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21 JENNIFER HOCHSTATTER

22 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

23 IN AND FOR THE CITY & COUNTY OF SAN FRANCISCO

24 JENNIFER HOCHSTATTER,

25 *Petitioner,*

26 vs.

27 JOHN ARNTZ, Director of the San Francisco  
28 Department of Elections; DOES I-X

*Respondents.*

SAN FRANCISCO BALLOT  
SIMPLIFICATION COMMITTEE; DENNIS  
HERRERA, in his official capacity as San  
Francisco City Attorney; DOES XI-XX,

*Real Parties in Interest.*

Case No.

**VERIFIED PETITION FOR  
PEREMPTORY WRIT OF  
MANDATE**

**CALENDAR PREFERENCE  
REQUIRED BY STATUTE  
(ELEC. CODE § 13314(a)(3))**

## INTRODUCTION

1. This November, the voters of San Francisco will face a choice regarding the sale of electronic cigarettes in the City: (1) outright prohibition, or (2) stringent regulation designed to prevent youth vaping while leaving electronic cigarettes available as an alternative for adult smokers seeking to transition away from traditional combustible cigarettes. The first choice is the policy ardently promoted by Real Party in Interest City Attorney Dennis Herrera and approved by the Board of Supervisors in June; the second approach is represented by a ballot initiative measure titled "An Act to Prevent Youth Use of Vapor Products" (the "Initiative"), due to be voted on at the November municipal election. (A true and correct copy of the Initiative's text is attached hereto as Exhibit 1.)

2. The choice between these two alternatives is one that the voters should be permitted to make without the government placing its thumb on the scale, or "taking sides." *See Stanson v. Mott*, 17 Cal. 3d 206, 217 (1976) (constitutional requirement of fair and free elections means government cannot spend public funds to take sides in a ballot measure campaign). Unfortunately, unless this Court intervenes, the voters will not make this choice free from one-sided government interference. This petition is brought in the public interest to challenge the official ballot question ("Ballot Question" or "Question") and ballot digest (the "Ballot Digest" or "Digest") for the Initiative, which fail to comply with well-established requirements that they "must not be false, misleading, or partial to one side." *McDonough v. Superior Court (City of San Jose)*, 204 Cal. App. 4th 1169, 1174 (2012).

3. A true and correct copy of the City's Attorney's Ballot Question for the Initiative is attached hereto as Exhibit 2.

4. A true and correct copy of the Committee's final Digest for the Initiative is attached hereto as Exhibit 3.

## **GENERAL FACTUAL ALLEGATIONS**

5. On June 25, 2019, the Board of Supervisors for the City and County of San Francisco voted to adopt Ordinance No. 122-19, which completely prohibits the sale of electronic cigarettes in San Francisco, even to adults over the age of 21. It even forbids adults from ordering electronic cigarettes online from jurisdictions outside of San Francisco and having them delivered via interstate commerce to their homes. Meanwhile the City continues to allow the sale of combustible cigarettes—the deadliest legal consumer product known to humankind—free from the competition of a viable, less harmful alternative: electronic cigarettes. The Ordinance has been widely criticized by leading public health experts as “insane public policy” and “ludicrous”;<sup>1</sup> by the *Los Angeles Times* editorial board as “bad public health policy”;<sup>2</sup> and as a “bizarre choice” by the *San Francisco Chronicle’s* editorial board.<sup>3</sup>

6. For decades, San Francisco has recognized that no consumer product is more deadly than combustible cigarettes. The City’s Health Code proclaims that smoking is the “single greatest preventable cause of disease and death” and mourns the fact that combustible tobacco “kill[s] more than 480,000 people each year.” S.F. Health Code § 1009.20(1), § 19P.1. In this respect, San Francisco joins the universal chorus of policymakers, epidemiologists, statisticians, doctors, and even many smokers, all of whom agree that the widespread consumption of combustible

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<sup>1</sup> See Elizabeth Chuck, “Banning e-cigarettes, not tobacco products, is ‘ludicrous,’ some public health experts say,” NBC NEWS, June 26, 2019, *online at* <https://www.nbcnews.com/news/us-news/banning-e-cigarettes-not-tobacco-products-ludicrous-some-public-health-n1022176> (last visited Aug. 21, 2019).

<sup>2</sup> Editorial, “San Francisco’s e-cigarette ban isn’t just bad policy, it’s bad for public health,” L.A. TIMES, June 24, 2019, *online at* <https://www.latimes.com/opinion/editorials/la-ed-san-francisco-ban-ecigarettes-20190624-story.html> (last visited Aug. 21, 2019).

<sup>3</sup> Editorial, “San Francisco has a case of the vapors over Juul,” S.F. CHRON., June 7, 2019, *online at* <https://www.sfchronicle.com/opinion/editorials/article/Editorial-San-Francisco-has-a-case-of-the-vapors-13952927.php> (last visited Aug. 21, 2019).

1 cigarettes represents perhaps the supreme catastrophe of American health policy.  
2 At least three generations of smokers have known of the danger posed by cigarettes,  
3 but billion-dollar anti-smoking campaigns, nicotine gums and patches, tax hikes,  
4 advertising bans, and surgeon-general warnings have only slowed the tragedy. In  
5 fact, in 2016, Americans spent more at stores on cigarettes than on beer and soda  
6 combined.<sup>4</sup>

7       7. Electronic nicotine delivery systems (“ENDS”), often called “e-  
8 cigarettes” or vapor products, allow adults to consume nicotine without the  
9 combustion inherent in smoking. It is combustion—the incineration of tobacco and  
10 plant matter, along with some 7,000 chemicals rolled up with it, sucked deep into  
11 the lungs—that causes the vast majority of tobacco-related harm, from lung cancer  
12 and heart disease to emphysema.<sup>5</sup> ENDS are widely recognized as less harmful than  
13 the cigarettes that they seek to displace, and they have proven to be more effective  
14 than other alternatives to combustible cigarettes. Recently, sales of combustible  
15 cigarettes have seen a rate of decline of 8.2%, compared to an historic rate of  
16 decline of only 2.7%, as smokers switched to alternative forms of non-combustible  
17 nicotine delivery, including electronic cigarettes. Thus, at long last, ENDS present a  
18 means to divert smokers, *en masse*, from the only consumer product that kills half  
19 of its long-term users. ENDS technology represents a public-health breakthrough  
20 and a chance to succeed where previous alternatives have failed.

21       8. In early May 2019, while the Ordinance was pending in committee,  
22 Petitioner Jennifer Hochstatter (the “Proponent”) timely filed and circulated the  
23 Initiative. As an alternative to the City’s counterproductive ban, the Initiative seeks

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24       <sup>4</sup> Jennifer Maloney and Saabira Chaudhuri, “Against All Odds, the U.S. Tobacco  
25 Industry Is Rolling in Money,” *Wall Street Journal*, Apr. 23, 2017,  
26 <https://www.wsj.com/articles/u-s-tobacco-industry-rebounds-from-its-near-death-experience-1492968698>.

27       <sup>5</sup> See Harmful Chemicals in Tobacco Products, American Cancer Society (last  
28 visited Aug. 21, 2019), <https://www.cancer.org/cancer/cancer-causes/tobacco-and-cancer/carcinogens-found-in-tobacco-products.html>.



1 to *regulate* ENDS sales to “keep vapor products out of the hands of persons under  
2 21, while allowing adult smokers choice and access to vapor products to transition  
3 them from the use of combustible cigarettes.” (Ex. 1, Initiative, Notice of Intent to  
4 Circulate Petition.)

5 9. In June 2019, the Board of Supervisors adopted, and the Mayor signed,  
6 Ordinance No. 122-19. Ordinance No. 122-19: (1) extended the City’s ban on  
7 flavored tobacco products to any person in San Francisco (including an extension to  
8 online sales, and not just brick and mortar retail stores);<sup>6</sup> and (2) prohibited the  
9 sale of electronic cigarettes—to adults and not just minors, which is already illegal—  
10 that have not proceeded through pre-market review by the U.S. Food and Drug  
11 Administration (the “FDA”) where the applications are currently due to be filed  
12 with the FDA on May 11, 2020. A true and correct copy of Ordinance No. 122-19 is  
13 attached as Exhibit 4.

14 10. Over 20,000 San Franciscans signed the Initiative petition, which was  
15 submitted to the Director Elections in early July. Pursuant to the Charter, the  
16 measure was placed on the November 2019 ballot and is being promoted by the  
17 Coalition for Reasonable Vaping Regulation, a political committee sponsored by  
18 JUUL Labs, Inc. The Ballot Question and the Ballot Digest will be printed in the  
19 voter pamphlet circulated to the electorate in connection with that election, and will  
20 be published at taxpayer expense.

21 11. The Question, prepared by the City Attorney—a leading *proponent* of  
22 the City’s ban and *opponent* of the Initiative—and the Digest, approved by the San  
23 Francisco Ballot Simplification Committee (the “Committee”) but initially drafted  
24 by the City Attorney, bear the imprimatur of official government action and, by law,  
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26 <sup>6</sup> In late-June and early-July 2017, the San Francisco Board of Supervisors adopted,  
27 and the Mayor signed, Ordinance No. 140-17, which prohibits tobacco retailers (*i.e.*, brick  
28 and mortar stores) from selling flavored tobacco products in San Francisco. After its  
passage, Ordinance No. 140-17 was subject to a referendum. The voters of San Francisco  
approved the Ordinance at the June 2018 statewide and municipal election.

1 “must not be false, misleading, or partial to one side.” *McDonough*, 204 Cal. App.  
2 4th at 1174; *Horneff v. City and County of San Francisco*, 110 Cal. App. 4th 814,  
3 819-21 (2003); S.F. Muni. Elec. Code §§ 500(c)(8)(A), 510, 515, 590; Cal. Elec. Code  
4 §§ 9295(b)(2), 10403.

5 12. “The main purpose of these requirements is to avoid misleading the  
6 public with inaccurate information.” *Amador Valley Joint Union High Sch. Dist. v.*  
7 *State Bd. of Equalization*, 22 Cal. 3d 208, 243 (1978). But the requirements also  
8 enforce fundamental constitutional principles prohibiting the government from  
9 “taking sides” in a ballot measure campaign. *See Stanson*, 17 Cal. 3d at 217;  
10 *McDonough*, 204 Cal. App. 4th at 1174 (issuing writ of mandate ordering biased  
11 ballot label to be altered).

12 13. Despite these well-established rules, the Question and Digest are false,  
13 misleading and lack the impartiality that is a legal requirement of such summaries.

14 14. Both the Question and the Digest tell voters that current law prohibits  
15 “the sale of electronic cigarettes that lack required FDA authorization.” Both  
16 summaries thereby falsely imply that there is presently a requirement that  
17 electronic cigarettes have FDA authorization, and that companies selling electronic  
18 cigarettes are currently flouting their legal obligations. In short, the language  
19 suggests that electronic cigarettes are currently being marketed illegally. That is  
20 simply not true. FDA authorization is not presently “required,” and these products  
21 are currently being sold legally.

22 15. The Committee’s Digest further included language claiming the  
23 Initiative “*may* repeal other existing City laws that apply to vapor products,  
24 including the City law that prohibits the sale of flavored vapor products.”  
25 (Emphasis added.) As explained below, such language is a politically crafted effort  
26 to mislead voters as to the legal effect of the Initiative.

27 16. The Digest is also speculative. The very purpose of the Digest is to tell  
28 voters clearly what the measure does and does not do. Not surprisingly, this false

1 and misleading language dovetails precisely with the chief campaign message of the  
2 Initiative's opponents.

3 17. These mischaracterizations of the Initiative's effect are, unfortunately,  
4 not surprising, because a leading member of that opposition is City Attorney Dennis  
5 Herrera. Mr. Herrera drafted and sponsored the City ordinance that the Initiative  
6 would partially repeal and he continues to campaign in defense of that ordinance.  
7 Mr. Herrera's office drafted the ballot title and summary for the signature gathering  
8 effort for the initiative and did not include this misleading language in that title and  
9 summary, a true and correct copy of which is attached as Exhibit 6.

10 18. Then, upon information and belief, a poll was run that showed the  
11 initiative was favored by the voters but that a carefully crafted disinformation  
12 campaign might change that result if a narrative could be formed that the initiative  
13 threatened the ban on flavored tobacco and vapor products. Mr. Herrera's office  
14 then provided the initial draft Digest, which included the misleading language, to  
15 the Committee and he prepared the misleading Ballot Question. This Court has the  
16 power to amend the digest to correct these politically-motivated deficiencies and  
17 should intervene to protect the integrity of the electoral process.

18 **FALSE, MISLEADING AND PARTIAL STATEMENTS IN THE**  
19 **BALLOT QUESTION AND BALLOT DIGEST RE THE**  
20 **PURPORTED LACK OF "REQUIRED" FDA APPROVAL**

21 19. In May 2016, the FDA adopted a final regulation "deeming" certain  
22 products—including electronic cigarettes—to be subject to its regulatory oversight.<sup>7</sup>  
23 At that time, FDA determined that it would allow newly regulated products,  
24 including electronic cigarettes, that were on the market as of August 8, 2016, to  
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26  
27 <sup>7</sup> FDA, "Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and  
28 Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act;  
Restrictions on the Sale and Distribution of Tobacco Products and Required Warning  
Statements for Tobacco Products," 81 Fed. Reg. 28980 (May 10, 2016).

1 remain on the market pending the submission of a premarket application by the  
2 applicable deadline. In 2017, the FDA announced its Comprehensive Plan for  
3 Tobacco and Nicotine Regulation (“Comprehensive Plan”), which extended the  
4 deadline for the submission of premarket applications for electronic cigarettes to  
5 August 8, 2022.<sup>8</sup> That deadline was subsequently moved to May 11, 2020, by a  
6 federal court action in Maryland that further provided a one-year deadline for the  
7 FDA to review those applications (*i.e.*, May 2021).

8       20. Under both the FDA’s Comprehensive Plan and the Maryland district  
9 court’s order, however, manufacturers of electronic cigarettes can continue to  
10 lawfully market and distribute their products prior to the deadline for submitting  
11 an application and while the application is pending agency review.<sup>9</sup> Consequently,  
12 “authorization” by the FDA is not presently “required” for the lawful marketing of  
13 electronic cigarettes. However, the Question and the Digest are phrased in a way  
14 that suggests otherwise.

15       21. The City Attorney’s Ballot Question reads:

16       “Shall the City overturn the law passed by the Board of Supervisors  
17 suspending the sale of electronic cigarettes that lack required FDA  
18 authorization, and adopt new regulations on the sale, manufacture,  
19 distribution and advertising of electronic cigarettes in San Francisco?”  
(Emphasis added.)

20       22. By telling voters that the Board of Supervisors’ ordinance would  
21 prohibit “the sale of electronic cigarettes that lack required FDA authorization,” the  
22

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23       <sup>8</sup> See FDA, *Guidance for Industry: Extension of Certain Tobacco Product*  
24 *Compliance Deadlines Related to the Final Deeming Rule, Sixth Revision*, Nov. 2018,  
[https://www.fda.gov/downloads/TobaccoProducts/Labeling/RulesRegulationsGuidance/](https://www.fda.gov/downloads/TobaccoProducts/Labeling/RulesRegulationsGuidance/UCM557716.pdf)  
25 [UCM557716.pdf](https://www.fda.gov/downloads/TobaccoProducts/Labeling/RulesRegulationsGuidance/UCM557716.pdf) (last visited Aug. 20, 2019).

26       <sup>9</sup> See *Am. Acad. of Pediatrics v. FDA*, 379 F. Supp. 3d 461, 468 (D. Md. May 15,  
27 2019) (summarizing Comprehensive Plan); *Am. Acad. of Pediatrics v. FDA*, 2019 U.S.  
28 Dist. LEXIS 116003, \*18-\*19 (D. Md. July 12, 2019) (products “for which applications have  
been timely filed may remain on the market without being subject to FDA enforcement  
actions for a period not to exceed one year from the date of application while FDA  
considers the application”).

1 Question falsely implies that there is presently a requirement that electronic  
2 cigarettes have FDA “authorization,” and that companies selling electronic  
3 cigarettes in San Francisco are presently flouting their legal obligations. It suggests  
4 that electronic cigarettes are currently being unlawfully marketed. That is simply  
5 not true. While FDA approval will be needed in the future, such approval is not  
6 presently “required” to lawfully sell these products.

7 23. In adopting the final Digest for the Initiative, the Committee included  
8 misleading language in a similar vein—initially proposed by the City Attorney’s  
9 office—stating:

- 10 • The U.S. Food and Drug Administration (FDA) regulates tobacco  
11 products. *Beginning in late January 2020, the City will suspend the*  
12 *sale of electronic cigarettes that have not gone through required pre-*  
13 *market review by the FDA. As of July 2019, the FDA has not*  
*completed a review for any electronic cigarette products”* (emphasis  
added);
- 14 • “The measure would: [¶] • Repeal the City law passed by the Board of  
15 Supervisors that suspends the sale of electronic cigarettes that lack  
16 required authorization by the FDA” (emphasis added); and
- 17 • “A ‘YES’ Vote Means: If you vote ‘yes,’ you want to overturn the law  
18 passed by the Board of Supervisors that suspends the sale of electronic  
19 cigarettes *that lack required FDA authorization* and to adopt new  
regulations on the sale, manufacture, distribution and advertising of  
electronic cigarettes in San Francisco” (emphasis added).

20 24. Here again, the language in question is false and/or misleading in that  
21 it suggests to voters that FDA authorization is presently required for the lawful sale  
22 of electronic cigarettes, when that is not the case. Relief is warranted under  
23 Elections Code §§ 9295 and 13314 and San Francisco Municipal Elections Code §  
24 590 to amend the misleading and biased phrasing of Question and Digest insofar as  
25 they suggest that FDA approval is presently “required” for the sale of electronic  
26 cigarettes.

1       **FALSE, MISLEADING AND PARTIAL STATEMENTS IN THE**  
2       **BALLOT DIGEST RE THE PURPORTED POSSIBLE REPEAL**  
3       **OF THE CITY'S BAN ON FLAVORED TOBACCO PRODUCTS**

4       25. Petitioner is informed and believes, and on that basis alleges, that  
5 opponents of the Initiative measure have determined that their best bet for  
6 defeating the Initiative is to convince voters that the measure will repeal the flavor  
7 ban, and they have been tailoring their public pronouncements accordingly.  
8 Petitioner is further informed and believes, and on that basis further alleges, that  
9 when the circulating Title and Summary was issued, opponents of the Initiative had  
10 not yet conducted polling, which eventually led them to the conclusion that their  
11 best campaign tactic was to suggest that the flavor ban would be repealed. Tellingly,  
12 the initial "circulating" Title and Summary, prepared by the City Attorney's office for  
13 inclusion on the initiative petition, made no claim that the flavor ban might be  
14 repealed. *See* Ex. 6.

15       26. In advance of the Ballot Simplification Committee's August 6, 2019  
16 Hearing to finalize the legally required and "impartial" digest for the Initiative (*see*  
17 S.F. Muni. Elec. Code § 500(c)(8)(A)), counsel for the Initiative's supporters sent a  
18 letter to the City Attorney, with a copy to the Ballot Simplification Committee,  
19 explaining the falsity of the claim that the Initiative would overturn the flavor ban  
20 and urging him to not mislead the voters by including an unwarranted claim in the  
21 draft digest provided by his office to the Committee. A true and correct copy of that  
22 letter is attached hereto as Exhibit 7. They widely publicized that letter in a full-  
23 sized ad in the *San Francisco Chronicle*, published two days before the hearing, a  
24 true and correct copy of which is attached as Exhibit 8.

25       27. Notwithstanding this clear statement of intent and the plain language  
26 of the initiative, in describing the Initiative's "Proposal" in the draft Digest, the City  
27 Attorney asserted that the Initiative "*may* also repeal other existing City laws that  
28 apply to vapor products, including the City law that prohibits the sale of flavored

1 vapor products.” (Emphasis added.) A true and correct copy of the draft digest is  
2 attached hereto as Exhibit 9.

3 28. On August 5, 2019, counsel for Proponent of the Initiative, after the  
4 draft Digest was introduced, wrote another letter to Mr. Herrera, asking that the  
5 draft Digest be withdrawn in part because of its inaccuracy on this point. A true and  
6 correct copy of that letter is attached hereto as Exhibit 10.

7 29. In an effort to undo the mischaracterization in the City Attorney’s draft  
8 digest, the Initiative’s supporters provided additional materials directly to the  
9 Committee to further confirm the lack of any intention that the Initiative affect the  
10 flavor ban, including a signed declaration by Ashley Gould, on behalf of those  
11 involved in the drafting of the Initiative, and numerous public pronouncements by  
12 the supporters of the Initiative to the contrary, during the Committee’s public  
13 hearing. The Committee also received a letter from the San Francisco Office of  
14 Small Business (“SFOSB”), a city agency, stating that the Initiative would not  
15 overturn the flavor ban. Copies of that declaration and the SFOSB’s letter are  
16 attached hereto as Exhibits 11 and 12, respectively.

17 30. Nevertheless, the Committee—comprised of volunteer non-lawyers and  
18 advised by the City Attorney’s office—deferred to the City Attorney’s false,  
19 misleading, and biased language, incorporating it into the approved Ballot Digest  
20 for the Initiative. On August 7, 2019, the Initiative’s supporters requested  
21 reconsideration of the Digest in accordance with the prescribed procedures. A true  
22 and correct copy of the request of reconsideration is attached hereto as Exhibit 13.

23 31. The Committee, again advised by the City Attorney’s office, retained  
24 the “may repeal” language, despite its falsity and bias. *See* Ex. 3, Final Digest.

25 32. Relief is warranted under Elections Code §§ 9295 and 13314 to amend  
26 the misleading and biased phrasing of the “Proposal” summary contained in the  
27 official Ballot Digest prepared by the Ballot Simplification Committee.

28 33. Ordinance No. 122-19 seeks to categorically prohibit the sale of vapor

1 products in the City & County of San Francisco, even for adults, beginning in early  
2 2020. The Initiative was designed as an alternative to that approach, which is both  
3 draconian and counter-productive from a health policy standpoint, because it will  
4 likely force former adult smokers back to traditional cigarettes. Rather than  
5 prohibiting legal vapor product sales outright, as the City has done, the Initiative  
6 seeks to impose additional regulations to “prevent the access to and sale of vapor  
7 products by those under the age of 21 years and to restrict the marketing of vapor  
8 products to those underage, while preserving access for adults.” Ex. 1, Initiative,  
9 Sec. 2.

10 34. Instead of running a campaign on objectively true facts, opponents of  
11 the Initiative seek to misinform San Francisco voters and falsely tell them that the  
12 Initiative repeals the flavored tobacco ban. The Ballot Simplification Committee has  
13 become an unwitting pawn for the Initiative’s opponents, who are determined to  
14 thwart the will of the voters in order to further their own policy objectives. This  
15 Court cannot allow such untruths based on a naked desire to defeat the Initiative to  
16 seep into the official government-published ballot materials for the Initiative.

17 35. California courts have clearly and repeatedly explained the standards  
18 for interpreting initiative measures. First, in “interpreting a voter initiative . . .  
19 courts apply the same principles governing the construction of a statute.” *Knight v.*  
20 *Superior Court* (2005) 128 Cal.App.4th 14, 23 (internal quotation marks and  
21 citations omitted). Accordingly, the first step is “examining the language of the  
22 initiative statute, giving the words their usual and ordinary meaning, viewed in the  
23 context of the statute as a whole and the overall statutory scheme.” *Id.* “If the terms  
24 of the [law] are unambiguous, we presume the lawmakers meant what they said,  
25 and the plain meaning of the language governs.” *Id.* If the terms of the initiative are  
26 ambiguous, courts must “interrogate the electorate’s purpose, as indicated in the  
27 ballot arguments and elsewhere.” *Hodges v. Superior Court* (1999) 21 Cal.4th 109,  
28 114. Importantly, though, the “history of the measure, which confirms this intent, is



1 found in contemporary understanding of [the relevant law], and statements made  
2 by the drafter and leading proponent of the initiative.” *Rossi v. Brown* (1995) 9  
3 Cal.4th 688, 699. Indeed, “ballot measure opponents frequently overstate the  
4 adverse effects of the challenged measure, and that their ‘fears and doubts’ are not  
5 highly authoritative in construing the measure.” *Legislature v. Eu* (1991) 54 Cal.3d  
6 492, 505 (internal citation omitted).

7 36. Under the clear standards set out by California courts, the Initiative  
8 does not repeal, in whole or in part, San Francisco’s flavored tobacco ban.

9 **Nothing in the Initiative Repeals the Flavor Ban**

10 37. The express terms of the Initiative do nothing to amend or repeal any  
11 part of San Francisco law that prohibits the sale of flavored tobacco. The flavor ban  
12 adopted in 2018 is contained in Article 19Q of the City’s Health Code; the expansion  
13 to online sales is contained in Article 19S. Except for adding certain enforcement  
14 provisions in Article 19H, the Initiative’s provisions are limited to amending Article  
15 19N—a pre-existing and wholly separate section of the Health Code. The Initiative’s  
16 provisions do not even reference the flavor ban, let alone *repeal* it. Additionally,  
17 Section 7 of the Initiative adopts new age verification requirements and product  
18 quantity limits “in addition to the restrictions contained in Section 19N.5 and  
19 19P.3.” Ex. 1 (emphasis added). The plain words of the Initiative clearly  
20 contemplate that the Initiative will exist alongside the City’s broader regulatory  
21 scheme, which includes the flavored tobacco ban.

22 38. The introductory text of the Initiative and other relevant materials also  
23 confirm the clear intention for the Initiative to regulate vapor products in the city in  
24 addition to the prohibition on sales of flavored tobacco in the City. The Notice of  
25 Intention states that the Initiative is being circulated “for the purpose of adopting  
26 additional restrictions and safeguards to prevent the sale of, and access to, vapor  
27 products (also referred to as ‘electronic cigarettes’ or ‘e-cigarettes’) to anyone under  
28 21 years of age.” Ex. 1, Initiative, Notice of Intention (emphasis added). The

1 foremost statement of the Initiative's intent is in the section setting forth the  
2 "findings and purposes in enacting this initiative": "This article is intended to  
3 impose additional safeguards to prevent the access to and sale of vapor products by  
4 those under the age of 21 years and to restrict the marketing of vapor products to  
5 those underage, while preserving access for adults to enable them to transition from  
6 the use of combustible cigarettes." Ex. 1, Initiative, Sec. 2(g) (emphasis added). The  
7 text and intent of the Initiative demonstrate an intention to adopt supplemental  
8 regulation of vapor products, and certainly not to repeal the flavored tobacco ban.  
9 Any insinuation otherwise in the ballot materials is wrong, illegal, and must be  
10 removed by this Court.

11 39. These repeated references to "additional restrictions" highlight the  
12 fundamental flaw in the Digest's approach. The purpose of the Initiative was to  
13 build on an existing regulatory structure—not to undermine it.

14 40. Opponents of the Initiative wrongly argue that the Initiative's stated  
15 intent to "comprehensively authorize and regulate" the sale of vapor products (Ex.  
16 1, Initiative, Sec. 12) implicitly repeals the City's flavored tobacco ban.

17 41. The California Supreme Court has repeatedly held that "repeal by  
18 implication" is disfavored. In fact, the California Supreme Court has ruled that the  
19 presumption against implied repeals is so strong that an implied repeal of a prior  
20 law can be found "only when there is *no rational basis* for harmonizing...two  
21 potentially conflicting statutes," such that the two laws are "irreconcilable, clearly  
22 repugnant, and so inconsistent that the two cannot have concurrent operation."  
23 *Lopez v. Sony Elecs., Inc.* (2018) 5 Cal.5th 627, 637 (emphasis added); *Kennedy*  
24 *Wholesale, Inc., v. Board of Equalization* (1991) 53 Cal.3d 245, 249. Since the  
25 vapor initiative is completely silent on the flavor ban and only adds new conditions  
26 on the manner in which vapor products can be sold, both the vapor Initiative and  
27 flavor ban can be rationally harmonized and concurrently enforced.

1           **The Statements and Other Evidence of the Intent of the Drafters**  
2           **Demonstrates That the Initiative Does Not Repeal the Flavor Ban**

3           42. The California Supreme Court, reiterating its disfavor of repeals by  
4 implication, has held that “[i]mplied repeal should not be found unless the later  
5 provision gives undebatable evidence of an intent to supersede the earlier.”  
6 *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th  
7 1029, 1040. No such “undebatable evidence” exists here and cannot exist here  
8 because the Proponent did not intend to repeal or alter the City’s flavored tobacco  
9 ban.

10           43. Under *Eu*, contrary arguments by opponents, offering surmises about  
11 the Initiative’s intent, are not “highly authoritative in construing the measure.” 54  
12 Cal.3d at 505. On the other hand, statements made by the *drafters and proponents*  
13 of the Initiative are highly persuasive evidence of its purpose. *Rossi*, 9 Cal.4th at  
14 699. Here, the Proponent of the Initiative is on record stating unequivocally, “The  
15 Initiative does not intend to repeal the flavor ban.” Ex. 7, Letter from J. Sutton to A.  
16 Shen, July 26, 2019, p. 1 (emphasis in original). This intention was widely  
17 publicized by a full-page advertisement published by the Initiative’s main  
18 supporters in the *San Francisco Chronicle* on August 4, 2019. Ex. 8. And it was  
19 attested to by the Chief Administrative Officer of JUUL Labs, Ashley Gould, in a  
20 sworn declaration submitted to the Committee, see Ex. 10, along with a  
21 supplemental letter from Mr. Sutton on August 5, 2019. See Ex. 9. Such admissions  
22 would likely be paramount to any court’s construction of the Initiative, and they  
23 demonstrate the falsity of the Ballot Digest’s contrary claims and the need for this  
24 Court to act to remove those claims from the Digest.<sup>10</sup>

25  
26           <sup>10</sup> It also strains the utmost bounds of plausibility to imagine that if the Initiative is  
27 ultimately successful in being adopted by the voters that the City Attorney’s office will take  
28 the position after the election that the flavor ban is no longer in effect. The cagey “may  
repeal” language allows repeal to be threatened by opponents of the Initiative before the  
election, as a cudgel, then disclaimed by them afterwards, if the Initiative prevails.

1           44. Furthermore, SFOSB is also on recording stating the “measure does  
2 not reverse the ban of sales [sic] flavored tobacco products.” Ex. 12, Letter from R.  
3 Dick-Endrizzi to J. Arntz, July 25, 2019, p. 1. SFOSB did not help draft the  
4 Initiative. Rather, it is an organization within the government of the City & County  
5 of San Francisco, separate from the Supervisors and City Attorney, that arrived  
6 independently at the most logical construction of the Initiative’s plain language.

7           45. Ultimately, inclusion of language suggesting the Initiative “may repeal”  
8 the City’s flavored tobacco ban in the final Ballot Digest results in a Digest that is  
9 “insufficiently neutral,” improperly favoring the chief argument of the Initiative’s  
10 opponents. It is no coincidence that the language in question—which ties directly  
11 into the chief campaign argument of the Initiative’s opponents—was initially  
12 proposed by the office of City Attorney Herrera, the chief sponsor of the prohibition  
13 on sales of vapor products that is the target of the Initiative and an activist against  
14 the Initiative.

15           46. Elections Code § 9295 (made applicable in San Francisco through San  
16 Francisco Municipal Code § 100) authorizes any voter in the City to seek a writ of  
17 mandate against the elections official to cause revisions to official ballot summaries  
18 that contain false, misleading, and/or biased statements, or statements  
19 “inconsistent with the requirements” of the Elections Code, so long as “the issuance  
20 of the writ will not substantially interfere with the printing and distribution of  
21 official election materials as required by law. . . .” *Id.*

22           47. The suggestion that the Initiative would result in a repeal of the flavor  
23 ban, as shown above, is false. The Initiative does not expressly or impliedly repeal  
24 the flavor ban. The “may repeal” language suggests that repeal is possible—despite  
25 the lack of any textual or intent-based evidence for repeal and despite the  
26 overwhelming evidence that the Initiative was *not* intended to repeal the flavor ban.

27           48. Finally, the adoption of an argument asserted by the Initiative’s  
28 political opponents, inserted, no less, by one of those opponents, ensures that the

1 Digest is biased. The “may repeal” language elevates a campaign argument into a  
2 legal conclusion, in what is supposed to be an impartial summary of the Initiative.

3 49. Elections Code § 13314 likewise authorizes the issuance of a writ to  
4 prevent any omission or error in “the printing of, a ballot, sample ballot, voter  
5 pamphlet, or other official matter”—such as the Ballot Digest—so long as “issuance  
6 of the writ will not substantially interfere with the conduct of the election.” Elec.  
7 Code § 13314(a)(1) & (2). Such relief is warranted here, to protect the integrity of  
8 the elections process.

### 9 **PARTIES**

10 50. Petitioner JENNIFER HOCHSTATTER is a resident, duly registered  
11 voter, and taxpayer in the City & County of San Francisco. She is the official  
12 proponent of the initiative that is the subject of this lawsuit.

13 51. Respondent JOHN ARNTZ is the Director of Elections for the City &  
14 County of San Francisco. As such, he is the elections official responsible for printing  
15 the voter information pamphlets that will be distributed to the voters of San  
16 Francisco containing the false and/or misleading Ballot Digest challenged herein.  
17 Petitioner is required to name Mr. ARNTZ as a respondent pursuant to California  
18 Elections Code § 9295(b)(3), and he is sued in his official capacity only.

19 52. Real Party in Interest SAN FRANCISCO BALLOT SIMPLIFICATION  
20 COMMITTEE is the body that, pursuant to ordinance, prepared the Ballot Digest  
21 challenged herein. The COMMITTEE is named as a real party in interest pursuant  
22 to California Elections Code § 9295(b)(3).

23 53. Real Party in Interest CITY ATTORNEY DENNIS HERRERA is the  
24 person that, pursuant to ordinance, prepared the Ballot Question challenged herein.  
25 Mr. HERRERA is named as a real party in interest, in his official capacity only,  
26 pursuant to California Elections Code § 9295(b)(3).

27 54. The true identities and capacities of Respondent Does I through X and  
28 Real Party Does XI-XX are unknown to Petitioner at this time. Petitioner is

1 informed and believes, and based upon such information and belief alleges, that  
2 each of the fictitiously named Respondents and Real Parties is in some manner  
3 responsible for the actions described in this Petition. When the true identities and  
4 capacities of these Respondents and Real Parties have been determined, Petitioner  
5 will seek leave to amend this Petition to insert such identities and capacities.

#### 6 VENUE

7 55. Venue for this action lies properly within the City & County of San  
8 Francisco pursuant to Code of Civil Procedure §§ 393(b) and 394. Respondent  
9 ARNTZ will conduct the election on behalf of the City & County.

#### 10 TIMING

11 56. California Elections Code § 9295(b)(1) and S.F. Municipal Elections  
12 Code § 590 provide a 10-day public review period following the submission of ballot  
13 materials, during which any petition for a writ of mandate must be filed. Attached  
14 hereto as Exhibit 14 is a true and correct copy of the calendar published by the San  
15 Francisco Department of Elections in connection with the November 2019 election,  
16 showing the review periods for various materials.

17 57. The BALLOT SIMPLIFICATION COMMITTEE finished its work on  
18 ballot digests on Monday, August 12, 2019. The ten-day review period for ballot  
19 digests therefore commenced on Tuesday, August 13, and expires on Friday, August  
20 23, 2019, as reflected in Exhibit 14. This petition is filed within the 10-day review  
21 period for filing challenges to that Ballot Digest.

22 58. Mr. HERRERA also finished his work on the ballot question on  
23 Monday, August 12, 2019. The ten-day review period for ballot questions therefore  
24 commenced on Tuesday, August 13, and expires on Friday, August 23, 2019, as  
25 reflected in Exhibit 14. This petition is filed within the 10-day review period for  
26 filing challenges to that Ballot Question.

27 59. Section 9295(b)(2) provides that this action must be resolved quickly  
28 enough that it will not “substantially interfere with the printing or distribution of

1 official election materials as provided by law.”

2 60. Elections Code § 13314 also provides for a writ of mandate to issue to  
3 prevent “an error or omission ... in the placing of a name on, or in the printing of, a  
4 ballot, county voter information guide, state voter information guide, or other  
5 official matter,” also provided that the suit “will not substantially interfere with the  
6 conduct of the election.” Section 13314(a)(3) provides that such a suit “shall have  
7 priority over all other civil matters.”

8 61. Petitioner is informed and believes, and on that basis alleges, that the  
9 Respondent ARNTZ told counsel for Petition, by phone on August 21, 2019, that the  
10 ballot materials will not go to print any sooner than September 11, 2019, at the  
11 earliest. Accordingly, the claims herein must be resolved by that date.

12 62. All conditions precedent to Petitioner’s right to recover have been  
13 performed, waived, or otherwise satisfied.

#### 14 **FIRST CAUSE OF ACTION**

#### 15 **(Writ of Mandate –Misleading and/or Partial Statements** 16 **in the Official Digest for the Initiative)**

17 63. Petitioner incorporates by reference each and every allegation made in  
18 Paragraphs 1 through 62 of this Petition as though fully set forth herein.

19 64. The official Ballot Digest for the Initiative, prepared by the Ballot  
20 Simplification Committee contains false, misleading and/or biased statements,  
21 which require deletions and amendments to avoid misleading the voters.

22 65. Specifically, the Digest is false, misleading, and/or biased insofar as it  
23 (1) suggests to voters that FDA authorization is presently required to lawfully  
24 market electronic cigarettes, and (2) tells the voters that the Initiative “may repeal  
25 other existing City laws that apply to vapor products, including the City law that  
26 prohibits the sale of flavored vapor products.” The Digest should be amended to  
27 make it clear to voters that FDA authorization is not presently required to lawfully  
28 market electronic cigarettes and the Initiative will not repeal the City’s laws that

1 prohibits the sale of flavored tobacco or vapor products.

2       66. The COMMITTEE's false, misleading and/or partial Ballot Digest is set  
3 to be printed by the government with taxpayer funds and provided to each voter in  
4 the City & County of San Francisco. Petitioner has no speedy or adequate remedy at  
5 law if a writ of mandate does not issue preventing the use of the misleading and/or  
6 partial phrasing contained in the Digest. Unless this Court issues a writ prohibiting  
7 Respondents from causing these improper election materials to be printed in the  
8 voter pamphlet and distributed to the voters, Petitioner will suffer irreparable  
9 injury and damage in that these materials will be distributed to voters at taxpayer  
10 expense in official election materials.

## 11                                   **SECOND CAUSE OF ACTION**

### 12                   **(Writ of Mandate –Misleading and/or Partial Statements** 13                   **in the Official Question for the Initiative)**

14       67. Petitioner incorporates by reference each and every allegation made in  
15 Paragraphs 1 through 66 of this Petition as though fully set forth herein.

16       68. The official Ballot Question for the Initiative, prepared by the City  
17 Attorney contains false, misleading and/or biased statements, which require  
18 deletions and amendments to avoid misleading the voters.

19       69. Specifically, the Question is false, misleading, and/or biased insofar as  
20 it suggests to voters that FDA authorization is presently required to lawfully market  
21 electronic cigarettes.

22       70. The CITY ATTORNEY's false, misleading and/or partial Ballot  
23 Question is set to be printed by the government with taxpayer funds and provided  
24 to each voter in the City & County of San Francisco. Petitioner has no speedy or  
25 adequate remedy at law if a writ of mandate does not issue preventing the use of the  
26 misleading and/or partial phrasing contained in the Question. Unless this Court  
27 issues a writ prohibiting Respondents from causing these improper election  
28 materials to be printed in the voter pamphlet and distributed to the voters,



1 Petitioner will suffer irreparable injury and damage in that these materials will be  
2 distributed to voters at taxpayer expense in official election materials.

3 **PRAYER**

4 WHEREFORE, Petitioner prays:

5 1. On the first cause of action that this Court issue an alternative writ of  
6 mandate prohibiting Respondents and their officers, agents, and all persons acting  
7 by, through or in concert with them, from printing the following misleading and/or  
8 biased statements:

- 9 • The U.S. Food and Drug Administration (FDA) regulates tobacco  
10 products. Beginning in late January 2020, the City will suspend the  
11 sale of electronic cigarettes that have not gone through required pre-  
12 market review by the FDA. As of July 2019, the FDA has not completed  
13 a review for any electronic cigarette products”
- 14 • “The measure would: [¶] • Repeal the City law passed by the Board of  
15 Supervisors that suspends the sale of electronic cigarettes that lack  
16 required authorization by the FDA”
- 17 • “A ‘YES’ Vote Means: If you vote ‘yes,’ you want to overturn the law  
18 passed by the Board of Supervisors that suspends the sale of electronic  
19 cigarettes that lack required FDA authorization and to adopt new  
20 regulations on the sale, manufacture, distribution and advertising of  
21 electronic cigarettes in San Francisco”
- 22 • The Initiative “may repeal other existing City laws that apply to vapor  
23 products, including the City law that prohibits the sale of flavored  
24 vapor products.”

25 in the official Ballot Digest for the Initiative in the ballot pamphlet for the  
26 November 5, 2019, election in San Francisco or in the alternative, to show cause  
27 why they should not be ordered to do so.

28 2. On the first cause of action that this Court issue a peremptory writ of  
mandate prohibiting Respondents and their officers, agents, and all persons acting  
by, through or in concert with them, from printing the misleading and/or biased  
statements set out in the previous paragraph in the official Ballot Digest for the

1 Initiative in the ballot pamphlet for the November 5, 2019, election in San  
2 Francisco.

3 3. On the second cause of action that this Court issue an alternative writ  
4 of mandate prohibiting Respondents and their officers, agents, and all persons  
5 acting by, through or in concert with them, from printing the Ballot Question for  
6 the Initiative unless amended as follows in the ballot pamphlet for the November 5,  
7 2019, election in San Francisco or in the alternative, to show cause why they should  
8 not be ordered to do so:

9 "Shall the City overturn the law passed by the Board of Supervisors  
10 suspending the sale of electronic cigarettes ~~that lack required FDA~~  
11 ~~authorization~~, and adopt new regulations on the sale, manufacture,  
12 distribution and advertising of electronic cigarettes in San Francisco?"  
(Emphasis added.)

13 4. On the second cause of action that this Court issue a peremptory writ  
14 of mandate prohibiting Respondents and their officers, agents, and all persons  
15 acting by, through or in concert with them, from printing the Ballot Question for  
16 the Initiative in the ballot pamphlet for the November 5, 2019, election in San  
17 Francisco unless amended as shown in the previous paragraph.

18 5. For costs of this proceeding; and

19 6. For such other and further equitable relief and other relief as this Court  
20 may deem just and proper.

21 Respectfully submitted,

22 Dated: August 22, 2019

THE SUTTON LAW FIRM PC

23 NIELSEN MERKSAMER

24 PARRINELLO GROSS & LEONI LLP

25  
26 By: 

27 *Attorneys for Petitioner*  
28 JENNIFER HOCHSTATTER

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**EXHIBIT 1**

Verified Petition for Writ of Mandate  
*Hochstatter v. Arntz*

SAN FRANCISCO  
FILED

2019 MAY 14 PM 3:33

DEPARTMENT OF ELECTIONS

**REQUEST FOR CITY ATTORNEY TITLE & SUMMARY**

May 14, 2019

Mr. John Arntz  
Director of Elections  
1 Dr. Carlton B. Goodlett Place  
City Hall, Room 48  
San Francisco, California 94102-4635

Dear Mr. Arntz:

Enclosed is the text of a proposed initiative ordinance to be submitted to the voters of the City and County of San Francisco. I request that a copy be forwarded to the Office of the City Attorney so that a ballot title and summary may be prepared.

I have also enclosed a draft ballot title and summary that is a true and impartial statement of the chief purpose and points of the proposed measure that should likewise be forwarded to the Office of the City Attorney. Given the City Attorney's personal involvement in the development of proposed Ordinances Nos. 190311 and 190312, which seek to ban the products that are the subject of this measure, if this version of the ballot title and summary is not used, I respectfully ask that he, anyone who assisted him in connection with those proposed ordinances, and his government law team recuse themselves entirely from this process and have other attorneys from his office undertake the preparation of the title and summary.

Enclosed herewith is the \$200.00 filing fee, made out to the "San Francisco Department of Elections," as required by Municipal Elections Code §§ 320 and 820.

Please send the Title & Summary to the following person (who shall also serve as a designated representative of the proponent for purposes related to this initiative):

**Name:** Jim Sutton

**Address:** The Sutton Law Firm, 150 Post Street, Suite 405

**City:** San Francisco, CA                      **Zip Code:** 94108

**E-mail address:** jsutton@campaignlawyers.com

If you have any questions, please contact me at:

**Telephone number:** 415 - 213 - 4649

**E-mail address:** jenniferhochstatter@gmail.com

Sincerely,

  
Jennifer Hochstatter

**NOTICE OF INTENT TO CIRCULATE PETITION**  
**(Cal. Elec. Code § 9202)**

**NOTICE OF INTENT TO CIRCULATE PETITION**

Notice is hereby given by the persons whose names appear hereon of their intention to circulate the petition within the City and County of San Francisco for the purpose of adopting additional restrictions and safeguards to prevent the sale of, and access to, vapor products (also referred to as "electronic cigarettes" or "e-cigarettes") to anyone under 21 years of age, including enhanced age-verification procedures, oversight and permit requirements for online retailers, marketing restrictions, and educational programs regarding the effects of nicotine consumption, while retaining their availability for adult smokers age 21 and older to provide them with an alternative to combustible cigarettes and the negative public-health effects associated with their use.

**A statement of reasons of the proposed action as contemplated in the petition is as follows (optional, maximum of 500 words):**

No person under 21 should have access to nicotine products, including vapor products (also known as "e-cigarettes"), which are addictive. But the use of nicotine vapor products among minors is on the rise. More can and must be done to keep these products away from persons under 21. At the same time, vapor products have enabled many smokers to transition from combustible cigarettes and their associated negative health effects. Thus, new restrictive measures to keep vapor products out of the hands of minors, while preserving the choice of adult San Franciscans to access these products that can help them stop the use of combustible cigarettes, are necessary.

This measure takes important steps to keep vapor products out of the hands of persons under 21, while allowing adult smokers choice and access to vapor products to transition them from the use of combustible cigarettes.

Specifically, the measure imposes a new permit requirement for online retailers selling vapor products to consumers in San Francisco and bolsters permit requirements for physical retailers in San Francisco that sell vapor products, enabling regulators to hold them accountable for allowing persons under 21 to purchase those products and to collect fee revenue from the permits to offset the cost of enforcement. The measure imposes more stringent and automated ID verification in stores through ID scanning requirements and online through third-party verification against publicly-available records and/or databases or third-party verification of the purchaser's uploaded photo ID. It requires that stores place vapor products behind the counter or in a lock-box that requires vendor assistance for any purchase. It also puts limits on bulk purchases to reduce social sourcing and the supply of vapor products on the black market. New restrictions prohibit the marketing of vapor products directed to minors. And the measure adds nicotine vapor products to the City's education outreach program, warning parents and minors of their dangers.

Jennifer Hochstatter  
NAME OF PROPONENT

  
PROPONENT'S SIGNATURE

5/14/19  
DATE

## INITIATIVE MEASURE TO BE SUBMITTED DIRECTLY TO THE VOTERS

The City Attorney has prepared the following title and summary of the chief purpose and points of the proposed measure:

[TITLE]

[SUMMARY]

*Be it ordained by the People of the City and County of San Francisco.*

### SECTION 1. Title.

This Initiative shall be known and may be cited as the “An Act to Prevent Youth Use of Vapor Products” (referred to hereinafter as the “Initiative”).

### SECTION 2. Findings & Conclusions.

The People of the City and County of San Francisco (the “City”) declare their findings and purposes in enacting this Initiative to be as follows:

(a) Recent reports suggest that despite existing laws and regulations, significant numbers of youth under the age of 21 in San Francisco are gaining unlawful access to vapor products (also known as “e-cigarettes”).

(b) Research into youth access and use of tobacco products, including vapor products, finds that the most common source for these products is “social sourcing” wherein persons of legal age purchase these products and then sell or share them with those underage.

(c) Enhanced regulations and restrictions that limit youth access to tobacco products, such as advanced, automated age-verification techniques and pre-set purchasing limits, can reduce the potential for failed age verification and social sourcing and ultimately lead to declines in the use of vapor products by individuals under the age of 21.

(d) Vapor products are not intended for use by any person under the age of 21.

(e) Vapor products are designed for the express purpose of reducing the deadly effects of combustible cigarette smoking, which causes approximately 480,000 deaths in the U.S. every year and imposes health care and lost economic productivity costs of nearly \$300 billion a year, by offering adult smokers an alternative nicotine delivery system that does not produce the multitude of harmful carcinogens and toxicants associated with the inhalation of burnt tobacco and smoke resulting from the use of combustible cigarettes.

(f) To preserve the harm-reduction potential of vapor products we must ensure that they stay out of the hands of youth and that their access is restricted to adults.

(g) This article is intended to impose additional safeguards to prevent the access to and sale of vapor products by those under the age of 21 years and to restrict the marketing of vapor products to those underage, while preserving access for adults to enable them to transition from the use of combustible cigarettes.



### SECTION 3. Amendment of Section 19N.2 of the Health Code

Section 19N.2 of the San Francisco Health Code is hereby amended to read as follows:

#### SEC. 19N.2. DEFINITIONS.

- (a) "Director" means the Director of Public Health or his or her designee.
- (b) "Vapor product," "Electronic Cigarette" or "E-cigarette" means any device with a heating element, a battery or an electronic circuit that provides nicotine or other vaporized liquids to the user in a manner that stimulates smoking tobacco electronic nicotine delivery system and includes any devices, components, and/or parts that deliver aerosolized nicotine-containing e-liquid when inhaled, and it includes the replacement or refill cartridge, pod, fluid, or other method for re-use of a vapor product.
- (c) "Establishment" means any store, stand, booth, concession or other enterprise located in the City and County of San Francisco that engages in the onsite retail sales of tobacco products and/or electronic cigarettes vapor products.
- (d) "Online retailer" means any individual or entity that sells more than 100 vapor products directly to consumers whose addresses are within the City and County of San Francisco via an internet-based website or retail sales platform per year.
- (e) "Manufacturer" means any individual or entity located in the City and County of San Francisco that makes more than 100 vapor products per year.
- (f) "Wholesaler" means any individual or entity that distributes or sells vapor products to an establishment located in the City and County of San Francisco for the purpose of onsite retail sales or to an online retailer for the purpose of online retail sales.

### SECTION 4. Amendment of Section 19N.3 of the Health Code

Section 19N.3 of the San Francisco Health Code is hereby amended to read as follows:

#### SEC. 19N.3. ~~TOBACCO SALES PERMIT REQUIRED.~~

- (a) An establishment must have a valid tobacco sales permit obtained pursuant to Health Code Section 1009.5219H.3 to sell electronic cigarettes vapor products.
- (b) Effective six months after the Director has adopted regulations providing for the application process in subdivision (c), an online retailer must have a valid online retail permit to sell vapor products in the City and County of San Francisco, except where the Director has failed to approve or deny the application within 90 days of its submission.
- (c) The Director shall promulgate regulations providing for an application and appeal process for issuing a permit to an online retailer and for the payment of an application and annual license fee sufficient to cover the costs of reviewing and evaluating the application or renewal. The application fee shall be submitted at the time of the application and the annual fee shall be due annually by March 31 of each year. The regulations shall address the requirements for approval and the grounds for denial or suspension of a permit, which shall be based on the requirements of this article, and the procedure for an appeal of a denial. The permitting process for an online retailer shall not be materially more burdensome than the process for obtaining a tobacco sales permit.
- (d**b**) The Director may enforce this section pursuant to Articles 19 *et seq.* of the Health Code including but not limited to the Articles prohibiting smoking in certain spaces or areas.

**SECTION 5. Amendment of Section 19N.4 of the Health Code**

Section 19N.4 of the San Francisco Health Code is hereby amended to read as follows:

**SEC. 19N.4. PROHIBITING THE USE OF ~~ELECTRONIC CIGARETTES~~ VAPOR PRODUCTS WHEREVER SMOKING OF TOBACCO PRODUCTS IS BANNED.**

(a) The use by any person of vapor products ~~electronic cigarettes~~ is prohibited wherever smoking of tobacco products is prohibited by law including Articles 19 *et seq.* of the Health Code.

(b) The Director may enforce this section pursuant to Articles 19 *et seq.* of the Health Code including but not limited to the Articles prohibiting smoking in certain spaces or areas.

**SECTION 6. Amendment of Section 19N.5 of the Health Code**

Section 19N.5 of the San Francisco Health Code is hereby amended to read as follows:

**SEC. 19N.5. PROHIBITING THE SALE OF ~~ELECTRONIC CIGARETTES~~ VAPOR PRODUCTS WHEREVER THE SALE OF TOBACCO PRODUCTS IS PROHIBITED.**

(a) The sale by an establishment of vapor products ~~electronic cigarettes~~ is prohibited wherever the sale of tobacco products is prohibited by law, including as prohibited in Articles 19 *et seq.* of the Health Code.

(b) The Director may enforce this section pursuant to Articles 19 *et seq.* of the Health Code including but not limited to Article 19J.

(c) Neither this section nor Article 19K nor any other provision of law apply to prohibit the manufacture, wholesale, or online retail sale of vapor products.

**SECTION 7. Enactment of Section 19N.5-1 of the Health Code**

The San Francisco Health Code is hereby amended by adding Section 19N.5-1 to read as follows:

**SEC. 19N.5-1. PROHIBITING THE SALE OF VAPOR PRODUCTS TO PERSONS UNDER 21 YEARS OF AGE, INCLUDING ELECTRONIC AGE VERIFICATION**

In addition to the restrictions contained in Sections 19N.5 and 19P.3:

(a) No person shall knowingly purchase a vapor product for another person who is under the age of 21, or provide a vapor product to another person who is under the age of 21 without charge, for nominal charge, or for barter or exchange.

(b) No establishment shall knowingly sell or distribute a vapor product to a person who is under the age of 21.

(c) No online retailer shall knowingly sell a vapor product for delivery in the City and County of San Francisco to a person under the age of 21.

(d) No wholesaler or manufacturer shall knowingly distribute a vapor product for delivery in the City and County of San Francisco to a person under the age of 21.

(e) No establishment shall sell vapor products to any person in the City and County of San Francisco unless the following requirements are met:

(1) The vapor product has been placed behind the counter or in a lock-box, requiring vendor assistance;

(2) The establishment requires the customer to submit a government-issued photo identification, as defined in Business and Professions Code section 22963, subdivision (b)(1)(B), and reviews and scans the identification to automatically verify that the purchaser is at least the age of 21 and that the identification has not expired; and

(3) The amount of vapor products that can be purchased during the transaction is limited to no more than 2 devices and/or 5 finished product packages of nicotine-containing liquid.

(f) In addition to the requirements in Business and Professions Code section 22963, subdivisions (a) and (b), no online retailer shall sell, or deliver, vapor products to a person whose address is in the City and County of San Francisco unless the following requirements are met:

(1)(A) The purchaser creates an online profile or account through the online retailer with personal information, including, but not limited to, the purchaser's name, address, and date of birth, and the online retailer verifies that information through a third party against publicly-available records and/or databases to determine that the purchaser is at least the age of 21; or

(1)(B) The purchaser uploads a copy of his or her government-issued photo identification which is verified by a third party to determine that the purchaser is at least the age of 21; and

(2) The online retailer shall limit the amount of product that can be purchased within a calendar month to no more than 2 devices and/or 60 milliliters of nicotine-containing liquid.

(g) The Director may enforce this section pursuant to Articles 19 *et seq.* of the Health Code including, but not limited to, administrative penalties and suspension or revocation of a permit pursuant to Article 19H. The restrictions in this section 19N.5-1 for the sale of vapor products in establishments and online shall take effect and be subject to enforcement commencing six months after the effective date of this section.

#### **SECTION 8. Enactment of Section 19N.5-2 of the Health Code**

The San Francisco Health Code is hereby amended by adding Section 19N.5-2 to read as follows:

#### **SEC. 19N.5-2. PROHIBITION ON MARKETING VAPOR PRODUCTS TO MINORS**

(a) No manufacturer, wholesaler, establishment, or online retailer shall knowingly market vapor products to minors.

(b) For purposes of this section "market vapor products to minors" means (i) to advertise, package, or label a vapor product in a manner designed to appeal to minors through the use of symbols, language, music, or cartoon characters intended to appeal primarily to persons under 21 years of age; or (ii) using an advertising medium that is known to be seen primarily by persons under 21 years of age.

#### **SECTION 9. Enactment of Section 19N.5-3 of the Health Code**

The San Francisco Health Code is hereby amended by adding Section 19N.5-3 to read as follows:

#### **SEC. 19N.5-3. PROHIBITING THE ADVERTISING OF VAPOR PRODUCTS WHEREVER THE ADVERTISING OF TOBACCO PRODUCTS IS PROHIBITED**

(a) The advertising of vapor products is prohibited wherever advertising of tobacco products is prohibited by law including Section 674 of the Police Code and Section 4.20 of the Administrative Code.

(b) Violations of this Section shall be punishable as an infraction pursuant to Section 710.3 of the Police Code.

#### **SECTION 10. Enactment of Section 19N.5-4 of the Health Code**

The San Francisco Health Code is hereby amended by adding Section 19N.5-4 to read as follows:

##### **SEC. 19N.5-4. REQUIRED TRAINING.**

(a) Each establishment that is permitted to sell vapor products shall, at least once semiannually, provide at least one hour of training to each of its employees regarding compliance with this Article 19N, and with Article 19P of the Health Code.

(b) The Director, after a noticed public hearing, may adopt rules and regulations to specify the content of such training, provided, however that such rules and regulations may not result in the prescribed training exceeding one-and-one-half hours per training session. Such rules and regulations shall take effect no earlier than 90 days after the date of adoption. Violation of any such rule or regulation may be grounds for administrative or civil action against the permittee pursuant to this Section 19H.14-3.

#### **SECTION 11. Enactment of Section 19N.5-5 of the Health Code**

The San Francisco Health Code is hereby amended by adding Section 19N.5-5 to read as follows:

##### **SEC. 19N.5-5. EDUCATION AND OUTREACH PROGRAM TO MINORS REGARDING VAPOR PRODUCTS.**

(a) The Director shall develop an educational and outreach program in connection with the Tobacco Free Project of the San Francisco Department of Public Health to inform parents, young adults, and children on the effects of nicotine consumption and the use of vapor products.

(b) The Director shall develop an informational website and bulletin that can be distributed to children in K-12 schools, to the Department of Social Services, the Recreation and Parks Department, the Library Commission, and other departments that the Director deems appropriate.

(c) The Director shall monitor the effectiveness of the education and outreach program in reducing the use of tobacco products and vapor products by persons under 21 years of age.

#### **SECTION 12. Enactment of Section 19N.5-6 of the Health Code**

The San Francisco Health Code is hereby amended by adding Section 19N.5-6 to read as follows:

##### **SEC. 19N.5-6. COMPREHENSIVE REGULATION OF VAPOR PRODUCTS**

(a) This article is intended to comprehensively authorize and regulate the retail sale, availability, and marketing of vapor products in the City and County of San Francisco.

(b) Notwithstanding subsection (a), nothing in this Article shall be construed to prohibit the enactment by the Board of Supervisors of a reasonable regulatory fee within the meaning of Article

XIIIC, section 1, subdivision (e)(3), of the California Constitution for purposes of the permits required under this Article, to the extent otherwise permitted by applicable law.

### **SECTION 13. Enactment of Section 19H.14-3 of the Health Code**

The San Francisco Health Code is hereby amended by adding Section 19H.14-3 to read as follows:

#### **SEC. 19H.14-3. CONDUCT VIOLATING HEALTH CODE SECTIONS 19N.5-1, 19N.5-2, 19N.5-3, OR 19N.5-4.**

(a) Upon a decision by the Director that the Permittee or the Permittee's agent or employee has engaged in any conduct that violates Health Code Section 19N.5-1 (Prohibiting The Sale Of Vapor Products To Persons Under 21 Years Of Age Including Electronic Age Verification), Section 19N.5-2 (Prohibition on Marketing Vapor Products to Minors), Section 19N.5-3 (Prohibiting the Advertising of Vapor Products Wherever the Advertising of Tobacco Products is Prohibited), or Section 19N.5-4 (Required Training), the Director may suspend the permit required under Section 19N.3 in the same fashion set forth in Section 19H.19, impose administrative penalties in the same fashion set forth in Section 19H.20, or both suspend the permit and impose administrative penalties.

(b) The Director shall commence enforcement pursuant to this Section 19H.14-3 by serving either a notice of correction under Section 19H.21 or a notice of initial determination under Section 19H.22 of this Article 19H; provided, however, that for a first violation during the period commencing on the effective date of this Section and for six months thereafter, the Director may serve only a notice of correction and may not serve a notice of initial determination or impose a permit suspension or administrative penalty. For a second violation occurring within the first twelve months, or a first violation occurring after the first twelve months, the Director may serve either a notice of correction under Section 19H.21 or a notice of initial determination under Section 19H.22, and may impose a permit suspension or administrative penalty in accordance with subsection (a), above.

(c) Any person who violates subsection (a) of Section 19N.5-1 hereof shall be subject either to a criminal action for a misdemeanor or a civil action punishable by a fine of two hundred dollars (\$200) for the first offense, five hundred dollars (\$500) for the second offense, and one thousand dollars (\$1,000) for the third offense.

### **SECTION 14. Interpretation.**

This Act must be interpreted so as to be consistent with all federal and state laws, rules, and regulations. It is the intent of the voters that the provisions of this Act be interpreted or implemented in a manner that facilitates the purposes set forth in this Act. The title of this Initiative and the captions preceding the sections of this Initiative are for convenience of reference only. Such title and captions shall not define or limit the scope or purpose of any provision of this Initiative. The use of the terms "including," "such as" or words of similar import when following any general term, statement or matter shall not be construed to limit such term, statement or matter to the specific items or matters, whether or not language of non-limitation is used. Rather, such terms shall be deemed to refer to all other items or matters that could reasonably fall within the broadest possible scope of such statement, term, or matter.

**SECTION 15. Severability.**

If any provision of this Act, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining provisions shall not be affected, but shall remain in full force and effect, and to this end the provisions of this Act are severable. The voters declare that this Act, and each section, sub-section, sentence, clause, phrase, part, or portion thereof, would have been adopted or passed irrespective of the fact that any one or more sections, sub-sections, sentences, clauses, phrases, part, or portion is found to be invalid. If any provision of this Act is held invalid as applied to any person or circumstance, such invalidity does not affect any application of this Act that can be given effect without the invalid application.

**SECTION 16. Conflicting Ballot Measures.**

In the event that this Act and another measure or measures relating to the sale of vapor products, including any proposal to prohibit the sale thereof, shall appear on the same municipal election ballot, the provisions of such other measures shall be deemed to be in conflict with this Act. In the event that this Act shall receive a greater number of affirmative votes, the provisions of this Act shall prevail in their entirety and each and every provision of the other measure or measures that conflict, in whole or in part, with this Act shall be null and void in their entirety. In the event that the other measure or measures shall receive a greater number of affirmative votes, the provisions of this Act shall take effect to the extent permitted by law.

**SECTION 17. Effective Date.**

In accordance with the provisions of Municipal Elections Code § 380 and California Elections Code § 9217, if a majority of the voters vote in favor of the Initiative, the Initiative shall go into effect ten days after the official vote count is declared by the Board of Supervisors.

**SECTION 18. Amendment.**

Pursuant to Municipal Elections Code § 390 and California Elections Code § 9217 the provisions of this Initiative may only be amended by a vote of the People.

**ACKNOWLEDGEMENT OF PROPONENT**

I, Jennifer Hochstatter, acknowledge that it is a misdemeanor under state law (California Elections Code Section 18650) to knowingly or willfully allow the signatures on an initiative petition to be used for any purpose other than qualification of the proposed measure for the ballot.

I certify that I will not knowingly or willfully allow the signatures for this initiative to be used for any purpose other than qualification of the measure for the ballot.

A handwritten signature in black ink, appearing to read "Jennifer Hochstatter", written over a horizontal line.

(Signature of Proponent)

Dated this 14th day of May, 2019

## **IMPOSES ADDITIONAL REGULATIONS AND RESTRICTIONS ON THE ACCESS, SALE, AND MARKETING OF VAPOR PRODUCTS IN THE CITY AND COUNTY OF SAN FRANCISCO**

Vapor products (also referred to as “electronic cigarettes” or “e-cigarettes”) are electronic devices that deliver aerosolized nicotine-containing liquid when inhaled, a process sometimes known as “vaping.” The sale and use of vapor products in San Francisco are regulated and taxed by the State of California, including a prohibition against the sale of tobacco products, including vapor products, to persons under 21 years of age, with additional regulation by the City and County of San Francisco.

This measure would impose additional safeguards, and enhanced restrictions, against the sale and marketing of vapor products to any person under the age of 21 years in San Francisco, including:

- A new permit requirement for online retailers, in addition to the permit already required for physical retail establishments, which imposes a series of automated third-party verification procedures to protect against sales to persons under 21 years of age.
- A requirement that for any online purchase, the purchaser create an online profile or account with personal information that is verified by a third party against publicly-available records and/or databases or upload a copy of his or her government-issued photo identification that is verified by a third party to ensure the purchaser is 21 years of age or older. The online retailer also must limit the amount of vapor products that can be purchased within a calendar month to a predefined limit.
- Requirements for physical retailers to place vapor products behind the counter or in a lock-box, requiring vendor assistance to make the purchase; that they scan a government-issued photo identification to confirm the purchaser’s age and the validity of the identification; and that they limit sales to no more than two devices and/or five finished product packages of nicotine-containing liquid per transaction.
- A new prohibition against marketing vapor products to persons under 21 years of age.
- Subjecting vapor products to other advertising restrictions that are currently applicable only to traditional tobacco products (e.g., combustible cigarettes).
- A requirement that at least every six months, retail establishments provide at least an hour of training to their employees regarding compliance with the laws regulating the sale and marketing of vapor products.
- A direction to the Director of Public Health to create educational materials to inform parents, young adults, and children regarding the effects of nicotine consumption and use of vapor products.

The measure authorizes the Director of Public Health to enforce the provisions of the measure.



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**EXHIBIT 2**

Verified Petition for Writ of Mandate  
*Hochstatter v. Arntz*

CITY AND COUNTY OF SAN FRANCISCO



DENNIS J. HERRERA  
City Attorney

OFFICE OF THE CITY ATTORNEY

JENICA D. MALDONADO  
Deputy City Attorney

DIRECT DIAL: (415) 554-4661  
E-MAIL:  
jenica.maldonado@sfcityattty.org

August 12, 2019

John Arntz  
Department of Elections  
City Hall, Room 48  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102

Re: November 2019 Ballot Questions

Dear Director Arntz:

Please find below the ballot questions for the November 2019 election. As authorized by law, the Board of Supervisors wrote the ballot question for the measure entitled "Affordable Housing Bond." The City Attorney's Office wrote the ballot questions for the remaining measures.

Proposition entitled "Affordable Housing Bond": "SAN FRANCISCO AFFORDABLE HOUSING BONDS. To finance the construction, development, acquisition, and preservation of housing affordable to extremely-low, low and middle-income households through programs that will prioritize vulnerable populations such as San Francisco's working families, veterans, seniors, and persons with disabilities; to assist in the acquisition, rehabilitation, and preservation of existing affordable housing to prevent the displacement of residents; to repair and reconstruct distressed and dilapidated public housing developments and their underlying infrastructure; to assist the City's middle-income residents or workers in obtaining affordable rental or home ownership opportunities including down payment assistance and support for new construction of affordable housing for San Francisco Unified School District and City College of San Francisco employees; and to pay related costs; shall the City and County of San Francisco issue \$600,000,000 in general obligation bonds with a duration of up to 30 years from the time of issuance, an estimated average tax rate of \$0.019/\$100 of assessed property value, and projected average annual revenues of \$50,000,000, subject to independent citizen oversight and regular audits?"

Proposition entitled "Department of Disability and Aging Services": "Shall the City amend the Charter to change the name of the Department of Aging and Adult Services to the Department of Disability and Aging Services; to change the name of the Aging and Adult Services Commission to the Disability and Aging Services Commission; and to add new qualifications for three of the seven seats on this Commission?"

Proposition entitled "Affordable Housing and Educator Housing": "Shall the City amend the Planning Code to allow 100% Affordable Housing Projects and Educator Housing Projects in public zoning districts and to expedite approval of these projects?"

Proposition entitled "Campaign Contributions and Campaign Advertisements": "Shall the City establish new restrictions on campaign contributions to local elected officials and candidates, and apply new disclaimer requirements to campaign advertisements?"

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY

Letter to John Arntz  
August 12, 2019

Proposition entitled "Vapor Products": "Shall the City overturn the law passed by the Board of Supervisors suspending the sale of electronic cigarettes that lack required FDA authorization, and adopt new regulations on the sale, manufacture, distribution and advertising of electronic cigarettes in San Francisco?"

Proposition entitled "Traffic Congestion Mitigation Tax": "Shall the City impose a 1.5% business tax on shared rides and a 3.25% business tax on private rides for fares charged by commercial ride-share and driverless-vehicle companies until November 5, 2045, raising an estimated \$30-35 million annually, to fund improvements in Muni service and bicycle and pedestrian safety?"

Very truly yours,

DENNIS J. HERRERA  
City Attorney

A handwritten signature in black ink, appearing to read "Jenica Maldonado", written in a cursive style.

Jenica D. Maldonado  
Deputy City Attorney

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**EXHIBIT 3**

Verified Petition for Writ of Mandate  
*Hochstatter v. Arntz*

## **Vapor Products\***

**Digest** by the Ballot Simplification Committee

**Status:** Final Digest

**On:** Friday, August 9, 2019

**Members:** Packard, Anderson, Raveche

**Deadline to Request Reconsideration:** 4:30 p.m. on Wednesday, August 7

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**The Way It Is Now:** The City and the State of California regulate the sale of tobacco products. The term “tobacco products” includes vapor products such as electronic cigarettes, their cartridges and other parts, and liquid nicotine. Electronic cigarettes are battery-operated devices that vaporize liquid nicotine and deliver it to the user.

City and State laws regulate the sale of electronic cigarettes in San Francisco in the following ways:

- The City and State prohibit the retail sale of tobacco products to people under age 21 and the State prohibits the sale of tobacco products on the internet to people under age 21;
- The City prohibits the sale of electronic cigarettes everywhere the sale of other tobacco products is prohibited;
- The City prohibits the sale of flavored tobacco products, including flavored electronic cigarettes;
- The City prohibits the sale, manufacture and distribution of electronic cigarettes and other tobacco products on City property; and
- The City prohibits advertising of certain tobacco products on billboards or other publicly visible signs in San Francisco and on City property. Federal and State law impose additional advertising restrictions on tobacco products.

The City and State regulate the sale of electronic cigarettes as follows:

- Tobacco retailers must obtain permits from the City and the State, and tobacco distributors must obtain a license from the State;
- State law requires tobacco retailers to check the identification of any customer who appears to be under age 21, and to store electronic cigarettes where customers cannot access them without assistance; and
- State law requires sellers and distributors of electronic cigarettes on the internet to verify that customers are at least 21 years old.

The U.S. Food and Drug Administration (FDA) regulates tobacco products. Beginning in late January 2020, the City will suspend the sale of electronic cigarettes that have not gone through required pre-market review by the FDA. As of July 2019, the FDA has not completed a review for any electronic cigarette products.

**The Proposal:** Proposition \_\_ would authorize and regulate the retail sale, availability and marketing of electronic cigarettes in San Francisco. The measure would:

- Repeal the City law passed by the Board of Supervisors that suspends the sale of electronic cigarettes that lack required authorization by the FDA; and
- Partially repeal City law to allow the sale, manufacture and online retail sale of electronic cigarettes on City property.

Proposition \_\_ may repeal other City laws that apply to electronic cigarettes, including the City law that prohibits the sale of flavored electronic cigarettes.

*\*Working title, for identification only. The Director of Elections determines the title of each local ballot measure; measure titles are not considered during Ballot Simplification Committee meetings.*

Proposition \_\_\_\_ would impose new regulations on the sale and distribution of electronic cigarettes in San Francisco as follows:

- Require retailers to scan photo identification to verify that customers are 21 years or older;
- Prohibit retailers from selling more than two electronic cigarette devices or five finished product packages of liquid nicotine in each transaction; and
- Require retailers to train their employees twice a year.

Proposition \_\_\_\_ would also require individuals and entities that sell more than 100 electronic cigarettes per year on the internet to San Francisco customers to:

- Obtain a permit from the City;
- Verify that customers are at least 21 years old; and
- Sell no more than two electronic cigarette devices or 60 milliliters of liquid nicotine, per month, to each customer.

Proposition \_\_\_\_ would prohibit advertising electronic cigarettes designed to appeal to minors or using an advertising medium known to be seen primarily by people under 21 years old.

**A "YES" Vote Means:** If you vote "yes," you want to overturn the law passed by the Board of Supervisors that suspends the sale of electronic cigarettes that lack required FDA authorization and to adopt new regulations on the sale, manufacture, distribution and advertising of electronic cigarettes in San Francisco.

**A "NO" Vote Means:** If you vote "no," you want to keep existing laws regulating electronic cigarettes.

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**EXHIBIT 4**

Verified Petition for Writ of Mandate  
*Hochstatter v. Arntz*

[Health Code - Restricting the Sale, Manufacture, and Distribution of Tobacco Products, Including Electronic Cigarettes]

**Ordinance amending the Health Code to prohibit the sale by tobacco retail establishments of electronic cigarettes that require, but have not received, an order from the Food and Drug Administration (FDA) approving their marketing; and prohibiting the sale and distribution to any person in San Francisco of flavored tobacco products and electronic cigarettes that require, but have not received, an FDA order approving their marketing.**

NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.  
**Additions to Codes** are in *single-underline italics Times New Roman font*.  
**Deletions to Codes** are in ~~*strikethrough italics Times New Roman font*~~.  
**Board amendment additions** are in double-underlined Arial font.  
**Board amendment deletions** are in ~~Arial font~~.  
**Asterisks (\* \* \* \*)** indicate the omission of unchanged Code subsections or parts of tables.

Be it ordained by the People of the City and County of San Francisco:

Section 1. Findings.

(a) Despite progress in reducing smoking, tobacco use is still the leading cause of preventable death in the United States. Tobacco kills more than 480,000 people in this country annually – more than AIDS, alcohol, car accidents, illegal drugs, murders, and suicides combined. And beyond this large, impersonal statistic, are countless human beings, whose lives are forever devastated by the irreparable loss of a loved one caused by tobacco use, and the inevitable rupture of family that follows such a loss. And that is to say nothing of the huge financial costs tobacco use places on our health care system, and the constraints on productivity it imposes on our economic system.



1 (b) Electronic cigarettes (or “e-cigarettes”) entered the marketplace around 2007, and  
2 since 2014, they have been the most commonly used tobacco product among youth in the  
3 United States. The dramatic surge in youth e-cigarette use (“vaping”) is no accident. E-  
4 cigarettes are frequently marketed in a variety of flavors with obvious appeal to youth, such as  
5 gummy bear, cotton candy, and fruit punch. As of 2017, researchers had identified more than  
6 15,500 unique e-cigarette flavors available online. In addition, e-cigarette companies have  
7 effectively used marketing strategies, including celebrity endorsements, slick magazine  
8 advertisements, social media campaigns, paid influencers, and music sponsorships, to reach  
9 youth and young adults. A 2016 study found that 78.2% of middle and high school students—  
10 20.5 million youth—had been exposed to e-cigarette advertisements from at least one source,  
11 an increase from 68.9% only two years before, in 2014.

12 (c) According to the Centers for Disease Control and Prevention (“CDC”), the number  
13 of middle and high school students who reported being current users of tobacco products  
14 increased 36%—from 3.6 million to 4.9 million students—between 2017 and 2018. This  
15 dramatic increase, which has erased past progress in reducing youth tobacco use, is directly  
16 attributable to a nationwide surge in e-cigarette use by adolescents. There were 1.5 million  
17 more youth e-cigarette users in 2018 than 2017, and those who were using e-cigarettes were  
18 using them more often. Frequent use of e-cigarettes increased from 20 percent in 2017 to 28  
19 percent in 2018 among current high school e-cigarette users.

20 (d) The widespread use of e-cigarettes by youth has significant public health  
21 consequences. As stated by the Surgeon General, “Most e-cigarettes contain nicotine – the  
22 addictive drug in regular cigarettes, cigars, and other tobacco products. Nicotine exposure  
23 during adolescence can harm the developing brain – which continues to develop until about  
24 age 25. Nicotine exposure during adolescence can impact learning, memory, and attention.  
25 Using nicotine in adolescence can also increase risk for future addiction to other drugs. In

1 addition to nicotine, the aerosol that users inhale and exhale from e-cigarettes can potentially  
2 expose both themselves and bystanders to other harmful substances, including heavy metals,  
3 volatile organic compounds, and ultrafine particles that can be inhaled deeply into the lungs.”

4 (e) And while there is some evidence that the use of e-cigarettes by adults may  
5 support smoking cessation under certain circumstances, a 2018 National Academy of  
6 Sciences, Engineering, and Medicine report concluded that there was moderate evidence that  
7 e-cigarette use in fact *increases* the frequency and intensity of cigarette smoking in the future.

8 (f) In addition, there is a growing body of research concluding that there are significant  
9 health risks associated with electronic cigarette use. For example, daily e-cigarette use is  
10 associated with increased odds of a heart attack. And the American Lung Association has  
11 warned that the inhalation of harmful chemicals through vaping may cause irreversible lung  
12 damage and lung disease.

13 (g) To reduce the burden of tobacco use, the City and County of San Francisco (the  
14 “City”) licenses tobacco retail establishments. (Health Code Article 19H). In 2017, to address  
15 the appeal of flavored tobacco products to youth, the City enacted Ordinance No. 140-17,  
16 prohibiting tobacco retail establishments from selling flavored tobacco products. As a result of  
17 the referendum process, the ordinance was placed before the voters, who approved the  
18 ordinance in June 2018 (Proposition E) by a majority of 68.39%.

19 (h) Notwithstanding these efforts, San Francisco’s youth still access and use tobacco  
20 products. According to the most recent Youth Risk Behavior Survey for which local data are  
21 available, in 2017, 16.7% of San Francisco’s high school students had tried smoking, 25%  
22 had used an electronic cigarette (or “vaped”), and 7.1% reported current e-cigarette use,  
23 which is defined as use on at least one day in the past 30 days.

24 (i) Among San Francisco high school students who reported currently using electronic  
25 cigarettes, 13.6% reported that they usually purchased their electronic cigarette products in a

1 store. The remaining 86.4% reported that they obtained them from places other than the  
2 City's licensed tobacco retail establishments, including friends, other social sources, and  
3 internet e-cigarette vendors.

4 (j) To protect the public, especially youth, against the health risks created by tobacco  
5 products, Congress enacted the Family Smoking Prevention and Tobacco Control Act  
6 ("Tobacco Control Act") in 2009. Among other things, the Tobacco Control Act authorized the  
7 U.S. Food and Drug Administration ("FDA") to set national standards governing the  
8 manufacture of tobacco products, to limit levels of harmful components in tobacco products  
9 and to require manufacturers to disclose information and research relating to the products'  
10 health effects.

11 (k) A central requirement of the Tobacco Control Act is premarket review of all new  
12 tobacco products. Specifically, every "new tobacco product"—defined to include any tobacco  
13 product not on the market in the United States as of February 15, 2007—must be authorized  
14 by the FDA for sale in the United States before it may enter the marketplace. A new tobacco  
15 product may not be marketed until the FDA has found that the product is: (1) appropriate for  
16 the protection of the public health upon review of a premarket tobacco application; (2)  
17 substantially equivalent to a grandfathered product; or (3) exempt from substantial  
18 equivalence requirements.

19 (l) In determining whether the marketing of a tobacco product is appropriate for the  
20 protection of the public health, the FDA must consider the risks and benefits of the product to  
21 the population as a whole, including users and nonusers of the product, and taking into  
22 account the increased or decreased likelihood that existing users of tobacco products will stop  
23 using tobacco products and the increased or decreased likelihood that those who do not use  
24 tobacco products will start using them. Where there is a lack of showing that permitting the  
25

1 sale of a tobacco product would be appropriate for the protection of the public health, the  
2 Tobacco Control Act requires that the FDA deny an application for premarket review.

3 (m) Virtually all electronic cigarettes that are sold today entered the market after 2007,  
4 but have not been reviewed by the FDA to determine if they are appropriate for the public  
5 health. In 2017, the FDA issued Guidance that purports to give electronic cigarette  
6 manufacturers until August 8, 2022 to submit their application for premarket review. The  
7 Guidance further purports to allow unapproved products to stay on the market indefinitely,  
8 until such time as the FDA complies with its statutory duty to conduct a premarket review to  
9 determine whether a new tobacco product poses a risk to public health. In March 2019, the  
10 FDA issued draft guidance in which it considered moving the premarket application deadline  
11 up by one year for certain flavored e-cigarette products. It is not known when, if ever, this  
12 narrow adjustment will become final or will take effect.

13 (n) By the time e-cigarette manufacturers will be required to submit their premarket  
14 review applications, e-cigarettes will have been on the market for fifteen years without any  
15 FDA analysis of their safety and alleged benefit. If current trends continue, six million more  
16 youth in the United States will begin using e-cigarettes between now and then. Until such  
17 time as the FDA fulfills its statutory duty to conduct premarket reviews of new tobacco  
18 products, a generation of young people will become addicted to tobacco, resulting in an  
19 entirely preventable increase in the burdens and tragedies associated with tobacco use. San  
20 Francisco is not content to wait until then before addressing, for its residents, what appears  
21 from the evidence to be a major public health crisis that is going unattended.

22  
23 Section 2. The Health Code is amended by adding new Article 19R, consisting of  
24 Sections 19R.1 through 19R.5, to read as follows:  
25

1 ARTICLE 19R: PROHIBITING THE SALE OF ELECTRONIC CIGARETTES LACKING FOOD  
2 AND DRUG ADMINISTRATION PREMARKET APPROVAL

3 SEC. 19R.1. DEFINITIONS.

4 For purposes of this Article 19R, the following terms have the following meanings:

5 "Director" has the meaning set forth in Health Code Section 19H.2.

6 "Electronic Cigarette" has the meaning set forth in Section 30121 of the California Revenue  
7 and Taxation Code, as may be amended from time to time.

8 "Establishment" has the meaning set forth in Health Code Section 19H.2.

9 "New Tobacco Product" has the meaning set forth in 21 U.S.C. § 387j(a)(1), as may be  
10 amended from time to time.

11  
12 SEC. 19R.2. SALE OR DISTRIBUTION OF ELECTRONIC CIGARETTES LACKING  
13 FOOD AND DRUG ADMINISTRATION PREMARKET ORDER OF APPROVAL PROHIBITED.

14 The sale or distribution by an Establishment of an Electronic Cigarette is prohibited where the  
15 Electronic Cigarette:

16 (a) Is a New Tobacco Product;

17 (b) Requires premarket review under 21 U.S.C. § 387j, as may be amended from time to time;  
18 and

19 (c) Does not have a premarket review order under 21 U.S.C. § 387j(c)(1)(A)(i), as may be  
20 amended from time to time.

21  
22 SEC. 19R.3. ADMINISTRATIVE REGULATIONS.

23 The Director may adopt rules, regulations, or guidelines for the implementation and  
24 enforcement of this Article 19R.

1           **SEC. 19R.4. ENFORCEMENT.**

2           *The Director may enforce Section 19R.2 under Articles 19 et seq. of the Health Code, including*  
3           *but not limited to Article 19H.*

4  
5           **SEC. 19R.5. NO CONFLICT WITH FEDERAL OR STATE LAW.**

6           *Nothing in this Article 19R shall be interpreted or applied so as to create any requirement,*  
7           *power, or duty that is preempted by federal or state law.*

8  
9           Section 3. Article 19H of the Health Code is amended by adding new Section 19H.14-  
10          3, to read as follows:

11  
12           **SEC. 19H.14-3. CONDUCT VIOLATING HEALTH CODE ARTICLE 19R**  
13           **(PROHIBITING THE SALE OR DISTRIBUTION OF ELECTRONIC CIGARETTES LACKING**  
14           **FOOD AND DRUG ADMINISTRATION PREMARKET ORDER OF APPROVAL).**

15           *(a) Upon a decision by the Director that the Permittee or the Permittee's agent or employee*  
16           *has engaged in any conduct that violates Health Code Section 19R.2 (Sale or Distribution of Electronic*  
17           *Cigarettes Lacking Food and Drug Administration Premarket Order of Approval Prohibited), the*  
18           *Director may suspend a Tobacco Sales permit as set forth in Section 19H.19.*

19           *(b) The Director shall commence enforcement under this Section 19H.14-3 by serving either a*  
20           *notice of correction under Section 19H.21 or a notice of initial determination under Section 19H.22.*

21  
22           Section 4. The Health Code is hereby amended by adding new Article 19S, consisting  
23          of Sections 19S.1 through 19S.6, to read as follows:

1 ARTICLE 19S. PROHIBITING THE SALE AND DISTRIBUTION OF TOBACCO PRODUCTS

2 IN SAN FRANCISCO

3 SEC. 19S.1. DEFINITIONS.

4 For purposes of this Article 19S, the following terms have the following meanings:

5 "Characterizing Flavor" has the meaning set forth in Health Code Section 19Q.2.

6 "Cigarette" has the meaning set forth in Health Code Section 19Q.2.

7 "City" means the City and County of San Francisco.

8 "Constituent" has the meaning set forth in Health Code Section 19Q.2.

9 "Director" means the Director of Health, or the Director's designee.

10 "Distinguishable" has the meaning set forth in Health Code Section 19Q.2.

11 "Distribute" or "Distribution" means the transfer, by any Person other than a common carrier,  
12 of a Tobacco Product at any point from the place of Manufacture or thereafter to the Person who sells  
13 the Tobacco Product to an individual for personal consumption.

14 "Electronic Cigarette" has the meaning set forth in Section 30121 of the California Revenue  
15 and Taxation Code, as may be amended from time to time.

16 "Flavored Tobacco Product" has the meaning set forth in Health Code Section 19Q.2.

17 "Labeling" has the meaning set forth in Health Code Section 19Q.2.

18 "New Tobacco Product" has the meaning set forth in 21 U.S.C. § 387j(a)(1), as may be  
19 amended from time to time.

20 "Packaging" has the meaning set forth in Health Code Section 19Q.2.

21 "Person" has the meaning set forth in Health Code Section 19H.2.

22 "Sell," "Sale," and "to Sell" mean any transaction where, for any consideration, ownership of  
23 a Tobacco Product is transferred from one Person to another, including but not limited to any transfer  
24 of title or possession for consideration, exchange, or barter, in any manner or by any means.

25 "Tobacco Product" has the meaning set forth in Health Code Section 19H.2.

1  
2 **SEC. 19S.2. PROHIBITION ON SALE OR DISTRIBUTION OF TOBACCO PRODUCTS.**

3 *(a) No Person shall Sell or Distribute any Flavored Tobacco Product to a Person in San*  
4 *Francisco. There shall be a rebuttable presumption that a Tobacco Product, other than a Cigarette, is*  
5 *a Flavored Tobacco Product if a manufacturer or any of the manufacturer's agents or employees, in*  
6 *the course of their agency or employment, has made a statement or claim directed to consumers or to*  
7 *the public that the Tobacco Product has or produces a Characterizing Flavor, including, but not*  
8 *limited to, text, color, and/or images on the product's Labeling or Packaging that are used to explicitly*  
9 *or implicitly communicate that the Tobacco Product has a Characterizing Flavor.*

10 *(b) No Person shall Sell or Distribute an Electronic Cigarette to a Person in San Francisco*  
11 *where the Electronic Cigarette:*

12 *(1) Is a New Tobacco Product;*

13 *(2) Requires premarket review under 21 U.S.C. § 387j, as may be amended from time*  
14 *to time; and*

15 *(3) Does not have a premarket review order under 21 U.S.C. § 387j(c)(1)(A)(i), as may*  
16 *be amended from time to time.*

17  
18 **SEC. 19S.3. ADMINISTRATIVE REGULATIONS.**

19 *The Director may adopt rules, regulations, or guidelines for the implementation of this Article*  
20 *19S.*

21  
22 **SEC. 19S.4. ENFORCEMENT.**

23 *(a) Violations of this Article 19S or of any rule or regulation issued under this Article shall be*  
24 *punishable by administrative fines imposed pursuant to administrative citations. Administrative Code*  
25 *Chapter 100 "Procedures Governing the Imposition of Administrative Fines," as amended from time to*



1 time, shall govern the issuance and enforcement of administrative citations, and collection and review  
2 of administrative fines, to enforce this Article and any rule or regulation adopted pursuant to this  
3 Article.

4 (b) The City Attorney may at any time institute civil proceedings for injunctive and monetary  
5 relief including civil penalties, against any Person for violations of this Article 19S, without regard to  
6 whether the Director has assessed or collected administrative penalties.

7 (c) At any time, the Director may refer a case to the City Attorney's Office for civil  
8 enforcement, but a referral is not required for the City Attorney to bring a civil action under subsection  
9 (b).

10 (d) Any Person that violates any provision of this Article 19S shall be subject to injunctive  
11 relief and a civil penalty in an amount not to exceed \$1,000 for each violation, which penalty shall be  
12 assessed and recovered in a civil action brought in the name of the people of the City and County of  
13 San Francisco by the City Attorney in any court of competent jurisdiction. In assessing the amount of  
14 the civil penalty, the court shall consider any one or more of the relevant circumstances presented by  
15 any of the parties to the case, including but not limited to, the following: the nature and seriousness of  
16 the misconduct giving rise to the violation, the number of violations, the persistence of the misconduct,  
17 the length of time over which the misconduct occurred, the willfulness of the misconduct, and the  
18 defendant's assets, liabilities, and net worth.

19 (e) The City may recover reasonable attorneys' fees and costs for civil actions brought  
20 pursuant to this Section 19S.4.

21 (f) Remedies under this Section 19S.4 are non-exclusive and cumulative to all other remedies  
22 available at law or equity.

23  
24 **SEC. 19S.5. NO CONFLICT WITH FEDERAL OR STATE LAW.**  
25

1        Nothing in this Article 19S shall be interpreted or applied so as to create any requirement,  
2 power, or duty that is preempted by federal or state law.

3  
4        **SEC. 19S.6. SEVERABILITY.**

5        If any section, subsection, sentence, clause, phrase, or word of this Article 19S, or any  
6 application thereof to any person or circumstance, is held to be invalid or unconstitutional by a  
7 decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining  
8 portions or applications of the Article. The Board of Supervisors hereby declares that it would have  
9 passed this ordinance and each and every section, subsection, sentence, clause, phrase, and word not  
10 declared invalid or unconstitutional without regard to whether any other portion of this Article or  
11 application thereof would be subsequently declared invalid or unconstitutional.

12  
13        Section 5. Effective and Operative Dates.

14        (a) This ordinance shall become effective 30 days after enactment. Enactment occurs  
15 when the Mayor signs the ordinance, the Mayor returns the ordinance unsigned or does not  
16 sign the ordinance within ten days of receiving it, or the Board of Supervisors overrides the  
17 Mayor's veto of the ordinance.

18        (b) This ordinance shall become operative six months after the effective date.

19  
20        Section 6. Severability. If any section, subsection, sentence, clause, phrase, or word of  
21 this ordinance, or any application thereof to any person or circumstance, is held to be invalid  
22 or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not  
23 affect the validity of the remaining portions or applications of the ordinance. The Board of  
24 Supervisors declares that it would have passed this ordinance and each and every section,  
25 subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional

1 without regard to whether any other portion of this ordinance or application thereof would be  
2 subsequently declared invalid or unconstitutional.

3  
4 Section 7. Undertaking for the General Welfare. In enacting and implementing this  
5 ordinance, the City is assuming an undertaking only to promote the general welfare. It is not  
6 assuming, nor is it imposing on its officers and employees, an obligation for breach of which it  
7 is liable in money damages to any person who claims that such breach proximately caused  
8 injury.

9  
10 APPROVED AS TO FORM:  
11 DENNIS J. HERRERA, City Attorney

12 By:

  
13 ANNE PEARSON  
14 Deputy City Attorney

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City and County of San Francisco

Tails

Ordinance

City Hall  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4689

File Number: 190312

Date Passed: June 25, 2019

Ordinance amending the Health Code to prohibit the sale by tobacco retail establishments of electronic cigarettes that require, but have not received, an order from the Food and Drug Administration (FDA) approving their marketing; and prohibiting the sale and distribution to any person in San Francisco of flavored tobacco products and electronic cigarettes that require, but have not received, an FDA order approving their marketing.

June 07, 2019 Public Safety and Neighborhood Services Committee - RECOMMENDED

June 18, 2019 Board of Supervisors - PASSED ON FIRST READING

Ayes: 11 - Brown, Fewer, Haney, Mandelman, Mar, Peskin, Ronen, Safai, Stefani, Walton and Yee

June 25, 2019 Board of Supervisors - FINALLY PASSED

Ayes: 10 - Brown, Haney, Mandelman, Mar, Peskin, Ronen, Safai, Stefani, Walton and Yee

Absent: 1 - Fewer

File No. 190312

I hereby certify that the foregoing  
Ordinance was FINALLY PASSED on  
6/25/2019 by the Board of Supervisors of  
the City and County of San Francisco.

fr Angela Calvillo  
Clerk of the Board

London N. Breed  
Mayor

Date Approved

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**EXHIBIT 5**

Verified Petition for Writ of Mandate  
*Hochstatter v. Arntz*



**Dennis Herrera** ✓ @dennisherrera · Jul 17

The judge noted that e-cig companies like Juul have had years to apply, but haven't. He also found they purposefully avoided complying with FDA requirements. If Juul actually helps people stop smoking, why hasn't it applied to the FDA yet? #vaporized



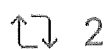
Juul And Rivals, Given 10 Months To Submit FDA Application, Face Batt...

The FDA had previously established a 2022 deadline for companies to prove why they should be able to keep selling e-cigarette products. ...

forbes.com



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**Dennis Herrera** ✓ @dennisherrera · Jul 17

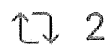
A federal judge has given e-cigarette companies like Juul 10 months to apply for FDA review. It's a good step in the right direction. FDA review is required by law, and it's the basis for #SF's sales moratorium. Pass FDA review = sell in SF. #Vaporized



**Judge Gives E-Cigarette Makers 10 Months to Seek FDA Review**

E-cigarette companies such as Juul Labs Inc. must submit applications to U.S. regulators by May 2020 to keep their vaping products on the ...

[bloomberg.com](https://www.bloomberg.com)



Show this thread



**Dennis Herrera** ✓ @dennisherrera · Jul 17

Federal court ruling: e-cigarettes have created a "clear public health emergency." #vaporized



In Public Health Win, Federal Court Sets 10-Month Deadline for E-Ciga...

In an important victory for public health and especially for the nation's kids facing an epidemic of e-cigarette use, a federal judge today set a ...

[tobaccofreekids.org](https://tobaccofreekids.org)



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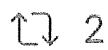


**Dennis Herrera**  @dennisherrera · Jul 17



Why a judge set a deadline for e-cig companies like Juul to apply for FDA review:

- uncertainty in the efficacy of e-cigarettes as smoking cessation devices
- industry's recalcitrance
- continued availability of e-cigarettes & their appeal to youth
- clear public health emergency



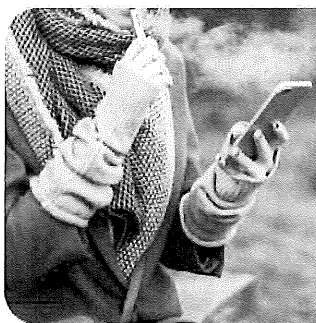
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**Dennis Herrera** ✓ @dennisherrera · Jul 24

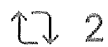


The Side Effects Of JUULing That No One Talks About - Refinery29



The Side Effects Of JUULing That No One Talks About  
Here's what JUULing really does to your body over time.

🔗 [apple.news](#)





**Dennis Herrera** ✓ @dennisherrera · Jul 24

The battery behind dangerous and deadly e-cigarette explosions - NBC News



The battery behind dangerous and deadly e-cigarette...  
Even vaping advocates urge consumers to learn about  
battery safety.

🔗 apple.news



↻ Dennis Herrera Retweeted



**Stanford Medicine Tobacco Prevention Toolkit** @Stanford... · Jul 24 ✓

Thank you to PAVe and the others for testifying today. It is about time the truth comes out.

 **ParentsAgainstVaping** @ParentsvsVape · Jul 24

PAVe team testified at today's House Oversight subcommittee investigating JUUL and how it targeted kids. Our sons described how a JUUL rep came into their school and gave a "mixed message" anti-JUUL talk without the knowledge of parents our teachers!



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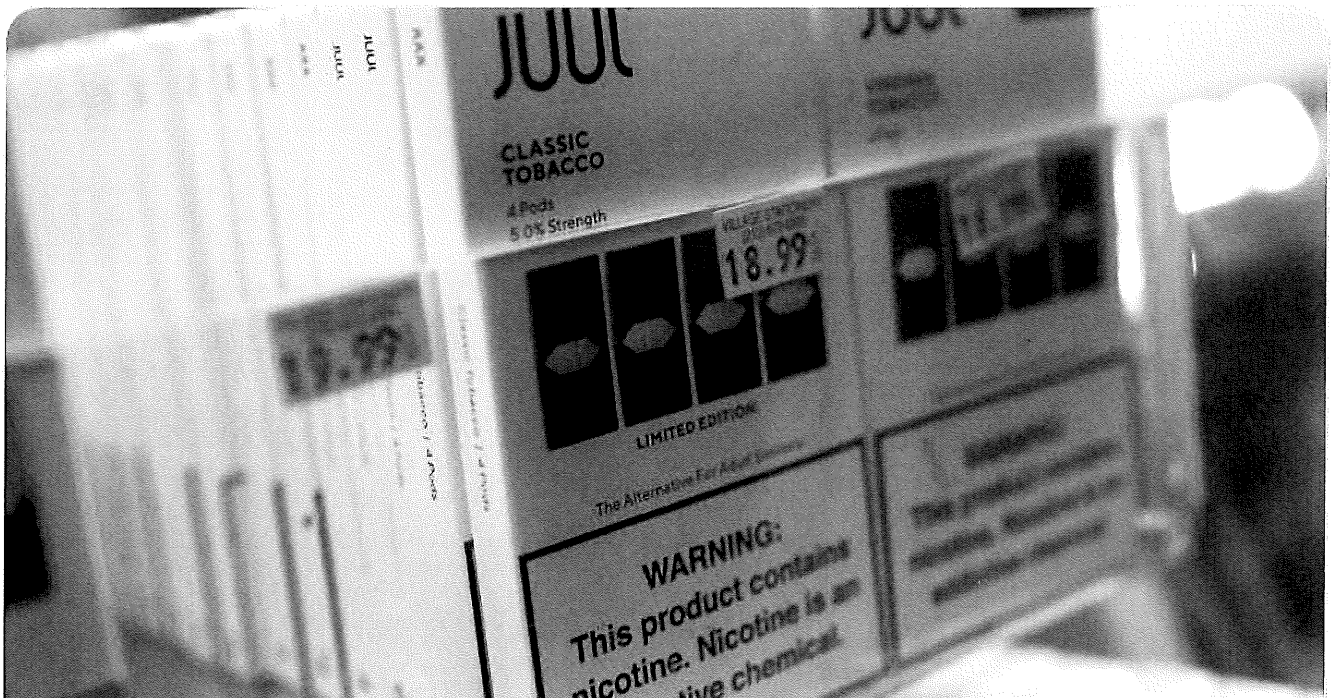




**Dennis Herrera** ✓ @dennisherrera · Jul 26

A congressional committee "released a cache of internal Juul emails and other documents that committee staff described as early attempts to 'enter schools and convey its messaging directly to teenage children.' "

#FlavorsHookKids



U.S. lawmakers grill e-cigarette maker Juul over efforts targeted...

E-cigarette maker Juul Labs Inc funded a "holistic health education" camp as part of efforts to market directly to school-aged children, ...

🔗 [reuters.com](https://www.reuters.com)



↻ Dennis Herrera Retweeted



**SF City Attorney** ✓ @SFCityAttorney · Jul 26

#Juul "'deployed a sophisticated program to enter schools and convey its messaging directly to teenage children,' recruited thousands of online influencers to market its vaping devices to youths and targeted children as young as 8 in summer camp."



Juul Targeted Schools and Youth Camps, House Panel on Vaping Claims  
Lawmakers grilled company officials about financing programs aimed at appealing to young people that familiarized them with Juul's products.

🔗 [nytimes.com](https://www.nytimes.com)

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↻ Dennis Herrera Retweeted



**Don Asmussen** @don\_asmussen · Jul 27

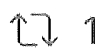
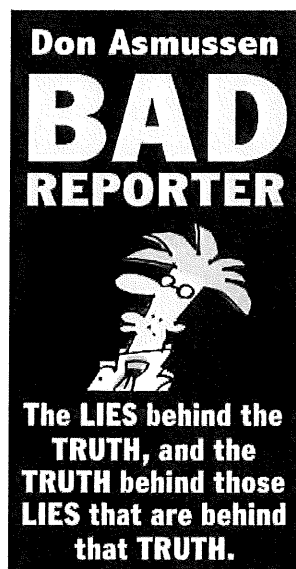
Bad Reporter: JUUL ain't CUUL  
at [sfchronicle.com/bad\\_reporter](http://sfchronicle.com/bad_reporter)

#JUUL

#Vaping

#JUULsucks

#JUULkids



🔄 Dennis Herrera Retweeted



**Don Asmussen** @don\_asmussen · Jul 27

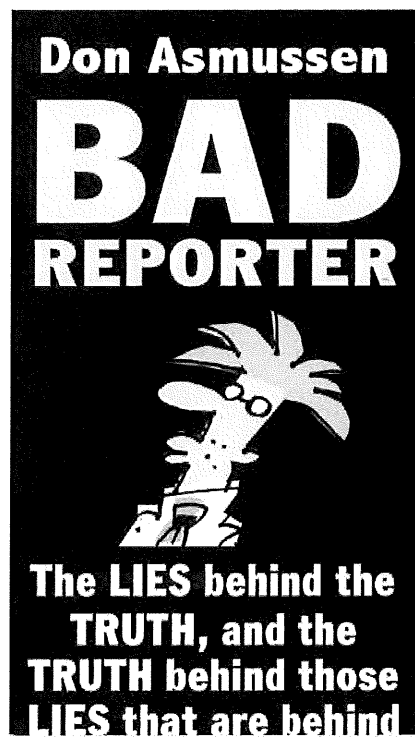
Bad Reporter: JUUL don't RUUL  
at [sfchronicle.com/bad\\_reporter](https://sfchronicle.com/bad_reporter)

#JUUL

#Vaping

#JUULsucks

#JUULkids



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↻ Dennis Herrera Retweeted



**ParentsAgainstVaping** @ParentsvsVape · Jul 29

Teens addicted to Juul: Doctors, parents and schools grapple with students hooked to e-cigarettes - The Washington Post



In the 'Juul room': E-cigarettes spawn a form of teen addiction that wor...  
Teen vaping skyrockets as effective interventions remain elusive.

🔗 [washingtonpost.com](https://www.washingtonpost.com)

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**Dennis Herrera** ✓ @dennisherrera · Jul 30



Juul told ninth graders vaping is 'totally safe,' teens testify

A Juul representative repeatedly told a ninth-grade classroom that the company's e-cigarette was "totally safe" before showing underage ...

[cnn.com](https://www.cnn.com)



↻ Dennis Herrera Retweeted



**Don Asmussen** @don\_asmussen · Jul 30

BAD REPORTER 'JUUL BREASTFEEDING LOGO'

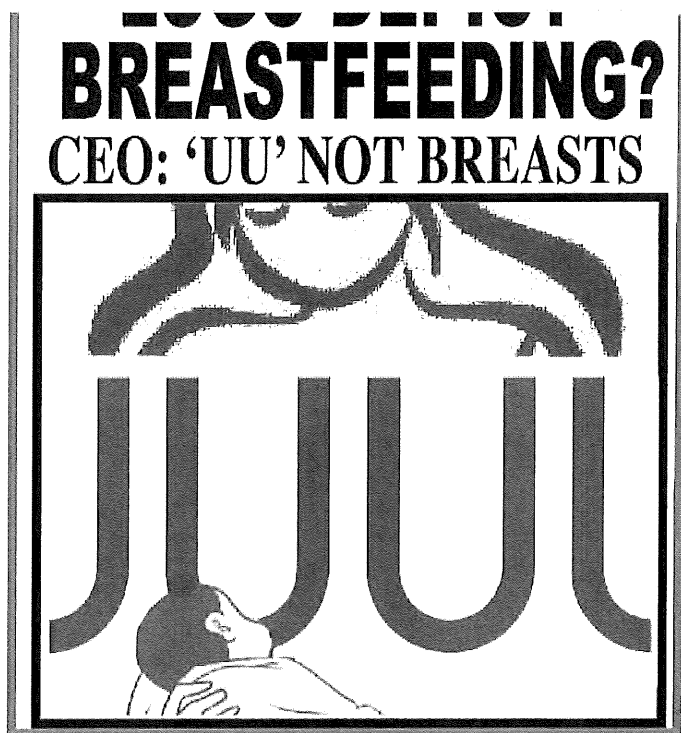
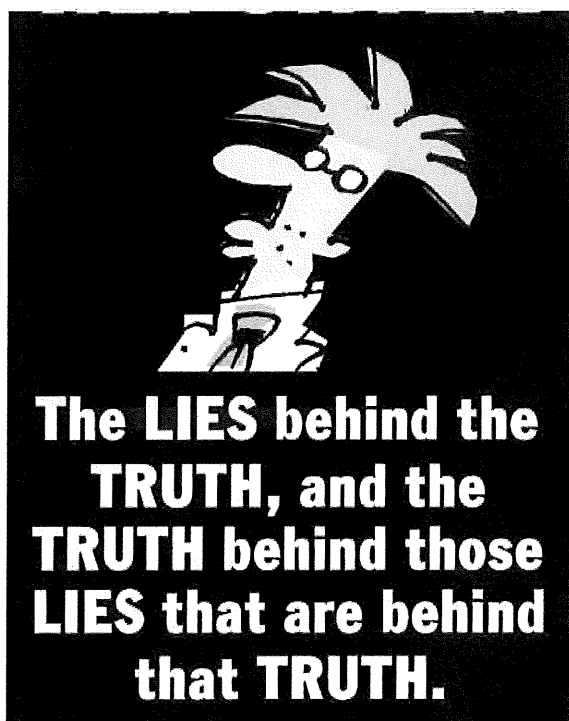
at [sfchronicle.com/bad\\_reporter](https://sfchronicle.com/bad_reporter)

#JUUL

#ecigarettes

#Vaping

#SanFrancisco



↻ Dennis Herrera Retweeted



**Don Asmussen** @don\_asmussen · Jul 30

**BAD REPORTER 'S.F. JUUL MURAL'**

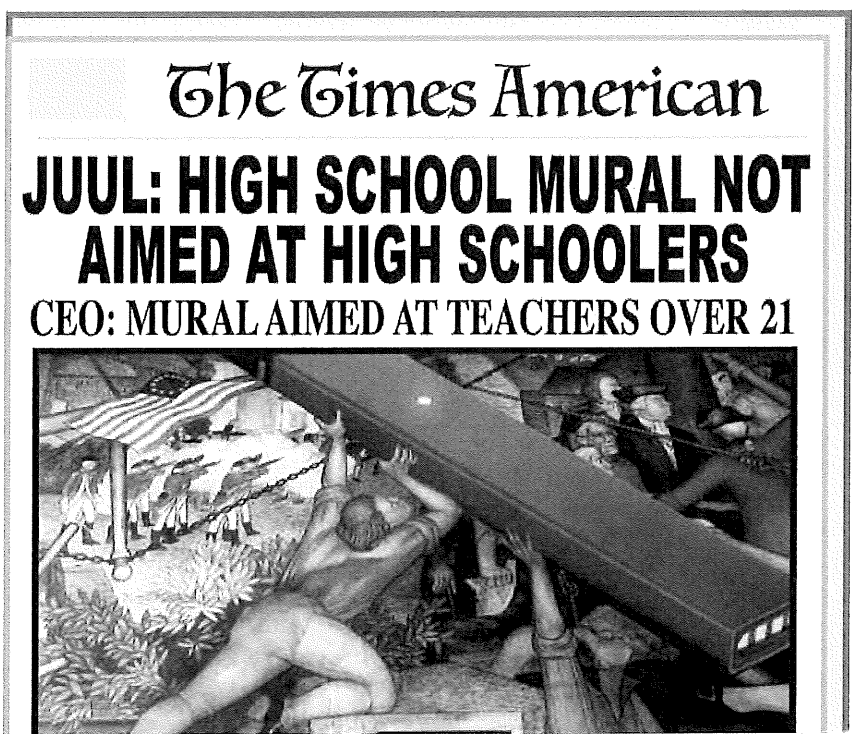
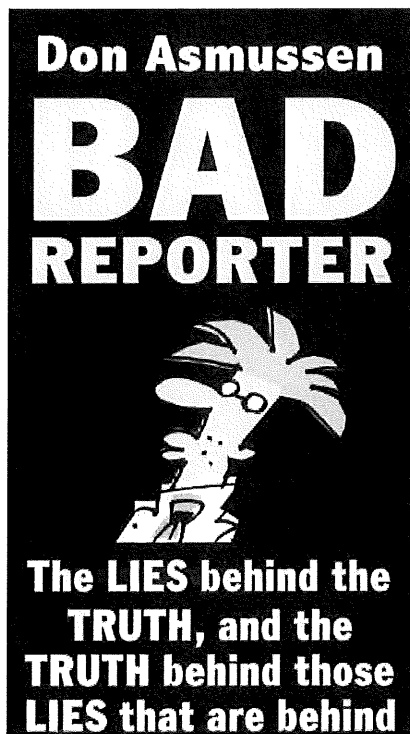
at [sfchronicle.com/bad\\_reporter](http://sfchronicle.com/bad_reporter)

#JUUL

#ecigarettes

#Vaping

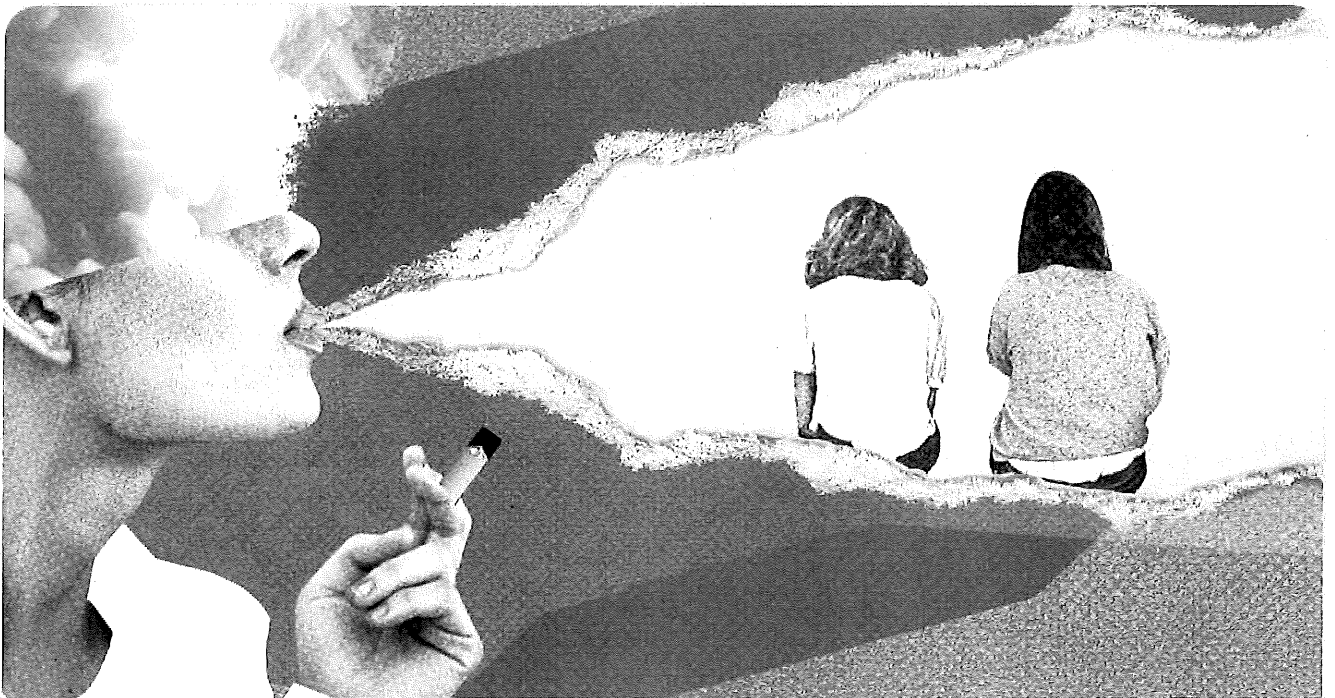
#SanFrancisco





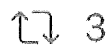
**Dennis Herrera** ✓ @dennisherrera · 23h

Former FDA head @DavidAKesslerMD is spot-on here about #Juul. "...the blueprint for that e-cigarette could easily have been taken straight out of the tobacco industry's playbook."



Opinion | Juul Says It Doesn't Target Kids. But Its E-Cigarettes Pull The...  
The design makes it easier for young people to use.

[nytimes.com](https://www.nytimes.com)



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**EXHIBIT 6**

Verified Petition for Writ of Mandate  
*Hochstatter v. Arntz*

## VAPOR PRODUCTS

2019 MAY 29 PM 12:58

City law regulates the sale and use of tobacco products, including vapor products such as electronic cigarettes, their component parts, and liquid nicotine. Electronic cigarettes are battery operated devices that deliver to the user vaporized nicotine. The City currently regulates the sale of these products by:

- Requiring retail establishments to obtain a permit from the City to sell them;
- Prohibiting selling flavored tobacco products to people of any age;
- Prohibiting selling electronic cigarettes everywhere the sale of other tobacco products is prohibited;
- Prohibiting selling electronic cigarettes to people ages 18, 19, and 20; and
- Prohibiting selling tobacco products on City property.

California law also currently regulates the sale of tobacco products, including electronic cigarettes and their component parts, by:

- Requiring tobacco retailers and distributors to obtain a license from the State;
- Prohibiting the sale or distribution of tobacco products to people under age 21, including internet sales;
- Requiring tobacco retailers to check the identification of any customer who appears to be under age 21;
- Requiring tobacco retailers to store products in a location inaccessible to customers without assistance; and
- Requiring sellers and distributors of tobacco products on the internet to verify that customers are at least 21 years old.

City law prohibits advertising tobacco products on billboards or other publicly visible signs in San Francisco. City law also prohibits tobacco product advertising on City property. Federal and State law impose additional advertising restrictions for these products.

This measure would authorize the retail sale of vapor products, including electronic cigarettes, in San Francisco under certain conditions. The measure would:

- Prohibit retailers from selling vapor products everywhere the sale of other tobacco products is prohibited;
- Prohibit retailers and others from selling or distributing vapor products to people under age 21;
- Require retailers to place vapor products in a location inaccessible to customers without assistance;
- Require retailers to scan photo identification of customers to verify that they are 21 years or older;
- Prohibit retailers from selling more than two devices or five finished product packages of nicotine-containing liquid, per transaction; and
- Require retailers to train their employees about these requirements twice a year.

The measure would also require individuals and entities that sell more than 100 vapor products per year on the internet to San Francisco customers to:

- Obtain a permit from the City;
- Verify that customers are at least 21 years old; and
- Sell no more than two devices or 60 milliliters of nicotine-containing liquid, per month, to each customer.

The measure would prohibit advertising or marketing vapor products designed to appeal to minors or using an advertising medium known to be seen primarily by people under 21 years old.

The measure would authorize the City's Department of Public Health to enforce the City permit requirements, and require that department to develop an education program for youth on the effects of nicotine consumption and vaping.

The measure states that it is intended to comprehensively authorize and regulate the retail sale, availability and marketing of vapor products in San Francisco.

SAN FRANCISCO  
FILED  
2019 MAY 29 PM 12:58  
DEPARTMENT OF ELECTIONS



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**EXHIBIT 7**

Verified Petition for Writ of Mandate  
*Hochstatter v. Arntz*

# THE SUTTON LAW FIRM

July 26, 2019

VIA E-MAIL

Andrew Shen, Esq.  
Jenica Maldonado, Esq.  
Deputy City Attorneys  
1 Dr. Carlton B. Goodlett Place  
City Hall, Room 234  
San Francisco, CA 94102-4635

Dear Mr. Shen & Ms. Maldonado:

We write on behalf of Jennifer Hochstatter, the proponent of the “Act to Prevent Youth Use of Vapor Products” initiative which will appear on the November 2019 ballot (the “Initiative”), and the Coalition for Reasonable Vaping Regulation, the political committee supporting this measure.

Our purpose in writing is to address the initial draft “Digest” for this measure. We recognize that the content of the Digest is ultimately up to the Ballot Simplification Committee, but we also understand that the City Attorney’s office often prepares an initial draft (and that you are the Deputy City Attorneys who will be working with the Committee this year).

Opponents of the Initiative have recently advanced a claim in the press that the Initiative would repeal the ban on flavored tobacco products which was adopted by the voters in 2018 and which was then extended by the Board of Supervisors earlier this year (collectively referred to herein as the “flavor ban”). That is false. The Initiative does not intend to repeal the flavor ban, and any legal analysis of the Initiative must conclude that it does not repeal the ban. Your office appropriately did not include any such claim about repealing the flavor ban in the title and summary it prepared for the Initiative, and we urge you to similarly refrain from including such a claim in any draft Ballot Simplification Committee Digest.

The flavor ban adopted in 2018 is contained in Article 19Q of the City’s Health Code, and the extension of the flavor ban adopted in 2019 is contained in Section 19S.2(a). Except for adding certain enforcement provisions in Article 19H, the Initiative’s provisions are limited to amending Article 19N – a wholly separate section of the Health Code – and do not expressly repeal or reference the flavor ban.

The opponents’ argument, as we understand it, is that the statement in the Initiative that it is intended to “comprehensively authorize and regulate” the sale of vapor products amounts to an “implied repeal” of the flavor ban. That is not a supportable reading of the Initiative. As you know, the courts strongly disfavor repeals by implication: “Absent an express declaration of legislative intent, a court will find an implied repeal only when there is no rational basis for harmonizing the two potentially conflicting statutes, and the statutes are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. Implied repeal

should not be found unless the later provision gives undebatable evidence of an intent to supersede the earlier.” (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1040; internal quotation marks and citations omitted.) This presumption against implied repeal is especially applicable here, where part of the law which would supposedly be repealed was the subject of a high-profile referendum campaign just last year. Courts will not presume that subsequently-enacted laws make major policy changes to prior laws in so obscure a manner – that they seek to “hide elephants in mouseholes.” (*Whitman v. Am. Trucking Ass’n* (2001) 531 U.S. 457, 468.)

Here, the prohibitions against the sale or distribution of any “Flavored Tobacco Product” contained in Sections 19.Q and 19S.2(a), which include combustible tobacco products and electronic cigarettes, are not irreconcilable with the Initiative’s intent to comprehensively authorize and regulate the sale of vapor products. The entire text, structure and context of the Initiative makes clear that it was meant to build on and supplement, and not supersede, the regulations of vapor products which were already in place, and also to apply certain regulations applicable to tobacco products also to vapor products.

Indeed, throughout the Initiative and the supporting materials submitted to the Department of Elections, there are frequent references to the fact that the Initiative was meant to impose “additional” restrictions on the sale and access to vapor products (in “addition” to those that already existed), as well as to extend existing restrictions on traditional tobacco products to vapor products. Thus:

- The Notice of Intention states that the Initiative is being circulated “for the purpose of adopting additional restrictions and safeguards to prevent the sale of, and access to, vapor products (also referred to as “electronic cigarettes” or “e-cigarettes”) to anyone under 21 years of age . . .” (Emphasis added.)
- The only statement of the Initiative’s intent is in the section setting forth the “findings and purposes in enacting this initiative”: “This article is intended to impose additional safeguards to prevent the access to and sale of vapor products by those under the age of 21 years and to restrict the marketing of vapor products to those underage, while preserving access for adults to enable them to transition from the use of combustible cigarettes.” (Initiative Section 2(g); emphases added.)
- Section 7 of the Initiative adopts new age verification requirements and product quantity limits “in addition to the restrictions contained in Sections 19N.5 and 19P.3.” (Emphasis added.)
- Section 9 of the Initiative bans advertising of vapor products in all places in which advertising of traditional tobacco products was already banned.

Moreover, the proposed title and summary submitted to your office would have titled the Initiative “Imposes Additional Regulations and Restrictions on the Access, Sale, and Marketing of Vapor Products in the City . . .” and would have further informed voters that “The sale and use

of vapor products in San Francisco are regulated and taxed by the State of California, including a prohibition against the sale of tobacco products, including vapor products; to persons under 21 years of age, with additional regulation by the City and County of San Francisco. This measure would impose additional safeguards, and enhanced restrictions, against the sale and marketing of vapor products to any person under the age of 21 years in San Francisco.” (Emphases added.)

In addition, the Initiative imposes a number of new regulations that were not already applicable to traditional tobacco products, including online seller permits, additional advertising regulations, etc.

Again, the text and context of the Initiative make clear that it was intended to supplement, and not repeal, pre-existing regulations.

What the Initiative was meant to supersede – what is irreconcilable with the Initiative – is the complete prohibition on the sale of vapor products adopted by the Board of Supervisors in June, found in Health Code Sections 19R.2 and 19S.2(b). That prohibition on vapor products, which will prevent adults from using vapor products to transition away from the use of traditional combustible cigarettes, was pending in a Board committee before the Initiative was submitted. If the Initiative passes, retailers will still not be able to sell flavored tobacco in San Francisco – they will simply be required to also comply with the Initiative’s more stringent regulations on the sale of vapor products. In this context, the Initiative’s declaration of “comprehensive” regulation can only be understood as a clear alternative to the Board’s complete ban on the sale of vapor products, and does not repeal the flavor ban, implicitly or otherwise.

It seems that opponents of the Initiative may shape their campaign around the claim that the flavor ban would be repealed, perhaps because the claim polls well. But such a claim is not consistent with the law, and, as this letter confirms, is not consistent with the proponent’s intention. We therefore urge your office to reject any suggestion that this claim be included in the draft Digest.

Finally, we would appreciate this letter being included in the formal public file for of the upcoming Ballot Simplification Committee hearing with respect to the Initiative.

Sincerely,

A handwritten signature in cursive script, reading "James R. Sutton".

James R. Sutton

cc: Barbara Carr, Ballot Simplification Committee

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**EXHIBIT 8**

Verified Petition for Writ of Mandate  
*Hochstatter v. Arntz*

Paid Political Advertisement

## Stopping youth vaping starts with keeping the City's flavored e-cigarette ban.

San Franciscans agree: we all want to stop youth vaping. Our ballot initiative does that, while also saving adults' right to choose e-cigarettes as an alternative to smoking.

Cigarettes kill 8 million people a year. They shouldn't stay on the shelf while e-cigarettes are banned. It's just a gift to cigarette makers. Instead, let's further restrict e-cigarette sales and marketing to youth, and **keep the City's existing flavored e-cigarette ban.**

### THE INITIATIVE TO STOP YOUTH VAPING WILL:

- **Keep the City's flavored e-cigarette ban**
- **Require an ID age verification system for all retail and online sales**
- **Ban e-cigarette marketing to youth under 21**
- **Prohibit bulk sales to stop black market re-sellers**

Read our letter to the City Attorney's Office and our plan to preserve the flavor ban at [RegulateNotBan.com](http://RegulateNotBan.com)

Ad paid for by Coalition for Reasonable Vaping Regulation, including neighborhood grocers and small businesses. Committee major funding from Juul Labs. Financial disclosures are available at [sfethics.org](http://sfethics.org).

**Stop Youth Vaping**

REGULATE DON'T BAN

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**EXHIBIT 9**

Verified Petition for Writ of Mandate  
*Hochstatter v. Arntz*

## **Vapor Products\***

**Digest** by the Ballot Simplification Committee

**Status:** Draft for Consideration  
**On:** Tuesday, August 6, 2019  
**Members:** Packard, Anderson, Raveche

**Deadline to Request Reconsideration:** TBD

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**The Way It Is Now:** The City and the State of California regulate the sale of tobacco products. The term “tobacco products” includes vapor products such as electronic cigarettes, their cartridges and other parts, and liquid nicotine. Electronic cigarettes are battery-operated devices that vaporize liquid nicotine and deliver it to the user.

City and State law prohibit the sale of vapor products in San Francisco in the following ways:

- The City and State prohibit the retail sale of tobacco products to people under age 21 and the State prohibits the sale of tobacco products on the internet to people under age 21.
- The City prohibits the sale of vapor products everywhere the sale of other tobacco products is prohibited.
- The City prohibits the sale of flavored tobacco products, including flavored vapor products.
- Beginning in late January 2020, the City will suspend the sale of electronic cigarettes that have not then gone through required pre-market review by the U.S. Food and Drug Administration (“FDA”). As of July 2019, the FDA has not completed that review for any electronic cigarette product and the FDA probably will not have done so by late January 2020.

In situations where the sale of vapor products, like other tobacco products, is allowed in San Francisco, the City and State also regulate the sale of those products in the following ways:

- Tobacco retailers must obtain permits from the City and the State, and tobacco distributors must obtain a license from the State.
- State law requires tobacco retailers to check the identification of any customer who appears to be under age 21, and to store vapor products where customers cannot access them without assistance.
- State law requires sellers and distributors of vapor products on the internet to verify that customers are at least 21 years old.

City law prohibits the sale, manufacture, and distribution of vapor and other tobacco products on City property.

City law prohibits advertising of certain tobacco products on billboards or other publicly visible signs in San Francisco and on City property. Federal and State law impose additional advertising restrictions for tobacco products.

**The Proposal:** Proposition \_\_\_\_ would prevent the City from prohibiting the manufacture, wholesale, and online retail sale of vapor products in San Francisco. The measure would also repeal certain existing City laws regarding vapor products and impose regulations on the sale and distribution of vapor products in San Francisco that would:

- Prohibit retailers and others from selling or distributing vapor products to people under age 21;
- Prohibit retailers from selling vapor products everywhere the sale of other tobacco products is prohibited;
- Require retailers to place vapor products where customers cannot access them without assistance;

*\*Working title, for identification only. The Director of Elections determines the title of each local ballot measure; measure titles are not considered during Ballot Simplification Committee meetings.*



- Require retailers to scan photo identification of customers to verify that they are 21 years or older;
- Prohibit retailers from selling more than two vapor product devices or five finished product packages of liquid nicotine, per transaction; and
- Require retailers to train their employees about these requirements twice a year.

Proposition \_\_\_\_ would also require individuals and entities that sell more than 100 vapor products per year on the internet to San Francisco customers to:

- Obtain a permit from the City;
- Verify that customers are at least 21 years old; and
- Sell no more than two vapor product devices or 60 milliliters of liquid nicotine, per month, to each customer.

Proposition \_\_\_\_ would prohibit knowingly advertising vapor products designed to appeal to minors or using an advertising medium known to be seen primarily by people under 21 years old.

Proposition \_\_\_\_ states that it would comprehensively authorize and regulate the retail sale, availability, and marketing of vapor products in San Francisco. The measure would repeal the City law suspending the sale of electronic cigarettes that lack required approval by the FDA. It would partially repeal the City law that prohibits the sale, manufacture, and distribution of tobacco products on City property by allowing the sale, manufacture, and online retail sale of vapor products on City property. The measure may also repeal other existing City laws that apply to vapor products, including the City law that prohibits the sale of flavored vapor products.

**A "YES" Vote Means:** If you vote "yes," you want to:

- Prevent the City from prohibiting the manufacture, wholesale, and online retail sale of vapor products in San Francisco;
- Repeal certain existing City laws relating to vapor products and impose laws permitting the sale of electronic cigarettes and other vapor products to people over age 21;
- Regulate these sales by imposing storage requirements on retailers, requiring retailers and internet sellers to obtain City permits and use age verification technology, and limiting the number of vapor products that retailers and internet sellers may sell per transaction; and
- Restrict the knowing advertising of vapor products to people under age 21.

**A "NO" Vote Means:** If you vote "no," you do not want to make these changes.

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**EXHIBIT 10**

Verified Petition for Writ of Mandate  
*Hochstatter v. Arntz*

# THE SUTTON LAW FIRM

August 5, 2019

VIA E-MAIL ONLY

Dennis Herrera, Esq.  
San Francisco City Attorney  
City Hall, Room 234  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4635

Dear Mr. Herrera:

This letter follows up on our letter to your office last week regarding the draft Ballot Simplification Committee digest for the “Act to Prevent Youth Use of Vapor Products” initiative (the “Initiative”).

In response to some politically motivated claims that the Initiative would repeal the City’s ban on flavored tobacco products, our letter made clear that the Initiative does not expressly or “impliedly” repeal either the ban on retail sales of flavored products adopted by voters last year or the extension of the flavor ban to online sales enacted by the Board of Supervisors earlier this year (collectively, the “flavor ban”). Despite our request that you not mention the flavor ban in the draft digest – just as your office had not mentioned it in the official Title & Summary – the draft digest (attached) incorrectly speculates that the Initiative “may” repeal the ban: “The measure may also repeal other existing City laws that apply to vapor products, including the City law that prohibits the sale of flavored vapor products.”<sup>1</sup> This sentence is false and misleading for a number of reasons.

First, including this sentence in the draft digest flies in the face of case law which, as you know, requires the digest and all other materials printed in the voter information pamphlet to be “true and impartial, and not argumentative,” and to not “create prejudice for or against the measure.” (See, e.g., Horneff v. City & County of San Francisco (2003) 110 Cal. App. 4th 814; McDonough v. Superior Court (2012) 204 Cal. App. 4th 1169.) Though we had hoped that our letter would avoid this prospect, the draft digest gives us serious concern – especially because you personally co-sponsored the complete ban on the sale of vaping products passed by the Board this June and because of your public statements to the press and on Twitter opposing the Initiative – that the City Attorney’s office has a conflict of interest in drafting the digest for the Ballot Simplification Committee as well as other official City actions relating to the Initiative. Given your personal and political opposition to the Initiative, we therefore call on you to rescind the draft digest, retain an outside law firm or other city attorney’s office to prepare a new one, and recuse yourself and your office from any and all official City actions relating to the Initiative.

Second, the Initiative will not repeal the flavor ban. Significantly, the City’s Office of Small Business submitted a letter to the Department of Elections (the day before we sent you our letter on this topic) which agrees unequivocally that the Initiative would not affect the flavor ban: “The measure does not reverse the ban on sales of flavored tobacco products.” (See attached 7/25/19

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<sup>1</sup>This sentence is found at the end of the last paragraph of “The Proposal” section.

Dennis Herrera, Esq.  
August 5, 2019  
Page 2

letter; emphasis added.) Moreover, the Initiative states repeatedly that it was intended to impose “additional” restrictions on vaping products; it also does not amend or otherwise alter the City laws which ban flavored tobacco products. (The flavor ban is found in sections 19Q and 19S of the City’s Health Code, while the Initiative only amends sections 19N and 19H.)

Third, and perhaps most notably, JUUL Labs, Inc. (“JLI”), the sponsor of the Initiative committee (the Coalition for Reasonable Vaping Regulation), has stated that it is not the intent of the Initiative to repeal the flavor ban. JLI’s Chief Administrative Officer, Ashley Gould, has submitted an affidavit to the Ballot Simplification Committee (attached) stating unequivocally:

“The Initiative was never intended to have the effect of . . . repeal[ing] the prohibition on the sale and distribution of flavored tobacco products. . . . It was always intended that the flavor ban, including its extension, would remain in effect. These flavor ban provisions are consistent with the Initiative, which was consciously designed to build on and incorporate existing regulation of vapor products and tobacco products more generally.”

In a full-page ad appearing in Sunday’s Chronicle (attached), the Coalition for Reasonable Vaping Regulation confirmed that the Initiative was never intended to repeal the flavor ban, stating: “Stopping youth vaping starts with keeping the City’s flavored e-cigarette ban” and “The Initiative to stop youth vaping will keep the City’s flavored e-cigarette ban.”

Finally, we ask the City Attorney’s office to recuse itself from all City matters relating to the Initiative. In sum, the draft digest is not impartial; is speculative and argumentative; and is deliberately misleading. Your office has an ethical and statutory obligation to the public and to the democratic process to provide true and impartial summaries of the Initiative, and to remain completely neutral in all advice given to the Department of Elections and City about the electoral process. We therefore repeat our request that you rescind the draft digest, retain an outside law firm or other city attorney’s office to prepare a new one, and hereinafter recuse your office from any and all official City actions relating to the Initiative.<sup>2</sup>

Sincerely,



James R. Sutton

cc: Barbara Carr, Ballot Simplification Committee

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<sup>2</sup>If you refuse to rescind the draft digest, by copy of this letter to the Ballot Simplification Committee, we respectfully request that the Committee completely remove the sentence regarding the flavor ban from the final version of the digest.

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**EXHIBIT 11**

Verified Petition for Writ of Mandate  
*Hochstatter v. Arntz*

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6 IN THE BALLOT SIMPLIFICATION COMMITTEE  
7 FOR THE CITY & COUNTY OF SAN FRANCISCO  
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9 IN RE BALLOT DIGEST FOR  
10 INITIATIVE ENTITLED "VAPOR  
11 PRODUCTS" AT THE NOVEMBER 2019  
12 ELECTION  
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**DECLARATION OF ASHLEY  
GOULD, CHIEF  
ADMINISTRATIVE OFFICER OF  
JUUL LABS, INC., REGARDING  
THE "VAPOR PRODUCTS"  
INITIATIVE'S INTENDED LACK  
OF EFFECT ON THE "FLAVOR  
BAN"**

**DATE: August 6, 2019  
TIME: 9:00 a.m.**

18  
19 I, ASHLEY GOULD, declare under penalty of perjury as follows:

20 1. I am over 18 years of age. I make this declaration of my personal knowledge.  
21 I am the Chief Administrative Officer of JUUL Labs, Inc., which is the sponsor of the  
22 Coalition for Reasonable Vaping Regulation, the committee primarily formed to support the  
23 "Act to Prevent Youth Use of Vapor Products" initiative, tentatively entitled the "Vapor  
24 Products" initiative in this proceeding (the "Initiative"). JUUL Labs was directly involved in  
25 the drafting of the Initiative.

26 2. There have been a number of public statements recently made by opponents of  
27 the Initiative to the effect that, if adopted, the measure would repeal the prohibition on the  
28 sale and distribution of flavored tobacco products, adopted by the voters as Proposition E in

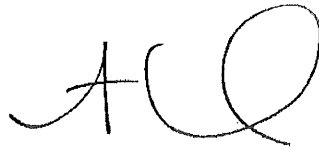
1 June 2018 and extended by the Board of Supervisors earlier this year (the “flavor ban”). The  
2 Initiative was never intended to have that effect, and it does not do so. It was always intended  
3 that the flavor ban, including its extension, would remain in effect. These flavor ban  
4 provisions are consistent with the Initiative, which was consciously designed to build on and  
5 incorporate existing regulation of vapor products and tobacco products more generally.

6 3. What the Initiative was meant to supersede—what is irreconcilable with the  
7 Initiative—was the complete prohibition on the sale of vapor products that was included in  
8 Sections 19R.2 and 19S.2, subdivision (b), of the Health Code, adopted by the Board of  
9 Supervisors in late June. Regulation cannot be reconciled with a categorical prohibition on  
10 the sale of all vapor products in the City.

11 4. If the Initiative passes, retailers will remain subject to the flavor ban—they will  
12 simply be required to also comply with the Initiative’s more stringent regulations on the sale  
13 of vapor products. In this context, the Initiative’s declaration of “comprehensive” regulation  
14 can only be understood as a clear alternative to the complete ban on the sale of vapor  
15 products, and does not repeal the flavor ban, implicitly or otherwise.

16 I declare under penalty of perjury under the laws of the State of California that the  
17 foregoing is true and correct of my personal knowledge, and, if called as a witness, I could  
18 testify competently thereto, except for those matters stated on information and belief and as  
19 to those matters, I believe them to be true.

20 Executed this 5th day of August, 2019, in San Francisco, California.

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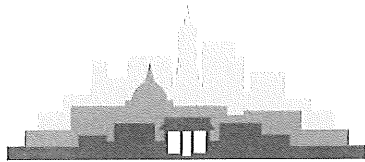
24 Ashley Gould, Declarant  
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**EXHIBIT 12**

Verified Petition for Writ of Mandate  
*Hochstatter v. Arntz*





SAN FRANCISCO

**OFFICE OF SMALL BUSINESS**

CITY AND COUNTY OF SAN FRANCISCO  
LONDON N. BREED, MAYOR

OFFICE OF SMALL BUSINESS  
SMALL BUSINESS COMMISSION  
REGINA DICK-ENDRIZZI, DIRECTOR

July 25, 2019

John Arntz  
Director  
Department of Elections  
City Hall, Room 48  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94117

Dear Director Arntz,

This letter is the Office of Small Business (OSB) analysis of the "VAPOR PRODUCT" measure to the Ballot Simplification Committee.

Currently there is approximately 815 City and County of Department of Public Health tobacco sales permit holders and roughly 92% of these permit holders are small businesses. Currently tobacco sales permit holders currently are able to sell e-cigarettes or nicotine vapor products to individuals 21 or older. Beginning January 1, 2020, Ordinance No: 122-19 will prohibit current City and County of Department of Public Health tobacco sales permit holders from selling and distributing e-cigarettes products that do not have FDA premarket approval.

This ballot measure as drafted and passed by the voters will allow the continuation of City and County of Department of Public Health tobacco sales permit holders to sell e-cigarettes. The measure does not reverse the ban of sales flavored tobacco products. The ballot measures retains the requirement for the permit holder to sell only to individuals that are 21 and older. The requirement for the permit holder to purchase a photo identification scanner will have a one-time expense that is approximately \$900.00.

The ballot measure does place a requirement of the number of products that the permit holder can sell at each transaction. This limitation in sales does will result in some reduction of revenue and sales for the permit holders, but it is a financial impact that is manageable for the small and all current tobacco permit holders.

The requirement to provide 1 hour of retail training twice a year to employees is manageable and a good procedure to ensure the retailer maintains the highest of standards necessary to ensure all sellable tobacco and vapor products are sold to individuals that are 21 and older.

CITY AND COUNTY OF SAN FRANCISCO  
OFFICE OF SMALL BUSINESS  
SMALL BUSINESS COMMISSION

This ballot measure is establishing new and first time regulations to online retailers, manufacturers and wholesalers. Very rarely does government attempt to apply the same regulatory requirements to online and app based businesses as is done to brick and mortar businesses. Not only is this very important to closing the loophole for easy access of e-cigarettes and vapor products for individuals under 21, it also levels the economic playing field for San Francisco's brick and mortar "establishments". One of the most critical components to this ballot measure is the creation of nearly similar regulatory requirements for online-retailers as there are for brick and mortar "establishment" retailers. This is done by:

- Requiring online retailers to obtain a tobacco sales permit from the Department of Public Health;
- Requirement so electronic age verification at the time of purchase;
- Requirement that limits the amount of e-cigarette or nicotine –containing liquids that can be sold at any one time;
- Placing advertising and marketing restrictions and a violation of this regulation that result in penalties and fines.

Where there are differences in brick and mortar "establishment" and online retailers is:

- A photo ID does not have to scanned at the time of the delivery of the purchase to insure the product is being delivered to the purchaser or an individual that is 21 or older;
- Employees of an online retailer are not required to do the twice a year 1 hour training.

The regulations applied to online retailers, manufacturers and wholesalers in this ballot measure are more stringent than current regulations and in Ordinance No: 122-19.

It is important for both San Francisco's small business and the City's youth to do the most we can to limit youth <21, in accessing tobacco. This ballot measure if passed takes good strong measures in doing so with minimal financial impact to San Francisco's tobacco sales permit holders while retaining adults in San Francisco the ability to continue to purchase these produces, and it strongly closes the online loopholes and ease of youth access through new online regulations.

Should the ballot measure not pass it will:

- Allow Ordinance No: 122-19 to go into effect January 1, 2020, which will prevent San Francisco brick and mortar businesses from selling e-cigarettes and nicotine containing liquids, which can significantly impact small tobacco sales permit holders;
- Prevent adults 21 and older from purchasing e-cigarettes;
- Will not require online retailers from obtaining a tobacco sales permit;
- Will not provide the Department of Public Health the tools it needs to regulation online sales to individuals <21;
- Will not provide the Department of Public Health the tools it needs to regulation advertising and marketing to youth.

CITY AND COUNTY OF SAN FRANCISCO  
OFFICE OF SMALL BUSINESS  
SMALL BUSINESS COMMISSION

Thank you to you, and the Ballot Simplification Committee for your consideration of the Office of Small Business analysis to the "Vapor Products" ballot measure. I will be happy to answer any questions you may have or attend any Committee meeting as requested.

Sincerely,

A handwritten signature in black ink, appearing to read "Regina Dick-Endrizzi". The signature is fluid and cursive, with the first name "Regina" being more prominent.

Regina Dick-Endrizzi  
Director, Office of Small Business

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**EXHIBIT 13**

Verified Petition for Writ of Mandate  
*Hochstatter v. Arntz*

# THE SUTTON LAW FIRM

150 Post Street, Suite 405 San Francisco, CA 94108  
Tel: 415/732-7700 Fax: 415/732-7701 www.campaignlawyers.com

August 7, 2019

## VIA EMAIL ONLY

Members of the Ballot Simplification Commission  
c/o Ms. Barbara Carr  
Ballot Simplification Committee  
1 Dr. Carlton B. Goodlett Place, Room 48  
San Francisco, CA 94102

RE: Request for Reconsideration of "Vapor Products" Digest

Dear Committee Members:

On behalf of our client, the Coalition for Reasonable Vaping Regulation, the political committee formed to support the "Act to Prevent Youth Use of Vapor Products," also known as the "Vapor Products" initiative, we respectfully request reconsideration of 12 items in the "Vapor Products" Digest approved by the Ballot Simplification Committee ("BSC") on Tuesday, August 7, 2019. We appreciate the BSC's diligent efforts to create an accurate and understandable ballot digest for San Francisco voters, and hope that the following proposals help support the BSC's goals.

Request Item 1: The term "electronic cigarette" should be replaced with the term "vapor product" throughout the Digest.

Justification: The City Attorney's official initiative title is "Vapor Products," and that term is used throughout the law. Use of a different term may confuse voters because the Digest does not mention "vapor products" despite the fact that term appears in the title and legal language. (Please note that proposed language below includes this replacement based on the same justification.)

Request Item 2: Amend the following sentence.

Current language: "The U.S. Food and Drug Administration (FDA) regulates tobacco products. Beginning in late January 2020, the City will suspend the sale of electronic cigarettes that have not then gone through required pre-market review by the FDA."

Members of the Ballot Simplification Commission  
c/o Ms. Barbara Carr  
August 7, 2019  
Page 2

Proposed Language: "The U.S. Food and Drug Administration (FDA) regulates tobacco products. Beginning in late January 2020, the City will suspend the sale of vapor products that have not then gone through pre-market review by the FDA, making it illegal to sell such products in San Francisco."

Justification: FDA pre-market review is not required until May 2020, and the word "required" implies that such a requirement exists today. The current sentence is also legalistic, and the phrase "suspend the sale" may be confusing to voters. Highlighting that the sale of such products would be made illegal clarifies the practical application of the law to voters.

Request Item 3: Amend the following sentence,

Current language: "The City would regulate the sale of authorized electronic cigarettes as follows:"

Proposed language: "Today, the City regulates the sale of vapor products as follows:"

Justification: The phrase "would regulate" may confuse voters regarding the point at which the enumerated laws are effective. The laws listed are currently in effect, and different laws will be in effect in the future.

Request Item 4: The statement "The State regulates the sale of vapor products as follows:" should be included prior to the point beginning with "State law requires tobacco retailers."

Justification: The two points which would fall below this proposed insertion detail State regulations, and are currently below a statement regarding the City's regulatory provisions. This could confuse voters regarding current City law.

Request Item 5: Amend the following sentence,

Current Language: "Repeal the City law that suspends the sale of electronic cigarettes that lack required authorization by the FDA."

Proposed Language: "Repeal the City law that suspends the sale of vapor products that lack authorization by the FDA."

Justification: As noted above, FDA pre-market review is not required until May 2020, and the word "required" implies that such a requirement exists today.

Request Item 6: Amend the following sentence,

Current Language: "Partially repeal City law to allow the sale, manufacture and online retail sale of electronic cigarettes on City property."

Members of the Ballot Simplification Commission  
c/o Ms. Barbara Carr  
August 7, 2019  
Page 3

Proposed Language: "Allow the sale, manufacture and online retail sale of vapor products on City property."

Justification: The current preface regarding repeal is unnecessary.

Request Item 7: The sentence reading "May repeal other City laws that apply to electronic cigarettes, including the City law that prohibits the sale of flavored electronic cigarettes" should be deleted.

Justification: The sentence is speculative and vague, and mentions no specific laws which will actually be repealed. A vague legalistic statement of this sort is likely to confuse voters and provides no concrete information upon which they may base their vote.

Alternative to Request Item 7: Amend the following sentence,

Current Language: "May repeal other City laws that apply to electronic cigarettes, including the City law that prohibits the sale of flavored electronic cigarettes."

Proposed Language: "May repeal other City laws that apply to vapor products."

Justification: If the current speculative statement regarding the repeal of "some laws" must be included, then it is similarly important to avoid highlighting one particular law without legal justification while omitting others. Voters are likely to read this clause as a legal conclusion that the initiative actually repeals the flavor ban, or else a voter will be confused as to why only one law is highlighted and/or which other laws might be repealed. Given the comments during the BSC's August 6 meeting, it is clear that the repeal of particular laws will be included in ballot arguments on both sides of the issue, which will permit voters to receive sufficient information on the subject within the ballot materials.

Further Alternative to Request Item 7: Amend the following sentence,

Current Language: "May repeal other City laws that apply to electronic cigarettes, including the City law that prohibits the sale of flavored electronic cigarettes."

Proposed Language: "May repeal other City laws that apply to vapor products, including the City law that prohibits the sale of flavored vapor products. The proponents and drafters of Proposition \_\_ contend that it does not repeal the City law that prohibits the sale of flavored vapor products."

Justification: Including the position held by proponents regarding the flavor ban may help establish the clear intent of the initiative to maintain the flavor ban. Such clarification may assist a court in finding that the initiative does not actually repeal the flavor ban – a result which benefits both sides of this debate.

Members of the Ballot Simplification Commission  
c/o Ms. Barbara Carr  
August 7, 2019  
Page 4

Request Item 8: Amend the following sentence,

Current Language: "Proposition \_\_ would repeal some City laws regarding electronic cigarettes and impose new regulations on the sale and distribution of vapor products in San Francisco as follows:"

Proposed Language: "Proposition \_\_ would impose new regulations on the sale and distribution of vapor products in San Francisco as follows:"

Justification: Including the phrase "would repeal some City laws regarding electronic cigarettes" is duplicative of the previous section.

Request Item 9: Amend the following sentence,

Current Language: "Require retailers to scan photo identification to verify that customers are 21 years or older."

Proposed Language: "Require retailers to scan photo identification to verify that customers are 21 years or older, and that the identification has not expired."

Justification: The proposed clause tracks the legal language of the initiative, and is a new legal requirement imposed by the initiative.

Request Item 10: Amend the following sentence,

Current Language: "Require retailers to train their employees twice a year."

Proposed Language: "Require retailers to train their employees twice a year on the restrictions on the sale of vapor products, including these new regulations."

Justification: The proposed clause tracks the legal language of the initiative, and clarifies the type and scope of training required under the new legal requirements.

Request Item 11: Amend the following sentence,

Current Language: "Verify that customers are at least 21 years old"

Proposed Language: "Verify that customers are at least 21 years old using enhanced verification techniques."

Justification: The proposed clause specifies that the initiative institutes new third-party verification requirements to the current state verification requirements, and thereby constitutes a new legal requirement.

Request Item 12: Amend the following sentence,

Current Language: "A 'YES' Vote Means: If you vote 'yes,' you want to allow vapor products to be sold in the City regardless of FDA authorization and adopt new regulations on the sale, manufacturing, distribution and advertising of vapor products in San Francisco."



Members of the Ballot Simplification Commission

c/o Ms. Barbara Carr

August 7, 2019


Page 5

Proposed Language: "A 'YES' Vote Means: If you vote 'yes,' you want to allow vapor products to be sold in the City, unless the FDA decides otherwise, and to adopt new regulations on the sale, manufacturing, distribution and advertising of vapor products in San Francisco."

Justification: The current statement inaccurately implies that products made illegal by the FDA could be sold in San Francisco. Instead, the sentence should indicate that the initiative would permit the continued availability of vapor products unless the FDA's review concluded that such a product should not be available to the public.

Thank you for your consideration of our proposed changes. We look forward to answering any questions you have during public meeting.

Sincerely,

A handwritten signature in black ink, appearing to read "Nicholas L. Sanders", with a stylized, flowing script.

Nicholas L. Sanders

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**EXHIBIT 14**

Verified Petition for Writ of Mandate  
*Hochstatter v. Arntz*

Filter by Office or Type	Begin Date	End Date	E-Date(s)	Event or Action	Description	Code Provision(s)
<b>Ballot Measures</b>						
Ballot Measures		6/18/2019	E-140	Notification Of Ordinances And Declarations Of Policy To Be Submitted By The Mayor Or Four Or More Board Members	Deadline for the Mayor or four or more members of the Board of Supervisors to submit an original proposed ordinance or declaration of policy to the Clerk of the Board's office and provide a copy to the Department of Elections.	SFC §2.113; SFMEC §300(b)
Ballot Measures		7/8/2019	E-120	Submission Of Initiative Petitions To Qualify A Local Ballot Measure	Deadline to submit initiative petitions to the Department of Elections to qualify an ordinance, declaration of policy, or charter amendment for the ballot. Once submitted, an initiative petition may not be withdrawn.	SFC §14.101; SFMEC §§300(c), 370(c)
Ballot Measures		7/26/2019 5 p.m.	E-102	Submission Of Charter Amendments And Bond Measures	Deadline for the Board of Supervisors to submit Charter amendments and bond measures to the Department of Elections. The Board of Supervisors may submit, and the Director of Elections has the discretion to accept, one Charter amendment or bond measure after E-102 but no later than E-95.	SFMEC §300(a)
Ballot Measures	7/29/2019	8/12/2019	E-99 - E-85	Ballot Simplification Committee Meetings	The Ballot Simplification Committee prepares a digest of each local measure to be published in the Voter Information Pamphlet.	SFMEC §§515, 610
Ballot Measures		7/30/2019 5 p.m.	E-98	Withdrawal Of Support By One Or More Supervisors	Measures proposed by four or more members of the Board of Supervisors shall be withdrawn if one or more of the Supervisors withdraw their support for the proposed measure, and following this withdrawal, fewer than four Supervisors continue to support the measure. A Supervisor may withdraw his or her support for a measure by filing with the Department of Elections a signed and sworn statement of withdrawal at any time up until 72 hours before the legal deadline for submission of the measure to the Department of Elections. Following such a withdrawal, additional members of the Board of Supervisors may join in support of the proposed measure, provided that they do so in writing before the legal deadline for submission of the measure to the Department of Elections. No Supervisor may withdraw his or her support for a proposed measure after this date, unless it is a unanimous withdrawal by the four or more Supervisors who supported the measure. Such a withdrawal must occur before the legal deadline for submission of the measure.	SFMEC §370(b)(2)

Filter by Office or Type	Begin Date	End Date	E-Date(s)	Event or Action	Description	Code Provision(s)
<b>Ballot Measures</b>						
Ballot Measures		8/2/2019	E-95	Submission Of Ordinances And Declarations Of Policy	Deadline for the submission of ordinances or declarations of policy proposed by a majority of the Board of Supervisors, the Mayor, or four or more members of the Board of Supervisors.	SFMEC §300(b)
Ballot Measures		8/9/2019	E-88	Submission Of District Measures	Deadline for submission of a school, college, or special district measure. If a bond or tax measure is placed on the ballot, the tax rate statement is due by this date.	CAEC §§9401, 10403; CA Ed. Code §5322
Ballot Measures	8/10/2019 noon	8/20/2019 noon	E-87 - E-77	Public Examination Period: District Measures	Period of public review and possible legal challenge of the district measures to be submitted to the voters.	CAEC §9509
Ballot Measures		8/12/2019	E-85	Designation Of Letters For Ballot Measures	The Department of Elections designates letters for local ballot measures according to the procedures set forth in the SFMEC.	SFMEC §505
Ballot Measures		8/12/2019	E-85	Ballot Simplification Committee Digests	Deadline for the Ballot Simplification Committee to submit digests of each local measure to the Department of Elections for publication in the Voter Information Pamphlet.	SFMEC §515
Ballot Measures		8/12/2019	E-85	Financial Analyses	Deadline for the Controller to submit a financial analysis of each local measure, including an estimate of the increase or decrease in the cost of government and/or the effect of the measure on the tax rate, to the Department of Elections, for publication in the Voter Information Pamphlet.	SFMEC §520
Ballot Measures		8/12/2019	E-85	Ballot Questions	Deadline for the City Attorney to submit the ballot questions for local measures to the Department of Elections.	SFMEC §510(b)
Ballot Measures	8/13/2019 noon	8/23/2019 noon	E-84 - E-74	Public Examination Period: Ballot Digests, Financial Analyses, And Ballot Questions	Period of public review and possible legal challenge for the Ballot Simplification Committee's digests, the Controller's financial analyses, and the City Attorney's ballot questions.	SFMEC §590(b)(1-3)
Ballot Measures		8/15/2019 noon	E-82	Submission Of Proponent And Opponent Ballot Arguments For Local Ballot Measures And District Measures	Deadline to submit proponent and opponent ballot arguments for local ballot measures and district measures to the Department of Elections. Prior to submitting an argument, the author must sign and submit a Declaration.	CAEC §§9162-4, 9281-3, 9286, 9315-6, 9501-9502; SFMEC §535(a),(b)
Ballot Measures		8/15/2019 2 p.m.	E-82	Selection Of Proponent And Opponent Arguments	If the Department of Elections receives more than one proposed proponent or opponent argument for a measure, the Department will select one proponent and one opponent argument according to priority levels and, if necessary, by lottery.	CAEC §§9166, 9287, 9503; SFMEC §545

Filter by Office or Type	Begin Date	End Date	E-Date(s)	Event or Action	Description	Code Provision(s)
<b>Ballot Measures</b>						
Ballot Measures		8/16/2019 noon	E-81	Deadline to Correct Factual, Grammatical, Or Spelling Errors In Proponent And Opponent Ballot Arguments For Local Measures Only	Deadline for the authors of proponent and opponent ballot arguments to correct any factual, grammatical, or spelling errors in the arguments for or against local measures.	SFMEC §535(f)
Ballot Measures	8/16/2019 noon	8/26/2019 noon	E-81 - E-71	Public Examination Period: Proponent And Opponent Arguments For Local Ballot Measures And District Measures	Period of public review and possible legal challenge of proponent and opponent arguments for publication in the Voter Information Pamphlet.	CAEC §§9380, 9509; SFMEC §590(b)(4)
Ballot Measures		8/19/2019 noon	E-78	Submission Of Rebuttal Arguments For Local Ballot Measures And District Measures	Deadline to submit rebuttal arguments for local ballot measures and district ballot measures to the Department of Elections.	CAEC §§9504, 9167, 9285; SFMEC §535(c)
Ballot Measures		8/19/2019 noon	E-78	Submission Of Paid Ballot Arguments For Local Ballot Measures	Deadline to submit paid ballot arguments for or against local measures to the Department of Elections. Paid ballot argument fee and original hard copy must be submitted together.	SFMEC §535(d)
Ballot Measures		8/20/2019 noon	E-77	Deadline To Correct Factual, Grammatical, Or Spelling Errors In Rebuttal Or Paid Arguments For Local Measures Only	Deadline for the authors of rebuttals or paid ballot arguments to correct any factual, grammatical, or spelling errors in their arguments for or against local measures.	SFMEC §535(f)
Ballot Measures	8/20/2019 noon	8/30/2019 noon	E-77 - E-67	Public Examination Period: Rebuttal Arguments (Local And District Measures) And Paid Arguments (Local Measures Only)	Period of public review and possible legal challenge of rebuttals and paid ballot arguments submitted for publication in the Voter Information Pamphlet.	CAEC §§9380, 9509; SFMEC §590(b)(5-6)

\*The legal deadline falls on a Saturday, Sunday or holiday; the deadline will move forward to the next working day. CA Gov. Code §6707

## Code References

CAEC: California Elections Code

CA Ed. Code: California Education Code

CA Gov. Code: California Government Code

SFC: San Francisco City Charter

SFMEC: San Francisco Municipal Elections Code

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*Attorneys for Petitioner*  
JENNIFER HOCHSTATTER

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE CITY & COUNTY OF SAN FRANCISCO

JENNIFER HOCHSTATTER,

*Petitioner,*

vs.

JOHN ARNTZ, Director of the San Francisco  
Department of Elections; DOES I-X

*Respondents.*

SAN FRANCISCO BALLOT  
SIMPLIFICATION COMMITTEE; DENNIS  
HERRERA, in his official capacity as San  
Francisco City Attorney; DOES XI-XX,

*Real Parties in Interest.*

Case No.

**MOTION FOR  
DISQUALIFICATION OF  
JUDGE [CCP § 170.6]**

**CALENDAR PREFERENCE  
REQUIRED BY STATUTE  
(ELEC. CODE § 13314(a)(3))**

1 TO THE HONORABLE PRESIDING JUDGE OF THE ABOVE-ENTITLED COURT:

2 The attorneys for Petitioner in the above-entitled matter hereby moves that  
3 the hearing of this matter, which involves a contested issue of law or fact, and which  
4 would be heard by the Honorable Ethan P. Schulman pursuant to Local Rule 8.1.A,  
5 be reassigned, and that no matters hereinafter arising in this case be heard by or  
6 assigned to the Honorable Ethan P. Schulman on the ground that said judge is  
7 prejudiced against the interests of Petitioner in this action.

8 This motion is based on the matters contained herein, on section 170.6 of the  
9 Code of Civil Procedure, and on the supporting Declaration under penalty of  
10 perjury of Christopher E. Skinnell, an attorney for Petitioner, which is attached  
11 hereto as Exhibit A and filed herewith.

12 WHEREFORE, Petitioner prays that the Honorable Ethan P. Schulman be  
13 disqualified under section 170.6 of the Code of Civil Procedure from hearing any  
14 matter in this action.

15 Respectfully submitted,

16 Dated: August 22, 2019

THE SUTTON LAW FIRM PC

17 NIELSEN MERKSAMER

18 PARRINELLO GROSS & LEONI LLP

19 By:   
20

21 *Attorneys for Petitioner*  
22 JENNIFER HOCHSTATTER  
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**EXHIBIT A**

I, Christopher E. Skinnell, hereby declare under penalty of perjury as follows:

1. I am an attorney at law, licensed to practice in the State of California and before this Court. I am an attorney for Petitioner in this action and am familiar with the file, the documents, and the history related to the action. I have personal knowledge of the facts stated in this declaration and, if called as a witness, could and would competently testify as set forth below.

2. The Honorable Ethan P. Schulman is the judge to whom all writ proceedings are assigned pursuant to Local Rule 8.1.A.

3. The judge is prejudiced against the interests of Petitioner.

4. Declarant believes that Petitioner cannot have a fair and impartial trial before this judge.

WHEREFORE IT IS RESPECTFULLY REQUESTED THAT the Honorable Ethan P. Schulman be disqualified under section 170.6 of the Code of Civil Procedure from hearing any matter in this action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 22, 2019, at San Rafael, California.



Christopher E. Skinnell