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COURT OF APPEALS, DIVISION II
OF THE 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.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Faced with a growing outbreak of vaping-associated lung disease in the middle of a youth vaping epidemic, the Washington State Board of Health adopted an emergency rule temporarily prohibiting the sale of flavored vapor products to reduce youth exposure to the outbreak while public health officials investigated its cause. WAC 246-80-020. The emergency rule fell well within the Board's authority to adopt rules to control and prevent infectious and noninfectious diseases, including food and vector borne illness. RCW 43.20.050(2)(f). In any event, Petitioners' challenge to the temporary rule will become moot once the rule sunsets according to law on February 7, 2020. This Court should dismiss this appeal as moot or alternatively affirm the trial court's order denying the Petitioners a preliminary injunction.

II. COUNTERSTATEMENT OF THE ISSUES

Should the Petitioners' challenge to WAC 246-80-020 be dismissed as moot once the rule expires on February 7, 2020?

Did the State Board of Health have authority to adopt WAC 246-80-020 to prevent and control an outbreak of vaping-associated lung disease during an epidemic of youth vaping?

III. STATEMENT OF THE CASE

Vapor products come in different shapes and sizes. Centers for Disease Control and Prevention, *Smoking and Tobacco Use, About Electronic Cigarettes (E-Cigarettes)*, https://www.cdc.gov/tobacco/basic_information/e-cigarettes/about-e-cigarettes.html (last visited January 31, 2020); CP at 168, 183–184. Some look like tobacco cigarettes. *Id.* Others are long, rectangular sticks that can be recharged using a USB port. *Id.* They generally have a battery, a heating element, and a place to store liquid. *Id.* Some vaping products are flavored. CP at 168. The flavors are often youth-friendly flavors like grape, bubble gum, and cotton candy. *Id.* Vapor products produce a vapor by using the heating element to heat a liquid, which contains the flavorings (when included), as well as other chemicals that help make the vapor. *Id.* The vapor is inhaled into the lungs. *Id.*

Petitioners contend that vaping helps people to quit smoking, but the body of research in this area remains mixed and non-conclusive. CP at 170, 193. Vapor products are not approved by the federal Food and Drug Administration as an aid to quit smoking. *Id.* In addition, the majority of vapor products users are dual users, using both vapor products and cigarettes. *Id.*

In October 2019, a multi-state outbreak of vaping-associated lung disease was spreading. CP at 186, 190. People with vaping-related lung disease experience a range of common symptoms including coughing, shortness of breath, chest pain, nausea, vomiting, and/or fever, as well as respiratory failure, abnormal findings on chest x-rays or CT scans, and death. CP at 185-186. More than 1,000 cases of vaping-associated lung disease had been reported across the country, including 18 deaths. *Id.* There were seven cases reported in Washington and the number was expected to grow. CP at 188. The specific chemical exposure causing the vaping-related lung disease outbreak was unknown and no single vapor product or substance had been linked to the cases. CP at 185, 187. Nicotine-only vapor products had not been ruled out as products of concern (nor have they since then). In the seven cases in Washington known in October 2019, three reported using only nicotine products. CP at 169. Two of these three individuals had negative urine tests for tetrahydrocannabinol (THC). *Id.*

At the same time, the use of vapor products among eighth, tenth, and twelfth graders in Washington had significantly increased between 2016 and 2018. *See* CP at 190. Strong evidence showed that prohibiting the sale of flavored vapor products would likely decrease initiation and use of vapor products among adolescents and young adults. CP at 206. To

protect public health, particularly among young people, the Board exercised its authority under RCW 43.20.050(2)(f) to adopt an emergency rule prohibiting the sale of flavored vapor products. WAC 246-80-020. No other vapor products were affected.

After the Board adopted its rule, the Centers for Disease Control and Prevention (CDC) determined that vitamin E acetate is a chemical of concern in vaping-associated lung disease. *See* Centers for Disease Control and Prevention, *Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products*, https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html (last visited January 31, 2020). Accordingly, the Board later adopted a rule specifically to address that concern. *See* WAC 246-80-021(1). The CDC has not determined that vitamin E acetate is present in only THC vapor products or only non-THC vapor products. *Id.* Further, the evidence is not yet sufficient to rule out the contribution of other chemicals, substances, or product sources to the disease. *Id.*

The State Legislature is currently considering two sets of companion bills that would prohibit the sale of non-THC flavored vapor products, and limit the flavors that may be incorporated in marijuana vapor products. SB 6254 § 6, 66th Leg., Reg. Sess. (2020); HB 2454 § 6, 66th Leg., Reg. Sess. (2020) (“Relating to protecting public health and

safety by enhancing the regulation of vapor products”); SB 6579 § 4, 66th Leg., Reg. Sess. (2020); HB 2826 § 4, 66th Leg., Reg. Sess. (2020) (“Relating to clarifying the authority of the liquor and cannabis board to regulate marijuana products”). If either bill passes, there would be no need for the Board to prohibit the sale of these products. If the Legislature chooses not to pass the bills, it is unlikely the Board will pursue permanent rulemaking to prohibit the sale of flavored vapor products when the Legislature has chosen not to do so.

By operation of statute, the temporary emergency rule prohibiting the sale of flavored vapor products will expire on February 7, 2020. RCW 34.05.350(2). The Board has not pursued another emergency rule or permanent rulemaking to prohibit the sale of flavored vapor products and, as described above, is unlikely to do so.

Petitioners challenged WAC 246-80-020, seeking a temporary restraining order and a preliminary injunction. Petitioners argued that the rule was arbitrary and capricious, that it was unconstitutional, and that it exceeded the Board’s authority. The superior court denied Petitioners’ motions, finding that the rule was none of these things, and that a stay was not warranted under RCW 34.05.550(3) because Petitioners were unlikely to prevail. CP at 319. The court addressed two of the remaining three factors required under RCW 34.05.550(3) for a stay to be granted, finding

that Petitioners met two of them, but did not make a determination on the fourth factor, which calls for a determination that the threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action in the circumstances. *Id.*

The court certified the question of statutory authority to this Court under Rule of Appellate Procedure 2.3(b)(4) as a controlling question of law as to which there was substantial ground for difference of opinion and immediate review of which may materially advance the ultimate termination of the litigation. Petitioners then moved for discretionary review on the single issue of statutory authority, and this Court granted review.

IV. STANDARD OF REVIEW

The Administrative Procedure Act (APA) is the exclusive means for judicial review of agency action. RCW 34.05.510. The present appeal is not an appeal of an order affirming or invalidating agency action under RCW 34.05.574. Rather, it is an appeal of an order denying temporary relief under RCW 34.05.550. Thus, the only question raised by this appeal is whether Petitioners are likely to prevail on their claim under RCW 34.05.570(2)(c) that WAC 246-80-020 exceeded the Board's statutory authority, in the context of whether the superior court properly denied the Petitioners' motion for temporary relief under RCW 34.05.550.

The burden of demonstrating invalidity is on the Petitioners. RCW 34.05.570(1)(a). Administrative rules are presumptively valid. *Spokane Cty. v. Dep't of Fish and Wildlife*, 192 Wn.2d 453, 457, 430 P.3d 655 (2018). “[O]nly compelling reasons demonstrating that the regulation conflicts with the intent and purpose of the legislation warrant striking down a challenged regulation.” *Armstrong v. State*, 91 Wn. App. 530, 537, 958 P.2d 1010 (1998). Judicial review is limited to a determination of whether the regulation in question is reasonably consistent with the statute being implemented. *Wash. Rest. Ass'n v. Liquor & Cannabis Bd.*, 10 Wn. App.2d 319, 327, 448 P.3d 140 (2019). The wisdom or desirability of an agency’s rules is not before the Court on judicial review. *St. Francis Extended Health Care v. Dep't of Soc. & Health Servs.*, 115 Wn.2d 690, 702, 801 P.2d 212 (1990). The validity of a rule is determined as of the time the agency took the action adopting the rule. RCW 34.05.570(1)(b); *Wash. Indep. Tel. Ass'n v. Util. & Transp. Comm'n*, 148 Wn.2d 887, 906, 64 P.3d 606 (2003).

V. SUMMARY OF THE ARGUMENT

1. Mootness. WAC 246-80-020 expires on February 7, 2020, in accordance with RCW 34.05.350(2), which requires that emergency rules be in effect for no more than one hundred twenty days. Once the rule expires, it will no longer prohibit Petitioners from selling flavored vapor products. In light of pending legislative consideration of the issue, the

Board is unlikely to pursue permanent rulemaking to prohibit the sale of flavored vapor products. Therefore, the case is moot and should be dismissed.

2. Statutory Authority. The Board's statutory authority to adopt rules "for the prevention and control of infectious and noninfectious diseases, including food and vector borne illness," encompasses the Board's emergency rule to prevent and control vaping-associated lung disease—a noninfectious disease—by prohibiting the sale of flavored vapor products. Under the plain language of the statute, food and vector borne illnesses are illustrative examples of the types of infectious and noninfectious diseases the Board may adopt rules to prevent and control. Vaping-associated lung disease is a type of noninfectious disease.

The Board's rule is valid even if the doctrine of *ejusdem generis* applies. Vaping-associated lung disease is similar in nature to food borne and vector borne illnesses. Eating something and getting sick is similar in nature to inhaling something and getting sick. In both situations, the individual chose to consume an item that turned out to be contaminated and caused illness. Additionally, like both a food borne illness and a vector borne illness, a vaping-associated lung disease is borne into the body by an external source.

VI. ARGUMENT

A. This Case Will Be Moot When the Emergency Rule Expires on February 7, 2020.

Because the emergency rule barring the sale of flavored vapor products will expire four days from the date of this brief, this case is moot as a matter of law. A case is moot if a court can no longer provide effective relief. *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 602, 229 P.3d 774 (2010) (citing *In re: Recall Charges Against Seattle Sch. Dist. No. 1 Dirs.*, 162 Wn.2d 501, 505, 173 P.3d 265 (2007) (action challenging recall petition moot because school board members to be recalled would no longer be in office when petition put to vote)). The “central question” in mootness is whether changes in circumstances since the beginning of litigation “have forestalled any occasion for meaningful relief.” *Id.* (citing *City of Sequim v. Malkasian*, 157 Wn.2d 251, 259, 138 P.3d 943 (2006)). In this case, they have.

WAC 246-80-020 expires in four days, on February 7, 2020, in accordance with RCW 34.05.350(2). Thereafter, the rule will not prevent Petitioners from selling flavored vapor products along with other vapor products, making their request for injunctive relief under RCW 34.05.550 moot. This Court cannot provide effective relief, and should dismiss the case.

The only exception is when it can be said that matters of continuing and substantial public interest are involved. *Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994). Three factors in particular are determinative: whether the issue is of a public or private nature, whether an authoritative determination is desirable to provide future guidance to public officers, and whether the issue is likely to recur. *Id.* (citing *Hart v. Dep't of Soc. & Health Servs.*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988)). Use of the criteria is necessary to ensure that an actual benefit to the public interest in reviewing a moot case outweighs the harm from an essentially advisory opinion. *Id.* at 450.

Here, the issue is unlikely to recur. The Legislature is currently considering two sets of companion bills that would prohibit the sale of non-THC flavored vapor products, and limit the flavors that may be incorporated in marijuana vapor products. SB 6254 § 6, 66th Leg., Reg. Sess. (2020); HB 2454 § 6, 66th Leg., Reg. Sess. (2020) (“Relating to protecting public health and safety by enhancing the regulation of vapor products”); SB 6579 § 4, 66th Leg., Reg. Sess. (2020); HB 2826 § 4, 66th Leg., Reg. Sess. (2020) (“Relating to clarifying the authority of the liquor and cannabis board to regulate marijuana products”). The legislative session this year follows the outbreak of vaping-associated lung disease that started last fall. If either bill passes, there would be no need for the

Board to prohibit sale of flavored vapor products. If the Legislature chooses not to pass the bills, it is unlikely the Board will pursue permanent rulemaking to prohibit the sale of flavored vapor products when the Legislature has chosen not to do so. In any event, the initiation of new rulemaking proceedings would be an additional opportunity for Petitioners to challenge the Board's authority. This appeal, of course, seeks review only of the denial of temporary relief—relief which would no longer be helpful if the rule has expired, anyway.

B. RCW 43.20.050(2)(f) Authorized the Board to Adopt an Emergency Rule Prohibiting the Sale of Flavored Vapor Products for the Prevention and Control of Vaping-Associated Lung Disease.

If the Court reaches the merits of the appeal, it should affirm the superior court's denial of temporary relief under RCW 34.05.550. The court correctly determined that Petitioners are unlikely to prevail on the merits of their challenge that WAC 246-80-020 exceeded the Board's statutory authority. Rather, the Board acted well within its broad authority to "[a]dopt rules for the prevention and control of infectious and noninfectious diseases, including food and vector borne illness." RCW 43.20.050(2)(f).

1. Principles of Statutory Interpretation

Statutory interpretation is a question of law the courts review de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d

4 (2002). The first step in statutory interpretation is to discern the statute's plain meaning from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Columbia Riverkeepers v. Port of Vancouver USA*, 188 Wn.2d 421, 435, 395 P.3d 1031 (2017). Determining and carrying out the Legislature's intent is the fundamental objective. *Id.* When a statute's meaning is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. *Id.* There is no need to resort to legislative history or other exterior aids of construction to discern the plain meaning of an unambiguous statute. *Id.* The Court "may discern the plain meaning of nontechnical statutory terms from their dictionary definitions." *Columbia Riverkeepers*, 188 Wn.2d at 435. If, after this inquiry, the statute remains ambiguous or unclear, it is appropriate to resort to canons of construction and legislative history. *Id.* "A statute is ambiguous when it is susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable." *State v. Gray*, 174 Wn.2d 920, 927, 280 P.3d 1110 (2012).

2. RCW 43.20.050(2)(f) Unambiguously Authorized the Board to Adopt a Rule for the Prevention and Control of Vaping-Associated Lung Disease

Here, faced with an outbreak of vaping-associated lung disease during a youth vaping epidemic, the Board's rule prohibiting the sale of flavored vapor products falls well within the authority delegated to it by

the Legislature. Strong evidence showed that prohibiting the sale of flavored vapor products would likely decrease initiation and use of vapor products among adolescents and young adults. CP at 206. Accordingly, the Board adopted WAC 246-80-020 to temporarily prevent the sale of flavored vaping products and protect public health, particularly young people.

The plain language of RCW 43.20.050(2)(f) authorized the Board's rule. RCW 43.20.050 vests the Board with broad authority and responsibility to adopt rules to protect public health. Specifically with respect to disease, and "in order to protect public health," the Board is required to:

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[.]”

RCW 43.20.050(2)(f).

This statute clearly directs the Board to adopt rules to prevent and control infectious and noninfectious diseases. “Because protecting and preserving the health of its citizens from disease is an important governmental function, public health statutes . . . are liberally construed.” *Spokane Cty. Health Dist. v. Brockett*, 120 Wn.2d 140, 149, 839 P.2d 324 (1992). Prohibiting the sale of flavored vapor products prevents and

controls the initiation and use of vapor products especially among young people thereby reducing exposure to the outbreak of vapor-associated lung disease.

Vaping-associated lung disease falls squarely within this statutory authority because it is a “noninfectious disease.” The Court “may discern the plain meaning of nontechnical statutory terms from their dictionary definitions.” *Columbia Riverkeepers*, 188 Wn.2d at 435. “Disease” means “a condition of the living animal or plant body or one of its parts that impairs normal functioning and is typically manifested by distinguishing signs and symptoms: sickness, malady.” *Merriam-Webster’s Collegiate Dictionary* at 358 (11th ed. 2011). Those affected by the outbreak of vaping-associated lung disease experience a range of common symptoms including coughing, shortness of breath, chest pain, nausea, vomiting, and/or fever, as well as respiratory failure, abnormal findings on chest x-rays or CT scans, and death. CP at 168, 185-186. These symptoms are those of disease because they are conditions impairing normal functioning, a sickness, or a malady. The term “infectious” means “capable of causing infection.” *Merriam-Webster’s Collegiate Dictionary* at 639 (11th ed. 2011). It can also mean “communicable by infection.” *Id.* “Noninfectious” means not infectious. *Id.* at 841-42. Vaping-associated lung disease is a noninfectious disease because it impairs normal functioning of the body

and is typically manifested by distinguishing signs and symptoms, and it is not infectious.

Of course, the court must also consider the language immediately following the words in the statute “for the prevention and control of infectious and noninfectious diseases:” *including food and vector borne illness* in order to give effect to all the language used in the statute. *Spokane Cty. v. Dep’t of Fish & Wildlife*, 192 Wn.2d 453, 458, 430 P.3d 655 (2018). The use of the word “including” is not generally considered a limitation.

For example, in *United States v. Hoffman*, 154 Wn.2d 730, 749 n.4, 116 P.3d 999 (2005), the Supreme Court considered the meaning of the following definition of “mixed waste:”

“Mixed waste” or “mixed radioactive and hazardous waste” means any hazardous substance or dangerous or extremely hazardous waste that contains both a nonradioactive hazardous component and a radioactive component, *including* any such substances that have been released to the environment, or pose a threat of future release, in a manner that may expose persons or the environment to either the nonradioactive or radioactive hazardous substances.

Hoffman, 154 Wn.2d at 739, n.4.

The Court noted that the definition encompassed both materials that had been released and posed a threat, and those that did not. *Id.* If the *ejusdem generis* canon of construction was applied to this definition,

materials that had not been released and did not pose a threat of future release would not have been included, materially changing the definition. *See also Fed. Trade Com'n v. MTK Marketing, Inc.*, 149 F.3d 1036, 1040 (9th Cir. 1998) (“[I]n terms of statutory construction, use of the word ‘includes’ does not connote limitation. In definitive provisions of statutes and other writings, ‘include’ is frequently, if not generally used as a word of extension or enlargement rather than as one of limitation or enumeration.”), *citing, In re Yochum*, 89 F.3d 661 (9th Cir. 1996). The term “including” simply connotes an illustrative application of the general principle. *See In re Yochum*, 89 F.3d at 668 (citations omitted).

Petitioners argue that such an interpretation is not applicable to the Board’s authority to prevent and control disease because it would leave the Board with an inappropriate breadth of authority. But courts in this state have consistently held that statutes intended to protect public health are broadly drawn to allow flexibility when the authorities are confronted with a disease outbreak that requires action in order to protect public health. *See Brockett*, 120 Wn.2d 140. The broad authority granted the Board can, in fact, be traced to the Washington State Constitution, which directed the establishment of the State Board of Health and authorized the Legislature to give it such powers as it chose to grant. Const. art. XX, § 1. The Legislature implemented this directive by enacting RCW

43.20.050(2), which expressly requires the Board to adopt certain rules to protect public health.

In contrast, article XX, section 2 concerns the practice of medicine and says “[t]he *legislature* shall enact laws to regulate the practice of medicine and surgery, and the sale of drugs and medicines.” (Emphasis added). Accordingly, in the public health sphere, the Legislature was to invest the State Board of Health with such general powers as the Legislature saw fit to grant. In the sphere of medicine and surgery, however, the framers specifically directed the *Legislature* to regulate the practice of medicine and surgery and the sale of drugs and medicines. Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: the Interaction of Police Power and Property Rights*, 75 Wash. L. Rev. 857, 875 (2000). Consistent with the Washington Constitution, the Legislature has invested the State Board of Health with general powers to protect public health.

Moreover, public health statutes are liberally construed in relation to both communicable and non-communicable disease. *Brockett*, 120 Wn.2d 140; *Kaul v. City of Chehalis*, 45 Wn.2d 616, 621, 277 P.2d 352 (1954). The *Brockett* case involved a needle exchange program established as part of an intervention to slow the spread of AIDS and other infectious disease among intravenous drug users and those with whom they came

into contact. *Brockett*, 120 Wn.2d at 144. The defendants argued that the program constituted an unlawful distribution of drug paraphernalia. *Id.* at 146-47. Considering the broad grant of powers to local health officials in RCW 70.05.060 and .070, which authorized local health to control and prevent the spread of diseases, the Court stated:

The legislatively delegated power to cities and health boards to control contagious diseases gives them extraordinary power which might be unreasonable in another context. Indeed, we have said that the subject matter and expediency of public health disease prevention measures are beyond judicial control, except as they may violate some constitutional right guaranteed to the plaintiffs.

Id. at 149 (citing *Kaul v. City of Chehalis*, 45 Wn.2d 616, 621, 277 P.2d 352 (1954) (internal quotations omitted)).

The court specifically noted that the plaintiffs were not relying on the general powers granted to local officials under the state constitution, but were acting pursuant to public health statutes. *Id.* at 148.

In *Kaul v. City of Chehalis*, the city sought to fluoridate its water supply in order to prevent and exterminate dental caries. The city council was statutorily authorized “to prevent the introduction and spread of disease.” *Kaul*, 45 Wn.2d at 619. The Court found that the protection of public health included protection from the introduction or spread of both contagious and non-contagious disease and held that the ordinance was valid. *Id.* at 623.

The emergency rule barring the sale of flavored vapor products to prevent and reduce youth exposure to lung disease is a public health disease prevention measure. The rulemaking authority delegated by the Legislature to the State Board of Health is similar to the authority at issue in the *Brockett* and *Kaul* cases and must be liberally construed, if necessary, to allow the Board to exercise the general power to protect public health delegated to it by the Legislature under RCW 43.20.050(2)(f).

Petitioners argue that the Board's reference to the historically liberal construction of public health statutes is a "red herring" because RCW 43.20.050(2)(f) must be interpreted to limit the Board's authority. But the whole point of a liberal construction of public health statutes is to allow public health experts to exercise their authority to protect people from disease consistent with the particular need. Article II, § 1 of the Washington Constitution precludes the Legislature from delegating its power to enact purely substantive law, but the Legislature may delegate to administrative officers and boards authority to promulgate rules and regulations to carry out an express legislative purpose. *Snohomish Cty. Builders Ass'n v. Snohomish Health Dist.*, 8 Wn. App. 589, 596, 508 P.2nd 617 (1973), (citing *Senior Citizens League v. Dep't of Soc. Sec.*, 38 Wn.2d 142, 152, 228 P.2d 478 (1951)).

In the *Snohomish* case, the court considered whether resolutions regarding the installation of private sewage disposal systems adopted by the health district were valid and concluded they were. Noting that delegation of power must include adequate standards of guidance, the court stated that “the complexity of the subject matter of legislation, and its character as an exercise of police power or otherwise, are to be taken into consideration in determining whether there has been an unlawful delegation of legislative power.” *Id.* at 596. The court held that a general grant of authority to protect public health was a sufficient basis for the health district’s resolutions. *Id.* There is no need to read the Board’s statute narrowly. In fact, it should be read liberally to accomplish its purpose of protecting public health. *See also Lindsey v. Tacoma-Pierce Cty. Health Dep’t*, 8 F. Supp.2d 1213, 1218 (W.D. Wash. 1997) (finding broad authority for Pierce County to regulate cigarette advertising).

Even more specifically, the standards required for a proper delegation of administrative power by the Legislature are (1) that the Legislature has provided standards or guidelines which define in general terms what is to be done and the administrative body that is to accomplish it; and (2) the procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wn.2d 455, 458, 722 P.2d 808,

(1986). Here, the Board's rulemaking statute defines in at least general terms what is to be done and by which administrative body. Further, the Administrative Procedure Act provides clear procedural safeguards in the form of the opportunity for judicial review of the Board's adoption of emergency rules. RCW 34.05.570.

Next, Petitioners argue that the phrase "food and vector borne illness" would be superfluous if it does not serve to limit the Board's authority to prevent and control disease. It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction* § 46:6 (7th ed. 2014). But the phrase "including food and vector borne illness" finds meaning as containing illustrative examples, consistent with the cases in which the word "including" is not read as a limitation. *See, e.g. Hoffman*, 154 Wn.2d 730. Furthermore, RCW 43.20.050(2)(f) *directs* the Board to adopt rules for the prevention and control of disease. It is not a discretionary grant of authority. From this perspective, the use of examples can be read as the Legislature making clear that food and vector borne illnesses were among the conditions the Legislature expected the Board to address. Again, there is no need to apply a canon of construction since a plain reading of the statute alone avoids the rule against superfluity.

Petitioners also argue that interpreting the statute to authorize the Board to prevent and control all infectious and noninfectious disease would call for application of the canon of avoiding absurd results. To make their point, they refer to a list of items that can cause disease, and worry that if the Board's authority is not limited to food and vector borne illness and comparable diseases, the Board could regulate almost anything in the name of public health. This, they argue, would be absurd. However, what is clear from the plain meaning of the statute is that the Legislature intended the Board to have broad authority to prevent and control infectious and noninfectious diseases. Thus, a reading of the statute that allows the Board to regulate items which cause infectious and noninfectious disease is far from absurd – rather it is squarely within the Legislature's intent.

Further, courts have in the past, applied the canon of avoiding absurd results sparingly because it “refuses to give effect to the words the legislature has written.” *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 311, 268 P.3d 892 (2011) (further noting that the absurd results canon “necessarily results in a court disregarding an otherwise plain meaning and inserting or removing statutory language, a task that is decidedly the province of the legislature”). Limiting the Board's authority as Petitioners suggest, by applying this canon of construction, would unnecessarily

refuse to give effect to the words the Legislature placed in the statute and restrict the broad authority the Legislature gave the Board to prevent and control disease.

Petitioners argue throughout their brief that the inclusion of more specific terms must always result in the narrowing of a general term citing *State v. Larson*, 184 Wn.2d 843, 365 P.3d 740 (2015) (*See, e.g. Petitioners' Opening Br.* at 1, 12, 15-17)). But the *Larson* case was different than this case in several respects. First, it involved interpretation of a criminal statute, which elevated retail theft to a more serious offense. In that case, former RCW 9A.56.360 provided:

A person commits retail theft with extenuating circumstances if he or she commits theft of property from a mercantile establishment with one of the following extenuating circumstances:

...

(b) The 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.

This is in marked contrast to the statute in this case, which concerns protection of public health, a type of statute the courts have historically interpreted broadly. *Brockett*, 120 Wn.2d 140; *Kaul*, 45 Wn.2d 616.

Further, it appears that the court considered the meaning of the phrase in question, “a device designed to overcome security systems” to

be doubtful, following a split in opinions in the Court of Appeals, and citing an earlier case stating that “a doubtful term or phrase in a statute or ordinance takes its meaning from associated words or phrases.” *Larson*, 184 Wn.2d at 849, *citing*, *Burns v. City of Seattle*, 161 Wn.2d 129, 148, 164 P.3d 475 (2007). The Board’s statute is not doubtful or ambiguous.

3. Vaping-Associated Lung Disease is Comparable to Food and Vector Borne Illness.

Even if the “food and vector borne illness” clause in RCW 43.20.050(2)(f) is read to limit the diseases the Board is authorized to prevent and control to those that are comparable to food and vector borne illness under the *ejusdem generis* canon of statutory construction, it does not invalidate the Board’s rule. Under the rule of *ejusdem generis*, specific terms modify or restrict the application of general terms when both are used in a sequence. *Silverstreak, Inc. v. Dep’t of Labor and Indus.*, 159 Wn.2d 868, 882, 154 P.3d 891 (2007), *citing* *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 970, 977 P.2d 554 (1999). However, the rule is to be employed to support “the legislative intent in the context of the whole statute and its general purpose.” *Id.*, *citing* *City of Seattle v. State*, 136 Wn.2d 693, 701, 965 P.2d 619 (1998) (quoting *Cherry v. Mun. of Metro. Seattle*, 116 Wn.2d 794, 800, 808 P.2d 746 (1991)). It is not applicable if it does not advance the intent of the Legislature.

Assuming for purposes of argument that the *ejusdem generis* canon of construction applied, the Board argued to the Superior Court that vaping-associated lung disease need only be similar in nature to food borne illness, and that it was similar in nature to food borne illness because both are carried into the body through the mouth, either by food or by vapor. The Superior Court enlarged this comparison in order to identify a common thread between food borne and vector borne illness, concluding that vaping-associated lung disease is similar in nature and comparable to both food and vector borne illness because it is a disease passed to humans through an external source. In each comparison, the thing causing the disease is “borne” into the body by an external source. In this manner, a disease that is comparable to a food borne illness is also comparable to a vector borne illness. Vaping-associated lung disease is borne into the body by aerosolized vape juice and is, therefore, comparable to either, or both, a food borne illness or a vector borne illnesses.

There is no need to add another layer to a straightforward application of the canon of construction. Nonetheless, Petitioners argue that the terms “food borne” and “vector borne” describe methods of largely indiscriminate transmission in terms of whom the disease affects, whereas vaping can only affect individuals who vape. They argue that

vaping is a lifestyle choice. That may be so, just as eating red meat and high-fat foods are also lifestyle choices, that can lead to poor health outcomes. But developing heart disease or cancer that may be related to a poor diet is much different than getting sick from an undercooked hamburger tainted with E coli, or contracting vaping-associated lung disease from vape juice tainted with an unknown contaminant.

A “lifestyle” choice suggests a way in which a person has chosen to live their life over a period of time, but a person can contract vaping-associated lung disease depending on the ingredients in the vapor product, just like a person can contract a food borne illness depending on the contaminants in food. It does not require a lifetime of vaping, or even something close to it, like heart disease related to a poor diet, or lung cancer related to cigarettes. Thus vaping-associated lung disease cannot be distinguished from food borne and vector borne illness because it is a lifestyle choice.

Furthermore, vaping-associated lung disease is not distinguishable from food borne and vector borne illnesses on the basis that the latter, but not the former, affect people indiscriminately. A person chooses what to eat just like a person chooses to use a vapor product. Just because everyone must eat does not mean that people do not make conscious

decisions about what they eat. Some individuals choose to ingest high-risk foods such as raw juice or sprouts, while others avoid those foods.

The disease from an undercooked hamburger is not transmitted to that individual any more indiscriminately than the disease from the aerosolized vape juice is transmitted to the other individual. An individual makes a deliberate choice to eat food, does not know it is contaminated, and gets sick just as an individual makes a deliberate choice to inhale aerosolized vape juice not knowing it is contaminated and gets sick. The mechanisms for transmission are the same. If accepted, Petitioners' "indiscriminate transmission" standard would in fact end up excluding any number of food borne illnesses from the Board's authority to prevent and control disease, which would clearly contradict the statute's plain language.

Even vector-borne illnesses do not necessarily affect people indiscriminately. For instance, tick borne diseases are a hazard to outdoor workers. Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, *Tick-Borne Diseases*, <https://www.cdc.gov/niosh/topics/tick-borne/default.html> (last visited February 3, 2020). Petitioners would have the Board protect public health only if the entire public at large is affected. This reading of the statute

diminishes the Board's authority in a way that is inconsistent with legislative intent. Nothing in the statutory language supports this interpretation, even when *ejusdem generis* is applied.

Petitioners further argue that food and vector borne illness are comparable only to water or air borne illnesses since these are the mechanisms by which a person contracts an indiscriminate disease. They cite to various Board rules that refer to transmission of disease by vector, food, water or air. The rules cited, WAC 246-100-011(7), 246-101-010(8), 246-337-005(6), 246-812-510(1), and 246-817-610, each contain the same definition of "communicable disease," in various settings. Vaping-associated lung disease, though, is not a communicable disease. It cannot be transmitted from one person to another. It can, however, affect enough people to be considered an outbreak. Petitioners acknowledge that diseases that are likely to mushroom into epidemics or pandemics as they move through the population are those that require executive-branch action. *Petitioners' Opening Br.*, at 26. When the Board adopted the rule prohibiting the sale of flavored vapor products, Washington was experiencing an outbreak of vaping-associated lung disease. An epidemic is the next level up from an outbreak. *See Centers for Disease Control and Prevention, Principles of Epidemiology in Public Health Practice, Lesson 1: Introduction to*

Epidemiology, Section 11: Epidemic Disease Occurrence, <https://www.cdc.gov/csels/dsepd/ss1978/lesson1/section11.html> (Last visited February 3, 2020.). The Board acted appropriately for the very purpose of preventing further cases and controlling the outbreak, especially in youth. WAC 246-80-010¹.

Finally, Petitioners take issue with the fact that WAC 246-80-020 is still in place even though the CDC is now warning consumers not to use vapor products containing THC or vitamin E acetate. Based on the CDC's findings, the Board adopted a second emergency rule, in November 2019, barring the sale of vapor products containing vitamin E acetate. WAC 246-80-021(2). The CDC has determined that vitamin E acetate is a chemical of concern in the vaping-associated lung disease outbreak, but has not ruled out other possible chemicals of concern. *See* WAC 246-80-021(1). It is for this reason that the prohibition against selling flavored vapor products has remained in effect, until February 7, 2020. Regardless of the current status of the outbreak, the validity of WAC 246-80-020 must be assessed at the time it was adopted. RCW 34.05.570(1)(b); *Wash. Indep. Tel. Ass'n v. Wash. Util. & Transp. Comm'n*, 148 Wn.2d 887, 906, 64 P.3d 606 (2003).

¹ Petitioners also argue against the use of the "other sanitary measures" clause in RCW 43.20.050(2)(f) as a basis for the Board's authority to adopt WAC 246-80-020. The superior court did not address this portion of the statute and the Board is not relying on it.

C. If the Court Reverses, it Should Remand to the Superior Court to Consider the Appropriate Factors for Temporary Relief under RCW 34.05.550

Under RCW 34.05.550, in order to stay a rule based on public health, safety or welfare grounds, the superior court must find: (1) the applicant is likely to prevail when the court finally disposes of the matter, (2) without relief the applicant will suffer irreparable injury, (3) the grant of relief to the applicant will not substantially harm other parties to the proceedings, and (4) the threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action in the circumstances. Each of these factors must be present before relief can be granted. RCW 34.05.550(3). Here, the superior court addressed the first three factors, but did not make a finding about the fourth factor. Therefore, even if this Court finds that Petitioners are likely to succeed on the merits, temporary relief is only appropriate if the superior court also finds that the threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action in the circumstances, and the Court should remand the case to the superior court to consider this factor.

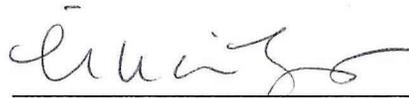
VII. CONCLUSION

Respondents respectfully request that the Court dismiss this matter as moot, or affirm the denial of temporary relief under RCW 34.05.550. The State Board of Health acted within its authority to adopt an

emergency rule prohibiting the sale of flavored vapor products during a combined outbreak of vaping-associated lung disease and a youth vaping epidemic.

RESPECTFULLY SUBMITTED this 3rd day of February, 2020.

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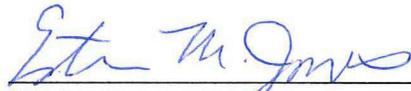
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