

IN THE COURT OF APPEALS OF THE STATE OF OREGON

**VAPOR TECHNOLOGY
ASSOCIATION,**

and

**VAPE CRUSADERS PREMIUM
E-LIQUID, LLC,**

and

SMOKELESS SOLUTIONS, LLC,

Petitioners,

vs.

**OREGON HEALTH
AUTHORITY,**

Respondent.

CA No. A172417

**MOTION-OTHER
MOTION TO STAY ENFORCEMENT
PENDING JUDICIAL REVIEW**

**EMERGENCY MOTION UNDER
ORAP 7.35**

ORAL ARGUMENT REQUESTED

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

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October 2019

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ORAP 7.35 STATEMENT

This motion is brought on an emergency basis. Unless the Court acts to stay enforcement of OAR 330-015-1000, Vapor Technology Association, Smokeless Solutions, LLC, and Vape Crusaders Premium E-Liquid, LLC, along with numerous Oregon businesses and residents, will suffer severe and irreparable harm long before the rule can be subjected to full judicial review pursuant to ORS 183.400. Smokeless Solutions and Vape Crusaders anticipate that unless stayed pending judicial review, OAR 330-015-1000 will force the permanent closure of their businesses within the next two weeks.

Petitioners have notified opposing counsel and provided a courtesy copy of this motion via email, with service to follow by U.S. Mail.

MOTION

Vapor Technology Association, Smokeless Solutions, LLC and Vape Crusaders Premium E-Liquid, LLC have sought judicial review of OAR 330-015-1000, a temporary administrative rule promulgated by the Oregon Health Authority that, among other things, prohibits the sale of “flavored vaping products.” In conjunction with that ORS 183.400 petition, and pursuant to the Court’s inherent authority, petitioners move for an order staying enforcement of the challenged rule pending judicial review, on grounds that petitioners will suffer irreparable harm absent a stay and can demonstrate (at the very least) colorable error with the rule.

This motion is supported by the accompanying Memorandum in Support and the Declaration of Elizabeth A. Weber, co-owner of Smokeless Solutions and Vape Crusaders.

MEMORANDUM IN SUPPORT

Vapor Technology Association, an industry trade group, and Oregon vape-shop owners and vapor-product manufacturers Smokeless Solutions, LLC and Vape Crusaders Premium E-Liquid, LLC bring this motion to stay the enforcement of Oregon Health Authority temporary administrative rule OAR 330-015-1000, which establishes a “prohibition on flavored vaping products” (the “Vaping Prohibition”).

The Vaping Prohibition, assertedly enacted in response to a lung-disease outbreak that the Centers for Disease Control & Prevention principally attribute to THC-based¹ vaping products, makes it unlawful to sell or offer for sale any flavored nicotine vaping products—a popular (and substantially safer) alternative to traditional cigarettes. The Prohibition, however, is both under-inclusive and over-inclusive. It is under-inclusive because it does not attempt to address what the “latest national and state findings” show: “products containing

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

THC, particularly those obtained off the street or from other informal sources . . . are linked to most of the cases [of lung disease] and play a major role in the outbreak.”² (Petitioners here do not sell THC products.) And it is over-inclusive because although OHA cites concerns about underage use of vaping products, it contains no provisions relating to minors and instead is a blanket ban on flavored vaping products. These defects alone render the Vaping Prohibition unsupportable, although the Court need not wade into these issues to stay enforcement.

Instead, the Prohibition is invalid because OHA lacked a statutory basis to promulgate it. *None* of the statutes that it cited as authority for the Prohibition grant OHA the power to engage in the broad policymaking it undertook here.

The Vaping Prohibition will produce the unrecoverable closure of vapor-products stores throughout Oregon. Unless stayed in anticipation of judicial review, it will destroy the nearly \$216 million nicotine-vapor-products industry in Oregon, harming the many law-abiding retailers, manufacturers, and distributors of vapor products located in the State—like petitioners Smokeless Solutions and Vape Crusaders. It also will heighten the health risks to the

² CDC, *Outbreak of Lung Injury Associated with E-Cigarette Use, or Vaping*, (updated Oct. 11, 2019 at 1:00 pm.), https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html.

public, both by eliminating a safer alternative to smoking and by forcing those who wish to use vapor products to obtain them “from . . . informal sources”—the very genesis of the health outbreak OHA cited to justify its ban.

The Court should act quickly to stay the Vaping Prohibition pending full judicial review.

ARGUMENT

I. The Court may stay enforcement of a challenged rule.

The Court of Appeals has the “inherent authority” to stay enforcement of an administrative rule pending judicial review of that rule’s validity. *Nw. Title Loans, LLC v. Div of Fin. And Corp. Secs.*, 180 Or App 1, 12, 42 P3d 313 (2002);³ *see also Blair v. Blair*, 199 Or 273, 287, 247 P2d 883 (1953); *Helms Groover & Dubber Co. v. Copenhagen*, 93 Or 410, 416, 177 P 935 (1919); *Armatta v. Kitzhaber*, 149 Or App. 498, 501, 943 P2d 634 (1997).

A showing of irreparable harm is required for a stay. *Nw. Title Loans*, 180 Or App at 13. The Court of Appeals also has suggested (albeit in *dicta*) that a petitioner may need to establish a colorable claim of error as well. *Id.* at 13 n.7 (discussing the criteria for a stay but declining to decide the elements because

³ The Court of Appeals later withdrew its *Northwestern Title Loans* decision by unpublished order because the underlying controversy was ultimately found to be moot. *See Lovelace v. Board of Parole*, 183 Or App 283, 288 n.3, 51 P3d 1269 (2002). The Court, however, has continued to cite the portions of the *Northwestern Title Loans* opinion “that remain persuasive.” *Id.*

there was no showing of irreparable harm). A “colorable claim” is “something less than a showing that the petitioner is reasonably likely to prevail on appeal.” *Evans v. OSP*, 87 Or App 514, 525–26, 743 P2d 168 (1987); *see also State ex rel Juv. Dept. v. Balderas*, 172 Or App 223, 229, 18 P3d 434 (2001) (describing “seemingly valid, genuine, or plausible [claim] of error or substantial and nonfrivolous [claim] of error.”).

Whether a stay requires a showing of irreparable harm alone, or irreparable harm along with a colorable claim of error, the result is the same: Petitioners clear both hurdles with room to spare.

II. Petitioners will suffer irreparable harm absent a stay.

The devastating harm that petitioners—and Oregon vape shops generally—will suffer is plain from the face of the Vaping Prohibition. For Oregon’s \$216 million vapor-products industry, the Prohibition is an extinction-level event that cannot be repaired *ex post*. *See Alum. Cooking Utensil Co. v. City of No. Bend*, 210 Or 412, 421, 311 P2d 464 (1957) (enjoining enforcement of anti-soliciting ordinance to prevent plaintiffs from going out of business). The ban on the sale of flavored vaping products in Oregon is causing vapor-products retailers across the state to close their doors and order employees to stay home. Each day the ban remains in place will see more closures and further layoffs. And those closures will become permanent if the Vaping Prohibition is

not stayed—destroying an entire industry, and the livelihoods of those employed by it. The loss of business revenues and goodwill constitutes irreparable harm. *See Winslow v. Fleischner*, 110 Or 554, 563, 223 P 922 (1924) (noting that an injury “is irreparable when it cannot be adequately compensated in damages, or when there exists no certain pecuniary standard for the measurement of damages due to the nature of the injury itself”).

For individual vape-shop owners, the unexpected and prolonged loss of their business will yield financial crisis and business ruin. The story of Elizabeth Weber, co-owner of Smokeless Solutions, which owns two vapor products stores in Oregon, and Vape Crusaders, is illustrative of the irreparable harm being worked by the Vaping Prohibition. Inspired to help others quit smoking combustible cigarettes, her husband opened his first store in Roseburg, Oregon, in 2014.⁴ Weber became co-owner of the business in June 2015.⁵ “Before the ban,” Weber’s shops “typically had revenues of \$1,900 to \$2,500 per day”; the day the ban went into effect revenue plummeted to “only \$600.”⁶ “That revenue will not cover the cost of the business inventory or employee wages”; indeed, Weber’s “labor costs alone were greater than what [she]

⁴ Exhibit 1 (Decl. of Elizabeth A. Weber (October 16, 2019)) ¶¶ 4–5.

⁵ Weber Decl. ¶ 4.

⁶ Weber Decl. ¶ 10.

grossed for the day in revenues.”⁷

The effect of the Vaping Prohibition, on Smokeless Solutions, Vape Crusaders, and vape shop retailers across Oregon, is clear: permanent closure. As Weber states, she “will have to close [her] stores in the next two weeks if the ban continues.”⁸ The businesses will lose their leases, which, if they are unable to escape them, will cost \$38,000 in savings that Weber and her husband do not have.⁹ Put simply, “[i]f the ban remains in place, [Weber] will be forced to close [her] stores permanently because [she] will not make sufficient revenue to pay [the] leases, much less generate any profit, from sales of tobacco-flavored vapor products only.”¹⁰

Weber’s testimony forecloses any argument by OHA that her business’ extinction is somehow speculative because the Vaping Prohibition only covers flavored nicotine vaping products. Since her first vapor shop opened, non-tobacco-flavored products “have accounted for more than 75 percent of [her] gross revenue.”¹¹ Without being free to sell flavored nicotine vapor products,

⁷ *Id.*

⁸ *Id.*

⁹ Weber Decl. ¶ 11.

¹⁰ Weber Decl. ¶ 8.

¹¹ *Id.*

Weber's stores will close.

The threatened extinction of vapor-product shops as a result of the Vaping Prohibition detailed by Ms. Weber—which will play out across the hundreds of vapor products shops across Oregon—constitutes irreparable harm. *See Alum. Cooking Utensil Co.*, 210 Or at 21 (“In the contemplation of the law, the humble business possessed by a . . . salesman is as much entitled to the protecting arm of a court of equity as the impressive establishments found in a metropolis.”); *see also Von Weidlein*, 16 Or App at 88 (petitioners’ affidavit declaring likelihood of bankruptcy if state order was not stayed demonstrated a “substantial showing of high probability of irreparable injury”); 11A Charles A. Wright et al., *Federal Practice & Procedure* § 2948.1 (3d ed.) (“[W]hen the potential economic loss is so great as to threaten the existence of the moving party's business, then a preliminary injunction may be granted. . . .”).

Further, for all retailers of vapor products, the Vaping Prohibition likely will harm the relationships they have formed with customers and the supply chains they have established with vapor product wholesalers. A company’s inability to supply products as advertised can alienate actual and potential customers, meaning a company would “suffer some irreparable harm in the form of loss of client relationships.” *Brinton Bus. Ventures, Inc. v. Searle*, 248 F Supp 3d 1029, 1039 (D Or 2017). So too can it push customers to turn to

competitors—like cigarette manufacturers—not laboring under the same handicaps. *See, e.g., id.; Stuhlbarg Int’l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F3d 832, 841 (9th Cir 2001) (“Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm.”). Indeed, Weber is worried about the Vaping Prohibition’s “effect on the health and safety of [her] customers” for this precise reason: some have told her “they will return to smoking combustible cigarettes,” while others “have stated that they will turn to the black market to seek out e-cigarettes.”¹²

Swift judicial action is needed to prevent irreparable harm to petitioners Smokeless Solutions and Vape Crusaders, along with vapor products retailers across Oregon, their employees, and the customers who rely on their products.

III. Petitioners can readily establish a colorable claim of error.

The showing of irreparable harm should be sufficient to obtain a stay. But even if the Court were to consider whether petitioners have raised a colorable claim of error with the Vaping Prohibition, that is no impediment to relief. The Prohibitions is invalid because, among other things, it exceeds OHA’s statutory authority. *See* ORS 183.400(4) (exceeding statutory authority a ground for

¹² Weber Decl. ¶ 15.

facial challenge to a rule).¹³ This infirmity is dispositive—to say nothing of a “colorable” claim of error sufficient for a stay. *Von Weidlein*, 16 Or App at 88–89 (granting stay).

Perhaps unnecessary to say, but an agency only can exercise the power granted to it; and any rule the agency adopts cannot exceed that authority. *See Oregon Ass’n of Acupuncture and Oriental Medicine v. Board of Chiropractors*, 260 Or App 676, 678, 320 P3d 575 (2014). The authority an agency has must be either “expressed or implied in the particular law being administered.” *Id.* (quoting *Planned Parenthood Assn. v. Dept. of Human Res.*, 297 Or 562, 565, 687 P2d 785 (1984)); *see also SAIF v. Shipley*, 326 Or 557, 561, 955 P2d 244 (1998) (holding that “an agency has only those powers that the legislature grants and cannot exercise authority that it does not have”).

OHA has identified five statutes as its authority to enact the Vaping Prohibition: ORS 183.360, ORS 413.042, ORS 431.110, ORS 431.141, and

¹³ There are additional defects in the Vaping Prohibition, although they are not the subject of this motion. For example, the Prohibition is arbitrary and capricious because it was enacted without due regard to relevant facts and circumstances, and because it is both under- and over-inclusive in light of its stated purpose.

ORS 431A.010. *See* OAR 333-015-1000 (listing under “Statutory/Other Authority”). *None* grant OHA the power to enact the Prohibition¹⁴:

ORS 183.360: This statute does not delegate any powers to OHA. Rather, it mandates that the Secretary of State “compile, index, and publish all rules adopted by each agency.” ORS 183.360(1). It also provides guidance as to the publication schedule and formatting. ORS 183.360(1)–(3). In short, this statute contemplates the *publication* of enacted administrative rules; it does not authorize the *enactment* of rules.

ORS 413.042: Although this statute delegates rule-making authority to OHA,¹⁵ the delegation does not provide it with authority to enact *any* administrative rules it so chooses. Rather, OHA’s rule-making power is limited to “rules necessary for the administration of the laws that the Oregon Health Authority is charged with administering.” ORS 412.042. Thus, this statute alone does not provide the requisite delegation for OHA to enact the Vaping Prohibition. Instead, OHA would have to also identify the specific law(s) that it

¹⁴ OHA also cites the Governor’s Executive Order addressing vaping as “authority” for the Vaping Production. That Order, of course, is not “statutory authority” for an administrative rule. *See* ORS 183.400(4)(b).

¹⁵ ORS 413.042 provides: “In accordance with applicable provisions of ORS chapter 183, the Director of the Oregon Health Authority may adopt rules necessary for the administration of the laws that the Oregon Health Authority is charged with administering.”

is charged with administering, for which the Vaping Prohibition is necessary. *See, e.g., Adamson v. Oregon Health Authority*, 289 Or App 501, 502–05, 412 P3d 1193 (2017) (recognizing that ORS 413.042 provides rulemaking authority “to carry out the statutes it is charged with administering” and reviewing the *specific* legislative grants governing coordinated care organizations to assess challenged rule). The remaining statutes cited by OHA do not satisfy that requirement.

ORS 431.110: This statute delineates the “general powers and duties of [the] Oregon Health Authority.”¹⁶ Most of the express powers have no relation to the Temporary Rule:

- ensuring the statewide and local application of the foundational capabilities established under ORS 431.131;
- administering the foundational programs established under ORS 431.141;
- overseeing and providing support for the implementation of the foundational programs established under ORS 431.141;
- conducting sanitary surveys about and investigations on the causes and prevent of diseases;

¹⁶ A companion statute ORS 431.115 provides additional instruction as to how OHA is to “fulfill[] its duties under ORS 431.110.” The Oregon Legislature provides a lengthy list of the particular steps OHA must take to fulfill its duties, but notably none include plenary rule-making authority.

- investigating in connection with annexations proposed by cities;
- having the authority to send a representative of the authority to any part of the state;
- having full power in the control of all communicable diseases; and
- publishing and distributing to the public information related to the functions and duties of the authority.

See ORS 431.110(2)–(9).

One provision, ORS 431.110(1), 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.” “Supervision,” of course, does not mean “power to enact regulations.” If the Legislature intended that OHA have the power to enact regulations relating to “of all matters relating to the preservation of life and health of the people of the state,” the Legislature would have said so. Instead, the Legislature provided a more constrained rule-making authority in ORS 413.042—limited to promulgating rules “necessary for the administration of the laws that the Oregon Health Authority is charged with administering.” *See generally See Oregon Newspaper Publishers Ass’n v. Peterson*, 244 Or 116, 123, 415 P2d 21, 24 (1966) (“In the absence of a statute which grants a presumption of validity to administrative regulations, an administrative agency must, when its rule-making power is challenged, show that its regulation falls

within a *clearly defined* statutory grant of authority. The reason behind this rule is that the people, by adopting the state constitution, conferred upon the Legislative Assembly the power to legislate. Therefore this power is not by implication to be delegated to nonelective officers.” (citations omitted) (emphasis added)).

Were ORS 431.110(1) a valid statutory basis for the Vaping Prohibition, it would mean the Legislature completely (and impermissibly) delegated away its own legislative power—and did so *sub silentio*. So too would it mean that OHA, under the standard of enacting rules related to the “health of the people of the state,” could ban any product it believed created a public-health issue. A few come readily to mind: non-electric vehicles (childhood asthma), aluminum foil (Alzheimer’s), coffee (cysts and gout), cell phones (brain cancer), alcohol (liver disease), salt (blood pressure), butter (stroke and heart attack), and margarine (heart disease). And it would permit OHA to make those judgments through temporary administrative rules where the safeguards are limited. Nothing in ORS 431.110 (or any of the statutes OHA has cited) contemplates that broad grant of executive policymaking.

The Supreme Court of Oregon concurs. In *Crane v. School District No. 14 of Tillamook County*, 95 Or 644, 188 P. 712 (1920) (en banc), the Court considered whether the Oregon public-health department had the power to close

schools to battle an influenza epidemic, given its “general supervision of the interests of the health and life of citizens” and its power to enact quarantine regulations. *Id.* at 653 (internal quotation marks omitted). The Court said no, and its reasoning is worth quoting at some length:

Although the state board is given ‘general supervision of the interests of the health and life of the citizens of the state,’ that provision should not be construed to mean that it alone has power to close the public schools of the state. Such authority would be very broad and farreaching, and would have to be read into the statute by construction. If it had been the intent of the Legislature to confer such a vast power upon the state board of health, it should have used language far more specific and certain than that appearing in the sections quoted. In every school district in the state there are three or more directors, of more or less prominence, elected by the people, who are in close and active touch with conditions in their respective district, and who have general charge and supervision of the schools.

Id. at 644. So too with the Vaping Prohibition.

ORS 431.141: This statute authorizes OHA to establish “foundational programs,” ORS 431.141, which are public health programs that are necessary to assess, protect, or improve the health of the residents of this state, ORS 431.0003(2). The Vaping Prohibition does not purport to establish such a “foundational program.”

ORS 431A.010: This statute permits OHA to “enforce public health laws.” It therefore is not a delegation to *create* new public-health rules

generally, or the Vaping Prohibition specifically. Instead, it provides enforcement powers with respect to other statutes governing public health.

Were there any doubt that OHA lacked the statutory basis to promulgate the Vaping Prohibition, the Governor's Executive Order resolves it. That Order directed the Authority to "develop *legislative* proposals" to "*clarify and expand* OHA's authority to take action when a harm or risk to the public's health is present." Executive Order No. 19-09 (1)(g) (emphases added).¹⁷ One imagines the Governor would not have told OHA to "expand" its powers if she simply could have pointed OHA to an existing statute giving it the authority to promulgate the Vaping Prohibition. And it is the legislature, not the executive, that can expand (or contract) an agency's authority.

CONCLUSION

"The tendency of administrators to expand the scope of their operations is perhaps as natural as nature's well-known abhorrence of a vacuum. But no matter how highly motivated it may be, the tendency to make law without a clear direction to do so must be curbed by the overriding constitutional requirement that substantial changes in the law be made solely by the Legislative Assembly, or by the people." *Oregon Newspaper Publishers Ass'n*, 244 Or at 123–24. The Vaping Prohibition, no matter how well-intentioned it

¹⁷ A copy of Executive Order No. 19-09 is attached as Exhibit 2.

may be, effects just such a “substantial change” in the law without the requisite statutory authority to do so. And notwithstanding the fact that OHA has labeled the Prohibition a “temporary” measure, it will cause severe and *permanent* harm to vape shop owners across Oregon, including Smokeless Solutions and Vape Crusaders, long before it can be subjected to full judicial review by the Court.

Accordingly, the Court should grant the motion to stay.

DATED this 16th day of October 2019

Respectfully submitted,

/s David H. Angeli

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CERTIFICATE OF SERVICE

I certify that on October 16th, 2019, I served a true copy of this

MOTION TO STAY ENFORCEMENT PENDING JUDICIAL REVIEW

on the following parties:

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Exhibit 1

IN THE COURT OF APPEALS OF THE STATE OF OREGON

**VAPOR TECHNOLOGY
ASSOCIATION,**

and

**VAPE CRUSADERS PREMIUM E-
LIQUID, LLC,**

and

SMOKELESS SOLUTIONS, LLC,

Petitioners,

vs.

**OREGON DEPARTMENT OF
HEALTH,**

Respondent.

CA No. _____

DECLARATION OF ELIZABETH AMBER WEBER

I, Elizabeth Amber Weber, do hereby declare as follows:

1. I am over the age of 18 years and have personal knowledge of the facts set forth below such that I would be competent to testify as to the same if called.
2. I am the co-owner of Vape Crusaders, an Oregon corporation that sells e-liquids, and Smokeless Solutions, an Oregon limited liability corporation that owns and operates two vape shops located in Roseburg, Oregon. One of my stores is located at 1058 W. Harvard Avenue, Roseburg, Oregon 97471. Both Smokeless Solutions and Vape Crusaders are members of the Vapor Technology Association.
3. I am submitting this declaration in support of the Plaintiffs' request for an immediate injunction against the state-wide emergency ban on manufacturing and selling non-tobacco-flavored e-liquids.

4. My husband founded our business in September 2014. We got married in March 2015 and I became a co-owner in June 2015. Our two vape shops are brick-and-mortar stores where we sell primarily flavored vapor products. We also conduct online sales through our website, selling our products to both in-state and out-of-state consumers. None of our products contain THC.

5. We founded our business to provide others with a pathway to quit smoking combustible cigarettes. My husband was a manager at a grocery store before he started the business. He was a chain smoker and had tried multiple ways of quitting. All were unsuccessful. After seeing an advertisement for e-cigarettes, he tried to purchase some but had to drive over an hour to find available e-cigarettes. When he tried e-cigarettes, he was unimpressed with the products on the market. In opening Vape Crusaders, a manufacturer of e-liquids, his goal was to inspire others to switch from combustible cigarettes to e-cigarettes. After having great success with quitting smoking, my husband opened our first Smokeless Solutions store. We have now expanded to multiple locations, where we continue in our mission to help others stop smoking combustible cigarettes.

6. We are committed to restricting youth vaping and abiding by the state's age restrictions on youth vaping. To ensure that our stores comply with age restrictions on the sale of vaping products to those under 21 years of age, we require all of our employees to go through training. Anyone who walks through our doors must show their ID, unless they visibly qualify as a senior citizen. We also have created an incentive for our employees to be compliant with state and federal regulations. Employees who fail our "secret shops"—age-restriction enforcers masquerading as legitimate customers—are immediately terminated. Employees who pass "secret shops" immediately receive \$100. As a result of this policy, we have a 100 percent

success rate during “secret shops.” We have successfully passed all “sting operations” by law enforcement to attempt to get us to sell to individuals who are underage. We have never received a citation from local, state, or federal authorities.

7. Encouraging smokers to quit using combustible cigarettes by trying vaping products is not only our passion, but also our sole source of income. Now, my business faces with economic ruin and my husband and I face personal financial disaster as a result of Oregon’s ban on non-tobacco-flavored vapor products.

8. Since we first opened our doors, non-tobacco-flavored e-liquids have made up 99 percent of our e-liquid inventory, and have accounted for more than 75 percent of our gross revenue. If the ban remains in place, we will be forced to close our stores permanently because we will not make sufficient revenue to pay our leases, much less generate any profit, from sales of tobacco-flavored vapor products only.

9. As a majority of our online sales are in-state sales, we will not produce enough revenue from online out-of-state sales to sufficiently cover the loss from in-state revenues.

10. We will have to close our stores in the next two weeks if the ban continues. Before the ban, we typically had revenues of \$1,900 to \$2,500 per day. On October 15, the first day of the ban, we brought in only \$600. That revenue will not cover the cost of the business inventory or employee wages. Our labor costs alone were greater than what we grossed for the day in revenues.

11. If our stores close, we will also not have the ability to pay for our store leases. If we are not able to break our leases, we will owe the remaining costs on these leases. One of our leases has 18 months remaining and costs us \$1,500 per month. The other lease has 11 months

remaining on it and costs us \$1,000 per month. Combined, our leases will cost us more than \$38,000. We do not have savings to cover that cost.

12. As part of the process of shutting our shops, we will be forced to lay off our 7 employees. These employees had worked in my stores since as early as 2015. If the ban continues, we will have to lay off these employees within the next two weeks.

13. In addition to closing my operations, we are left with over \$133,000 worth of non-tobacco-flavored e-liquid inventory in our stores. With the ban in place, we will not be able to sell this inventory.

14. We were also in the process of purchasing a building for an additional storefront, but have had to cancel those plans.

15. More than even my own economic outlook, I worry about the ban's effect on the health and safety of my customers. Some of my customers have told me that they will return to smoking combustible cigarettes. Other customers 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, I am concerned for the safety of these customers.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

Dated: October 16, 2019


Elizabeth Amber Weber

Exhibit 2



EXECUTIVE ORDER NO. 19-09

DIRECTING STATE AGENCIES TO TAKE IMMEDIATE ACTION TO ADDRESS THE VAPING PUBLIC HEALTH CRISIS

WHEREAS, it is crucial the State take actions necessary to protect the health and safety of Oregonians, especially Oregon's youth; and

WHEREAS, in recent years Oregon has experienced a dramatic increase in the use of vaping products, including e-cigarettes and vape pens, through which users inhale a vapor or aerosol that can contain nicotine, tetrahydrocannabinol (THC), flavor, and other additives or chemicals; and

WHEREAS, in 2015 the Oregon Legislature enacted House Bill 2546, which incorporated inhalant delivery systems—including vaping products that deliver nicotine or cannabinoids—into the state's tobacco regulatory structure; and

WHEREAS, despite Oregon laws that ban sales of inhalant delivery systems to youth under 21 years of age, flavored nicotine vaping products and advertisements for those products have contributed to a significant increase in youth vaping—for example, among 11th graders in Oregon, use of e-cigarette products increased from 13 percent to 23 percent from 2017 to 2019; and

WHEREAS, data released by the U.S. Centers for Disease Control and Prevention (CDC) and the U.S. Food and Drug Administration (FDA) last year show a rapid increase in youth e-cigarette use, with one in five youth using e-cigarettes in 2018—an “epidemic” that requires “historic action”; and

WHEREAS, nationally there is a vaping public health crisis, with an alarming outbreak in recent months of lung injuries among previously healthy individuals who have used vaping products; and

WHEREAS, according to the CDC, as of October 1, 2019, there have been more than 1,000 confirmed and probable vaping-related lung injury cases and 18 deaths nationally, with eight vaping-relating illnesses and two deaths in Oregon; all patients have reported a history of using vaping products; and

WHEREAS, products from state-licensed retail stores have been tied to vaping-associated lung injuries in Oregon; and

WHEREAS, many vaping-related lung injury cases involve younger users, with 16 percent of the cases nationally involving patients under 18 years old, and 22 percent involving individuals who are between 18 and 21 years old; and



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WHEREAS, the FDA and CDC are investigating the causes of vaping-related illnesses and deaths, have not yet determined specific causes, but recently advised consumers to cease their use of vaping products until more is known; and

WHEREAS, while the FDA recently reported it would ban flavored vaping products, it has not taken steps to protect the public from these products; and

WHEREAS, the Oregon Health Authority has issued a public health advisory, warning all Oregonians not to use vaping products or e-cigarettes, in light of the nationwide and local outbreak of vaping-associated lung injuries and deaths; and

WHEREAS, it is imperative for the State to take immediate action in an evidence-based manner, to protect Oregonians, particularly Oregon's youth, from the harms associated with vaping products;

NOW, THEREFORE, IT IS HEREBY DIRECTED AND ORDERED:

1. Agency Action: The Oregon Health Authority (OHA) and the Oregon Liquor Control Commission (OLCC) shall adopt rules and take any action necessary to protect Oregonians, particularly Oregon's youth, from the ongoing vaping public health crisis, to the full extent allowed by law. Such action shall include:
 - a. *Ban on flavored vaping products*. OHA and OLCC are directed to immediately adopt emergency rules, effective for 180 days, banning the sale of all flavored vaping products.
 - b. *Ban on identified causes*. As sources causing or contributing to vaping-associated lung injuries or death are identified in an evidence-based manner in the weeks and months ahead, OHA and OLCC are directed to take immediate action and adopt additional emergency rules necessary to ban the sale of products containing those specific sources.
 - c. *Testing, warnings, and disclosures*. Within 90 days of this Executive Order, OHA and OLCC shall develop plans for consumer warnings (including displays of the health risks of vaping in all licensed retailers of THC and non-THC vaping products), ingredient



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disclosures, testing, and other similar actions, to ensure that consumers are aware of the health effects of vaping products.

- d. *Provider reporting.* OHA is directed to adopt rules requiring providers to report all cases of vaping-associated lung injuries.
 - e. *Access to FDA-approved cessation methods.* OHA and the Department of Consumer and Business Services are directed to work with Coordinated Care Organizations (CCOs), local public health, and commercial health insurers to identify and remediate barriers to obtaining cessation supports and services.
 - f. *Statewide Prevention and Education Campaign.* OHA, in collaboration with OLCC, is directed to establish a statewide prevention and education campaign aimed at discouraging the use of vaping products.
 - g. *Legislation.* OHA and OLCC are directed to develop legislative proposals to:
 - i. Ban all flavored vaping products permanently, including those containing nicotine or THC;
 - ii. Disclose all ingredients in vaping products to consumers;
 - iii. Increase the regulatory oversight of vaping products; and
 - iv. Clarify and expand OHA's authority to take action when a harm or risk to the public's health is present.
2. Workgroup Recommendations: The Governor's Vaping Public Health Workgroup is hereby established, and will advise the Governor and state agencies regarding Oregon's vaping public health crisis, and actions taken pursuant to this Executive Order. The workgroup will be convened by the Governor's Office and shall include, but is not limited to, individuals with expertise in public health and pulmonology, representatives from business, and agency directors from OHA and OLCC. The workgroup shall review evidence regarding the causes and effects of vaping-related lung injuries and deaths, and make policy recommendations that can be implemented by



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the Legislature, state agencies, and other state and local authorities. The workgroup shall submit recommendations to the Governor no later than June 1, 2020.

3. This Executive Order shall be effective until December 31, 2020, at which time it shall expire unless extended by the Governor.

Done at Salem, Oregon, this 4th day of October, 2019.

A handwritten signature in black ink that reads "Kate Brown".

Kate Brown
GOVERNOR

ATTEST:

A handwritten signature in blue ink that reads "Bev Clarno".

Bev Clarno
SECRETARY OF STATE

