

1 Steven N. Geise (SBN 249969)
JONES DAY
2 sngeise@jonesday.com
4655 Executive Drive, Suite 1500
3 San Diego, CA 92121
Tel: (858) 314-1200

4 *[Additional counsel identified on signature page]*
5 *Counsel for Plaintiffs*
R.J. Reynolds Tobacco Company; R.J. Reynolds
6 Vapor Company; American Snuff Company, LLC;
Santa Fe Natural Tobacco Company, Inc.;
7 Neighborhood Market Association, Inc.; and
Moriya, LLC dba Vapin' the 619

8 Tommy Huynh (SBN 306222)
9 ARNOLD & PORTER KAYE SCHOLER LLP
Tommy.Huynh@arnoldporter.com
10 Three Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024
11 Tel: (415) 471-3100
Fax: (415) 471-3400

12 *[Additional counsel identified on signature page]*
13 *Counsel for Plaintiffs*
Philip Morris USA Inc; John Middleton Co.; U.S.
14 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
26 XAVIER BECERRA, in his official capacity as
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

1 “VUSE” and a variety of flavored oral nicotine pouches and lozenges under the brand
2 name VELO.

3 14. Plaintiff ASC is a North Carolina corporation headquartered in
4 Winston-Salem, North Carolina. ASC develops, manufactures, markets, and
5 distributes a variety of flavored smokeless tobacco products, including under the
6 brand name “Grizzly.”

7 15. Plaintiff Santa Fe is a New Mexico corporation headquartered in
8 Oxford, North Carolina. Santa Fe develops, manufactures, markets, and distributes
9 menthol cigarettes under the brand name Natural American Spirit.

10 16. All of the aforementioned flavored products manufactured and
11 distributed by RJRT, RJRV, ASC, and Santa Fe qualify as “flavored tobacco
12 product[s]” that are prohibited under Senate Bill 793.

13 17. Plaintiff PM USA Inc. is a Virginia corporation and has its principal
14 place of business in Richmond, Virginia. PM USA Inc. is a leading manufacturer of
15 cigarettes in the United States. PM USA Inc. sells cigarettes under a number of
16 leading brands, including Marlboro, Parliament, Virginia Slims, and L&M. Certain
17 of PM USA Inc.’s products qualify as “flavored tobacco product[s]” that are
18 prohibited under Senate Bill 793.

19 18. Plaintiff JMC is a Pennsylvania limited liability company and has its
20 principal place of business in Pennsylvania. JMC manufactures pipe tobacco and
21 large machine-made cigars under a variety of brands, including Black & Mild,
22 Kentucky Club, and Prince Albert. Certain of JMC’s products qualify as “flavored
23 tobacco product[s]” that are prohibited under Senate Bill 793.

24 19. Plaintiff UST is a Virginia limited liability company and has its
25 principal place of business in Richmond, Virginia. UST manufactures moist
26 smokeless tobacco under a variety of brand names, including Copenhagen, Skoal,
27 Red Seal, and Husky. Certain of UST’s products qualify as “flavored tobacco
28 product[s]” that are prohibited under Senate Bill 793.

1 20. Plaintiff Helix is a Delaware limited liability company and has its
2 principal place of business in Richmond, Virginia. Helix manufactures oral nicotine
3 pouches under the brand name “on!”. Certain of Helix’s products qualify as “flavored
4 tobacco product[s]” that are prohibited under Senate Bill 793.

5 21. Neighborhood Market Association is a local non-profit industry trade
6 association comprised of various family-owned businesses within San Diego County,
7 California. The Association has members who are tobacco retailers, wholesalers, and
8 manufacturers located within the County that will be subject to Senate Bill 793 once
9 it goes into effect. Many of the Association’s tobacco retailers sell flavored tobacco
10 products, including those manufactured by RJRT, RJRV, ASC, and Santa Fe. Those
11 retailers will no longer be able to sell “flavored tobacco product[s],” as defined in
12 Senate Bill 793, once the law goes into effect. But for Senate Bill 793, those members
13 who currently sell flavored tobacco products would continue to do so to consumers
14 in California. Dozens of NMA’s members, including Vapin’ the 619, will likely have
15 to close shop completely and lay off their employees if California’s ban goes into
16 effect.

17 22. MORIJA, LLC is headquartered in El Cajon, California. The company
18 does business as Vapin’ the 619 and is a tobacco retailer with a retail establishment
19 located on Clairemont Mesa Boulevard in the City of San Diego, California. The
20 establishment exclusively sells electronic smoking devices and e-liquid tobacco
21 products used in conjunction with such devices. In particular, the establishment sells
22 flavored tobacco products as defined in Senate Bill 793. Vapin’ the 619 will no longer
23 be able to sell “flavored tobacco product[s],” as defined in Senate Bill 793, once the
24 law goes into effect. But for Senate Bill 793, Vapin’ the 619 would continue to sell
25 flavored tobacco products to consumers in California. If Senate Bill 793 does go into
26 effect, Vapin’ the 619 will likely have to close its store permanently and lay off its
27 employees.

28

1 retailers in this judicial district, including Reynolds’s products by members of
2 Neighborhood Market Association. In addition, prior to Senate Bill 793’s enactment,
3 members of Neighborhood Market Association as well as Vapin’ the 619 sold
4 flavored tobacco products in this judicial district. Senate Bill 793 forbids the sale of
5 nearly all flavored tobacco products in this judicial district, and will thus cause
6 financial injury to Plaintiffs in this district.

7 **BACKGROUND**

8 **The Tobacco Control Act and Federal Regulation of Tobacco Products**

9 28. The Family Smoking Prevention and Tobacco Control Act of 2009,
10 Public Law 111-31, 123 Stat. 1776 (June 22, 2009), amended the Federal Food, Drug,
11 and Cosmetic Act and established the U.S. Food and Drug Administration as “the
12 primary Federal regulatory authority with respect to the manufacture, marketing, and
13 distribution of tobacco products.” *Id.* § 3(1), 123 Stat. at 1781 (codified at 21 U.S.C.
14 § 387 note). The Tobacco Control Act applies to cigarettes, cigarette tobacco, roll-
15 your-own tobacco, and smokeless tobacco products, as well as to any other tobacco
16 products that FDA by regulation deems subject to the Act. 21 U.S.C. § 387a(b). The
17 Act defines “tobacco product” as “any product made or derived from tobacco that is
18 intended for human consumption.” 21 U.S.C. § 321(rr)(1).

19 29. In 2016, FDA exercised its deeming authority, 21 U.S.C. § 387a(b), to
20 bring within its regulatory authority all products meeting the statutory definition of a
21 tobacco product, except accessories of the newly deemed tobacco products. *See*
22 *Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic*
23 *Act, as Amended by the Family Smoking Prevention and Tobacco Control Act;*
24 *Restrictions on the Sale and Distribution of Tobacco Products and Required Warning*
25 *Statements for Tobacco Products*, 81 Fed. Reg. 28,974 (May 10, 2016).

26 30. Congress passed the Tobacco Control Act to, *inter alia*, “authorize the
27 [FDA] to set national standards controlling the manufacture of tobacco products and
28 the ... amount of ingredients used in such products.” Tobacco Control Act § 3(3),

1 123 Stat. at 1782 (codified at 21 U.S.C. § 387 note). To that end, the Act empowers
2 FDA to adopt “tobacco product standards,” 21 U.S.C. § 387g, including “provisions
3 respecting the ... additives ... [and] properties of the tobacco product,” *id.*
4 § 387g(a)(4)(B)(i). The term “additives” includes “substances intended for use as a
5 flavoring.” *Id.* § 387(1).

6 31. The Act also directly created tobacco product standards such as a
7 “Special Rule for Cigarettes.” The Special Rule for Cigarettes bans the use in
8 cigarettes of “characterizing flavor[s]” “other than tobacco or menthol.” 21 U.S.C.
9 § 387g(a)(1)(A). But the Act expressly reserves “menthol cigarettes” to FDA’s
10 regulatory authority. *See id.* (noting “the Secretary’s authority to take action . . .
11 applicable to menthol”). To date, the FDA has chosen not to ban the use of menthol
12 in cigarettes.

13 32. In fact, FDA has issued advance notices of proposed rulemaking
14 (“ANPRMs”) contemplating the adoption of “tobacco product standard[s]” banning
15 various flavored tobacco products, including menthol cigarettes and flavored vapor
16 products. *See, e.g., Menthol in Cigarettes, Tobacco Products; Request for Comments*,
17 78 Fed. Reg. 44,484, 44,485 (July 24, 2013); *Regulation of Flavors in Tobacco*
18 *Products*, 83 Fed. Reg. 12,294, 12,299 (Mar. 21, 2018). But it has never banned
19 menthol in cigarettes. And studies have shown that menthol cigarettes do not
20 adversely affect initiation of or progression to smoking, and there is no clear
21 association between menthol use and decreased smoking cessation. *See RAI Services*
22 *Company, Comment Letter on Advance Notice of Proposed Rulemaking Regarding*
23 *Regulations of Flavors in Tobacco Products* (July 18, 2018), available at
24 <https://www.regulations.gov/document?D=FDA-2017-N-6565-18265>.

25 33. The Tobacco Control Act expressly preempts state or local regulations
26 that set forth requirements “different from, or in addition to,” any of the Tobacco
27 Control Act’s or FDA’s requirements relating to federal “tobacco product standards.”
28 *Id.* § 387p(a)(2)(A) (“Tobacco Preemption Clause”). The Tobacco Preemption

1 Clause ensures that tobacco product manufacturers will have to comply with just one
2 set of product specifications nationwide—rather than having to grapple with
3 potentially hundreds of different requirements set by different states and local
4 jurisdictions governing the same products. *See Tobacco Control Act* § 3(3), 123 Stat.
5 1782 (codified at 21 U.S.C. § 387 note).

6 34. The Tobacco Control Act also contains a narrow saving clause, which
7 provides that the Tobacco Preemption Clause “does not apply to requirements
8 relating to the sale [and] distribution . . . of . . . tobacco products by individuals of
9 any age.” *Id.* § 387p(a)(2)(B). But the saving clause narrows the category of
10 permissible state and local requirements to those that turn on the “age” of the
11 “individuals” buying or using the regulated tobacco products. *See id.* And even if the
12 saving clause applies beyond age-based requirements, the clause does not protect
13 state and local laws that prohibit a product’s sale and distribution altogether, but
14 rather only more limited laws that regulate the time, place, and manner of the
15 product’s sale and distribution. *Compare id., with id.* § 387p(a)(1).

16 **Plaintiffs and FDA Work To Keep Tobacco Products Away from Youth**

17 35. The original motivation for California’s ban on flavored tobacco
18 products was to prevent youth usage of tobacco products. *See Sen. Hill, SB 793*
19 *Frequently Asked Questions* (2020), available at <https://tinyurl.com/yyomllfx>. Both
20 Plaintiffs and FDA are committed to keeping tobacco products out of the hands of
21 youth.

22 36. Reynolds and PM USA have taken active steps to prevent youth access
23 to their products. Reynolds and PM USA are original sponsors and lead participants
24 in the We Card program. Reynolds and PM USA require their contracted retailers to
25 commit to participating in We Card. Since this partnership began in 1995, We Card
26 has trained nearly half a million storeowners, managers, and frontline employees to
27 help prevent youth access to tobacco products.
28

1 37. Reynolds has expanded those efforts, including through use of We
2 Card’s “mystery shopper” program, which also will provide additional retailers with
3 further education and training on verifying legal age of purchasers.

4 38. In 2018, RJRV took targeted action to ensure youth were not obtaining
5 its vapor products. The company instituted a contract-based tiered compliance
6 program that involves penalties on retailers that are found to have illegally sold
7 VUSE products to youth. In conjunction with this program, RJRV also has its trade
8 marketing representatives discussing the issue of underage youth access with each of
9 RJRV’s contracted retailers on an ongoing basis. And the company provides access
10 to additional materials and resources on preventing youth access to tobacco products
11 via its online customer portal, engageVIP.com.

12 39. In 2019, PM USA announced a new retailer incentive program to further
13 encourage responsible retailing through age-validation technology at the point of
14 purchase. To participate in the incentive program, retailers must implement a
15 technological solution at a store’s point(s) of purchase, requiring the electronic scan
16 of a consumer’s government-issued identification to complete a sales transaction
17 involving the purchase of a tobacco product.

18 40. FDA also has specifically addressed concerns about youth vaping. In a
19 recent guidance for industry, FDA states that it “intends to prioritize enforcement for
20 lack of marketing authorization against any flavored, cartridge-based ENDS product
21 (other than a tobacco- or menthol-flavored ENDS product) that is offered for sale in
22 the United States without regard to whether or when premarket application for such
23 product has been submitted.” FDA, *Enforcement Priorities* 19. By way of
24 background, when FDA promulgated its Deeming Rule, it brought ENDS products
25 within its regulatory umbrella—meaning that before the products were sold, they
26 needed FDA authorization. 81 Fed. Reg. 28,974. At the time, FDA said it would use
27 its enforcement discretion and allow the products to stay on the market for some time
28 even if they had not received FDA authorization. *Id.* at 28,977–78. FDA has now

1 changed course with regard to flavored, cartridge-based ENDS products (other than
2 those that are tobacco- or menthol-flavored). FDA, *Enforcement Priorities* 19. The
3 upshot of the new policy is that flavored, cartridge-based ENDS products (other than
4 those that are tobacco- or menthol-flavored) can no longer be sold, unless and until
5 FDA grants authorization for such products.

6 41. In addition, as part of the same guidance referred to above, FDA stated
7 that it would prioritize enforcement against ENDS products for which the
8 manufacturer has failed to take adequate measures to prevent minors' access. *Id.* at
9 3. And FDA will make enforcement a priority with respect to ENDS products that
10 are "targeted to minors or whose marketing is likely to promote use of ENDS by
11 minors." *Id.*

12 42. FDA has also issued numerous warning letters to entities that are
13 improperly marketing or selling "unauthorized flavored, cartridge-based ENDS
14 products" and other ENDS products that are being marketed or sold in ways that are
15 appealing to youth. *See, e.g.*, FDA News Release, *FDA Warns Manufacturers and*
16 *Retailers to Remove Certain E-cigarette Products Targeted to Youth from the Market*
17 (Apr. 27, 2020), at <https://tinyurl.com/ybg9yny3> (announcing warning letters); FDA
18 News Release, *FDA Notifies Companies, Including Puff Bar, to Remove Flavored*
19 *Disposable E-Cigarettes and Youth-Appealing E-Liquids from Market for Not*
20 *Having Required Authorization* (July 20, 2020), at <https://tinyurl.com/y4shrbuf>.

21 43. Importantly, however, FDA has decided to allow the sale of menthol-
22 flavored ENDS products. That is, in part, to allow menthol cigarette smokers to
23 transition to other "potentially less harmful" menthol-flavored products and also
24 because "[d]ata shows that . . . menthol-flavored ENDS products are not as appealing
25 to minors as other flavored ENDS products." FDA, *Enforcement Priorities* 23–24,
26 39. In FDA's view, "[t]his approach"—effectively banning flavors except for
27 menthol and tobacco—"strikes an appropriate balance between restricting youth
28 access to such products, while maintaining availability of potentially less harmful

1 options for current and former adult smokers who have transitioned or wish to
2 transition completely away from combusted [tobacco- and menthol-flavored]
3 tobacco products.” *Id.* at 20. And, as of September 9, 2020, virtually all ENDS
4 products must be off the shelves unless the product is the subject of a timely filed
5 premarket tobacco product application under review by FDA. *Id.* at 3.

6 **The State’s Categorical Ban on Flavored Tobacco Products**

7 44. On August 28, 2020, the Governor of California signed Senate Bill 793
8 into law, banning the sale of nearly all flavored tobacco products anywhere in the
9 state. A copy is attached to this Complaint as Exhibit 1.

10 45. The law states that tobacco retailers “shall not sell, offer for sale, or
11 possess with the intent to sell or offer for sale, a flavored tobacco product or a tobacco
12 product flavor enhancer.” SB 793 § 14559.5(b)(1).

13 46. The law defines “[f]lavored tobacco product” as “any tobacco product
14 that contains a constituent that imparts a characterizing flavor.” *Id.* § 104559.5(a)(4).
15 “Tobacco product” means “[a] product containing, made, or derived from tobacco or
16 nicotine that is intended for human consumption.” Cal. Health & Safety Code
17 § 104495(8)(A)(i). “Tobacco product” explicitly includes “cigarettes,” “chewing
18 tobacco,” “snuff,” and electronic nicotine delivery systems. *Id.*
19 §§ 104495(a)(8)(A)(i), (a)(8)(A)(ii). Senate Bill 793 defines “[c]haracterizing
20 flavor” as “a distinguishable taste or aroma, or both, other than the taste or aroma of
21 tobacco, imparted by a tobacco product or any byproduct produced by the tobacco
22 product.” SB 793 § 104559.5(a)(1). The definition explicitly includes “menthol.” *Id.*
23 The sales ban excludes a handful of products sold in certain situations, including
24 shisha tobacco products, premium cigars, and loose leaf pipe tobacco. *Id.*
25 §§ 104559.5(c), (d), (e).

26 47. A person who violates the law “is guilty of an infraction and shall be
27 punished by a fine of two hundred fifty dollars (\$250) for each violation.” *Id.*
28 § 104559.5(f).

1 48. In short, the law bans nearly all kinds of flavored tobacco products,
2 including the sale of all menthol flavored cigarettes, menthol flavored e-cigarettes,
3 flavored smokeless tobacco products, and other flavored products.

4 49. The ban on flavored tobacco products will go into effect on January 1,
5 2021. *See* Cal. Const. art. IV, § 8(c).

6 **Plaintiffs’ Products**

7 50. Plaintiffs RJRT, RJRV, ASC and Santa Fe collectively manufacture
8 numerous tobacco products, which are subject to California’s prohibition on flavored
9 tobacco products and which Plaintiffs would continue distributing for resale in the
10 state—including in this District—but for Senate Bill 793.

11 51. RJRT manufactures and sells various tobacco products—including
12 products with characterizing flavors, such as menthol cigarettes, as well as cigarettes
13 that do not have characterizing flavors—under a variety of brand names, including
14 Newport and Camel. RJRT also sells other tobacco-related products, including
15 flavored smokeless tobacco products, under the brand name Camel SNUS.

16 52. RJRV manufactures and sells tobacco products. Those include menthol-
17 and tobacco-flavored vaping products, under the brand name VUSE, as well as a
18 variety of flavored tobacco products under the brand name VELO.

19 53. ASC manufactures and sells various smokeless tobacco products—
20 including products with and without characterizing flavors—under the brand name
21 “Grizzly.”

22 54. Santa Fe manufactures and sells various tobacco products—including
23 menthol cigarettes as well as cigarettes that do not have characterizing flavors—
24 under the brand name Natural American Spirit.

25 55. RJRT, RJRV, ASC and Santa Fe each desires to continue distributing
26 banned “flavored tobacco products” for resale within California.

27 56. Plaintiffs PM USA Inc., JMC, UST, and Helix collectively manufacture
28 numerous tobacco products which are subject to California’s prohibition on flavored

1 tobacco products and which Plaintiffs would continue distributing for resale in the
2 state—including this District—but for Senate Bill 793.

3 57. Plaintiffs PM USA Inc., JMC, UST, and Helix each desires to continue
4 distributing banned “flavored tobacco products” for resale within California.

5 58. Plaintiff Neighborhood Market Association has members who are
6 tobacco retailers and who sell numerous “flavored tobacco product[s],” which are
7 subject to California’s prohibition on the sale of flavored tobacco products and which
8 those members would continue selling in this state—including in this District—but
9 for Senate Bill 793. In particular, members of Neighborhood Market Association sell
10 menthol cigarettes, flavored smokeless tobacco products, flavored vapor products,
11 and other flavored products, including products manufactured by Reynolds. Those
12 members desire to continue selling banned “flavored tobacco product[s]” within the
13 state of California, including in this District.

14 59. Plaintiff Vapin’ the 619 is a tobacco retailer that sells “flavored tobacco
15 product[s],” which are subject to California’s prohibition on the sale of flavored
16 tobacco products and which Vapin’ the 619 would continue selling in this state—
17 including in this District—but for Senate Bill 793. In particular, Vapin’ the 619 sells
18 flavored vapor products. Vapin’ the 619 desires to continue selling banned “flavored
19 tobacco product[s]” within the state of California, including in this District.

20 60. The Act’s categorical ban on “flavored tobacco product[s]” harms
21 RJRT, RJRV, ASC, Santa Fe, PM USA Inc., JMC, UST, Helix, members of
22 Neighborhood Market Association, and Vapin’ the 619 because it severely restricts
23 their ability to market and sell such products to customers in California.

24 **CLAIMS FOR RELIEF**

25 **COUNT I**

26 **Express Preemption**

27 61. The preceding paragraphs are incorporated and re-alleged here.
28

1 70. Another purpose of the Tobacco Control Act is “to continue to permit
2 the sale of tobacco products to adults” while making them inaccessible to minors. *Id.*
3 § 3(7), 123 Stat. at 1782 (codified at 21 U.S.C. § 387 note). To that end, FDA has
4 elected to allow menthol cigarettes to stay on the market. *See id.* § 387g(a)(1)(A).
5 Menthol cigarettes thus can remain on the market unless and until FDA properly
6 determines that they must be removed from the market. *See id.*

7 71. Consistent with its federal authority, FDA has been exploring regulation
8 of flavors in tobacco products. *See, e.g., Menthol in Cigarettes, Tobacco Products;*
9 *Request for Comments*, 78 Fed. Reg. 44,484, 44,485 (July 24, 2013); *Regulation of*
10 *Flavors in Tobacco Products*, 83 Fed. Reg. 12,294, 12,299 (Mar. 21, 2018); FDA,
11 *Enforcement Priorities* 19 (announcing policy that effectively bans the sale of any
12 flavored, cartridge-based ENDS product (*other than a tobacco- or menthol-flavored*
13 *ENDS product*)). In addition, FDA is currently engaged in efforts to address concerns
14 about youth use of flavored vapor products. Indeed, in a recent guidance for industry,
15 FDA states that it “intends to prioritize enforcement for lack of marketing
16 authorization against any flavored, cartridge-based ENDS product (other than a
17 tobacco- or menthol-flavored ENDS product).” FDA, *Enforcement Priorities* 19. In
18 other words, flavored, cartridge-based ENDS products (other than those that are
19 tobacco- or menthol-flavored) can no longer be sold, unless and until FDA grants
20 authorization for such products. In issuing its guidance, FDA made the specific
21 judgment that menthol-flavored ENDS products could remain on the market.

22 72. California’s ban also interferes with the method that Congress chose to
23 effectuate the goals of the Tobacco Control Act. Congress created a detailed
24 regulatory process as the sole method for evaluating the design and sale of new
25 tobacco products such as ENDS. *See* 21 U.S.C. § 387j. By creating that singular
26 channel, Congress intended to subject each new tobacco product to one regulatory
27 assessment conducted by FDA, not multiple rounds of assessments by states. FDA is
28 thus the sole entity charged with striking “an appropriate balance of complex and

1 competing public health and agency resource considerations,” including the benefits
2 of innovation and the risk that former smokers would revert “from potentially less
3 harmful ENDS products back to combustible tobacco products.” Zeller Decl. ¶¶ 11–
4 12.

5 73. By creating a holistic regulatory process for the evaluation of new
6 tobacco products, Congress clearly signaled that it did not intend for states to interfere
7 with FDA’s evaluation. But that is precisely what California Senate Bill 793 threatens
8 to do. If Senate Bill 793 stands, then every state could create its own standards and
9 review processes, upending the pathway Congress designated as the sole path for
10 evaluating new tobacco products.

11 74. California’s ban on flavored tobacco products directly conflicts with the
12 federal government’s ongoing and active efforts to address flavors in tobacco
13 products, and is therefore preempted.

14 75. Accordingly, the Tobacco Control Act preempts California’s law,
15 rendering it invalid and unenforceable.

16 **COUNT III**

17 **Commerce Clause**

18 76. The preceding paragraphs are incorporated and re-alleged here.

19 77. The Dormant Commerce Clause provides a “self-executing limitation
20 on state authority to enact laws imposing substantial burdens on interstate commerce
21 even in the absence of Congressional action.” *United Egg Producers v. Dep’t of*
22 *Agric. of Puerto Rico*, 77 F.3d 567, 570 (1st Cir. 1996).

23 78. The dormant Commerce Clause prohibits California from enforcing a
24 law that “regulates or discriminates against interstate commerce, or when its effect is
25 to favor in-state economic interests over out-of-state interests.” *Tenn. Wine & Spirits*
26 *Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2471 (2019); *Brown-Forman Distillers*
27 *Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

28

1 86. Award Plaintiffs their costs and disbursements associated with this
2 litigation under 28 U.S.C. § 2412 and other applicable authority; and

3 87. Provide such other relief as the Court deems appropriate.
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: October 9, 2020

Respectfully submitted,
JONES DAY

By: /s/ Steven N. Geise
Steven N. Geise
sngeise@jonesday.com

Christian G. Vergonis*
Ryan J. Watson*
Andrew Bentz*
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Tel: (202) 879-3939
Fax: (202) 626-1700
* *pro hac* application forthcoming

Attorney for Plaintiffs
R.J. REYNOLDS TOBACCO COMPANY; R.J.
REYNOLDS VAPOR COMPANY; AMERICAN
SNUFF COMPANY, LLC; SANTA FE
NATURAL TOBACCO COMPANY, INC.;
NEIGHBORHOOD MARKET ASSOCIATION,
INC.; and MORIJA, LLC dba VAPIN' THE 619

ARNOLD & PORTER KAYE SCHOLER LLP

By: /s/ Tommy Huynh
Tommy Huynh
Tommy.Huynh@arnoldporter.com

Lisa S. Blatt (*pro hac* application forthcoming)
Sarah M. Harris (*pro hac* application
forthcoming)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street NW
Washington, D.C. 20005
Tel: (202) 434-5000
Fax: (202) 434-5029

Attorney for Plaintiffs
PHILIP MORRIS USA INC; JOHN
MIDDLETON CO.; U.S. SMOKELESS
TOBACCO COMPANY LLC; and HELIX
INNOVATIONS LLC.