IN THE COURT OF APPEALS OF THE STATE OF OREGON

VAPOR TECHNOLOGY ASSOCIATION; **VAPE CRUSADERS PREMIUM E-LIQUID, LLC**; and **SMOKELESS SOLUTIONS, LLC,** Petitioners, vs. **OREGON HEALTH AUTHORITY**, Respondent.	CA No. A172417 (Control)
NO MOKE DADDY, LLC, dba Division Vapor, an Oregon limited liability company; and **PAUL BATES**, an individual, Petitioners, vs. **OREGON HEALTH AUTHORITY**; **KATE BROWN,** in her official capacity as Governor of Oregon and as Chief Executive of the Oregon Health Authority; and **PATRICK ALLEN,** in his official capacity as Director of the Oregon Health Authority, Respondents.	CA No. A172419

REPLY IN SUPPORT OF MOTION TO STAY ENFORCEMENT PENDING JUDICIAL REVIEW

Judicial Review of Oregon Health Authority Rule OAR 333-015-1000

October 2019

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Petitioners Vapor Technology Association, Vape Crusaders Premium e-Liquid, LLC, and Smokeless Solutions, LLC demonstrated in their motion to stay that the Oregon Health Authority's "Vaping Prohibition" (OAR 330-015-1000) will cause irreparable harm and is invalid.

OHA concedes irreparable harm, which under controlling law is sufficient for a stay. And OHA hardly defends the statutes it cited as authority for the Vaping Prohibition. Instead, OHA now offers a new statutory basis for its authority, and even suggests that the Governor's Executive Order *alone* gave it the power to enact the Prohibition. OHA's theory finds no support in the law and is inconsistent with the limited reach of public health power the Oregon Supreme Court detailed in *Crane v. School District No. 14 of Tillamook County*, 95 Or 644, 188 P 712 (1920)—a case OHA simply ignores. The Vaping Prohibition is invalid.

While laudable goals may underlie the Vaping Prohibition, its consequences will be profoundly negative—both to a thriving industry in Oregon and to the very individuals the ban is designed to help: Oregon citizens. The Court should continue to stay enforcement of the Prohibition—consistent with the decisions of its sister courts.[1]

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[1] In each of the jurisdictions in which a court has passed on the validity of an executive-branch vaping-product ban, there is some form of injunction in place (or soon to be in place): Michigan (preliminary injunction, October 15, 2019),

I. OHA concedes that Petitioners will suffer irreparable harm if a stay is not granted.

OHA's opposition confirms that Petitioners will suffer irreparable harm: "The state does not dispute that the rule in this case could have significant financial implications for those who sell non-tobacco flavored vaping products." (Resp't's Resp. to Mot. to Stay ("Opp.") at 10.) And OHA's theory that Petitioners could "mitigate" the Vaping Prohibition's harm by transforming into some other type of business selling some other type of product (Opp. at 10 n.9) only underscores that the Prohibition is an extinction-level event.[2]

In the end, OHA does not dispute that Oregon vaping-products shops face permanent closure because of the Vaping Prohibition (Pets.' Mot. to Stay ("Mot.") at 5–6), or that that constitutes irreparable harm (Mot. at 5 (citing *Alum. Cooking Utensil Co. v. City of N. Bend*, 210 Or 412, 421, 311 P2d 464 (1957))). Nor does OHA dispute that the potential loss of customer goodwill is itself irreparable harm (Mot. at 6), or that Petitioners have made that showing here. The undisputed facts from Ms. Weber establish Petitioners' irreparable

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New York (temporary restraining order, October 3, 2019), Montana (temporary restraining order, October 18, 2019), and Massachusetts (preliminary injunction, October 21, 2019, to take effect October 28, 2019, absent further action by the Commonwealth—which action would be subject to challenge).

[2] OHA's note about the Vaping Prohibition's "temporary" status (Opp. at 10 n.9) is cold comfort. The Prohibition was enacted for 180 days; Elizabeth Weber will have to shutter her business in "two weeks if the ban continues." (Decl. of Elizabeth A. Weber (Oct. 16, 2019) (Ex. 1 to Mot.) ¶ 11.)

harm from the Vaping Prohibition in a manner that OHA cannot deny.

That should be the end of the matter: *Northwest Title Loans, LLC v. Division of Financial & Corporate Securities* suggested that a showing of irreparable harm is sufficient for a stay of an agency regulation pending judicial review. 180 Or App 1, 13, 42 P3d 313 (2002).

II. OHA did not have statutory authority to enact the Vaping Prohibition.

To the extent that *Northwest Title* requires a showing that a colorable claim of error exists, Petitioners readily satisfy that element as well. A colorable claim is a "seemingly valid, genuine, or plausible [claim] of error or substantial and nonfrivolous [claim] of error." *State ex rel. Juv. Dept. v. Balderas*, 172 Or App 223, 229, 18 P3d 434 (2001). Petitioners have gone further, however, by demonstrating that OHA lacked the statutory authority to promulgate the Vaping Prohibition. OHA's opposition all but confirms this fact.

Of the five statutes OHA cited as authority for the Prohibition,[3] OHA does not even mention two of them in its opposition (ORS 183.360 and ORS 431.042). Petitioners' showing that these two statutes are not authority for the Vaping Prohibition is unrebutted. (Mot. at 11–12.) And although OHA at least mentions ORS 431A.010 and ORS 431.141 in its brief, it concedes that they

[3] ORS 183.360, ORS 413.042, ORS 431.110, ORS 431.141, and ORS 431A.010.

"do not independently provide authority for the adopting the rule at issue here [sic]." (Opp. at 15 n.11.) That settles the matter. To be sure, OHA suggests that ORS 431A.010 and ORS 431.141 provide "context for understanding the intended scope of the OHA's supervisory power." (Opp. at 15 n.11.) But it is not the scope of OHA's "supervisory power" that is at issue; it instead is the scope of the agency's *rulemaking* authority—which OHA admits ORS 431A.010 and ORS 431.141 do not address.

The only statute of the five that OHA now contends grants it the power to promulgate the Vaping Prohibition is ORS 431.110(1), which provides that OHA shall "[h]ave direct supervision of all matters relating to the preservation of life and health of the people of the state." OHA concedes that this "supervisory power" generally "may not include the power to adopt regulations in the interest of promoting public health." (Opp. at 14.) Yet it then argues that in cases of "an unanticipated and acute public health crisis," this supervisory power "*does* include the power to take necessary actions like the one OHA took here." (Opp. at 14.) That, of course, is not what the statute says. And OHA offers no support—neither statutory nor case law—for its bold vision of executive-branch authority; a vision dripping with significant constitutional separation-of-powers questions.

What is more, OHA completely ignores *Crane v. School District No. 14*

of Tillamook County, 95 Or 644, 654, 188 P 712 (1920) which forecloses its (unsupported) reading of ORS 431.110(1). There, the Supreme Court held that the public health board's "general supervision of the interests of the health and life of citizens of the state" did not provide authority to close a public school *during the height of the Spanish Flu pandemic*, *Crane*, 95 Or at 654—which ultimately killed over 450,000 people in the United States, including thousands in Oregon.[4] In reasoning equally dispositive of OHA's position here: "If it had been the intent of the Legislature to confer such a vast power upon the state board of health, it would have used language far more specific and certain that that appearing in the sections quoted." *Id.*

Simply put, none of the statutes OHA cited as authority for the Vaping Prohibition gave it the power to enact that rule. It thus is invalid.

III. Neither the Governor's Executive Order nor ORS 431A.015 are authority for the Vaping Prohibition.

Perhaps recognizing that none of the statutes it cited confer it with the authority to enact the Vaping Prohibition, OHA deploys the Governor's Executive Order and a statute cited for the first time in its opposition. Neither saves OHA's rule.

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[4] Oregon Secretary of State Archives, "Oregon Suffers as Global Influenza Pandemic Hits," https://sos.oregon.gov/archives/exhibits/ww1/Pages/active-influenza-victim.aspx (last accessed Oct. 23, 2019).

A. An Executive Order cannot, standing alone, authorize an agency rule.

"[A]n agency has only those powers that the legislature grants and cannot exercise authority that it does not have." *SAIF v. Shipley*, 326 Or 557, 561, 955 P2d 244 (1998); *see also Or. Ass'n of Acupuncture & Oriental Med. v. Bd. of Chiropractors*, 260 Or App 676, 678, 320 P3d 575 (2014). Indeed, a "court shall declare the rule invalid" if it "[e]xceeds the *statutory* authority of the agency." ORS 183.400(4) (emphasis added)). Notwithstanding this well-settled law, OHA contends that the Executive Order "is, standing alone, a sufficient source of authority." (Opp. at 12 (emphasis omitted).) The breadth of this claim of executive power is matched only by its brazenness: OHA cites nothing to support this assertion. With good reason: case after case, from Oregon and elsewhere, confirms that an agency's authority must derive from a legislative source. OHA has nothing to say about this black-letter principle of administrative law.

B. ORS 431A.015 is not authority for the Vaping Prohibition.

OHA finally turns to ORS 431A.015 to justify the Vaping Prohibition. (Opp. at 12–13.) But the Court need not even interpret that statute to reject OHA's argument, because the Vaping Prohibition does not cite ORS 431A.015. That omission is fatal.

When an agency promulgates a temporary rule, it must include "[a]

citation of the statutory or other legal authority relied upon and bearing upon the promulgation of the rule." ORS 183.335(5)(b). If OHA intended to rely on ORS 431A.015 for the Prohibition, it was required to expressly identify it when enacting the rule. By not doing so, and now claiming it as authority for the Prohibition, OHA necessarily adopted the Prohibition "without compliance with applicable rulemaking procedures." ORS 183.400(4)(c).

OHA gamely asserts that the Vaping Prohibition need not have cited ORS 431A.015 because it referenced the Governor's Executive Order. (Opp. at 13 n.10.) But the Executive Order does not mention ORS 431A.015 either (or indeed any authority for OHA's rulemaking). In fact, the Executive Order directs OHA to "clarify and expand [its] authority to take action when a harm or risk to the public's health is present." It appears, in other words, that even the Governor does not believe that ORS 431A.015 applies, or that OHA already had the necessary statutory authority to promulgate the Vaping Prohibition.

There are good reasons OHA must expressly identify when ORS 431A.015 is invoked—aside from complying with the requirements of ORS 183.335(5)(b). For one thing, the statute permits the Public Health Director to take certain actions that he or she otherwise would be unable to take. Transparency informs the public of these changed circumstances. For another, identifying the statute ensures that the public, and other organs of government,

are aware of *their* rights. Consider: "[t]he authority granted to the Public Health Director" under ORS 431A.015 "is not intended to override the general authority provided to a local public health authority." ORS 431A.015(3). One more: "If property is taken under the authority granted to the Public Health Director . . . the owner of the property is entitled to reasonable compensation from the state." ORS 431A.015(6). (Perhaps this provision explains why OHA did not rely on ORS 431A.015 in the first place.)[5]

OHA's effort to base the Vaping Prohibition on ORS 431A.015 fails on the merits as well. OHA observes that the statute, upon a determination "that 'a condition of public health importance is reported in Oregon and is an issue of significant regional or national concern," the Public Health Director may "prescribe measures for the control of the . . . disease outbreak, epidemic, or other condition of public health importance." (Opp. at 13 (quoting ORS 431A.015(1)(A) & (2)(b)(A)) (alteration in original).) That cherry-picked reading obscures the specific thrust of the statute: empowering the Public Health Director to take actions one would expect a centralized health official to take in the face of a potential outbreak of an infectious disease:

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[5] In all instances, ORS 431A.015 requires the Public Health Director to make a specific determination of the circumstances rendering the statute applicable. This contemplates a public statement that the Director has invoked the statute.

- coordinate the public health response across the state;
- help identify the disease and allocate and distribute antitoxins, serums, vaccines, immunizing agents, antibiotics, antidotes and other pharmaceutical agents, medical supplies or personal protective equipment;
- create and require the use of diagnostic and treatment guidelines in consultation with appropriate medical experts;
- require people to obtain treatment or use prophylactic measures to prevent the spread of the disease;
- direct a direct school board to close a facility;
- issue guidelines regarding appropriate work restrictions;
- organize public information regarding the response to the disease;
- adopt reporting requirements to obtain information about the disease; and
- take control of antitoxins, serums, vaccines, immunizing agents, antibiotics, antidotes and other pharmaceutical agents, medical supplies or personal protective equipment.

ORS 431A.015(2)(a)–(i). Put simply, ORS 431A.015 grants the Public Health Director powers that, understood as a whole, are part of a coordinated response to stop a quick-spreading outbreak, including marshaling resources, informing the public, ordering quarantines and isolation, and providing treatment. These are *not* measures designed to respond to generic "public health" concerns and

certainly do not align with the vaping-related lung injuries OHA purportedly was addressing with the Vaping Prohibition.

Once again, *Crane* is instructive: "If it had been the intent of the Legislature to confer such a vast power . . . it would have used language far more specific and certain that that appearing in the sections quoted." 95 Or at 654. If, by contrast, ORS 431A.015 empowered the broad policymaking OHA undertook here, it would raise serious non-delegation and separation-of-powers concerns—constitutional principles OHA does not even address.

Legislative history confirms that ORS 431A.015 does not authorize the Vaping Prohibition. *See State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (legislative history may be used to construe statute). The statute was initially was enacted in 2007 by House Bill 2185 and codified as ORS 431.266.[6] The 2007 Summary of Legislation, published by the Legislative Administration Committee Services, explains that the purpose of the bill was to centralize the responsibilities for responding to "reportable diseases" in a newly created position at the OHA of Public Health Director.[7] And the testimony and exhibits submitted during the debate over HB 2185 make plain that the bill's purpose

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[6] It was later renumbered as ORS 431A.015 in 2015.

[7] *See* https://www.oregonlegislature.gov/lpro/summleg/2007SummaryOfLegislation.pdf.

was not to make the Public Health Director a one-person shadow Legislature on public health matters. Rather it was to ensure uniform county-by-county responses to widespread public health disasters such as disease outbreaks, chemical spills, or nuclear accidents.[8]

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OHA seems ready to defend the invalid Vaping Prohibition by *gestalt*: arraying all statutes that mention public health and arguing that, collectively, they must provide authority for the Prohibition. Or else OHA will continue to throw up as many (inapposite) statutes as it can find, and see what sticks.[9]

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[8] Decl. of David Randall J. Riskin in Support of Mot. for Stay ("Riskin Decl.") Ex. 1) (Testimony of State Public Health Director Susan Allan Exs. A–B, 2007 HB 2185 Legislative Records Exhibit File). Dr. Allen explained "local health depts., hospitals and physicians . . . didn't want to be in a situation where 5 counties were affected and the county next door to them or the hospital across the county line was taking a different approach." She went on to note that "if something does happen—a pandemic, a 'SARS II' outbreak, a chemical accident resulting in the release of a large toxic cloud sweeping across a city—we want to have the tools in place to do the best we can, to respond quickly and clearly, to protect people and to save lives."

[9] OHA offers that the Governor may "respond to public health threats" by declaring an emergency, citing ORS 443.441. (Opp. at 12.) But the Governor has not declared an emergency here—and nothing in ORS 443.441 hints that the Legislature gave *OHA* the power to ban an entire class of products. Similarly, OHA notes that ORS 431.110(7) grants it "full power in control of communicable diseases," but then quickly concedes, as it must, that vaping-related lung injuries are not communicable diseases. (Opp. at 15.)

Neither approach comports with Oregon law. OHA is required to ground its rulemaking in specific statutory authority. It has not done so.

IV. The balance of hardships and the public interest are not relevant; and if they are, these factors weigh in favor of a stay.

OHA begins its opposition by quarrelling with the standard for a stay. It offers that *Northwest Title* left open the applicable standard, and that the standard should include a showing that "the balance of harms, including the public interest . . . tilts in [Petitioners] favor." (Opp. at 9.) That is not the standard. Even so, the balance of harms and the public interest confirm why a stay is both appropriate and necessary.

Although OHA is correct that "*Northwest Title* left open what standard applies in considering the stay of rule" (Opp. at 7), what it "left open" was whether a stay was appropriate on a showing of irreparable harm, or instead whether a petitioner must also establish a colorable claim of error, *Nw. Title*, 180 Or App at 13. As detailed above, Petitioners meet either standard.

OHA ignores the limited question *Northwest Title* posed, and argues that the Court should follow the standard for stays of a trial-court judgment pending appeal (ORS 19.350) or the procedures for preliminary relief in the circuit courts (ORCP 79), both of which require a balancing of harms and assessment of the public interest. (Opp. at 7–9.) Nothing in *Northwest Title* suggests ORS 19.350 or ORCP 79 are relevant to the standard for staying an administrative

rule, and OHA has cited no authority to support its proposed standard.

OHA's arguments about the balance of hardships (Opp. at 10–11) therefore are irrelevant. Yet examining these factors only confirms that a stay is appropriate.

OHA contends that "[g]iven the seriousness" of the vapor-related lung injuries "and the speed with which the outbreak has escalated[,] the balance of hardships and the public interest . . . weighs in favor of allowing the rule to remain in place." (Opp. at 10–11.) Yet OHA offers no evidence that flavored nicotine vaping products—what the Vaping Prohibition bans—are the cause of the outbreak. And it concedes that the majority of the lung-injury cases involve products containing THC (Opp. at 3), which are not the subject of the Prohibition.

The Centers for Disease Control and Prevention's findings underscore that the Vaping Prohibition is untethered from the evidence—and thus not in the public interest. As of October 24, 2019, the CDC explains that "[t]he latest national and state findings suggest products containing THC, particularly those obtained off the street or from other information sources (*e.g.* friends, family members, illicit dealers), are linked to most of the cases and play a major role in

the outbreak.[10] And last week the CDC *eliminated* from its website a statement that had previously appeared: "Therefore, the possibility that nicotine-containing products play a role in this outbreak cannot be excluded."[11] OHA cites the CDC's October 18 website (Opp. at 3 & nn.4–5) without acknowledging this fact.

Moreover, OHA's argument about public harms fails to address the negative consequences from the Vaping Prohibition itself. Flavored nicotine vaping products assist smokers from transitioning away from combustible cigarettes.[12] That is a net benefit for public health. Indeed, research indicates

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[10] Riskin Decl. Ex. 2 (CDC, *Outbreak of Lung Injury Associated with E-Cigarette Use, or Vaping* (information current as of Oct. 24, 2019), https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html).

[11] *Compare* Riskin Decl. Ex. 3 (CDC, *Outbreak of Lung Injury Associated with E-Cigarette Use, or Vaping* (information current as of Oct. 17, 2019)), *with* Riskin Decl. Ex. 4 (CDC, *Outbreak of Lung Injury Associated with E-Cigarette Use, or Vaping* (information current as of Oct. 11, 2019).

[12] *See*, *e.g.*, 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) (explaining 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."); 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 ("[W]e found that the use of non-tobacco flavors was associated with lower likelihood of current smoking. This introduces the

that vaping poses substantially less risk than combustible cigarettes and may significantly reduce the public health harms associated with smoking:

- A study conducted by the National Academies of Sciences, Engineering and Medicine, commissioned by the FDA, found that evidence suggests that "across a range of studies and outcomes, e-cigarettes pose less risk to an individual than combustible cigarettes."[13]

- 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."[14]

- A Georgetown University study concluded that switching from traditional cigarettes to vaping products would prevent millions of premature deaths over a 10 year period in the United States.[15]

- A randomized clinical study published in the New England Journal of Medicine found that cigarette smokers were more likely to quit smoking

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possibility that non-tobacco flavors may aid the transition from smoking to vaping.").

[13] 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.

[14] 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.

[15] 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/.

> when using e-cigarettes than when using nicotine-replacement therapies.[16]

Unfortunately, as a result of the Vaping Prohibition, "[s]ome of [Ms. Weber's] customers have told [her] that they will return to smoking combustible cigarettes."[17] And others "have stated that they will turn to the black market to seek out e-cigarettes. As black-market products are not regulated and present huge health risks," Ms. Weber is justifiably "concerned for the safety of those customers."[18]

Petitioners understand the need for, and fully support, further efforts to study the lung injuries that appears to be caused by vaping THC products, including those from the black market. But the Vaping Prohibition sweeps far too broadly to accomplish that goal without creating deleterious and unintended consequences. Any perceived benefit in outlawing flavored vaping products is readily outweighed by the unintended public health risks such a ban would create, and the significant and irreparable harm to the many thousands of individuals whose livelihoods depend on the industry.

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[16] 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.

[17] Weber Decl. ¶ 15.

[18] *Id.*

CONCLUSION

For the foregoing reasons, as well as for the reasons detailed in Petitioners' motion, the Court should continue to stay enforcement of the Vaping Prohibition pending judicial review of the Prohibition's validity.

DATED this 25th day of October 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 25th, 2019, I directed that a true copy of this **REPLY IN SUPPORT OF MOTION TO STAY ENFORCEMENT PENDING JUDICIAL REVIEW** be served on the following parties:

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