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Vapor Company; American Snuff Company, LLC;  
7 Santa Fe Natural Tobacco Company, Inc.;  
Neighborhood Market Association, Inc.; and  
Moriya, LLC dba Vapin' the 619

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Smokeless Tobacco Company LLC; and Helix  
Innovations LLC.

15  
16 UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

17  
18 R.J. REYNOLDS TOBACCO COMPANY;  
R.J. REYNOLDS VAPOR COMPANY;  
19 AMERICAN SNUFF COMPANY, LLC;  
SANTA FE NATURAL TOBACCO  
COMPANY, INC.; PHILIP MORRIS USA  
20 INC.; JOHN MIDDLETON CO.; U.S.  
SMOKELESS TOBACCO COMPANY LLC;  
21 HELIX INNOVATIONS LLC;  
NEIGHBORHOOD MARKET  
22 ASSOCIATION, INC.; and MORIJA, LLC dba  
VAPIN' THE 619,

23 *Plaintiffs,*

24 v.

25 XAVIER BECERRA, in his official capacity as  
26 Attorney General of California; and SUMMER  
STEPHAN, in her official capacity as District  
27 Attorney for the County of San Diego,

28 *Defendants.*

Case No. **'20CV1990 LAB RBB**

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

1 Plaintiffs R.J. Reynolds Tobacco Company (“RJRT”), R.J. Reynolds Vapor  
2 Company (“RJR”), American Snuff Company, LLC (“ASC”), Santa Fe Natural  
3 Tobacco Company, Inc. (“Santa Fe”), Philip Morris USA Inc. (“PM USA Inc.”),  
4 John Middleton Co. (“JMC”), U.S. Smokeless Tobacco Company LLC (“UST”),  
5 Helix Innovations LLC (“Helix”), Neighborhood Market Association, Inc., and  
6 MORIJA, LLC dba Vapin’ the 619 bring this action for declaratory and injunctive  
7 relief against Defendants Xavier Becerra, in his official capacity as Attorney General  
8 of California, and Summer Stephan, in her official capacity as District Attorney for  
9 the County of San Diego.

### 10 PRELIMINARY STATEMENT

11 1. In an overbroad reaction to legitimate public-health concerns about  
12 youth use of tobacco products, the state of California recently enacted the most  
13 draconian ban on tobacco products of any state in the nation. California is rightly  
14 concerned with youth use of tobacco products. Although youth use of combustible  
15 cigarettes is at an all-time low, youth vaping and serious health issues from illicit  
16 products are at the heart of a national discussion. But California’s new law, Senate  
17 Bill 793, strikes far broader than necessary, banning menthol cigarettes, menthol-  
18 flavored vapor products, and myriad other flavored tobacco products manufactured  
19 and sold by Plaintiffs R.J. Reynolds Tobacco Company, R.J. Reynolds Vapor  
20 Company, American Snuff Company, LLC, and Santa Fe Natural Tobacco Company  
21 (collectively, “Reynolds”), and by Plaintiffs Philip Morris USA Inc., John Middleton  
22 Co., U.S. Smokeless Tobacco Company LLC, and Helix Innovations LLC  
23 (collectively, “PM USA”). SB793 also bans flavored tobacco products sold by  
24 Plaintiff Vapin’ the 619 as well as by members of Plaintiff Neighborhood Market  
25 Association.

26 2. Reynolds and PM USA are committed to keeping tobacco products out  
27 of the hands of youth. Reynolds and PM USA have rigorous standards to ensure their  
28 marketing is accurate and responsibly directed to adult tobacco consumers aged

1 twenty-one and over. Reynolds and PM USA also have strict compliance policies for  
2 retailers who sell their products to prevent youth from purchasing tobacco products  
3 and support programs that train retailers to comply with age restrictions.

4 3. The federal Food and Drug Administration shares Reynolds's and PM  
5 USA's goals, and, earlier this year, effectively banned the sale of flavored cartridge-  
6 based electronic nicotine delivery system ("ENDS") products (other than tobacco- or  
7 menthol-flavored cartridge-based ENDS products). FDA, *Enforcement Priorities for*  
8 *Electronic Nicotine Delivery Systems (ENDS) and Other Deemed Products on the*  
9 *Market Without Premarket Authorization (Revised)* 19 (Apr. 2020), available at  
10 <https://www.fda.gov/media/121384/download> ("*Enforcement Priorities*"). In fact,  
11 the latest report from FDA finds that "1.8 million fewer U.S. youth are currently  
12 using e-cigarettes compared to 2019." FDA Statement, *National Survey Shows*  
13 *Encouraging Decline in Overall Youth E-Cigarette Use, Concerning Uptick in Use*  
14 *of Disposable Products* (Sept. 9, 2020), available at <https://tinyurl.com/y3rpwfph>.  
15 As FDA recognizes, "[t]his is good news" (*id.*), and it also shows that FDA's efforts  
16 as well as those by industry leaders such as Reynolds and PM USA are paying off.

17 4. California could have supplemented these efforts by targeting youth  
18 usage of vapor products (and other tobacco products) through increased enforcement  
19 of age restrictions or public-education campaigns. Instead, Senate Bill 793, which  
20 added Article 5 to Chapter 1 of Part 3 of Division 103 of the Health and Safety Code,  
21 bans sales to adult tobacco consumers in the state and, moreover, indiscriminately  
22 extends the ban to nearly every conceivable flavored tobacco product, from menthol  
23 cigarettes and smokeless tobacco to flavored vapor products and other flavored  
24 products. This categorical ban is unjustified.

25 5. For one, Congress has already banned all characterizing flavors in  
26 cigarettes other than tobacco or menthol. 21 U.S.C. § 387g(a)(1)(A). And as to  
27 menthol, Congress left it to FDA to determine whether that flavor should be banned  
28

1 when it comes to cigarettes. To date, even though FDA has studied the issue, FDA  
2 has chosen not to ban menthol in cigarettes.

3 6. Moreover, California's law could have adverse public health  
4 consequences. FDA's Director of the Center for Tobacco Products has asserted that  
5 "[d]ramatically and precipitously reducing availability of [electronic nicotine  
6 delivery system products ("ENDS")] could present a serious risk that adults,  
7 especially former smokers, who currently use ENDS products and are addicted to  
8 nicotine would migrate to combustible tobacco products." *Am. Acad. of Pediatrics v.*  
9 *FDA*, No. 8:18-cv-883, Dkt. 120-1, at ¶ 15 (D. Md. filed June 12, 2019) (Decl. of  
10 Director of FDA's Center for Tobacco Products Mitchell Zeller) ("Zeller Decl.").  
11 This risk of migration is especially pronounced for menthol-flavored products. When  
12 FDA previously considered restrictions on flavored ENDS products, FDA declined  
13 to impose restrictions on menthol-flavored ENDS products precisely because adults  
14 who used those products "may be at risk of migrating back to cigarettes, which  
15 continue to be available in menthol flavor, in the absence of access to mint- and  
16 menthol-flavored ENDS products." *See* FDA, Modifications to Compliance Policy  
17 for Certain Deemed Tobacco Products 19 (Mar. 2019), *available at*  
18 <https://tinyurl.com/yyywgoat>.

19 7. But not only is California's law misguided, the sweeping ban is also  
20 preempted by federal law and therefore unconstitutional under the U.S.  
21 Constitution's Supremacy Clause. In addition, California's law violates the dormant  
22 Commerce Clause and is thus unconstitutional.

23 8. *First*, federal law expressly preempts the state's ban on flavored tobacco  
24 products. The manufacture of tobacco products is subject to intensive regulation by  
25 the federal Government. In striking a balance between federal authority and state  
26 authority over the regulation of tobacco products, Congress expressly denied states  
27 the ability to promulgate any requirement relating to tobacco product standards that  
28 are different from or in addition to federal standards. California's ban on flavored

1 tobacco products, however, is a product standard because it regulates the ingredients,  
2 additives, and properties of those products. California's ban is thus expressly  
3 preempted by federal law.

4 9. *Second*, federal law also impliedly preempts California's law because  
5 the state's ban stands as an obstacle to the purposes of federal law. Congress  
6 authorized FDA to promulgate tobacco product standards that, in appropriate  
7 circumstances, can establish uniform, national standards for the manufacture of  
8 tobacco products and the ingredients used in such products. Congress and FDA have  
9 made the judgment that certain tobacco products, particularly menthol cigarettes,  
10 should remain available to adult users of tobacco products. California's ban,  
11 however, conflicts with those federal goals and must give way.

12 10. *Third*, because California's law attempts to regulate manufacturers that  
13 are not within the state's borders, the law violates the dormant Commerce Clause.  
14 And because California's ban does so, it is unconstitutional and must be set aside.

15 11. California has no legitimate interest in enforcing its unconstitutional  
16 law. The Court should thus grant injunctive and declaratory relief preventing the  
17 Defendants and their agents from violating the U.S. Constitution's Supremacy Clause  
18 and Commerce Clause.

## 19 **PARTIES**

20 12. Plaintiff RJRT is a North Carolina corporation headquartered in  
21 Winston-Salem, North Carolina. RJRT is a leading manufacturer of tobacco  
22 products. In particular, RJRT develops, manufactures, markets, and distributes a  
23 variety of flavored tobacco products under a variety of brand names, including  
24 menthol cigarettes under the brand names Newport and Camel, among others, and  
25 flavored smokeless tobacco products under the brand name Camel SNUS.

26 13. Plaintiff RJRV is a North Carolina corporation headquartered in  
27 Winston-Salem, North Carolina. RJRV develops, manufactures, markets, distributes,  
28 and sells menthol-flavored electronic nicotine delivery devices under the brand name

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