

FILED  
Court of Appeals  
Division II  
State of Washington  
1/13/2020 1:47 PM  
NO. 54358-3-II  
(THURSTON COUNTY No. 19-2-05196-34)

---

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

---

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

*Plaintiffs/Petitioners,*

v.

WASHINGTON STATE BOARD OF HEALTH;  
STATE OF WASHINGTON DEPARTMENT OF HEALTH

*Defendants/Respondents.*

---

**PETITIONERS' OPENING BRIEF**

---

**DAVIS WRIGHT TREMAINE LLP**  
Steven P. Caplow (WSBA #19843)  
920 Fifth Avenue, Suite 3300  
Seattle, WA 98104  
Telephone: (206) 622-3150

**WILLIAMS & CONNOLLY LLP**  
David Randall J. Riskin (*pro hac vice*)  
725 Twelfth St., N.W.  
Washington, DC 20005  
Telephone: (202) 434-5000

*Attorneys for Vapor Technology  
Association and Baron Enterprises,  
LLC*

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ASSIGNMENTS OF ERROR..... 3

III. STATEMENT OF THE CASE..... 3

IV. SUMMARY OF THE ARGUMENT ..... 11

V. ARGUMENT ..... 13

THE VAPING BAN EXCEEDS THE BOARD’S STATUTORY  
AUTHORITY UNDER RCW 43.20.050(2)(f)..... 13

    A. The Legislature Intended that the Board May  
        Regulate Only Diseases Like Food- and Vector-  
        Borne Illnesses. .... 15

    B. The Vaping Ban Falls Outside the Disease Clause..... 24

    C. RCW 43.20.050(2)(f)’s “Sanitary-Matters” Clause  
        Does Not Authorize the Vaping Ban. .... 31

VI. CONCLUSION..... 34

## TABLE OF AUTHORITIES

### CASES

<i>Ali v. Federal Bureau of Prisons</i> , 552 U.S. 214 (2008).....	20
<i>Brower v. State</i> , 137 Wn.2d 44, 969 P.2d 42 (1998).....	22
<i>Cockle v. Department of Labor &amp; Industry</i> , 142 Wn.2d 801, 16 P.3d 583 (2001).....	18
<i>Dean v. McFarland</i> , 81 Wn.2d 215, 500 P.2d 1244 (1972).....	17
<i>Department of Corrections v. McKee</i> , 199 Wn. App. 635, 399 P.3d 1187 (2017).....	14
<i>Department of Ecology v. Campbell &amp; Gwinn, L.L.C.</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	15, 18, 19
<i>Diversified Investment Partnership v. Department of Social &amp; Health Services</i> , 113 Wn.2d 19, 775 P.2d 947 (1989).....	22
<i>In re Motor Fuel Temporary Sales Practices Litigation</i> , 872 F.3d 1094 (10th Cir. 2017).....	20
<i>In re Recall of Pearsall–Stipek</i> , 141 Wn.2d 756, 10 P.3d 1034 (2000)....	19
<i>John H. Sellen Construction Co. v. Department of Revenue</i> , 87 Wn.2d 878, 558 P.2d 1342 (1976).....	18
<i>Service Employees International Union Local 925 v. Department of Early Learning</i> , 450 P.3d 1181 (Wash. 2019).....	14
<i>Simpson Investment Co. v. Department of Revenue</i> , 141 Wn.2d 139, 3 P.3d 741 (2000).....	16
<i>Southwest Washington Chapter, National Electric Contractors Association v. Pierce County</i> , 100 Wn.2d 109, 667 P.2d 1092 (1983).....	17
<i>State v. Flores</i> , 164 Wn.2d 1, 186 P.3d 1038 (2008).....	18, 29
<i>State v. K.L.B.</i> , 180 Wn.2d 735, 328 P.3d 886 (2014).....	16

<i>State v. Larson</i> , 184 Wn.2d 843, 365 P.3d 740 (2015).....	<i>passim</i>
<i>State v. Sweany</i> , 174 Wn.2d 909, 281 P.3d 305 (2012).....	15
<i>Tingey v. Haisch</i> , 159 Wn.2d 652, 152 P.3d 1020 (2007).....	22
<i>Vita Food Products, Inc. v. State</i> , 91 Wn.2d 132, 587 P.2d 535 (1978) ..	24
<i>Washington Independent Telephone Association v. Washington Utilities &amp; Transportation Commission</i> , 148 Wn.2d 887, 64 P.3d 606 (2003).....	13
<i>Washington State Republican Party v. Washington State Public Disclosure Commission</i> , 141 Wn.2d 245, 4 P.3d 808 (2000).....	23

**CONSTITUTIONAL PROVISIONS**

Washington Constitution Article II, § 1.....	22
Washington Constitution Article XX, § 1.....	23

**STATUTES AND REGULATIONS**

RCW 9A.56.360.....	16
RCW 16.65.350 .....	33
RCW 28A.330.100.....	33
RCW 42.56.565 .....	14
RCW 43.20.030 .....	33
RCW 43.20.050 .....	<i>passim</i>
RCW 43.22.270 .....	33
RCW 43.70.130 .....	33
RCW 70.05.060 .....	33
RCW 70.108.010 .....	33
RCW 86.16.041 .....	33
WAC 246-80-001.....	1, 6, 7, 31
WAC 246-80-020.....	7, 11

WAC 246-100-011.....	26
WAC 246-101-010.....	26
WAC 246-337-005.....	26
WAC 246-812-510.....	26
WAC 246-817-610.....	26

**OTHER AUTHORITIES**

<i>Sanitary</i> , The Chambers Dictionary (1998).....	32
<i>Sanitary</i> , Merriam-Webster’s Collegiate Dictionary (11th ed. 2009) .....	32
<i>Sanitary</i> , New Oxford American Dictionary (3d ed. 2010).....	31
<i>Sanitary</i> , Stedman’s Medical Dictionary (26th ed. 1995) .....	31

## I. INTRODUCTION

The Washington Board of Health did not have statutory authority to promulgate the rule banning the sale of flavored vapor products, WAC 246-80-001 *et seq.* (the “Vaping Ban”). It purported to act under RCW 43.20.050(2)(f)’s clause contemplating “rules for the prevention and control of infectious and noninfectious diseases, including food and vector borne illness.” The power that clause delegates, however, is narrower than the sweeping view of executive-branch authority the Board ascribed to it—and which would be required to enact the Vaping Ban.

By the clause’s plain language, the Board may only adopt rules about “food and vector borne illness” or comparable diseases. That was the Legislature’s verdict when it gave examples (“food and vector borne illness”) of the “infectious and noninfectious diseases” the Board may regulate. Under a straightforward application of the Washington Supreme Court’s decision in *State v. Larson*, “[e]xtrapolating from the two illustrative examples ... the legislature intended to limit the scope of [RCW 43.20.050(2)(f)] to similar items.” 184 Wn.2d 843, 849, 365 P.3d 740, 743 (2015). And a contrary reading not only would contradict the clause’s plain language, but also would render statutory language superfluous and yield absurd results. Indeed, extending the Board’s regulatory authority to any “infectious and noninfectious disease[]” would

allow the Board, without legislative oversight, to ban any product allegedly tied to public-health issues (for example, coffee (gout), gluten (celiac sprue), cell phones (brain cancer), soda (diabetes))—giving it a general policymaking role in derogation of the separation of powers.

Vaping-related lung injury—what the Board purported to address through the Vaping Ban—is not comparable to “food and vector borne illness.” The latter categories describe methods of disease transmission that largely are indiscriminate in terms of whom they affect. Vaping-related lung injury does not have that characteristic; it is, instead, associated with a particular activity and affects only individuals who choose to engage in that activity. The Superior Court committed error in concluding that vaping-related lung injury was similar to “food and vector borne illness,” and then refusing to preliminarily enjoin the Vaping Ban.

\* \* \* \* \*

Notwithstanding the Superior Court’s interpretative error, the court found the issue a close call and certified for immediate review the Board’s authority under RCW 43.20.050(2)(f). That question of statutory construction is the single issue before this Court; the Superior Court otherwise found that Petitioners Vapor Technology Association and Baron Enterprises, LLC were likely to suffer irreparable harm absent preliminary relief and that relief would not substantially harm other parties.

## II. ASSIGNMENT OF ERROR

Based on an erroneous interpretation of RCW 43.20.050(2)(f), the Superior Court refused to preliminarily enjoin the Vaping Ban.

Issue pertaining to the assignment of error: Does RCW 43.20.050(2)(f)'s clause permitting the Board to adopt rules addressing "infectious and noninfectious diseases, including food and vector borne illness" authorize the Vaping Ban, when vaping-related lung injury is not a "food and vector borne illness" or a comparable disease?

## III. STATEMENT OF THE CASE

*A Brief Primer on Vapor Products.* Vapor-delivery products are handheld electronic devices used to heat and aerosolize a liquid mixture containing nicotine. (CP.8, ¶ 14.) Once the liquid is aerosolized into a "vapor," the user inhales that vapor as he or she would inhale actual tobacco smoke—but without the fire, flame, tar, carbon monoxide, or ash associated with traditional "combustible" cigarettes. (CP.8–9, ¶ 14.)

Vapor products first gained traction in the United States in 2009. (CP.9, ¶ 15.) Since the introduction of these products, the demand for traditional combustible cigarettes as a percentage of the U.S. population has fallen—from 20.6% in 2008 to 14% in 2017. (CP.10, ¶ 17.) Many vapor-products users are current or former smokers. (CP.9, ¶ 15.) An extensive body of research has shown that vapor products pose

substantially less risk than combustible cigarettes and could significantly reduce the public-health harms associated with smoking. (CP.9, ¶ 16.).

Nationally, the vapor-products industry accounts for approximately \$24.46 billion in economic output; Washington-based activity is responsible for \$484 million of that total. (CP.99, ¶ 5.) Washington’s industry provides approximately 3,475 jobs, and the state’s vapor-products companies and their employees contribute over \$40 million in state taxes; consumers of those products generate an additional \$16 million in state taxes. (CP.100, ¶¶ 8–9.)

***Vaping-Related Lung Injuries.*** Earlier this year, state and federal health officials began investigating reports of lung injuries suffered by vapor-products users, some of which were fatal. (CP.12, ¶ 28.) From the outset, the evidence pointed to products containing tetrahydrocannabinol (or THC, the primary psychoactive compound in marijuana) as the cause. (CP.12–15, ¶¶ 28–36.) For example, on September 5, 2019, the New York Department of Public Health reported that it had received “34 reports from New York State physicians of severe pulmonary illness among patients ranging from 15 to 46 years of age who were using at least one cannabis-containing vape product before they became ill.” (CP.12–13, ¶ 29.) Laboratory tests found that each patient who submitted a product for testing had been linked to at least one vapor product

containing vitamin E acetate, an additive used in THC vapor liquids.

(CP.12–13, ¶ 29.)

The next day, the Centers for Disease Control and Prevention reported “[i]nitial findings” that showed “many of the [lung-injury] patients ... reported recent use of THC-containing products.” (CP.13, ¶ 30.) The CDC also reported that five patients in North Carolina who presented with lung injuries believed to be associated with vapor-product use “shared a history of recent use of marijuana oils or concentrates in e-cigarettes,” and had used vapor devices “that had refillable chambers or interchangeable cartridges with tetrahydrocannabinol (THC) vaping concentrates or oils, which were purchased on the street.” (CP.13, ¶ 31.) Later that month, the CDC reported that health officials in Illinois and Wisconsin found that 87 percent of patients with vaping-related lung injuries acknowledged that they had used THC-containing vaping products in the prior three months. (CP.14, ¶ 33.) As detailed below, the medical evidence has continued to bear out the initial focus on THC-containing vapor products generally, and on vitamin E acetate specifically.

Further, epidemiological evidence suggests that the demographics of vaping-related lung injury patients do not mirror the demographics of nicotine-vapor-products users. (CP.58, ¶ 12.) For example, although nicotine-vapor-products users tend to be adults between the ages of 25 and

64, patients with vaping-related lung injuries are disproportionately young. (CP.58, ¶ 12.) And the high percentage of patients who have admitted using THC-containing products indicates a causal relationship between those products and the lung injuries; that percentage is many times the percentage of THC vapor-products users. (CP.59, ¶ 13.)

*Washington’s Ban on Flavored Vapor Products.* On September 27, 2019, Governor Jay Inslee issued Executive Order 19-03, titled “Addressing the Vaping Use Public Health Crisis,” which asked the Board to “use its emergency rulemaking authority to impose a ban on all flavored vapor products, including flavored THC vapor products.” (CP.178.) As the basis for that directive, the Governor cited the use of vapor products among minors (including from 2018), as well as “an outbreak of a lung injury ... [among] previously healthy individuals who had recently vaped THC and/or nicotine vapor products.” (CP.177.) The Board thereafter promulgated the Vaping Ban, which the Board stated was “necessary to prevent and reduce youth and young adult exposure” to vaping-related lung injury, as well as address use of vapor products by minors generally. WAC 246-80-001. In pertinent part, the Ban stated that

[n]o person ... may sell, offer for sale, or possess with the intent to sell or offer for sale flavored vapor products or any product that he or she knows or reasonably should know will be used with or in a vapor product to create a flavored vapor product. The foregoing prohibition applies to the sale, offer

for sale, or 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.

WAC 246-80-020.

The Board purported to enact the Ban under RCW 43.20.050(2)(f)'s first clause, which gives the Board authority to promulgate rules for the “prevention and control of infectious and noninfectious diseases, including food and vector borne illness.” *See generally* WAC 246-80-001 (“The Board has the authority and responsibility to adopt rules for the prevention and control of such disease.”).

*The Vaping Ban's Effects.* For individual Washington vapor-products-shop owners, the Ban had an immediate and devastating effect. The story of Kimberly Thompson, owner of three vapor-products shops in Pierce County through her company Baron Enterprises, illustrates the irreparable harm the Vapor Ban worked. (CP.48, ¶ 2.) Inspired to help others quit smoking combustible cigarettes, Thompson opened her first store in 2010—one of the first vapor-products shops in the country. (CP.49, ¶ 5.) At the same time, she “began lobbying for thoughtful regulation of the vapor-products industry,” including “mak[ing] vapor products age restricted.” (CP.49, ¶ 6.) Consistent with that commitment,

Thompson has “never received a citation from local, state, or federal authorities.” (CP.50, ¶ 7.) When the Vaping Ban went into effect, Thompson had to close one of her stores; she testified that, as of October 20, 2019, she would have to close another “in the next week if the ban continues,” and her final store shortly thereafter. (CP.50–51, ¶ 9.)

***The Subsequent Science.*** On October 25, 2019, a top CDC official identified THC-containing vapor products as the source of “the vast majority of individuals’ lung injury.”<sup>1</sup> As to the minority of lung-injury patients who claimed no THC-product use, the Director of the Food and Drug Administration’s Center for Tobacco Products urged skepticism:

Remember that these are self-reports. It’s the person saying, ‘I only used the nicotine-containing products.’ There is the question of—especially if the report is coming from a teen or someone living in a state where the use of any of the potential compounds is illegal[—]whether, in fact, when they say the only thing I used was a nicotine-containing product turns out to be the case.<sup>2</sup>

The day before those comments, the official in charge of the CDC’s lung-injury “command center” was reported as saying that the CDC had “narrowed this clearly to THC-containing products that are associated

---

<sup>1</sup> *Transcript of CDC Telebriefing: Lung Injury Investigation*, Ctrs. for Disease Control & Prevention (Oct. 25, 2019), <https://www.cdc.gov/media/releases/2019/t1025-lung-injury-investigation.html>.

<sup>2</sup> *Id.*

with most patients who are experiencing lung injury.”<sup>3</sup>

Therefore, it was unsurprising when the CDC published a study on November 8, 2019 linking vitamin E acetate to the lung-injury incidents.<sup>4</sup> Assessing lung-fluid samples from 29 patients suffering lung injury (from ten states), CDC researchers “detected” vitamin E acetate, a “thickening agent in THC products,” in *every* sample.<sup>5</sup> The CDC explained that “[b]ased on these data . . . , it appears that vitamin E acetate is associated with” the lung injuries.<sup>6</sup> “These findings reinforce[d] CDC’s recommendation that persons should not use e-cigarette, or vaping, products *containing THC*, especially those obtained from informal sources such as friends or family, or those from the illicit market.”<sup>7</sup>

The findings undergird the CDC’s current recommendation:

CDC and FDA recommend that people should not use THC-

---

<sup>3</sup> Richard Harris, *Behind the Scenes of CDC’s Vaping Investigation*, NPR (Oct. 25, 2019, 7:03 AM), <https://www.npr.org/sections/health-shots/2019/10/25/773138356/behind-the-scenes-of-cdcs-vaping-investigation>.

<sup>4</sup> Benjamin C. Blount et al., *Evaluation of Bronchoalveolar Lavage Fluid from Patients in an Outbreak of E-cigarette, or Vaping, Product Use-Associated Lung Injury – 10 States, August-October 2019*, Ctrs. for Disease Control & Prevention (Nov. 8, 2019), <https://www.cdc.gov/mmwr/volumes/68/wr/mm6845e2.htm>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* (emphasis added).

containing e-cigarette, or vaping, products, particularly from informal sources like friends, family, or in-person or online sellers.

Vitamin E acetate should not be added to e-cigarette, or vaping, products. Additionally, people should not add any other substances not intended by the manufacturer to products, including products purchased through retail establishments.<sup>8</sup>

The CDC currently is warning people not to use THC- or vitamin-E-acetate-containing products; it says no such thing about nicotine products.<sup>9</sup>

***Procedural History.*** To remedy the irreparable harm the Vaping Ban was causing, Vapor Technology Association and Baron Enterprises sought preliminary relief in Thurston County Superior Court, arguing that they were likely to succeed on their arguments that (i) the Board did not have the statutory authority to enact the Ban; (ii) the Ban was arbitrary and capricious; and (iii) the Ban violated free-speech guarantees by barring out-of-state vapor-product advertising. (CP.5, ¶ 1.)

The Superior Court found for the Board on (ii) and (iii), the latter following the Board’s representation that it was not taking the position

---

<sup>8</sup> *Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products*, Ctrs. for Disease Control & Prevention (last updated Jan. 9, 2020), [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/severe-lung-disease.html](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html).

<sup>9</sup> *Id.* As to nicotine products, the CDC says only that “[t]he best way to assure that you are not at risk while the investigation continues is to consider refraining from use of all e-cigarette, or vaping, products.” *Id.*

that the Vaping Ban barred advertising. (CP.255–256.) But the court requested further briefing on the statutory-authority question. (CP.254.) It also held that without preliminary relief, Vapor Technology Association and Baron Enterprises were likely to suffer irreparable harm and that the relief would not substantially harm other parties. (CP.255–256.)

Following that further briefing, the Superior Court concluded that the Board likely had authority to promulgate the Vaping Ban:

WAC 246-80-020 is a rule for the prevention and control of vaping-associated lung disease, which is a noninfectious disease. Applying the statutory interpretation canon *ejusdem generis*, vaping-associated lung disease is similar in nature and comparable to food and vector borne illness because it is a disease passed to humans through an external source.

(CP.319.)

Finding the issue a close question “as to which there is a substantial ground for a difference of opinion,” however, the Superior Court certified for immediate appeal “whether ... WAC 246-80-020 exceeds the Board’s statutory authority.” (CP.319–320.)

This Court granted discretionary review.

#### **IV. SUMMARY OF THE ARGUMENT**

To ban flavored vapor products, the Board adopted a sweeping theory of its own power, exceeding the authority granted to it by statute or permitted by the Washington Constitution. Under its asserted view, the

Board would have the power to regulate an almost-limitless range of products in the name of public health—from cigarettes (lung cancer) to breast implants (lymphoma), salt (heart disease) to fossil-fuel burning cars (asthma)—allowing the Board to completely rewrite the laws governing what Washington residents consume and how they choose to live their lives. Its statutory authority (to say nothing of the Washington Constitution) does not permit the Board to act so expansively.

A. The Board purported to act under the first clause of RCW 43.20.050(2)(f), which contemplates rules for the “prevention and control of infectious and noninfectious diseases, including food and vector borne illness.” Under a straightforward statutory interpretation (of the kind the Washington Supreme Court detailed in *State v. Larson*), the Legislature intended that the Board only regulate “food and vector borne illness” and similar diseases. Not only is that the import of the language the Legislature used—as the Superior Court correctly held—but also it both ensures that each word of the clause is given meaning and prevents an absurd outcome. Were the Board permitted to regulate all “infectious and noninfectious diseases,” it would have the freedom to engage in general policymaking, in violation of the separation of powers.

B. “Food and vector borne illness” describe methods of disease transmission that largely are indiscriminate in terms of whom they

affect. This shared characteristic defines and limits the types of diseases the Board may regulate under RCW 43.20.050(2)(f). And thus it could only promulgate the Vaping Ban if vaping-related lung injury were transmitted by means that are largely indiscriminate. It is not. That injury results from a particular activity (if at all) and affects only those individuals who choose to engage in that activity. The Vaping Ban thus falls outside of the Board’s statutory authority, and the Superior Court erred in finding to the contrary.

C. Although the Board suggested below that RCW 43.20.050(2)(f)’s last clause—contemplating rules for “other sanitary matters as may best be controlled by universal rule”—provided authority to promulgate the Vaping Ban, it hardly defended that position before the Superior Court. With good reason. Not only did the Board not purport to rely on the clause in enacting the Ban, but also the clause only permits regulations addressing hygienic matters (which the Ban is not).

## V. ARGUMENT

### **THE VAPING BAN EXCEEDS THE BOARD’S STATUTORY AUTHORITY UNDER RCW 43.20.050(2)(f)**

When a statute does not grant an agency the power to promulgate a regulation, the regulation is invalid. *Wash. Indep. Tel. Ass’n v. Wash. Utils. & Transp. Comm’n*, 148 Wn.2d 887, 901, 64 P.3d 606, 613 (2003)

(“An agency has only the authority granted by statute.”). That is the case with the Vaping Ban.

The Board asserts that the first clause of RCW 43.20.050(2)(f)—the “Disease Clause”—authorized the Ban. That provision (with the Clause emphasized) empowers the Board to

***[a]dopt rules for 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.

The Superior Court correctly held that the Disease Clause authorized the Board only to promulgate rules addressing “food and vector borne illness” and comparable diseases. (CP.319.) But the court then incorrectly found vaping-related lung injury “similar in nature and comparable to food and vector borne illness.” (CP.319.) This Court reviews that error in statutory interpretation *de novo*. *Serv. Emps. Int’l Union Local 925 v. Dep’t of Early Learning*, 450 P.3d 1181, 1184 (Wash. 2019); *accord Dep’t of Corrections v. McKee*, 199 Wn. App. 635, 643, 399 P.3d 1187, 1192 (2017) (“The question before us is whether the trial court properly construed RCW 42.56.565(2)(c)(i) when it generally denied the Department’s request for a preliminary injunction. Statutory construction is a question of law that we review *de novo*.”).

**A. The Legislature Intended that the Board Can Regulate Only Food- and Vector-Borne Illness and Similar Diseases.**

The “fundamental objective” of statutory interpretation is to “give effect to the intent of the legislature.” *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305, 308 (2012); *accord Larson*, 184 Wn.2d at 849, 365 P.3d at 743. The “surest indication” of that intent is “the plain language of the statute,” the meaning of which a court may determine “by looking to the text of the statutory provision in question, as well as the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Larson*, 184 Wn.2d at 848, 365 P.3d at 742 (internal quotation marks omitted); *accord Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4, 10 (2002). Following that analysis here demonstrates that the Board has the authority to regulate only “food and vector borne illness” and comparable diseases.

1. None of the Disease Clause’s relevant terms—“infectious,” “noninfectious,” “food borne,” “vector borne”—are defined in the statute. The Washington Supreme Court in *Larson* detailed how a court should undertake a plain-language analysis in the absence of defined terms.

There, the Court considered the meaning of a statute elevating the offense level of retail theft if

[t]he person was, at the time of the theft, in possession of an

item, article, implement, or device designed to overcome security systems including, but not limited to, lined bags or tag removers.

RCW 9A.56.360(1)(b).

The statute did not define “device designed to overcome security systems,” and this Court and Division I split on its meaning. To resolve the meaning of that provision, *Larson* “look[ed] first to the surrounding statutory language.” 184 Wn.2d at 848–49, 854, 365 P.3d at 742–43, 745. That surrounding statutory language: the examples “lined bags or tag removers” following the phrase “device designed to overcome security systems,” and introduced by “including, but not limited to.” As *Larson* explained, ““general terms, when used in conjunction with specific terms in a statute, should be deemed only to incorporate those things similar in nature or comparable to the specific terms.”” *Id.* at 849, 365 P.3d at 743 (quoting *Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 151, 3 P.3d 741, 746 (2000)). Under this principle of *ejusdem generis*, “instructive examples ... demonstrate the type and character of items that are included within the scope of the statute.” *Id.* at 851, 365 P.3d at 744; accord, e.g., *State v. K.L.B.*, 180 Wn.2d 735, 740, 328 P.3d 886, 888 (2014) (“[G]eneral words accompanied by specific words are to be construed to embrace only similar objects.”).

A statute need not use magic words for *ejusdem generis* to apply,

although a common scheme is “[general], including [specific] and [specific].” *Sw. Wash. Chapter, Nat’l Elec. Contractors Ass’n v. Pierce Cty.*, 100 Wn.2d 109, 116, 667 P.2d 1092, 1096 (1983). That is how the Legislature structured the Disease Clause: “infectious and noninfectious diseases [general], including food [specific] and vector [specific] borne illness.”<sup>10</sup> “Food and vector borne illness” thus “demonstrate the type and character of items” the phrase “infectious and noninfectious diseases” encompasses. *Larson*, 184 Wn.2d at 851, 365 P.3d at 744; *accord Dean v. McFarland*, 81 Wn.2d 215, 221, 500 P.2d 1244, 1248 (1972) (presence of specific terms “restrict[s]” the interpretation of “general terms where both are used in sequence”).

The Superior Court followed this straightforward analysis, recognizing that the Board’s authority under the Disease Clause was limited to adopting rules addressing “food and vector borne illness” and comparable diseases. This Court should not disturb that holding.

The Board, for its part, offered two arguments to avoid this

---

<sup>10</sup> There should be no dispute that “infectious and noninfectious diseases” is general. As the Board argued below, “infectious means capable of causing infection; “noninfectious means not infectious”; and “disease means a condition of the living animal or plant body or one of its parts that impairs normal functioning and its typically manifested by distinguishing signs and symptoms: sickness malady.” (CP.287 (internal quotation marks omitted).) Nor should there be any dispute that “food and vector borne illness” are lesser-included, more specific categories of disease.

interpretation, which the Disease Clause’s plain language compels. *First*, it suggested that the Legislature’s use of the term “including” in the Clause was meant as a “term of enlargement.” (CP.288 (internal quotation marks omitted).) But there is nothing to “enlarge[.]”—“food and vector borne illness” already are subsumed entirely in “infectious and noninfectious diseases.” (This, of course, is another way of saying that the Legislature used the term “including” consistent with *ejusdem generis*.)

*Second*, the Board argued that *ejusdem generis* has no purchase absent a finding of statutory ambiguity. (CP.290.) The Superior Court properly ignored this, and *Larson* forecloses it. *See* 184 Wn.2d at 854, 365 P.3d at 745 (finding statute “plain and unambiguous on its face” *after* applying *ejusdem generis*).<sup>11</sup> And although Washington courts have not always been “uniform” in describing the plain-language rule, *Campbell & Gwinn*, 146 Wn.2d at 10, 43 P.3d at 9, with the Supreme Court previously suggesting that courts should not follow *ejusdem generis* absent ambiguity, *see Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583, 586 (2001), it subsequently rejected that formalistic approach as

---

<sup>11</sup> Time and again, the Washington Supreme Court has applied *ejusdem generis* as part of a plain-language analysis, without statutory ambiguity. *See, e.g., State v. Flores*, 164 Wn.2d 1, 13, 186 P.3d 1038, 1044 (2008); *John H. Sellen Constr. Co. v. Dep’t of Revenue*, 87 Wn.2d 878, 883–84, 558 P.2d 1342, 1345–46 (1976).

less “likely to carry out legislative intent,” *Campbell & Gwinn*, 146 Wn.2d at 12, 43 P.3d at 10; *accord Larson*, 184 Wn.2d at 854, 365 P.3d at 745.

2. Two additional well-established statutory-interpretation principles—both of which *Larson* applied, 184 Wn.2d at 850–51, 365 P.3d at 743–44—confirm that the Disease Clause only authorizes Board regulation of “food and vector borne illness” and similar diseases: the presumptions against (i) superfluity and (ii) absurdity.

***Superfluity.*** If “food and vector borne illness” were not limiting examples, they would be superfluous. It would be as if the Legislature had passed, and the Governor had signed, a different version of RCW 43.20.050(2)(f) :

Adopt rules for 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.

But “the drafters of legislation ... are presumed to have used no superfluous words and [the Court] must accord meaning, if possible, to every word in a statute.” *In re Recall of Pearsall–Stipek*, 141 Wn.2d 756, 767, 10 P.3d 1034, 1041 (2000); *accord, e.g., Larson*, 184 Wn.2d at 850, 365 P.3d at 743–44. The Court thus “can reasonably infer that [‘food and vector borne illness’] were intended to limit” the Disease Clause’s scope. *Larson*, 184 Wn.2d at 851, 365 P.3d at 743. The alternative would read

that phrase out of the statute.

The Board fought this straightforward application of the presumption against superfluity before the Superior Court, suggesting that the Legislature may have included the examples “simply ... to remove any doubt that they were included.” (CP.290 (citing *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008)).) But it is hard to see how there could be any “doubt” that “infectious and noninfectious diseases” encompass “food and vector borne illness.” Vector-borne illness—malaria, dengue fever, Zika, plague, West Nile virus<sup>12</sup>—may be the *first* thing one thinks of when one hears “disease.” In any event, *Ali* does nothing to help the Board, as it addressed a statutory provision that did “not lend itself to application of” *ejusdem generis* because it was “disjunctive, with one specific and one general category.” 552 U.S. at 225; *cf. In re Motor Fuel Temp. Sales Practices Litig.*, 872 F.3d 1094, 1106 n.3 (10th Cir. 2017) (explaining that Washington courts apply *ejusdem generis* “more broadly” than other courts have historically done).

**Absurdity.** The phrase “infectious and noninfectious diseases” is so broad that it cries out for the more precise meaning the Legislature supplied through the illustrative examples “food and vector borne illness.”

---

<sup>12</sup> See *Vector-Borne Diseases*, World Health Org. (Oct. 31, 2017), <https://www.who.int/news-room/fact-sheets/detail/vector-borne-diseases>.

A contrary interpretation would permit the Board to regulate almost anything in the name of public health—without legislative oversight and with only the minimal process provided by emergency rulemaking.

Consider, just by way of example, that the Board could ban:

- Cigarettes, to guard against lung cancer<sup>13</sup>
- Breast implants, to prevent Breast Implant Associated Lymphoma<sup>14</sup>
- Sand (found in brick, concrete, mortar, and other construction materials), to decrease risk of lung cancer<sup>15</sup>
- Salt, to control the risk of heart disease<sup>16</sup>
- Fossil-fuel-burning cars, to protect children against asthma<sup>17</sup>

---

<sup>13</sup> *What Are the Risk Factors for Lung Cancer?*, Ctrs. for Disease Control & Prevention (Sept. 18, 2019), [https://www.cdc.gov/cancer/lung/basic\\_info/risk\\_factors.htm](https://www.cdc.gov/cancer/lung/basic_info/risk_factors.htm).

<sup>14</sup> *Questions & Answers about Breast Implant-Associated Anaplastic Large Cell Lymphoma (BIA-ALCL)*, U.S. Food & Drug Admin. (Oct. 23, 2019), <https://www.fda.gov/medical-devices/breast-implants/questions-and-answers-about-breast-implant-associated-anaplastic-large-cell-lymphoma-bia-alcl>.

<sup>15</sup> *Crystalline Silica*, Nat'l Cancer Inst, (Feb. 1, 2019), <https://www.cancer.gov/about-cancer/causes-prevention/risk/substances/crystalline-silica>.

<sup>16</sup> *Know Your Risk for Heart Disease*, Ctrs. for Disease Control & Prevention (Dec. 9, 2019), <https://www.cdc.gov/heartdisease/behavior.htm>.

<sup>17</sup> *The Links Between Air Pollution and Childhood Asthma*, U.S. Env'tl. Protection Agency (Oct. 22, 2018), <https://www.epa.gov/sciencematters/links-between-air-pollution-and->

The plenary authority an unbounded interpretation of “infectious and noninfectious diseases” yields would allow the Board to fundamentally change what Washington residents consume, how they live their lives, and how they interact with each other. Courts “must interpret statutes to avoid absurd results.” *Larson*, 184 Wn.2d at 851, 365 P.3d at 744; accord *Tingey v. Haisch*, 159 Wn.2d 652, 664, 152 P.3d 1020, 1026 (2007) (“[I]t will not be presumed that the legislature intended absurd results.”).

In fact, had the Legislature intended to delegate the authority to regulate all “infectious and noninfectious diseases” it would have given the Board the “power to declare general public policy,” *Diversified Inv. P’ship v. Dep’t of Soc. & Health Servs.*, 113 Wn.2d 19, 24, 775 P.2d 947, 950 (1989), in violation of the separation of powers. Article II, § 1 of the Washington Constitution provides that “[t]he legislative authority of the state of Washington shall be vested in the legislature.” Although the Legislature may delegate the power to promulgate regulations filling “the interstices of the law if the Legislature defines generally what is to be done,” it “is prohibited from delegating its purely legislative functions.” *Diversified Inv. P’ship*, 113 Wn.2d at 24, 775 P.2d at 950; see also *Brower*

---

childhood-asthma. That the Board thinks these examples are “long term public health concerns” is of no moment. (CP.297.) Without the limitation supplied by “food and vector borne illness,” “infectious and noninfectious diseases” would encompass long- and short-term illness.

*v. State*, 137 Wn.2d 44, 54, 969 P.2d 42, 49 (1998).<sup>18</sup> Regulating cigarettes to prevent lung cancer and salt to control heart disease would be first-line policymaking, constitutionally committed to the Legislature.

In the end, however, the Court need not wade into these delicate separation-of-powers issues because the plain language of the Disease Clause forecloses a broad interpretation that would run afoul of (and, at the least, raise questions about) constitutional limitations. *Cf. Wash. State Republican Party v. Wash. State Pub. Disclosure Com'n*, 141 Wn.2d 245, 280, 4 P.3d 808, 827 (2000) (“Where possible, statutes should be construed so as to avoid unconstitutionality.”).

\* \* \* \* \*

The Board’s Disease Clause authority extends not to all “infectious and noninfectious diseases,” but only to a subset of those diseases: “food and vector borne illness” and their comparables. That was the Legislature’s verdict, implemented by using specific words in the provision, in a specific sequence—the Clause’s plain language. This “surest indication” of legislative intent renders any suggestion that public-

---

<sup>18</sup> That the Washington Constitution creates the state Board of Health does not alter the analysis. Under Article XX, § 1, “[t]here shall be established by law a state board of health and a bureau of vital statistics in connection therewith, with such powers as the legislature may direct.” But other provisions of the Constitution—including separation-of-powers principles—limit what authority the Legislature may invest in the Board.

health statutes be liberally construed a red herring. Whether a liberal construction (or not) is given to the Disease Clause, the result is the same: By using statutory language that placed specific examples next to general concepts, the Legislature “intended to limit the scope of [the Disease Clause] to illnesses “similar” to the examples. *Larson*, 184 Wn.2d at 850, 365 P.3d at 743.

Had the Legislature meant something else, it could have used different language. And if it now believes that its policy choice was incorrect, it can amend the Disease Clause. But this Court should follow the plain language the Legislature used. *See Vita Food Prods., Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535, 536 (1978) (“It is not within our power to add words to a statute even if we believe the legislature intended something else but failed to express it adequately.”).

**B. The Vaping Ban Falls Outside the Disease Clause.**

The Board could have validly promulgated the Vaping Ban under the Disease Clause only if vaping-related lung injury has the characteristic(s) that “food and vector borne illness” share. It does not. Whereas the latter diseases are characterized by modes of transmission that largely affect people indiscriminately, vaping-related lung injury only can impair individuals who use vapor products.

1. The Legislature has not defined the terms “food or vector

borne illness,” but examining their commonly accepted meanings “provides insight into the statute’s intended meaning and scope.” *Larson*, 184 Wn.2d at 850, 365 P.3d at 743. A food-borne illness is “any sickness that is caused by the consumption of foods or beverages that are contaminated with certain infectious or noninfectious agents.”<sup>19</sup> The CDC explains that although most food-borne illnesses are “infections, caused by a variety of bacteria, viruses, and parasites[, h]armful toxins and chemicals also can contaminate foods and cause foodborne illness.”<sup>20</sup> As a result, food-borne illnesses can be either infectious or noninfectious.<sup>21</sup> Vector-borne diseases, meanwhile, are “human illnesses caused by parasites, viruses and bacteria that are transmitted by mosquitoes, sandflies,

---

<sup>19</sup> Sarah E. Boslaugh, *Foodborne Illness*, Encyclopaedia Britannica (May 10 2016), <https://www.britannica.com/science/foodborne-illness>.

<sup>20</sup> *Foodborne Illnesses and Germs*, Ctrs. for Disease Control & Prevention (Oct. 23, 2019), <https://www.cdc.gov/foodsafety/foodborne-germs.html>; *see also Foodborne Illness*, Wash. State Dep’t of Health, <https://www.doh.wa.gov/youandyourfamily/illnessanddisease/foodborneillnesses> (last visited Jan. 12, 2020) (listing norovirus, salmonella, campylobacter, e. coli, listeriosis, vibriosis, shigellosis, and hepatitis A as common causes of food-borne illness).

<sup>21</sup> *Foodborne Illnesses and Germs*, Ctrs. for Disease Control & Prevention; *see also Botulism*, Merck Manuals Professional Version (Sept. 2019), <https://www.merckmanuals.com/professional/infectious-diseases/anaerobic-bacteria/botulism> (“Botulism is poisoning that is due to *Clostridium botulinum* toxin that affects the peripheral nerves. Botulism may occur without infection if toxin is ingested, injected, or inhaled.”).

triatomine bugs, blackflies, ticks, tsetse flies, mites, snails, and lice.”<sup>22</sup>

“Food-borne” and “vector-borne” thus describe methods of disease transmission, which largely are indiscriminate in terms of whom the disease affects. Anyone, in other words, can get a food- or vector-borne illness—think of e. coli in romaine lettuce or malaria from mosquitos. Diseases of the same “type and character,” *id.* at 851, 365 P.3d at 744, would be those that, similarly, are largely indiscriminate in their effect. The other iterations come readily to mind: water-borne illnesses (like cholera and dysentery) and air-borne illnesses (like the common cold, influenza, chickenpox, mumps, measles, whooping cough, diphtheria, and tuberculosis). *Cf.* WAC 246-100-011(7) (discussing together “transmission via an intermediate host or vector, food, water, air”); WAC 246-101-010(8) (same); WAC 246-337-005(6) (same); WAC 246-812-510(1) (same); WAC 246-817-610 (same). This shared characteristic—and thus limiting principle—makes sense: Diseases with the characteristic of indiscriminate transmission (SARS, Ebola, influenza) are most likely to mushroom into epidemics or pandemics as they move through a population, requiring executive-branch emergency action.

---

<sup>22</sup> *Vector-Borne Diseases*, World Health Org. (Oct. 31, 2017), <https://www.who.int/news-room/fact-sheets/detail/vector-borne-diseases> (listing, among others, dengue fever, malaria, plague, and Zika).

But vaping-related lung injury is not transmitted by food, water, vector, or air. Nor is it indiscriminate in its terms of whom it affects. Instead, it is, by definition, associated with a particular activity (vaping) and affects only those individuals who choose to engage in that activity.<sup>23</sup> To put a term on it, it is a “lifestyle” injury, “associated with the way a person or group of people lives.”<sup>24</sup> Unlike food-borne, vector-borne, and other indiscriminately transmitted illnesses, lifestyle injuries are “ailments that are primarily based on the day to day habits of people,” the most common of which are cardiovascular disease, type 2 diabetes, various forms of cancer, and chronic respiratory diseases.<sup>25</sup> Lifestyle injuries primarily result from individual choice. And one cannot contract vaping-related lung injury without actively choosing to use vapor products—putting it within the category of lifestyle injuries (and rendering it unlike “food and vector borne illness”).

---

<sup>23</sup> In fact, as detailed above, the latest research suggests that vaping-related lung injury is not associated with vaping generally, but rather with a specific chemical found in products containing THC.

<sup>24</sup> William C. Shiel Jr., *Medical Definition of Lifestyle Disease*, MedicineNet (Jan. 24, 2017), <https://www.medicinenet.com/script/main/art.asp?articlekey=38316>.

<sup>25</sup> S. A. Tabish, *Lifestyle Diseases: Consequences, Characteristics, Causes and Control*, J. Cardiology & Current Res. (July 21, 2017), at 1, available at <https://medcraveonline.com/JCCR/JCCR-09-00326.pdf>; see also William C. Shiel Jr., *Medical Definition of Lifestyle Disease*.

Because vaping-related lung injury is not “similar in nature or comparable to” food-borne and vector-borne illnesses, *Larson*, 184 Wn.2d at 849, 365 P.3d at 743, the Board does not have authority to regulate it under the Disease Clause. The Vaping Ban therefore is invalid.

2. The Superior Court reached a different (and erroneous) conclusion by extrapolating a different shared characteristic from “food and vector borne illness.” According to the court, the similarity those two illness categories share is “pass[age] to humans through an external source” (CP.319), which, in its view, also describes vaping-related lung injury. But that purported shared characteristic is no limit at all—it is hard to think of a single disease not “passed ... through an external source.” In other words, there is virtually no disease that (i) is infectious or noninfectious, *but* (ii) is not “passed to humans through an external source.” (And the Superior Court did not give any examples.) The characteristic thus proves too much, and would leave the Disease Clause as broad as if it said “infectious and noninfectious diseases” only—contrary to the Legislature’s intent. The Superior Court’s shared characteristic was erroneous, as the Clause’s “plain language ... indicates that the illustrative examples were intended to *limit* the scope of the statute.” *Larson*, 184 Wn.2d at 849, 365 P.3d at 743.

For its part, the Board made no effort to identify a characteristic of

both “food and vector borne illness” that also described vaping-related lung injury. Instead, it offered that vaping injuries are “clearly similar in nature or comparable to food borne illness” because both involve an individual “putting something into their body through their mouth that brings with it a chemical or other substance that makes them sick.”

(CP.295.) But that does not describe vector-borne illnesses. And under *ejusdem generis*, the specific examples must share a common character. *See Larson*, 184 Wn2d at 851, 365 P.3d at 744 (“In order to give meaning and effect to the examples the legislature chose to provide, we must interpret them as instructive examples that demonstrate the type and character of items that are included within the scope of the statute.”); *Flores*, 164 Wn.2d at 13, 186 P.3d at 1044.<sup>26</sup>

\* \* \* \* \*

No one disputes the importance of the Board’s power to “[a]dopt rules for the prevention and control of infectious and noninfectious diseases.” But the fact that a power is important does not make it boundless. Interpreting the Disease Clause as broadly as would be

---

<sup>26</sup> The Board also suggested that a food-borne illness is not indiscriminate, insofar as it affects only the person consuming the tainted food. (CP.295.) But those illnesses may affect the population at large—because the product at issue is widely consumed, because the contaminating agent can affect nearby products, or both—and thus they readily reflect the shared characteristic. And, after all, everyone eats.

required to uphold the Vaping Ban (and in a way the statute's plain language forecloses) would vastly expand the Board's authority—and fundamentally alter how Washington's citizens interact with each other and their government.

These implications are not hypothetical, as the Board's actions in implementing, and then maintaining, the Vaping Ban demonstrate. The Board promulgated a facially invalid product ban; and then it has maintained that ban—in the same form—even as the scientific evidence continues to contradict it. Indeed, the CDC currently is warning consumers not to use THC- or vitamin-E-acetate-containing products; it says no such thing about nicotine products. Yet the Board has made no move to narrow the Vaping Ban—even as the Ban has continued to put Washington small businesses out of business. That approach mocks the Governor's directive “that the state respond in a comprehensive and *evidence-based* manner.” (CP.15, ¶ 40 (emphasis added).) Whatever the Board's disease-control authority, it should not mean that the Board can ban a product no matter the contrary evidence.

The Board stretched the meaning of the Disease Clause past breaking in promulgating the Vaping Ban (a fact the Board's repeated incantation of the “liberal construction given to public-health statutes” cannot cure), and the Superior Court's failure to find the Ban beyond the

Board’s Disease-Clause authority was error.

**C. RCW 43.20.050(2)(f)’s “Sanitary-Matters” Clause Does Not Authorize the Vaping Ban.**

The Board whispered that RCW 43.20.050(2)(f)’s “Sanitary-Matters” Clause—contemplating rules for “other sanitary matters as may best be controlled by universal rule”—provided authority to promulgate the Vaping Ban. It is unclear if the Board continues to take that position, however, which in any event is wrong for at least two reasons.

*First*, it is counterfactual. The Board did not purport to promulgate the Ban under the Sanitary-Matters Clause. The Ban begins by stating that “[t]he board has the authority and responsibility to *adopt rules for the prevention and control of such disease*,” WAC 246-80-001 (emphasis added)—the language of the Disease Clause. And there is nothing else in the regulation that contemplates additional supporting statutory authority.

With good reason as, *second*, the Sanitary-Matters Clause could not authorize the Vaping Ban. “Sanitary” is undefined in the statute. But dictionaries recognize that that the term is connected with hygienic matters. *See, e.g., Sanitary*, Stedman’s Medical Dictionary (26th ed. 1995) (“healthful; conducive to health; usually in reference to a clean environment”); *Sanitary*, New Oxford American Dictionary (3d ed. 2010) (“of or relating to the conditions the affect hygiene and health, esp. the

supply of sewage facilities and clean drinking water”; “hygienic and clean”); *Sanitary*, The Chambers Dictionary (1998) (“relating to, or concerned with, the promotion of health, esp. connected with drainage and sewage disposal; conducive to health”). The Vaping Ban is not a regulation addressing hygiene.

To be sure, some dictionaries offer a broader definition of “sanitary,” as “of or relating to health.” *See, e.g.*, Merriam-Webster’s Collegiate Dictionary (11th ed. 2009). But the structure of RCW 43.20.050(2)(f), and other statutes and regulations that use the term “sanitary,” confirm that the Legislature did not intend this broad definition.

As to the statutory structure: If “sanitary” in RCW 43.20.050(2)(f) means “of or relating to health,” the power to adopt sanitary rules would render the rest of the provision’s language superfluous. In that world, it would have been unnecessary for the Legislature to *also* grant the Board the power to adopt “rules for the prevention and control of infectious and noninfectious diseases” and “rules governing the receipt and conveyance of remains of deceased persons.” A broad reading of the Sanitary-Matters Clause that encompassed the Vaping Ban would be “inconsistent with the well-established principle that statutes must be interpreted so that all the language used is given effect, with no portion rendered meaningless or

superfluous.” *Larson*, 184 Wn.2d at 850, 365 P.3d at 743.

As to other statutes: Equating sanitary with health would also render superfluous the language in a raft of other statutes that separately use both “health” and “sanitary” (or the like). *See, e.g.*, RCW 16.65.350 (“rules regarding *sanitary practices, health practices* and standards, and the examination of animals at public livestock markets”); RCW 70.108.010 (“assuring that proper *sanitary, health, fire, safety, and police* measures are provided and maintained” at outdoor music festivals); RCW 43.70.130(8) (Secretary of Health shall “determine compliance with *sanitary and health care standards*”); RCW 43.22.270(4) (“supervise” enforcement of laws “relating to the *health, sanitary conditions, surroundings, hours of labor, and wages of employees*”); RCW 70.05.060(2) (“[s]upervise the maintenance of all health and sanitary measures”); RCW 86.16.041(2)(a) (“state or local *health, sanitary, or safety code specifications*”); RCW 43.20.030 (“persons experienced in matters of *health and sanitation*”); RCW 28A.330.100 (“school district medical inspector” who shall “decide ... all questions of *sanitation and health* affecting the safety and welfare of the public schools”).

The Legislature did not intend for the Sanitary-Matters Clause to authorize the Board to regulate any health matter. Instead, it intended for the Board to address hygienic matters (like the handling of human

remains) under the Clause. The Vaping Ban thus could not be a valid exercise of the Board's sanitary-matters authority.

## **VI. CONCLUSION**

For the foregoing reasons, the Court should reverse the Superior Court's order and hold that the Board did not have authority to promulgate the Vaping Ban.

Dated: January 13, 2020

**DAVIS WRIGHT TREMAINE LLP**

By s/ Steven P. Caplow  
Steven P. Caplow (WSBA #19843)  
920 Fifth Avenue, Suite 3300  
Seattle, WA 98104  
Telephone: (206) 622-3150  
Facsimile: (206) 757-7700  
E-mail: stevenaplow@dwt.com

**WILLIAMS & CONNOLLY LLP**

David Randall J. Riskin (*pro hac vice*)  
725 Twelfth St., N.W.  
Washington, D.C. 20005  
Telephone: (202) 434-5000  
Facsimile: (202) 434-5029  
Email: driskin@wc.com

*Attorneys for Vapor Technology  
Association and Baron Enterprises,  
LLC*

## CERTIFICATE OF SERVICE

I hereby certify that on this day I caused a copy of the foregoing to be served upon counsel of record as follows, in accordance with the parties' email service agreement:

**Robert W. Ferguson**  
**Attorney General**

Via E-Service and E-Mail

Lilia Lopez (WSBA #22273)  
Eric A. Sonju (WSBA #43167)  
Christopher P. Wright (WSBA #47422)  
Assistant Attorneys General  
Attorneys for Washington State Board of  
Health  
State of Washington Department of Health  
1125 Washington St. S.E.  
Olympia, WA 98504-0100  
Lilia.lopez@atg.wa.gov  
Eric.sonju@atg.wa.gov  
Christopher.wright@atg.wa.gov

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated: January 13, 2020

DAVIS WRIGHT TREMAINE LLP

By s/ Steven P. Caplow  
Steven P. Caplow (WSBA #19843)

**DAVIS WRIGHT TREMAINE LLP**

**January 13, 2020 - 1:47 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 54358-3  
**Appellate Court Case Title:** Vapor Technology Association, et al, Appellant v. State Board of Health,  
Respondent  
**Superior Court Case Number:** 19-2-05196-2

**The following documents have been uploaded:**

- 543583\_Briefs\_20200113134254D2584928\_7001.pdf  
This File Contains:  
Briefs - Petitioners  
*The Original File Name was Final Petitioners Opening Brief.pdf*

**A copy of the uploaded files will be sent to:**

- Eric.Sonju@atg.wa.gov
- ahdolyef@atg.wa.gov
- christopher.wright@atg.wa.gov
- driskin@wc.com
- jordanharris@dwt.com
- lilia.lopez@atg.wa.gov

**Comments:**

Petitioners' Opening Brief

---

Sender Name: Steven Caplow - Email: stevencaplow@dwt.com  
Address:  
920 5TH AVE STE 3300  
SEATTLE, WA, 98104-1610  
Phone: 206-757-8018

**Note: The Filing Id is 20200113134254D2584928**