

EXPEDITE
 No hearing set
 Hearing is set:
Date: Friday, October 25, 2019
Time: 9:00 a.m.
Judge/Calendar: Christopher Lanese/Civil Motions

SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY

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

Petitioners,

v.

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

Respondents.

No. 19-2-05196-34

**PETITIONERS' MOTION FOR
TEMPORARY RESTRAINING
ORDER**

1 Vapor Technology Association, an industry trade group with members in Washington,
2 and Baron Enterprises move under RCW 7.40.020 and CR 65(b) for a temporary restraining
3 order enjoining the Washington State Board of Health and Washington State Department of
4 Health from enforcing the emergency rule banning the sale of flavored vaping products, WAC
5 246-80-001 *et seq.* (“Emergency Rule”). Purportedly enacted in response to a lung-injury
6 outbreak and concerns about youth vaping, the Emergency Rule sweeps much more broadly.
7 The result is an existential threat to the \$484 million vaping-products industry in Washington,
8 and the livelihood of thousands of its citizens. Indeed, Baron Enterprises—a Washington small
9 business—is faced with economic ruin as a result of the Emergency Rule.

10 Although petitioners support efforts to address appropriately the lung-injury outbreak, by
11 any measure the Emergency Rule is without statutory authority, is arbitrary and capricious when
12 read against its alleged animating concerns, and infringes on free-speech rights. *First*, no statute
13 permits the Board to engage in the far-reaching executive-branch policymaking of the
14 Emergency Rule; and if it did, it would run afoul of Washington’s non-delegation doctrine, and
15 separation-of-powers principles generally.

16 *Second*, regarding the Emergency Rule’s arbitrariness and capriciousness, consider:

- 17 • The Rule asserts that “prohibiting the sale of flavored vapor products is necessary to
18 prevent and reduce youth and young adult exposure to severe lung disease associated
19 with the use of vapor products.” WAC 246-80-001. But the Rule bans flavored
20 vaping products for anyone in Washington, regardless of age. So too does the Rule
21 fail to take into account that Washington law will soon prohibit people under the age
22 of 21 from purchasing vaping products.
- 23 • The Emergency Rule also states that it was promulgated to “reduce the exposure of
24 our most vulnerable population to the current outbreak of severe lung disease
25 associated with the use of vapor products.” *Id.* But evidence from before (and after)
26 the Rule’s enactment suggests that vaping THC¹ products have caused of the lung
27 injuries—not nicotine products.
- The likely result of the Rule’s ban on flavored vaping products is the creation of a
public-health crisis. By rendering illegal those products, the Rule will likely drive

¹ “THC.” short for tetrahydrocannabinol, is the chemical responsible for most of cannabis’
psychoactive effects.

1 individuals to the black market—and to the very products that have precipitated the
2 current outbreak of lung disease. At the same time, it will likely force ex-smokers
3 who used vaping products to quit back to combustible cigarettes.

4 In light of these facts, the Emergency Rule cannot pass muster under arbitrary-and-capricious
5 review.

6 *Third*, the Rule’s prohibition on “offer[ing] for sale” flavored vaping products violates
7 constitutional free-speech protections.

8 While laudable goals may underlie the Emergency Rule, its consequences will be
9 profoundly negative—both to a thriving industry in Washington and to the very individuals the
10 ban is designed to help: Washington citizens. The Court should restrain and enjoin enforcement
11 of the Emergency Rule—as have courts in each of the jurisdictions in which a challenge to
12 executive bans of vaping products has been brought.²

13 I. BACKGROUND

14 Petitioners are members of the nicotine-vapor-products industry and are being irreparably
15 harmed by the Emergency Rule. The Vapor Technology Association (“VTA”) is a national, non-
16 profit industry trade association of nicotine-vapor-products manufacturers and sellers. Baron
17 Enterprises owns and operates vaping-products stores in Pierce County, Washington. It already
18 has had to close one store as a result of the Emergency Rule, and, absent preliminary relief, it
19 will have to close two more stores within weeks.

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

25 ² Indeed, there is a form of injunction in place (or soon to be in place) in each of the
26 jurisdictions: Michigan (preliminary injunction), New York (temporary restraining order),
27 Montana (temporary restraining order), Oregon (stay pending full briefing and decision on a
motion to stay enforcement of rule pending judicial review), and Massachusetts (preliminary
injunction to take effect October 28, 2019, absent further action by the Commonwealth—which
action itself would be subject to challenge).

1 Vaping products first gained traction in the United States in 2009 and present a safer
2 alternative to combustible cigarettes. Many users of vaping products are current or former
3 smokers. An extensive body of research has shown that vaping products pose substantially less
4 risk than combustible cigarettes and thus may significantly reduce the public-health harms
5 associated with smoking. For example:

- 6 • A study of peer-reviewed literature conducted by the National Academies of
7 Sciences, Engineering and Medicine (and commissioned by FDA) found that
8 evidence suggests “across a range of studies and outcomes, e-cigarettes pose less risk
9 to an individual than combustible cigarettes.”³
- 10 • The United Kingdom’s Royal College of Physicians advised that “the hazard to health
11 arising from long-term vapour inhalation from the e-cigarettes available today is
12 unlikely to exceed 5% of the harm from smoking tobacco.”⁴
- 13 • A Georgetown University study concluded that switching from traditional cigarettes
14 to vaping products would prevent millions of premature deaths over 10 years in the
15 United States.⁵
- 16 • A randomized clinical study published in the *New England Journal of Medicine*
17 found that cigarette smokers were more likely to quit smoking when using e-
18 cigarettes than when using nicotine-replacement therapies.⁶

19 The availability of nicotine vapor products has coincided with a substantial drop in
20 demand for cigarettes. The Centers for Disease Control and Prevention reports that the number
21 of adult smokers as a percentage of the U.S. population dropped from 20.6% in 2008⁷—the year

22 _____
23 ³ Kathleen Stratton et al., *Public Health Consequences of E-Cigarettes*, Nat’l Acads. Sci., Eng’r
24 & Med. 12 (2018), available at [https://www.ncbi.nlm.nih.gov/books/NBK507171/pdf/Bookshelf_](https://www.ncbi.nlm.nih.gov/books/NBK507171/pdf/Bookshelf_NBK507171.pdf)
25 [NBK507171.pdf](https://www.ncbi.nlm.nih.gov/books/NBK507171/pdf/Bookshelf_NBK507171.pdf).

26 ⁴ Royal College of Physicians Tobacco Advisory Group, *Nicotine without Smoke: Tobacco Harm*
27 *Reduction* (2009), available at [https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-](https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0)
[smoke-tobacco-harm-reduction-0](https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0).

⁵ 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>.

28 ⁶ Peter Hajek et al., *A Randomized Trial of E-Cigarettes Versus Nicotine-Replacement Therapy*,
29 *380 New Eng. J. Med.* 629–37 (2019), available at
30 <https://www.nejm.org/doi/10.1056/NEJMoa1808779>.

31 ⁷ Decl. of Steven Caplow (Oct. 21, 2019), Ex. 1 (CDC, Morbidity & Mortality Weekly Report,
32 *Cigarette Smoking among Adults & Trends in Smoking Cessation—United States, 2008* (Nov.
33 13, 2009), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5844a2.htm>).

1 before vaping products gained traction in the United States—to 14% as of 2017.⁸ And, perhaps
2 relatedly, between June 2018 and June 2019, the sales of combustible cigarettes fell by more
3 than 10%.⁹ As Iowa Attorney General Thomas J. Miller and other public health officials
4 explained to the U.S. Secretary of Health and Human Services in July 2019, “[m]odeling the
5 effects of e-cigarettes on smoking-related disease suggests that e-cigarettes should save millions
6 of lives, even with pessimistic assumptions about unlikely unintended consequences.”¹⁰

7 B. The nicotine vaping-products industry, which employs approximately 166,000
8 people nationwide, is a “dynamic part of the U.S. economy, accounting for \$24.46 billion
9 annually in economic output.”¹¹ Approximately \$484 million of that output is traceable to
10 Washington, where the vapor-products industry generates jobs for approximately 3,475
11 individuals.¹² Those individuals include the 1,594 employees of 35 vaping-products
12 manufacturers, 12 vaping-liquid manufacturers, and 347 vape shops.¹³ Washington vaping-
13 products companies and sellers, and their employees, contribute nearly \$40 million in state taxes;
14 Washington consumers of vaping products generate an additional \$16 million in sales taxes.¹⁴

15 C. On September 27, 2019, Governor Jay Inslee executed Executive Order 19-03,
16 titled “Addressing the Vaping Use Public Health Crisis.”¹⁵ Governor Inslee requested that the

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18 ⁸ Caplow Decl. Ex. 2 (CDC, *Current Cigarette Smoking among Adults in the United States* (last
19 revised Feb. 4, 2019), [https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/
20 cig_smoking/index.htm](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm)).

21 ⁹ Caplow Decl. Ex. 3 (Ltr. from Thomas J. Miller to Alex M. Azar II, U.S. Secretary of Health &
22 Human Servs. (July 24, 2019), at 2 & n.4,
23 [https://www.iowaattorneygeneral.gov/media/cms/PMTA_letter__
24 190724__headed_45164DED1A0BA.pdf](https://www.iowaattorneygeneral.gov/media/cms/PMTA_letter__190724__headed_45164DED1A0BA.pdf)).

25 ¹⁰ Caplow Decl. Exh. 3 (Miller Ltr. to Azar), at 2.

26 ¹¹ Declaration of John Dunham (Oct. 21, 2019), ¶ 5.

27 ¹² Dunham Decl. ¶ 6.

¹³ Dunham Decl. ¶ 7.

¹⁴ Dunham Decl. ¶ 9.

¹⁵ Caplow Decl. Ex. 4 (Executive Order 19-03).

1 Board of Health “use its emergency rulemaking authority to impose a ban on all flavored vapor
2 products, including flavored THC vapor products, at the Board’s next meeting on October 9.”¹⁶

3 Governor Inslee requested that the Board “use its emergency rulemaking authority to
4 impose a ban on all flavored vapor products, including flavored THC vapor products, at the
5 Board’s next meeting on October 9.” As the basis for that directive, the Governor cited both the
6 use of vaping products among minors (including statistics on youth vaping from 2018), as well
7 as “an outbreak of a lung injury ... [among] previously healthy individuals who had recently
8 vaped THC and/or nicotine vapor products.”¹⁷ The Governor continued that “it is imperative
9 that the state respond in a comprehensive and *evidence-based* manner to address this public
10 health crisis.”¹⁸

11 During its October 9, 2019 meeting, the Board of Health promulgated the Emergency
12 Rule, which the Board stated was “necessary to prevent and reduce youth and young adult
13 exposure” to lung injury related to use of vaping products. WAC 246-80-001. The Board, like
14 Governor Inslee, cited statistics on youth vaping, including from 2018, as well as an outbreak of
15 lung injuries among vaping-product users, as support for the Rule. *Id.*

16 In pertinent part, the Emergency Rule completely banned the sale of flavored vapor
17 products:

18 No person ... may sell, offer for sale, or possess with the intent to sell or offer for
19 sale flavored vapor products or any product that he or she knows or reasonably
20 should know will be used with or in a vapor product to create a flavored vapor
21 product. The foregoing prohibition applies to the sale, offer for sale, or
22 possession with intent to sell or offer for sale flavored vapor products at any
location or by any means in this state, including, but not limited to, by means of a
telephonic or other method of voice transmission, the mails or any other delivery
service, or the internet or other online service.

23 WAC 246-80-020.

24
25 ¹⁶ Caplow Decl. Ex. 4 (Executive Order 19-03), at 3.

26 ¹⁷ Caplow Decl. Ex. 4 (Executive Order 19-03), at 1–2.

27 ¹⁸ Caplow Decl. Ex. 4 (Executive Order 19-03), at 2 (emphasis added).

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

5 In adopting this blanket prohibition, the Board of Health relied on a handful of
6 presentations and a memorandum from the Secretary of Health.¹⁹ Among those materials were a
7 health-impact review and related presentation addressing HB 1932, a bill the Washington
8 legislature had introduced in early 2019 to ban flavored vaping products. That bill remains in
9 committee. Indeed, completely absent from the Emergency Rule’s “Purpose and Necessity”
10 section is any discussion of the myriad state laws already addressing youth vaping.

11 II. STATEMENT OF ISSUES

12 Whether VTA and Baron Enterprises are entitled to a temporary restraining order under
13 RCW 7.40.020 and CR 65(b) preventing the Board from enforcing the Emergency Rule because
14 it: (1) exceeds the Board’s statutory authority, (2) is arbitrary and capricious, and (3) violates
15 free-speech guarantees.

16 III. EVIDENCE RELIED ON

17 The papers and pleadings on file in this lawsuit; the Declaration of Steven P. Caplow,
18 along with its accompanying exhibits; the Declaration of Kimberly Thompson; the Declaration
19 of John Dunham; and the Declaration of Michael Siegel.

20 IV. ARGUMENT

21 Preliminary relief is available when the moving party “is entitled to the relief demanded
22 [in its pleadings] and the relief, or any part thereof, consists [of] restraining the commission or
23 continuance of some act, the commission or continuance of which during the litigation would
24 produce great injury to the [moving party].” RCW 7.40.020. The court should grant a motion
25 for a temporary restraining order when the moving party demonstrates that:

26 _____
27 ¹⁹ The list of materials used at the Board’s meeting are available on the Board’s website,
<https://sboh.wa.gov/OurMeetings/MeetingInformation/2019/October9SeaTac>.

1 (1) [it] has a clear legal or equitable right; (2) [it] has a well-
2 grounded fear of immediate invasion of that right; and (3) the acts
3 complained of are either resulting in, or will result in actual and
4 substantial injury to [it].

5 *Tyler Pipe Indus., Inc. v. State, Dep't of Revenue*, 96 Wn.2d 785, 792 (1982) (citing *Port of*
6 *Seattle v. Int'l Longshoremen's & Warehousemen's Union*, 52 Wn.2d 317, 324 (1958)).

7 A temporary restraining order “preserve[s] the status quo until the trial court can conduct
8 a full hearing on the merits of the complaint.” *Nw. Gas Ass'n v. Wash. Utilities & Transp.*
9 *Comm'n*, 141 Wn. App. 98, 115–16, 168 (2007). The moving party “need not prove and the trial
10 court does not reach or resolve the merits of the issues underlying these above three requirements
11 for injunctive relief.” *Id.* A court’s only role is to consider “the *likelihood* that the plaintiff will
12 ultimately prevail at a trial on the merits by establishing that he has a clear legal or equitable
13 right, that he reasonably fears will be invaded by the requested disclosure, resulting in substantial
14 harm.” *Id.* (emphasis in original).

15 Here, VTA and Baron Enterprises clear each of those hurdles with room to spare.

16 **A. The Emergency Rule Is Invalid.**

17 A court must declare a regulation invalid if it, among other things, “exceeds the statutory
18 authority of the agency,” “is arbitrary and capricious,” or “violates constitutional provisions.”
19 RCW 34.05.570(2)(c). The Emergency Rule exceeds each of these limits on agency action.

20 **1. The Board’s Emergency Rule Exceeds Its Statutory Authority.**

21 A regulation must be “reasonably consistent with the statute being implemented.”
22 *Wash. Rest. Ass'n v. Wash. State Liquor & Cannabis Bd.*, 448 P.3d 140, 145 (Wash. Ct. App.
23 2019) (quoting *St. Francis Extended Health Care v. Dep't of Soc. & Health Servs.*, 115 Wash. 2d
24 690, 702 (1990)). Here, the Board of Health rested on RCW 43.20.050(2)(f) as authority to
25 promulgate the Emergency Rule:

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

1 Because the Emergency Rule does not “govern[] the receipt and conveyance of remains of
2 deceased persons,” the Board must have relied on the clause contemplating the adoption of rules
3 to control “infectious and noninfectious diseases.” And, further, because there is no evidence or
4 statement that the outbreak of lung injury among vaping-product users is an “infectious” disease,
5 the Board must have adopted a rule purportedly addressing “noninfectious diseases.” But no
6 matter which it was proceeding under, RCW 43.20.050(2)(f)’s reference to “infectious and
7 noninfectious diseases” does not grant the Board the authority to adopt the Emergency Rule.

8 The Court’s role in interpreting an enabling statute is to “ascertain and carry out the
9 Legislature’s intent.” *Wash. Rest. Ass’n*, 448 P.3d at 147. Thus, the analysis begins with the
10 meaning of the phrase “infectious and noninfectious diseases.” “Infectious” and “noninfectious”
11 are not defined in the statute, *see* RCW 43.20.025, but they have generally accepted meanings.
12 The former are “diseases caused by organisms—such as bacteria, viruses, fungi or parasites.”²⁰
13 Regarding the latter, the World Health Organization states that “[n]oncommunicable diseases ...
14 tend to be of long duration and are the result of a combination of genetic, physiological,
15 environmental and behaviours factors [sic],” and include “cardiovascular diseases ... cancers,
16 chronic respiratory diseases ... and diabetes.”²¹ Similarly, Wikipedia notes that “non-
17 communicable disease[s]” include Parkinson’s disease, autoimmune diseases, strokes, most heart
18 diseases, most cancers, diabetes, chronic kidney disease, osteoarthritis, osteoporosis,
19 Alzheimer’s disease, [and] cataracts.”²² *See generally Sch. Bd. of Nassau Cty., Fla v. Arline*, 480
20 U.S. 273, 284 (1987) (listing “epilepsy [and] cancer” as examples of “noninfectious diseases”).
21 In other words, the term “noninfectious diseases” encompasses a host of genetic, environmental,
22 and lifestyle diseases.

23 ²⁰ Mayo Clinic, *Infectious Diseases, Symptoms & Causes* (July 17, 2019),
24 <https://www.mayoclinic.org/diseases-conditions/infectious-diseases/symptoms-causes/syc-20351173>.

25 ²¹ World Health Org., *Noncommunicable Diseases* (last updated June 1, 2018)
26 <https://www.who.int/news-room/fact-sheets/detail/noncommunicable-diseases>.

27 ²² *Non-Communicable Disease*, Wikipedia (last edited Sept. 23, 2019),
https://en.wikipedia.org/wiki/Non-communicable_disease.

1 Were RCW 43.20.050(2)(f) to use the term in that way, it would permit the Board of
2 Health (including on an emergency basis, with no notice-and-comment procedures) to ban a host
3 of lawful products known or suspected to cause noninfectious disease: non-electric cars (child
4 asthma), aluminum foil (Alzheimer’s), coffee (gout), cell phones (brain cancer), alcohol (liver
5 disease), soda (diabetes), salt (high blood pressure), butter (stroke and heart disease), margarine
6 (heart disease), and tobacco (lung cancer). It would allow the Board to completely rewrite what
7 Washington residents consume, how they live their lives, and how they interact with each other.

8 And it would violate the separation of powers.

9 Under Article II, § 1 of the Washington Constitution, “[t]he legislative authority of the
10 state of Washington shall be vested in the legislature.” “The legislative power to make purely
11 substantive law cannot be surrendered or delegated to or performed by any other agency.”
12 *Senior Citizens League v. Dep’t of Social Sec. of Wash.*, 38 Wn.2d 142, 152 (1951). To be sure,
13 that prohibition does not prevent the legislature from delegating “to administrative officers and
14 boards authority to promulgate rules and regulations to carry out an express legislative purpose,
15 or to effect the operation and enforcement of a law.” *Id.* at 153. But to pass constitutional
16 muster, the statute delegating authority must provide “adequate standards of guidance.”
17 *Snohomish Cty. Builders Ass’n v. Snohomish Health Dist.*, 8 Wash. App. 589, 596 (1973).

18 If RCW 43.20.050(2)(f) really encompassed every noninfectious disease, it would be an
19 unconstitutional delegation as it would cede to the Board of Health the power to determine the
20 social objectives or programs that are worthy of pursuit in Washington. The clause “infectious
21 and noninfectious diseases” thus must be more limited. The limitation is in the statute itself:
22 RCW 43.20.050(2)(f) empowers the Board of Health to “[a]dopt rules for the prevention and
23 control of infectious and noninfectious diseases, *including food and vector borne illness*”
24 (emphasis added). The clause “including food and vector borne illness” provides the context to
25 understand “infectious and noninfectious diseases.”

26 The principle of “*noscitur a sociis* ... provides that a single word in a statute should not
27 be read in isolation, and that ‘the meaning of words may be indicated or controlled by those with

1 which they are associated.” *State v. Jackson*, 137 Wash.2d 712, 729, 976 P.2d 1229 (1999).
2 Consider the application of that principle in *State v. Larson*, in which the Washington Supreme
3 Court examined a statute that defined retail theft with “extenuating” circumstances to include an
4 offense when the defendant “was, at the time of the theft, in possession of an item, article,
5 implement, or device designed to overcome security systems including, but not limited to, lined
6 bags or tag removers.” 184 Wash. 2d 843, 846 (2015) (internal quotation marks omitted).
7 Larson was convicted under that statute for using wire cutters to remove a security tag on a pair
8 of shoes, on the theory that “wire cutters are designed to cut wire and wires are used in security
9 systems.” *Id.* at 847. The Supreme Court reversed, holding that the two non-exclusive examples
10 demonstrated that the “legislature intended to limit the scope of [the statute] to similar items.”²³
11 *Id.* at 850. Further, the State’s argument to the contrary would have been “inconsistent with the
12 well-established principle that statutes must be interpreted so that all the language used is given
13 effect”: “If the statute were to encompass *any* device that could be used to overcome a security
14 system ... the examples enumerated by the legislature would be superfluous and provide no
15 additional guidance on the application of the statute.” *Id.* at 850–51; *see also Wash. State Hosp.*
16 *Ass’n v. Wash. State Dep’t of Health*, 183 Wn.2d 590, 596–97 (2015) (finding regulation
17 exceeded Department of Health’s power because although regulation was consistent with “broad
18 dictionary definitions” of a word used in the statute, the regulation nevertheless departed too far
19 from the statute’s meaning).

20 So too here. “[F]ood and vector borne illness” must both have independent meaning and
21 provide context for the phrase “infectious and noninfectious diseases.” “Food-borne” illness
22 speaks for itself; “vector-borne” illness refers to diseases “caused by parasites, viruses and
23 bacteria.”²⁴ Those examples were intended to limit the scope of RCW 43.20.050(2)(f)’s first
24 clause to similar illnesses. Applying that principle here, the outbreak of lung injuries among

25 ²³ Although a decision interpreting a criminal statute, the Supreme Court’s analysis did not turn
26 on the rule of lenity.

27 ²⁴ World Health Org., *Vector-Borne Diseases* (Oct. 31, 2017), <https://www.who.int/news-room/fact-sheets/detail/vector-borne-diseases>.

1 vaping-products users are not of a piece with food- or vector-borne illnesses, and thus RCW
2 43.20.050(2)(f) does not authorize the Board of Health to promulgate rules banning vaping
3 products.²⁵ The alternative would be absurd because it would permit the Board of Health to
4 regulate, without legislative oversight, any products plausibly connected to public health—
5 running afoul of separation-of-powers limitations, as well as the canon of constitutional
6 avoidance. *See In re Impoundment of Chevrolet Truck*, 148 Wash.2d 145, 156 (2019) (adopting
7 a statutory interpretation that rendered a regulation invalid to avoid constitutional issues).²⁶

8 **2. The Emergency Rule Is Arbitrary and Capricious.**

9 Not only does the Emergency Rule exceed the Board of Health’s statutory authority, but
10 also it is arbitrary and capricious because it was adopted without due regard to all relevant facts
11 and circumstances. An agency rule is arbitrary and capricious if it is “willful and unreasoning
12 and taken without regard to the attending facts or circumstances.” *Puget Sound Harvesters Ass’n*
13 *v. Dep’t of Fish & Wildlife*, 157 Wn. App. 935, 945 (2010). An agency “must not act cursorily
14 in considering the facts and circumstances surrounding its actions.” *Id.* at 951. The premise of
15 the Emergency Rule is that prohibiting the sale of flavored vapor products will reduce youth
16 exposure to severe lung disease associated with the use of vapor products. WAC 246-80-001.
17 But having stated that goal, the Board acted arbitrarily and capriciously in attempting to fulfill it.

18 *First*, although premised on the need to combat youth vaping, the Rule sweeps far more
19 broadly. *Second*, the Rule is not tailored to the substance (THC) linked most closely with the
20 lung-injury outbreak the Rule purports to address. And by categorically banning all vapor
21 products, the Emergency Rule implicitly promotes black-market vaping products and

22 _____
23 ²⁵ It is not even clear that the Board of Health believes the lung injuries are “diseases,” as its
24 website refers to “vaping associated lung injury.” *See* Wash. State Dep’t of Health, *Vaping*
Associated Lung Injury (last updated Oct. 16, 2019),
<https://www.doh.wa.gov/Emergencies/VapingAssociatedLungInjury>.

25 ²⁶ Further, applying the series-qualifier canon of statutory construction, RCW 43.20.050(2)(f)’s
26 reference to “such other sanitary matters as may best be controlled by universal rule” would
27 modify the entire grant of power in the statute—further demonstrating the Board of Health’s
departure from the statute in promulgating the Emergency Rule. The Rule, of course, does not
relate to sanitation matters.

1 combustible cigarettes (the latter, an avowed health risk which remains on the market). If the
2 prohibition against “arbitrary and capricious” regulation has any meaning, surely it precludes a
3 rule that ignores evidence and may yield its own public-health crisis.

4 ***The Emergency Rule Is Too Broad Compared to Its Concern for Youth Vaping.***

5 Washington already has a full suite of legislation aimed at ensuring children and young adults do
6 not use vaping products. Most significantly, beginning January 1, 2020, Washington will ban the
7 sale of vaping products to individuals under the age of 21. See RCW 26.28.080(1). Neither the
8 Governor’s Executive Order nor the Emergency Rule acknowledges this new legislative
9 enactment.²⁷ Nor does either address the many other Washington laws designed to prevent
10 underage vaping:

- 11 • RCW 70.345.150: prohibiting the use of vapor products in and on grounds of child
12 care facilities, schools, playgrounds, school buses, elevators, and within 500 feet of
13 schools.
- 14 • RCW 70.345.080: prohibiting self-service displays of vapor products except in
15 retailers inaccessible to persons under age 21, beginning January 21, 2020.
- 16 • RCW 70.345.100: permitting samples of vapor products only at licensed retailers
17 restricted to those over the age of 21 years. Further, the samples cannot contain
18 nicotine unless “customer explicitly consents,” and they must use a disposable
19 mouthpiece. These provisions take effect January 1, 2020.
- 20 • RCW 70.345.110: prohibiting free vapor-product distribution without
21 contemporaneous purchase of vapor product.
- 22 • RCW 70.345.090: prohibiting deliveries of vapor products unless seller has a valid
23 delivery-sale license, verifies the age of the purchaser through a third-party database,
24 and only accepts payment through a credit or debit card in the purchaser’s name.

25 Putting that aside, the Emergency Rule contains no provision specifically targeting youth vaping;
26 instead, the executive branch has used its emergency powers to preclude *everyone* from selling
27 or possessing flavored vaping products.

28 ²⁷ To be sure, the Executive Order mentions in passing that “notwithstanding state law
29 prohibiting the sale or distribution of vapor products to minors ... vapor product use increased
30 dramatically among 8th, 10th, and 12th grade students.” Exec. Or. 19-03 at 1. But the statistics
31 the Governor cites are from 2018; they do not consider the effect of that forthcoming ban.

1 What is more, neither the Executive Order nor the Emergency Rule grapples with the fact
2 that the *legislature* considered, but has not acted on, a bill to ban flavored vaping products. HB
3 1932, “an act relating to the regulation of vaping products,” was introduced on February 6, 2019.
4 The House Committee on Commerce & Gaming held a public hearing about the bill on February
5 12. And it has remained in committee ever since.²⁸ Given the significant legislative oversight of
6 vaping products generally, and flavored products specifically, the Board of Health’s one-size-
7 fits-all ban is unreasoned and therefore arbitrary and capricious.

8 ***The Emergency Rule Does Not Follow the Evidence.*** Federal health agencies have
9 found the majority of patients with vaping-related lung injuries used vaping products containing
10 THC. At the same time, there is no evidence that nicotine *flavors* themselves are the cause of
11 any the injuries.²⁹ Indeed, on October 17, 2019, the CDC reported that “[t]he latest national and
12 state findings suggest products containing THC, particularly those obtained off the street or from
13 other informal sources (e.g. friends, family members, illicit dealers), are linked to most of the
14 cases and play a major role in the outbreak.”³⁰ And FDA has stated that “[a] majority of the
15 samples tested by states or by the FDA as part of this ongoing investigation have been identified as
16 vaping products containing THC.”³¹ Perhaps that is why the CDC now recommends that people

17 ²⁸ See <https://app.leg.wa.gov/billsummary?BillNumber=1932&Year=2019>.

18 ²⁹ This only underscores the capriciousness of the Emergency Rule. The Rule bans all vaping
19 products that have a “characterizing flavor” aside from tobacco or marijuana flavors. But if there
20 is no evidence that any particular flavor is the cause of injury, the Board’s definitional dance
21 bears no rational relationship to addressing lung injuries. And if the goal of banning
22 “characterizing flavors” is to address youth vaping, then, as discussed above, the Rule is
23 overbroad; and it also would fail to reflect the fact that non-tobacco flavored nicotine vaping
24 products “may be important for encouraging and assisting adults to use e-cigarettes in place of
conventional cigarettes.” (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)). In all events, the Board’s characterizing of youth
vaping as an “emergency” requiring deviation even from normal notice-and-comment procedures
(which would not save the Emergency Rule) runs headlong into the fact that the Board cites
statistics from 2018 when discussing vaping among young adults.

25 ³⁰ Caplow Decl. Ex. 5 (CDC, *Outbreak of Lung Injury Associated with E-Cigarette Use, or*
26 *Vaping* (revised Oct. 17, 2019), [https://www.cdc.gov/tobacco/basic_information/e-](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html)
[cigarettes/severe-lung-disease.html](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html)).

27 ³¹ Caplow Decl. Ex. 6 (FDA, *Lung Illnesses Associated with Use of Vaping Products* (revised

1 should not use vaping products containing THC, but offers no similar recommendation as to
2 nicotine vaping products.³²

3 Moreover, the CDC has implicitly acknowledged that even in the few cases in which
4 patients have *not* reported using THC, the CDC has failed to establish other products (such as
5 nicotine vaping products) as culprits. When reporting about health-agency findings, the CDC has
6 gone out of its way to tell the public that some patients have misled health officials as to what they
7 vaped, perhaps because of THC's legal status.³³ In publicizing the results of investigations in
8 Illinois and Wisconsin, the CDC disclosed that five of the eight Wisconsin patients who initially
9 denied using THC vaping products later were determined to have used them.³⁴

10 Further, considering the existing regulatory structure and the established place of nicotine
11 vaping products in the market, it would be hard to believe that those products were responsible
12 for the recent lung injuries. Nicotine vaping products have been on the market for years, and, as
13 a result of federal regulations, their ingredients have not changed throughout the entirety of the
14 current spate of lung injuries.³⁵ Despite the popularity of such products, and, until recently, their
15 widespread availability since 2009, health officials have identified approximately 1,479 cases of
16 lung disease.³⁶ If federally regulated products were the cause of the disease, the number of
17 patients presumably would be much higher. Moreover, under such a scenario, one also would
18 expect the patient population to mirror the demographics of nicotine-vaping-products users. But

19 _____
20 Oct. 16, 2019), <https://www.fda.gov/news-events/public-health-focus/lung-illnesses-associated-use-vaping-products>).

21 ³² Caplow Decl. Ex. 5 (*Outbreak of Lung Injury Associated with E-Cigarette Use, or Vaping*).

22 ³³ Caplow Decl. Ex. 7 (Isaac Ghinai et al., Morbidity & Mortality Weekly Report, *E-Cigarette*
23 *Product Use, or Vaping, Among Persons with Associated Lung Injury—Illinois & Wisconsin,*
24 *April–September 2019*, CDC, Morbidity & Mortality Weekly Report (Sept. 27, 2019),
<https://www.cdc.gov/mmwr/volumes/68/wr/mm6839e2.htm>).

25 ³⁴ Caplow Decl. Ex. 7 (*E-Cigarette Product Use, or Vaping, Among Persons with Associated*
Lung Injury—Illinois & Wisconsin, April–September 2019).

26 ³⁵ Decl. of Michael Siegel (Oct. 21, 2019), ¶ 11.

27 ³⁶ Caplow Decl. Ex. 5 (*Outbreak of Lung Injury Associated with E-Cigarette Use, or Vaping*).

1 the data shows otherwise: Affected patients are young (with a median age of 19 in one study)
2 and overwhelmingly male.³⁷ Yet nicotine-vaping-product users trend decades older, and only 55
3 percent of them are male.³⁸

4 The Emergency Rule was adopted without due regard for these relevant facts. The
5 limited administrative record reflects that the Board made a hair-trigger decision based on an
6 incomplete investigation—mocking the Governor’s suggestion that Washington would “respond
7 in a comprehensive and evidence-based manner.”³⁹

8 In addition to ignoring the evidence that THC vaping products are the primary (if not
9 exclusive) cause of the lung-injury outbreak, it appears that the Board of Health failed to give
10 sufficient weight to information detailing the deleterious consequences of a vaping-products ban.
11 As discussed above, research has shown that vaping products pose substantially less risk than
12 combustible cigarettes and thus may significantly reduce the public-health harms associated with
13 smoking. And the Emergency Rule likely will promote a black market for vaping products,
14 leading consumers to the very products the CDC and FDA state are strongly linked with the
15 outbreak in lung injuries. This backsliding contradicts the Emergency Rule’s stated goal of
16 promoting public health and preventing disease. And the overbroad Rule’s failure to address
17 these unintended, but readily foreseeable, public-health issues underscores the Rule’s
18 arbitrariness. *See Ctr. for Env’tl. Law & Policy v. Dep’t of Ecology*, 444 P.3d 622, 634 (Wash.
19 Ct. App. 2019) (finding agency rule arbitrary and capricious where the agency considered the
20 rule’s impact on one population while disregarding the rule’s impact on other affected groups).

21 So too does the fact that Washington appears not to have taken any specific measures to
22 address the “informal” THC market at the root of the lung-injury outbreak—either in the
23 Emergency Rule itself or through other mechanisms such as drug-enforcement actions. The
24 result is a regulatory regime that leaves a known cause of the injuries unaddressed,

25 ³⁷ Siegel Decl. ¶ 12.

26 ³⁸ Siegel Decl. ¶ 12.

27 ³⁹ Caplow Decl. Ex. 4 (Executive Order 19-03), at 2.

1 notwithstanding the promulgation of an emergency rule to purportedly combat them. That
2 choice, in the words of *Puget Sound Harvesters Association*, is “willful and unreasoning,” and
3 thus arbitrary and capricious. 157 Wn. App.at 945.

4 **3. The Emergency Rule’s Prohibition on “Offer[ing] for Sale” Flavored**
5 **Vaping Products Violates Free-Speech Guarantees.**

6 By its plain terms, the Emergency Rule prohibits “offer[ing] for sale” any flavored
7 vaping product “by any means in this state.” Consequently, a retailer in Idaho (or any
8 jurisdiction in which VTA has members), where the sale of vaping products is lawful, would
9 nonetheless be barred from advertising those products online (or in print), if the advertising was
10 available in Washington. That is true even if the advertising simply invited Washington
11 residents to purchase flavored vaping products lawfully in an out-of-state retail location. So too
12 would the Emergency Rule bar an out-of-state manufacturer from advertising the superiority of
13 its products without reference to a purchase location. The permutations are numerous and in
14 each instance the restrictions are plainly unconstitutional. A state “may not, under the guise of
15 exercising internal police powers, bar a citizen of another State from disseminating information
16 about an activity that is legal in that State.” *Bigelow v. Virginia*, 421 U.S. 809, 824–25 (1975).
17 The Emergency Rule’s broad ban violates this fundamental constitutional principle.

18 Advertising is a form of commercial speech protected by the First Amendment. *See*
19 *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553 (2001). To determine whether a regulation
20 has intruded on this protection, courts apply the four-part test from *Central Hudson Gas &*
21 *Electric Corp. v. Public Service Commission*:

22 At the outset, we must determine whether the expression is protected by the First
23 Amendment. For commercial speech to come within that provision, [1] it at least
24 must concern lawful activity and not be misleading. Next, we ask whether [2] the
25 asserted governmental interest is substantial. If both inquiries yield positive
answers, we must determine whether [3] the regulation directly advances the
governmental interest asserted, and [4] whether it is not more extensive than is
necessary to serve that interest.

26 447 U.S. 557, 566 (1980); *see also State v. Living Essentials*, 8 Wash. App. 2d 1, 24–25 (2019)
27 (following *Central Hudson*); *see generally id.* at 23–24 (noting “that because Washington case

1 law provides no clear rule for constitutional restrictions on commercial speech we therefore
2 follow the interpretive guidelines under the federal constitution”).

3 Applying the *Central Hudson* factors here, the Emergency Rule’s ban on “offer[ing] for
4 sale” flavored vapor products imposes an unconstitutional restriction on speech.

5 a. The offer for sale of flavored vaping products may concern lawful activity: the
6 sale of those products in states where their sale is permitted. To the extent that a retailer’s “offer
7 for sale” of a flavored vaping product (for example, online) “does not specifically promote a sale
8 to occur in a jurisdiction where it is illegal—it would pass the first step of the *Central Hudson*
9 test.” *Nat’l Assoc. of Tobacco Outlets, Inc. v. City of Worcester*, 851 F. Supp.2d 311, 314–15
10 (D. Mass 2012); *see also Katt v. Dykhouse*, 983 F.2d 690, 695 (6th Cir. 1992); *Wash. Mercantile*
11 *Assoc. v. Williams*, 733 F. 2d 687, 691 (9th Cir. 1984). In *National Association of Tobacco*
12 *Outlets*, although the City of Worcester had banned the sale of certain tobacco-related products,
13 the Court held that “advertisements promoting such sales in the nearby city of Fitchburg (where
14 such sales are apparently lawful) or an advertisement promoting such sales generally, without
15 reference to location, is within the scope of First Amendment protection.” 851 F. Supp. 2d at
16 314–15. The same analysis applies here.

17 b. Washington lacks a substantial interest in preventing all advertising regarding
18 vaping products within its borders. The only conceivable rationale for banning, for example, the
19 online “offer for sale” of vaping products is that it would entice consumers to purchase those
20 products, which Washington deems to be dangerous. But in *Thompson v. Western States*
21 *Medical Center*, the Supreme Court rejected “the notion that the Government has an interest in
22 preventing the dissemination of truthful commercial information in order to prevent members of
23 the public from making bad decisions with the information.” 535 U.S. 357, 374 (2002). And
24 that holding has been applied to find that a locality has no substantial interest in “the protection
25 of adults from tobacco advertising,” *Nat’l Assoc. of Tobacco Outlets*, 851 F. Supp. 2d at 317, a
26 conclusion that applies with equal force to vaping products.

27 c. The Emergency Rule does not directly advance the government interest asserted.

1 Protecting adults from tobacco advertising cannot meet *Central Hudson*'s direct-advancement
2 prong; thus, display bans that restrict advertisements "to prevent adults from purchasing a
3 disfavored product" run afoul of the First Amendment. *Id.* at 318. And even if the Emergency
4 Rule directly advanced a permissible government interest *vis-à-vis* minors, it could not possibly
5 satisfy the final *Central Hudson* factor.

6 d. The Emergency Rule's ban on the "offer for sale" of flavored vaping products is
7 overbroad and thus more excessive than necessary to serve any Washington interest. The ban is
8 not limited to, nor meaningfully directed at, advertising to minors. It instead is a categorical ban
9 on any display of flavored vaping products (even solely to adults) within Washington's borders.
10 It is precisely the type of overbroad prohibition on tobacco advertising that the Supreme Court
11 struck down in *Lorillard*. 533 U.S. at 566–68.

12 Accordingly, the Emergency Rule's ban on "offer[ing] for sale" flavored vaping
13 products flunks *Central Hudson* and runs afoul of federal and state free-speech guarantees.

14 **B. VTA and Baron Enterprises Have a Well-Founded Fear of Immediate**
15 **Invasion of Their Rights.**

16 Enforcement of the Emergency Rule will foreclose VTA's members', including Baron
17 Enterprises', right to conduct business both in Washington and in other jurisdictions. By way of
18 example, and as discussed in more detail below, the Emergency Rule precludes individual vape-
19 shop owners like Baron Enterprises from plying their trade. So too will it prevent out-of-state
20 retailers who may advertise online from exercising their constitutional free-speech rights.

21 **C. VTA and Baron Enterprises Have Suffered and Will Continue to Suffer**
22 **Actual and Substantial Harm Absent Preliminary Relief.**

23 The devastating harm that VTA and Baron Enterprises—and Washington vape shops
24 generally—will suffer is plain from the face of the Emergency Rule. For Washington's nearly
25 \$484 million vapor-products industry, the Rule is an extinction-level event that cannot be
26 repaired *ex post*. See, e.g., *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470,
27 1474 (9th Cir. 1985) ("The threat of being driven out of business is sufficient to establish
irreparable harm."); *Roso Lino Beverage Distribs., Inc. v. Coca Cola Bottling Co. of N.Y. Inc.*,

1 749 F.2d 124, 125–26 (2d Cir. 1984) (“The loss of ... an ongoing business representing many
2 years of effort and the livelihood of its ... owners, constitutes irreparable harm.”) (per curiam);
3 *accord, e.g., Alum. Cooking Utensil Co. v. City of N. Bend*, 210 Or 412, 421, 311 P2d 464 (1957)
4 (enjoining enforcement of anti-soliciting ordinance to prevent plaintiffs from going out of
5 business). The ban on the sale of flavored vaping products in Washington is causing vapor-
6 products retailers across the state to close their doors and order employees to stay home. Each
7 day the ban remains in place will see more closures and further layoffs. And those closures will
8 become permanent if the Court does not enjoin the Emergency Rule—destroying an entire
9 industry, and the livelihoods of those employed by it.

10 For individual vape-shop owners, the unexpected and prolonged loss of their business
11 will yield financial crisis and business ruin. The story of Kimberly Thompson, owner of Baron
12 Enterprises, which owns and operates vape shops in Pierce County, illustrates the irreparable
13 harm being worked by the Emergency Rule. Inspired to help others quit smoking combustible
14 cigarettes, Thompson opened her first store in 2010—which was one of the first vape shops in
15 the country.⁴⁰ At that same, she “began lobbying for thoughtful regulation of the vapor-products
16 industry,” including “mak[ing] vapor products age restricted.”⁴¹ Consistent with that
17 commitment, Thompson has “never received a citation from local, state, or federal authorities.”⁴²

18 Since the Emergency Rule went into effect Thompson has had to close one of her stores;
19 she will have to close another “in the next week if the ban continues.”⁴³ Indeed, before the Rule,
20 that location “typically bro[ught] in \$800 to \$1000 per day”; since the ban, that has plummeted
21 to “\$200 to \$300.”⁴⁴ “That revenue will not cover the cost of the business inventory, or
22

23 ⁴⁰ Decl. of Kimberly Thompson (Oct. 20, 2010), ¶¶ 4–5.

24 ⁴¹ Thompson Decl. ¶ 6.

25 ⁴² Thompson Decl. ¶ 7.

26 ⁴³ Thompson Decl. ¶ 9.

27 ⁴⁴ Thompson Decl. ¶ 9.

1 employee wages.”⁴⁵ Thompson will have to close her final store shortly thereafter and, indeed,
2 she has “already taken steps to begin shutting” it down.⁴⁶ The effect of the Emergency Rule, on
3 Baron Enterprises and vape-shop retailers across Washington, is clear: permanent closure.

4 Thompson’s testimony forecloses any argument by the Board of Health that her
5 business’s extinction is somehow speculative because the Emergency Rule only covers flavored
6 nicotine vaping products. Since she first opened a vapor shop, non-tobacco-flavored products
7 “have accounted for more than 70 percent of [her] business’s profits.”⁴⁷ Without being free to
8 sell flavored nicotine vapor products, Thompson “will be forced to close all three stores
9 permanently because [she] will not be able to maintain sufficient revenue levels to pay [her]
10 leases, much less generate any profit, from sales of only tobacco-flavored vapor products.”⁴⁸

11 Further, for all retailers of vapor products, the Emergency Rule likely will harm the
12 relationships they have formed with customers and the supply chains they have established with
13 vapor product wholesalers. A company’s inability to supply products as advertised can alienate
14 actual and potential customers, meaning a company would “suffer some irreparable harm in the
15 form of loss of client relationships.” *Brinton Bus. Ventures, Inc. v. Searle*, 248 F Supp. 3d 1029,
16 1039 (D. Or. 2017). So too can it push customers to turn to competitors—like cigarette
17 manufacturers—not laboring under the same handicaps. *See, e.g., id.; Stuhlberg Int’l Sales Co.,*
18 *Inc. v. John D. Brush & Co., Inc.*, 240 F. 3d 832, 841 (9th Cir. 2001) (“Evidence of threatened
19 loss of prospective customers or goodwill certainly supports a finding of the possibility of
20 irreparable harm.”). Indeed, Thompson is worried about the Emergency Rule’s effect on the
21 health and safety of her customers for this precise reason: “many” of her customers have told
22 her that “once the flavor ban is enforced and flavors are no longer available, they intend to go
23

24 ⁴⁵ Thompson Decl. ¶ 9.

25 ⁴⁶ Thompson Decl. ¶ 9.

26 ⁴⁷ Thompson Decl. ¶ 8.

27 ⁴⁸ Thompson Decl. ¶ 8.

1 back to smoking combustible cigarettes.”⁴⁹

2 Swift judicial action is needed to prevent irreparable harm to VTA and its members,
3 including Baron Enterprises, along with vapor-products retailers across Washington, their
4 employees, and the customers who rely on their products.

5 * * * * *

6 A temporary restraining order is appropriate based on the showing above. At least some
7 courts, however, have suggested “that because injunctions are addressed to the court’s equitable
8 power, the court must examine the above three preliminary injunction requirements in light of
9 competing equities.” *Nw. Gas Ass’n*, 141 Wash. App.at 122. That analysis does not change
10 either the necessity or appropriateness of preliminary relief here.

11 As discussed above, VTA and Baron Enterprises face irreparable harm to their businesses
12 absent swift injunctive relief. That relief will permit Washington vapor-products retailers to
13 remain in operation and preserve legitimate economic expectations regarding their businesses.

14 The risk of harm to the Board of Health, on the other hand, is speculative and limited.
15 The Board will not suffer any appreciable harm if the Court enjoins the Emergency Rule. The
16 only harm they may endure would be the *de minimis* cost of communicating with the public that
17 vaping products may continue to be sold in Washington, pending a determination of the merits of
18 this action. The restraining order would have no bearing on their ability to develop an
19 appropriate response to the concerns purportedly animating the Emergency Rule, such as by
20 participating in the normal legislative process used to enact policy measures.

21 The public, for its part, stands to benefit from a restraining order. The Emergency Rule
22 punishes Washington consumers, vaping-store employees, and retailers by bringing the state’s
23 \$484 million industry to a sudden stop. Moreover, the public has an interest in lifting the
24 Emergency Rule’s ban to ensure access to regulated vapor products, rather than the more
25 dangerous alternative of combustible cigarettes or black-market vaping products.

26 Petitioners understand the need for, and support, further efforts to study the lung injury

27 ⁴⁹ Thompson Decl.¶ 14.

1 that evidence indicates is caused by THC-based vaping products, including those on the black
2 market. But the Emergency Rule sweeps far too broadly to accomplish that goal without
3 creating deleterious and unintended consequences. Any perceived benefit in outlawing flavored
4 vaping products is readily outweighed by the unintended public health risks such a ban would
5 create, and the significant and irreparable harm to the many thousands of individuals whose
6 livelihoods depend on the industry.

7 V. CONCLUSION

8 For the foregoing reasons, VTA and Baron Enterprises respectfully request that the Court
9 restrain and enjoin the Emergency Rule, and the Board of Health and Department of Health's
10 enforcement of it.

11
12
13 DATED this 21st day of October, 2019.

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