including that in 2018 about two-thirds of high school users of nicotine vaping products “reported using flavored products.” (Executive Order at 2.)

48. Governor Raimondo briefly noted the recent cases of vaping-related lung injuries. (Executive Order at 2–3.)

49. The Executive Order did not acknowledge that the majority of cases of persons with vaping-related lung injuries had admitted to health officials that they had used THC vaping products. Nor did it acknowledge that health officials were investigating vaping products obtained on the unregulated black market as the source of the illnesses.

50. Governor Raimondo ordered the Department of Public Health to “promulgate emergency regulations to prohibit the sale of flavored ends,” and to convene a “Vaping Advisory Group” for the purpose of “monitor[ing] state and national vape trends, illnesses, and product developments and provide regular recommendations on further steps that should be taken to ensure public health and safety related to ENDS products.”³⁵

51. The Executive Order also:

- Ordered the State Police “to investigate the sale and distribution of ENDS and ENDS Products containing Tetrahydrocannabinol (THC) outside of the state’s medical

³⁵ *Id.* “ENDS” is shorthand for electronic nicotine-delivery system.

cannabis program, and the sale of ENDS products to underage youth.”

- Directed the Rhode Island Department of Business Regulation and Department of Revenue to make recommendations as to certain tax and license requirements.
- Directed the Department of Behavioral Healthcare, Developmental Disabilities, and Hospitals, and the Department of Business Regulation, to draft recommendations “to *reduce* the availability of ENDS products to persons under 21.”
- Directed RIDOH and the Department of Business Regulation to make recommendations regarding disclosure requirements, packaging standards, and safety standards for flavored vaping products.
- Directed RIDOH, the Department of Behavioral Healthcare, Developmental Disabilities, and the Department of Business Regulation to make recommendations on vaping product “distributors’ density limits” with the goal of “preventing *an increase* of licensed ENDS sellers within 500 feet” of schools and after-school care facilities.

(Executive Order at 3–4.)

52. On October 4, 2019, RIDOH promulgated the Emergency Regulations. The Regulations address licensing requirements for vaping-products sellers, enforcement mechanisms, and flatly ban “flavored electronic nicotine-delivery system products,” where flavored is defined as imparting a “characterizing flavor.” (Emergency Regulations at 1.)

53. The Emergency Regulations define “characterizing flavor” as “a distinguishable taste or aroma [apart from tobacco] imparted either prior to, or during, consumption of an electronic nicotine-delivery system product or component part thereof.” (Emergency Regulations at 1.)

54. As reflected on the Rhode Island Secretary of State’s website entry for the Emergency Regulations, RIDOH based its emergency rulemaking on the purported “imminent

harm” from “a youth vaping crisis.”³⁶

55. That entry, which reflects RIDOH’s “Brief [S]tatement of Reason for Finding Imminent Peril,” and thus RIDOH’s asserted bases for ignoring standard rulemaking, repeated the statistics about youth vaping from Governor Raimondo’s Executive Order. *All* of the statistics in the “statement of [r]eason” are data from 2018 or earlier, and released—at the latest—in the first half of 2019.³⁷

56. Were the statistics cited not sufficient to demonstrate the point, Defendants were aware of the use of nicotine vapor products by underage persons long before Governor Raimondo issued her Executive Order and RIDOH promulgated the Emergency Regulations.

57. By way of a few examples: in October 2017, Governor Raimondo signed into law a bill banning the use of e-cigarettes on school grounds. The bill’s sponsors explained they were motivated to act because the flavor of vaping products offer “particular appeal” to minors, and the increasing popularity of e-cigarettes.³⁸

58. The findings of the Youth Behavioral Risk Survey for Rhode Island, which

³⁶ Department of Health, *Licensing of Electronic Nicotine-Delivery System Distributors and Dealers (216-RICR-50-15-6), Overview*, (Oct. 4, 2019), <https://rules.sos.ri.gov/regulations/part/216-50-15-6> (Exhibit 18).

³⁷ RIDOH’s statement of reasons for finding “imminent peril” contain nine footnote to six unique sources, all of which are months old: (1) a U.S. Surgeon General Advisory that was “last reviewed” on April 9, 2019; (2) an American Cancer Society website post, dated November 21, 2018; (3) a September 18, 2019, Emergency Rule promulgated by the Michigan Department of Health and Human Services, for the source of the finding of a study of flavored tobacco use from 2013 to 2014, which was published in 2017; (4) an informational document from the American Thoracic Society, which was published in 2017; (5) a June 4, 2019, signing statement of Michigan Governor Whitmer, as the source for undated statistics that Governor Whitmer called “recent”; and (6) a CDC website that was “last reviewed” on March 11, 2019. *Id.*

³⁸ Carl Sisson, *Gov. Raimondo Signs Bill Banning E-Cigarette use on School Grounds*, WPRI, (Oct. 7, 2017), <https://www.wpri.com/news/gov-raimondo-signs-bill-banning-e-cigarette-use-on-school-grounds/> (Exhibit 19).

RIDOH publishes, dates from July 2016. It notes that 19.3 percent of Rhode Island high school students were e-cigarette users as of 2015, and that 15.6 percent of the state's middle-school students had tried an electronic cigarette product.³⁹

59. In July 2018, Governor Raimondo signed legislation banning the use of electronic cigarettes and other vaping devices in the workplace. The bill's sponsor, in explaining the need for the legislation, noted that in Rhode Island "use of e-cigarettes by youth has surpassed use of conventional cigarettes."⁴⁰

60. An April 10, 2019, presentation by Governor Raimondo's Task Force on Overdose and Prevention, on which Dr. Alexander-Scott serves as a co-chair and listed on the presentation,⁴¹ listed e-cigarette use as a "challenge[...]" and listed "[r]eduction of youth use of electronic cigarettes/vaping" as one of the Task Force's "Next Steps."⁴²

61. In addition, Director Alexander-Scott attended an event five months before promulgating the Emergency Regulations, on May 2, 2019, to raise awareness about teen usage

³⁹ Rhode Island Department of Health, *Youth Risk Behavior Survey Results*, (July 2016), available at <http://www.health.ri.gov/publications/datareports/2016YouthRiskBehavior.pdf> (Exhibit 20).

⁴⁰ Nancy Krause, *E-Cigs, Vaping Now Part of RI's Workplace Smoking Ban*, WPRI (July 6, 2018), available at <https://www.wpri.com/news/e-cigs-vaping-now-part-of-ri-workplace-smoking-ban/> (Exhibit 21).

⁴¹ See Governor Raimondo's Task Force on Overdose Prevention and Intervention, available at <https://preventoverdoseri.org/the-task-force/>.

⁴² Governor Raimondo's Task Force on Overdose Prevention and Intervention, *Fatal Overdoses in Rhode Island: Data Highlights* (April 10, 2019), available at https://preventoverdoseri.org/wp-content/uploads/2019/04/2019_April_-MasterTF_Final.pdf (Exhibit 22).

of cigarettes and vaping products.⁴³ Dr. Alexander-Scott issued a statement noting the addictive nature of e-cigarettes, and urging people to “do everything we can to prevent youth tobacco and e-cigarette use.” The RIDOH Press Release about the May 2, 2019, event, noted that 20 percent of Rhode Island high school teens reported using e-cigarettes in 2017.

62. The RIDOH Press Release accompanying the promulgation of the Emergency Regulations did not refer to or otherwise acknowledge recent cases of vaping-related lung injuries. Rather, the Department’s statement quoted Governor Raimondo as expressing “deep[] concern[] about the rapid increase and effects of e-cigarette use,” and Dr. Alexander-Scott as expressing a desire to “prevent youth from immediate nicotine health harms and from becoming cigarette smokers in the future.”⁴⁴ It stated that RIDOH had promulgated Emergency Regulations “[i]n response to Governor Gina M. Raimondo’s Executive Order last week on the public health epidemic of youth e-cigarettes use.”⁴⁵

63. Moreover, neither the Press Release, the Executive Order, the Emergency Regulations, nor RIDOH’s “statement of [r]eason” have grappled with—or even acknowledged—the harm that will result from the total eradication of flavored vaping products in Rhode Island. The elimination of flavored vaping products from Rhode Island—while allowing combustible cigarettes to remain for sale—will undoubtedly push former smokers who currently use e-cigarettes to return to using more dangerous cigarettes, or spur flavored vapor

⁴³ Rhode Island Department of Health, *Press Releases: Rhode Island Tens Kick Butts with Zombie Walk and State House Rally* (May 2, 2019), available at <https://www.ri.gov/press/view/35775> (Exhibit 23).

⁴⁴ Rhode Island Department of Health, *Press Releases: Emergency Health Regulations Ban the Sale of Flavored E-Cigarettes in Rhode Island* (Exhibit 3).

⁴⁵ *Id.*

products users to seek out products on the black market. (Siegel Aff. ¶¶ 26–28.)⁴⁶

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

64. In the three weeks since its promulgation, the ban on flavored vaping products has ravaged the state’s nicotine vaping industry by forcing business owners to shut their doors and order their employees to stay home. (Affidavit of Donna Dionne (Oct. 22, 2019), ¶¶ 21, 27–29 (Exhibit 24).) Each day that the ban remains in effect, business owners lose income and employees miss out on paychecks. (Dionne Aff. ¶¶ 21, 27–29.) The effects of the ban—still in its infancy now—will be utterly devastating for this industry and the 460 individuals it employs, should it be allowed to remain in effect. (Dunham Aff. ¶ 10.)

65. For example, Plaintiff Donna Dionne operated two retail stores named RI e-Cig & Vapes—in Coventry and in Warwick—until October 4, 2019, when the ban on sales of flavored vaping products left her with no choice but to close her Coventry location. (Dionne Aff. ¶ 21.)

66. RI e-Cig & Vapes, like many Rhode Island vapor-products companies, is a small business. Its owner, Donna Dionne, a former social worker, opened her first store more than five years ago after flavored electronic cigarettes helped her to finally quit smoking. (Dionne Aff. ¶¶ 9–10, 13–14). She decided to open a vaping products store because she realized their potential to help smokers quit. (Dionne Aff. ¶ 14.)

67. But as a direct result of Defendants’ ban, Dionne’s stores are failing. (Dionne Aff. ¶¶ 20–27.) Dionne already has laid off seven of her employees. (Dionne Aff. ¶ 27.) In a matter of weeks, if the ban remains in place, she will have to close her Warwick store and cease operations. (Dionne Aff. ¶ 23.) The closure of her stores also will mean Dionne and her

⁴⁶ Matthew Perrone, *Clampdown on Vaping Could Send Users Back Toward Cigarettes*, Associated Press (Oct. 5, 2019), available at <https://www.apnews.com/0fdefc03152c4034a1a254b6e71a7ff1>.

husband, who earn their living through operating their two stores, will lose their sole source of income. (Dionne Aff. ¶¶ 20, 29.)

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

69. If the statewide ban remains in effect for four months, it will prove fatal to a “large number” of nicotine-vapor-products retailers. (Dunham Aff. ¶ 10.)

COUNT I
Declaratory Judgment, *Ultra Vires* Action
in Violation of Articles 5 and 9 Rhode Island Constitution

70. Plaintiffs incorporate each of the preceding paragraphs 1–69 as if fully set forth herein.

71. The Emergency Regulations are *ultra vires*, in violation of the Rhode Island Constitution.

72. The Rhode Island Constitution vests the legislative power in the Rhode Island General Assembly. R.I. Const. Art. 6, § 2. The legislative power includes making “fundamental policy decisions.” *Kaveny v. Town of Cumberland Zoning Bd. of Review*, 875 A.2d 1, 11 (R.I. 2005) (discussing R.I. Const. Article 6, §§ 1, 2).

73. By contrast, the Rhode Island Constitution grants “chief executive power” to the governor, R.I. Cons. Art. 9, § 1, and directs her to “take care that the laws be faithfully executed,” *id.* § 2. “The executive power is also commonly characterized as being the power relating to the ‘enforcement of the law’ and the power to ‘administer the law.’” *In re Request for*

Advisory Opinion from House of Reps. (Coastal Res. Mgmt. Council), 961 A.2d 930, 940 (R.I. 2008).

74. The Legislative and Executive branches of Rhode Island state government are “separate and distinct.” R.I. Const. Art. 5.

75. Defendants’ ban on flavored vaping products is an unconstitutional exercise of legislative power by the executive branch, which violates the principle of Rhode Island Constitution’s Distribution of Powers, in violation of Article 5 of the Rhode Island Constitution, and in excess of the authority granted to the executive branch, in violation of Article 9 of the Rhode Island Constitution.

76. Rather than enacting legislation under the guise of rulemaking, Governor Raimondo should have pursued her policy objective through the legislative process, which necessitates discussion and deliberation of policy decisions prior to enactment—procedural protections that promote sound decision-making and inclusiveness. Indeed, Governor Raimondo could have attempted to pursue her policy objective through the proper lawmaking process—if not during the regular session in recent years (as she became aware of or concerned about the prevalence of youth usage of flavored vaping products), then by convening a special session of the General Assembly, as authorized by Article 9, Section 7, of the Rhode Island Constitution. That provision allows the governor, “on extraordinary occasions” to convene the Rhode Island General Assembly “at any time not provided for by law.” R.I. Const. Art. 9, § 7.

77. As a result of the Emergency Regulations, Plaintiffs have suffered, and will continue to suffer, irreparable harm.

78. Plaintiffs have no adequate remedy at law.

COUNT II
Declaratory Judgment, *Ultra Vires* Action
in Excess of Statutory Authority

79. Plaintiffs incorporate each of the preceding paragraphs 1–78 as if fully set forth herein.

80. RIDOH relied on Rhode Island General Law § 23-1-1 as authority for the portion of the Emergency Regulations that banned “[t]he manufacture, distribution, sale, offer for sale, and possession with intent to manufacture, distribute, sell, or offer for sale” flavored nicotine vaping products. (Emergency Regulations at 1.)⁴⁷

81. Section 23-1-1 authorizes RIDOH to “take cognizance of the interests of life and health among the state,” to “make investigations into the causes of disease, the prevalence of epidemics and endemics . . . the sources of mortality, the effects of localities, employments, and all other conditions and circumstances on the public health,” to do all in its power to ascertain the causes and the best means for the prevention and control of diseases or conditions detrimental to the public health,” and “to adopt proper and expedient measures to prevent and control diseases and conditions detrimental to the public health.”

82. Article 6, Sections 1 and 2 of the Rhode Island Constitution “forbid[] unrestricted delegations of legislative power by the General Assembly.” *Kaveny v. Town of Cumberland Zoning Bd. of Review*, 875 A.2d 1, 11 (R.I. 2005) (internal citation omitted). The non-delegation doctrine “provides the assurance that duly authorized, politically accountable

⁴⁷ RIDOH cites Rhode Island General Laws Sections 23-1-1 and 23-1-55 through 23-1-58 as the basis for its statutory authority to promulgate all of the Emergency Regulations which were issued on October 4, 2019. (Emergency Regulations at 1.) Sections 23-1-55 through 23-1-58 establish licensing requirements for nicotine vaping products distributors and dealers, and penalties for operating without such licenses. Thus, they do not provide a statutory basis for RIDOH’s ban on the manufacture, distribution, or sale of flavored vaping products.

officials make fundamental policy decisions.” *Newport Ct. Club Assoc. v. Town Council of the Town of Middletown*, 800 A.2d 405, 417 (R.I. 2002) (internal citations and punctuation omitted).

83. In evaluating whether a legislative delegation is unconstitutional, the court considers “the specificity of the functions delegated, the standards accompanying the delegation, and the safeguards against administrative abuse.” *Borque v. Dettore*, 589 A.2d 815, 819 (R.I. 1991). Only “reasonable” delegations of legislative power, and only those reasonable delegations in which the legislature “lays out an intelligent principle to which an administrative officer or body must conform,” pass Constitutional muster. *Newport Ct. Club Assoc. v. Town Council of the Town of Middletown*, 800 A.2d 405, 417 (R.I. 2002) (internal citations and punctuation omitted).

84. If Section 23-1-1 permits RIDOH to promulgate the Emergency Regulations, it would violate Rhode Island’s non-delegation doctrine. It would mean that RIDOH could ban any lawful products that are known or suspected to be “detrimental to the public health,” including aluminum foil (Alzheimer’s), coffee (cysts and gout), power lines (headaches, fatigue, and anxiety), cell phones (brain cancer), alcohol (liver disease), soda (diabetes), salt (high blood pressure), butter (stroke and heart attack), and margarine (heart disease).

85. So too would that interpretation of § 23-1-1 allow RIDOH to usurp the role of the state lawmakers. *Contra Town of Scituate v. O’Rourke*, 239 A.2d 179, 185 (R.I. 1968) (“No court will ever impute to the legislature an intent to enact statutes . . . which achieve unreasonable consequences” (internal citation omitted)).

86. As a result of the Emergency Regulations, Plaintiffs have suffered, and will continue to suffer, irreparable harm.

87. Plaintiffs have no adequate remedy at law.

COUNT III
Violation of Rhode Island General Law Section 42-35-2.10

88. Plaintiffs fully incorporate each of the preceding paragraphs 1–87 as if fully set forth herein.

89. Rhode Island’s Administrative Procedures Act, R.I. Gen. Laws § 42-35-1 *et seq.*, governs the process by which state agencies can promulgate rules and regulations. These statutory requirements include agency notice of the proposed rulemaking and rule, opportunities for public comment, and an agency regulatory analysis of the proposed rule, including “[d]emonstration that there is no alternative approach among the alternatives considered . . . which would be as effective and less burdensome to affected private persons as another regulation.” R.I. Gen. Laws §§ 42-35-2.7–42-35-2.9.

90. The Administrative Procedures Act permits an agency to issue an “emergency rule” only if “the agency finds that an imminent peril to the public health, safety, or welfare . . . requires [its] immediate promulgation.” R.I. Gen. Laws § 42-35-2.10.

91. When promulgating an emergency rule, the agency is required to “publish in a record with the secretary of state and on its agency website reasons for that finding” in order to promulgate an emergency rule. R.I. Gen. Laws § 42-35-2.10.

92. The Emergency Regulations are an improper emergency rule.

93. *First*, the Regulations fail to comply with § 42-35-2.10 because RIDOH did not “publish[] . . . on its agency website reasons for the finding.” R.I. Gen. Laws § 24-35-2.10.

94. *Second*, the Emergency Regulations violate § 42-35-2.10 because there is no “imminent peril to the public health, safety or welfare” that requires the promulgation of these Emergency Regulations, including the ban on flavored vaping products.

95. RIDOH’s reasons for its finding of “imminent harm,” which are published only

on the Rhode Island Secretary of State’s website, are “a youth vaping crisis.”⁴⁸ The “youth vaping crisis” described in that statement of reasons was known to RIDOH (and Governor Raimondo and Dr. Alexander-Scott) for months, if not years, before the agency promulgated the Emergency Rules. Their knowledge of youth vaping usage disproves any “imminent peril” that might justify emergency rulemaking. Defendants chose not to pursue this policy decision in the ordinary course; they cannot now claim it is an emergency and enjoy the watered-down procedural requirements of the emergency rulemaking process.

96. As a result of the Emergency Regulations, Plaintiffs have suffered, and will continue to suffer, irreparable harm.

97. Plaintiffs have no adequate remedy at law.

COUNT IV
Violation of Rhode Island General Law Sections 23-1-1

98. Plaintiffs fully incorporate each of the preceding paragraphs 1–97 as if fully set forth herein.

99. RIDOH relies on Rhode Island General Law § 23-1-1 as the authority for the portion of the Emergency Regulations that banned “[t]he manufacture, distribution, sale, offer for sale, and possession with intent to manufacture, distribute, sell, or offer for sale” flavored nicotine vaping products.

100. Section 23-1-1 authorizes RIDOH to “adopt proper and expedient measures to prevent and control . . . conditions detrimental to the public health.” Rules and regulations authorized by RIDOH must be “necessary . . . to carry out the purposes of [that] section.” R.I. Gen. Laws § 23-1-1.

⁴⁸ Rhode Island Secretary of State, *Overview, Licensing of Electronic Nicotine-Delivery System Distributors and Dealers (216-RICR-50-15-6)*.

101. The Emergency Regulations are not a proper, expedient, or necessary means either to address youth vaping or, to the extent that RIDOH was relying on it as a justification, to address vaping-related lung injuries. By way of example:

102. The Emergency Regulations are not a proper, expedient, or necessary means to “prevent and control” youth usage of nicotine vaping products because state and federal law already prohibits persons under the age of 18 from purchasing such vaping products. Defendants have failed to provide evidence or basis to believe that also prohibiting adults from access to flavored vaping products will have any effect on youth usage.

103. The Emergency Regulations are not a proper, expedient, or necessary means to reduce youth usage of vaping products because it improperly denies adult users—including those who depend on vaping products to avoid smoking more dangerous combustible cigarettes—access to such products. As a result, nicotine-dependent adults who dislike tobacco or unflavored vaping products may return to combustible cigarettes or may turn to products from the black market, both of which pose significant health risks. (Siegel Aff. ¶¶ 21–24.)

104. As a result of the Emergency Regulations, Plaintiffs have suffered, and will continue to suffer, irreparable harm.

105. Plaintiffs have no adequate remedy at law.

COUNT IV—By VTA Only
Violation of the First Amendment of the United States Constitution
and Article I, § 21 of the Rhode Island Constitution

106. Plaintiffs fully incorporate each of the preceding paragraphs 1–105 as if fully set forth herein.

107. Advertising, including the online or other display of products, is a form of commercial speech protected by the free-speech clauses of the United States Constitution,

Amendment 1, and the Rhode Island Constitution, Article 1, Section 21.

108. The Emergency Regulations violate the rights of VTA's members by prohibiting anyone from "offer[ing] for sale ... flavored electronic nicotine-delivery system products to consumers ... in the State of Rhode Island." Offering for sale is a form of advertising.

109. By the plain language of the Emergency Regulations, VTA's members in states where flavored vaping products are lawful are now precluded from advertising in Rhode Island.

110. The Regulations' advertising ban on flavored vaping products imposes an unconstitutional restriction on speech by prohibiting the display of products that are lawful in other states, in violation of the free-speech clauses of the United States and Rhode Island Constitutions. Rhode Island lacks a substantial interest in precluding all advertisements of vaping products within its borders.

111. The Emergency Regulations do not permissibly advance the purported health interest asserted by Rhode Island, in light of the state's existing restrictions on the sales of vaping products to youth. The state's wholesale ban on advertising is far more restrictive than necessary to advance any legitimate state interest.

112. As a result of the Emergency Regulations, Plaintiffs have suffered, and will continue to suffer, irreparable harm.

113. Plaintiffs have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request the following relief:

- a. A declaration that the Emergency Regulation's ban on, among other things, the manufacture, distribution, sale, or offering for sale of flavored vaping products is unlawful;

- b. Temporary, preliminary, and permanent injunctive relief and vacatur of the Emergency Regulation's ban on flavored vaping products and any enforcement actions carried out by Defendants or at their direction pursuant to the Emergency Regulations or, in the alternative, injunctive relief to prevent Defendants from enforcing the Emergency Regulations;
- c. Entry of judgment in favor of Plaintiffs and against Defendants on Counts I, II, III, and IV;
- d. An award of Plaintiffs' costs, expenses, and reasonable attorney's fees; and
- e. Any such relief as the Court deems just and equitable.

**VAPOR TECHNOLOGY ASSOCIATION,
DONNA DIONNE, and RI E-CIG & VAPES**
By their Attorneys,

/s/ Robert Clark Corrente

Robert Clark Corrente (#2632)
Christopher N. Dawson (#8508)
WHELAN CORRENTE & FLANDERS LLP
100 Westminster Street, Suite 710
Providence, RI 02903
Telephone: (401) 270-4500
rcorrente@whelancorrente.com
cdawson@whelancorrente.com

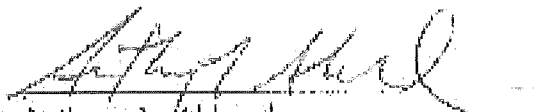
Joseph M. Terry (*pro hac vice forthcoming*)
David Randall J. Riskin (*pro hac vice forthcoming*)
Whitney G. Woodward (*pro hac vice forthcoming*)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
Telephone: (202) 434-5000
jterry@wc.com
driskin@wc.com
wwoodward@wc.com

Dated: October 22, 2019

00042430.DOCX

VERIFICATION

I, Anthony L. Abboud, having been duly sworn, declare (1) that I am the Executive Director of the Vapor Technology Association; (2) that I have personal knowledge of the facts set forth in this Verified Complaint (other than the facts concerning Donna Dianna and her company RI e-Cig & Vapes); and (3) that those facts are true and correct to the best of my information, knowledge, and belief.

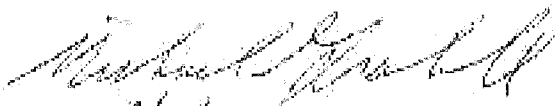

Anthony L. Abboud

State: Illinois

County: Cook

Subscribed and sworn to before me on this 22nd day of October, 2019.

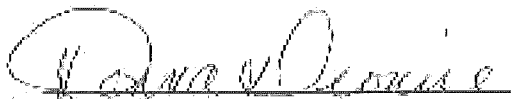



Notary

Notary Public

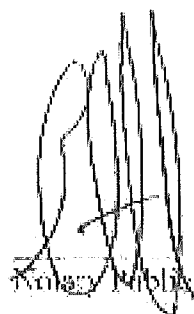
VERIFICATION

I, Donna Dianne, having been duly sworn, declare (1) that I am the owner of RI e-Cig & Vapes; (2) that I have personal knowledge of the facts set forth in this Verified Complaint that concern myself and RI e-Cig & Vapes; and (3) that those facts are true and correct to the best of my information, knowledge, and belief


Donna Dianne

State: Rhode Island
County: Kent

Subscribed and sworn to before me on this 22 day of October, 2019


Gregg Fallon

GREGG FALLON
NOTARY PUBLIC
STATE OF RHODE ISLAND
MY COMMISSION EXPIRES AUG. 09, 2023

