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16 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
17 **IN AND FOR THE COUNTY OF MARICOPA**

18 STATE OF ARIZONA, *ex rel.* MARK
19 BRNOVICH, Attorney General,

20 Plaintiff,

21 v.

22 EONSMOKE, LLC, a New Jersey limited
23 liability company,

24 Defendant.

Case No.: CV 2020-000318

**APPLICATION FOR ORDER TO
SHOW CAUSE REGARDING
PRELIMINARY INJUNCTION**

(Evidentiary Hearing Requested)

25 The State of Arizona, *ex rel.* Attorney General Mark Brnovich (“the State”) petitions and
26 submits this application for an Order to Show Cause for a preliminary injunction against
27 Defendant Eonsmoke, L.L.C. (“Eonsmoke” or “Defendant”), on grounds of the Arizona
28 Consumer Fraud Act, A.R.S. § 44-1521 *et seq.* and Rules 7.3 and 65, Ariz. R. Civ. P. The State

1 supports this application with attached exhibits and the memorandum below, and seeks an
2 evidentiary hearing at which the Court may hear live testimony from witnesses on the stand.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 In just four years, vaping has become an “epidemic” in Arizona schools, according to the
5 Arizona Bureau of Chronic Disease and Health Promotion. Eonsmoke has unreservedly
6 contributed to this epidemic. Eonsmoke currently markets and sells vaping devices and vape
7 pods to Arizonans through retail stores and online, over two months after the federal
8 government explicitly determined 96 of those products to be unlawful. Therefore, under the
9 Arizona Consumer Fraud Act (“CFA”), Eonsmoke falsely holds out to Arizona consumers that
10 its illegal products are legal, or at a minimum, conceals, suppresses, or omits the material fact
11 that its illegal products are illegal. The State’s investigation reveals that many, if not all of
12 Eonsmoke’s illegal products, are available for purchase at this very moment in physical stores
13 located in most of Arizona’s fifteen counties, in addition to being available online.

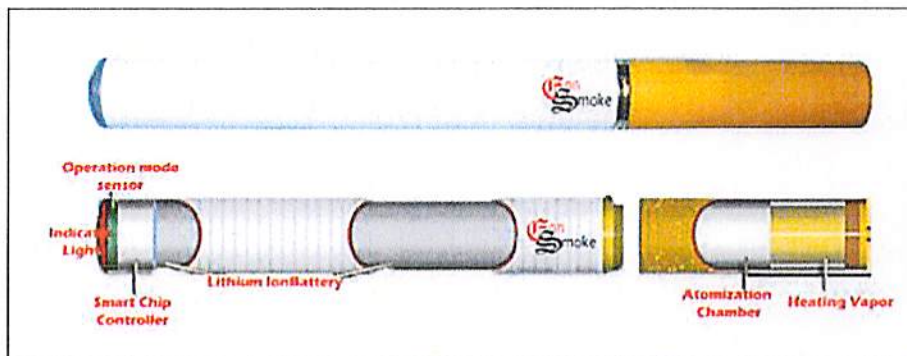
14 When seeking a preliminary injunction, it is appropriate under Arizona law to “file a
15 petition and secure an Order to Show Cause requiring” a defendant to appear for a hearing on
16 the petition. *Mandraes v. Hungerford*, 127 Ariz. 585, 587 (1981). Thus, the State requests this
17 Court to order briefing and an evidentiary hearing, followed by a preliminary injunction
18 requiring Eonsmoke to (1) cease all marketing activity of unlawful Eonsmoke products in
19 Arizona, (2) remove all unlawful Eonsmoke products from retail stores or other physical
20 locations in Arizona, and (3) eliminate the ability of consumers to purchase unlawful Eonsmoke
21 products online for delivery to Arizona.

22 **I. Facts**

23 **A. Background Facts Regarding Eonsmoke and Vaping**

24 Eonsmoke incorporated as an LLC on February 10, 2011, with its sole member-managers
25 identified as Gregory Grishayev and Michael Tolmach. (Ex. 1, New Jersey Formation
26 Documents). The first record of its website, according to the nonprofit Internet Archive, is dated
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1 March 25, 2011.¹ At that time, Eonsmoke featured an “electronic cigarette” on its website that
2 looked like a tobacco cigarette, i.e., a “cigalike”:
3



11 During these early years of Eonsmoke and vaping in general, this new technology posed
12 challenges to federal regulators. There was no federal regulatory oversight squarely addressing
13 vaping until May 10, 2016. *See Nicopure Labs, LLC v. FDA*, 266 F. Supp. 3d 360, 375 (D.
14 D.C. 2017) (describing FDA’s promulgation of rules governing e-cigarettes). Meanwhile, in
15 2015, the corporation now known as JUUL Labs, Inc. (“JUUL”), launched a major marketing
16 initiative for what it called its “JUUL System.” (Ex. 2, Declaration of Ramon Alarcon² at 12, ¶
17 35). JUUL’s marketing mission was a massive financial success, in part thanks to sophisticated
18 methods of viral, social-media campaigns that appealed to and targeted young people. Within
19 three years of launching, JUUL boasted that its share of the e-cigarette market had grown to 76
20 percent. (*Id.* at 14, ¶ 41). JUUL’s own expert has observed that “Juul Labs has driven nearly all
21 pod-based electronic cigarette industry growth.” (*Id.*)
22
23

24 ¹ Internet Archive, Wayback Machine archive of March 11, 2011 for Eonsmoke.com,
25 *About Us* (<https://tinyurl.com/upz4q3c>) (accessed on Dec. 27, 2019).

26 ² Mr. Alarcon was retained by JUUL to draft this declaration in a lawsuit by JUUL
27 against Eonsmoke.

1 JUUL's rapid growth was part and parcel of a nationwide increase in nicotine use by
2 youth. Nicotine—whether it is smoked or vaped—is highly addictive.³ After devastating
3 increases in youth tobacco use through the 1990s, youth tobacco use fell sharply as a result of
4 the Tobacco Master Settlement Agreement, signed in 1998 by forty-six state Attorneys General.
5 This significant progress for public health has been reversed almost entirely in recent years by
6 the epidemic of youth e-cigarette use.⁴ For example, while JUUL has touted its 76 percent
7 market share, it routinely has failed to mention that part of this growth consists of 1.5 million
8 more youth users from 2017 to 2018.⁵

9 Eonsmoke saw its opportunity as these events unfolded. Appearing to ignore the FDA's
10 issuance of new rules in 2016, the company compiled a new business model in 2017 that sought
11 to enter what it called the "Juul-compatible pod market." (Ex. 3, *JUUL v. Eonsmoke* March 29,
12 2019 Transcript at 75). Eonsmoke's clear plan was to feed off of the frenzy created by JUUL.
13 The following ad was on Eonsmoke's website (www.eonsmoke.com) as of January 6, 2020:



21 ³ National Institute on Drug Abuse, *Is nicotine addictive?* (<https://tinyurl.com/yas82rx8>)
22 (accessed on Dec. 27, 2019).

23 ⁴ Center for Disease Control and Prevention, *Tobacco-Related Legal Requirements and*
24 *Obligations: Master Settlement Agreement* (<https://tinyurl.com/whesr4s>) (accessed on Dec. 27,
25 2019).

26 ⁵ Center for Disease Control and Prevention, *Tobacco Use By Youth is Rising: E-*
27 *Cigarettes Are the Main Reason* (<https://tinyurl.com/t8zj8lf>) (accessed on Dec. 27, 2019).

1 Eonsmoke product in Tempe, Arizona. The volunteer was born in 2003 and carried
2 identification stating her true date of birth. Nonetheless, she was able to buy an Eonsmoke
3 “Strawberry Banana Stik” disposable device containing 6.8 percent nicotine, which is among the
4 highest levels of nicotine currently available on the market. The youth volunteer reported that
5 the clerk specifically suggested this product to her, describing it as the “most popular.” The
6 State attaches a photograph of the purchased Eonsmoke product. (Ex. 7, Photo dated Dec. 12,
7 2019).

8 **C. Eonsmoke’s Interactions With the FDA**

9 On May 10, 2016, federal law put Eonsmoke on notice that all new vaping products
10 brought to market after August 8, 2016, must be approved by the FDA. Subsequently, the FDA
11 has repeated this notice in writing to Eonsmoke specifically. It delivered an official letter to
12 Eonsmoke on October 12, 2018, via “UPS, Electronic Mail, and Facsimile.” (Ex. 8, FDA Ltr. of
13 Oct. 12, 2018).⁷ This letter informed Eonsmoke that it may have been manufacturing and
14 marketing ten new vaping systems and pods “without premarket authorization, as required by
15 [the] Federal Food, Drug, and Cosmetic Act.” *Id.* To address this, the FDA demanded
16 information about the ten items within 30 days. *Id.* Eonsmoke responded to this demand with a
17 letter dated November 12, 2018.

18 On October 24, 2019, the FDA delivered explicit notice to Eonsmoke that, following a
19 review of the company’s responses and other evidence, Eonsmoke’s products were illegal. (Ex.
20 9, FDA Ltr. of Oct. 24, 2019). Among a number of violations, the FDA provided a list of 96
21 specific new products that were being marketed in the United States by Eonsmoke “without a
22 marketing order.” (*Id.* at 2). The products “are adulterated,” “are misbranded,” and introduction
23 of them to the market “is a prohibited act.” (*Id.* at 5). Out of the 96 prohibited products, the
24 State’s investigators have specifically located 14 in physical, brick-and-mortar stores in Arizona

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26 ⁷ On June 20, 2019, the FDA also delivered a similar letter to an entity known as Eon
27 Pods, LLC, regarding a product known as Eon Pods. This entity may be related to Eonsmoke,
28 but the State has not completed its investigation to verify such facts as of this filing.

1 and purchased two more online in Arizona for a total of 16 different prohibited products. The
2 16 are listed below, corresponding to the table on pages two through four of the FDA's October
3 24 letter:

- 4 • #2 – Blueberry Pods 6% (purchased in Prescott Valley, Ariz. on Nov. 14, 2019)
- 5 • #5 – Caffè Latte Pods 6% (Payson, Ariz. on Dec. 13, 2019)
- 6 • #13 – Grape Pods 6% (Show Low, Ariz. on Nov. 22, 2019 and Tucson, Ariz. on Dec.
7 20, 2019)
- 8 • #16 – Mango Pods 6% (Yuma, Ariz. on Nov. 15, 2019)
- 9 • #18 – Menthol Pods 6% (Kingman, Ariz. on Nov. 14, 2019)
- 10 • #22 – Pineapple Pods 6% (Prescott Valley, Ariz. on Nov. 14, 2019)
- 11 • #25 – Pink Lemonade Pods 6% (Tucson, Ariz. on Dec. 20, 2019)
- 12 • #27 – Silky Strawberry Pods 6% (Miami, Ariz. on Dec. 13, 2019)
- 13 • #32 – Watermelon Pods 6% (Prescott Valley, Ariz. on Nov. 14, 2019)
- 14 • #36 – Lush Ice Pods 6% (Phoenix, Ariz. on Oct. 31, 2019 and Tucson, Ariz. on Dec.
15 20, 2019)
- 16 • #41 – Green Apple 4X Pods 6.8% (Miami, Ariz. on Dec. 13, 2019)
- 17 • #42 – Kiwi Strawberry 4X Pods 6.8% (Payson, Ariz. on Dec. 13, 2019)
- 18 • #45 – Peach Madness 4X Pods 6.8% (Payson, Ariz. on Dec. 13, 2019)
- 19 • #48 – Sour Gummy 4X Pods 6.5% (Payson, Ariz. on Nov. 22, 2019 and on Dec. 13,
20 2019)
- 21 • #52 - Kiwi Strawberry Disposable Device 7% (online from Phoenix, Ariz. on Dec. 4,
22 2019)
- 23 • #54 – Mango Disposable Device 7% (online from Phoenix, Ariz. on Dec. 4, 2019)

24 Eonsmoke responded to the FDA's October 24, 2019 letter on November 18, 2019, and
25 again on December 12, 2019. In both letters, Eonsmoke claimed it "already has ceased" the
26 "import" of tobacco products, and that it has "discontinued and removed from distribution" the
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1 listed products. The State's investigation belies this claim, however. An investigator
2 successfully purchased an Eonsmoke product in Goodyear, Arizona, on January 6, 2020.

3 In sum, the State has located multiple Eonsmoke products in Arizona that the FDA
4 explicitly told Eonsmoke are illegal. These products are located in physical stores open to
5 business to Arizonans at this moment, in nine out of Arizona's fifteen counties. The FDA
6 informed Eonsmoke that these products are illegal on multiple occasions. First, it promulgated a
7 federal regulation that addressed vaping products on May 10, 2016. While this alone may not
8 constitute actual notice, it at least gave Eonsmoke an opportunity to begin reviewing the
9 legalities of its business practices. Next, the FDA delivered a letter to Eonsmoke on October 12,
10 2018, followed by another one on October 24, 2019. Despite this, the State easily found
11 Eonsmoke products in Arizona as recently as January 6, 2020, 74 days after the FDA's most
12 recent letter, almost 15 months after the FDA's first letter, and almost 44 months after
13 publication of the FDA's vaping regulations.

14 **II. Law and Argument**

15 The State seeks a preliminary injunction based on the CFA because Eonsmoke
16 deceptively presents certain of its products to the Arizona marketplace as legal ones when they
17 are not, or at a minimum, conceals, suppresses, or omits the material fact that its illegal products
18 are illegal. Although there may be additional legal bases on which to obtain later injunctions
19 against Eonsmoke, the State deliberately narrows the scope of its motion here due to the lack of
20 any ambiguity in the available facts and law regarding the legality of its products. Thus, while
21 the State has grave concerns about the safety of Eonsmoke's pods and devices and their impact
22 on Arizonans, especially youth, those issues need not be addressed here. Simply stated, the
23 company's products are illegal under federal law. They should not be available in retail stores
24 anywhere. By making them available, Eonsmoke is deceiving the public into a false belief
25 about legality. This violates the CFA.

1 To prevail on this motion, the State must establish four elements: (1) a strong likelihood
2 that it will succeed at trial on the merits; (2) the possibility of irreparable injury not remediable
3 by damages if the requested relief is not granted; (3) the balance of hardships favors the State;
4 and (4) public policy favors the injunction. *IB Property Holdings, LLC v. Rancho Del Mar*
5 *Apartments Ltd. Partnership*, 228 Ariz. 61, 64 (App. 2011). The “critical factor” when
6 weighing an injunction is the relative hardship on each party. *TP Racing, L.L.P. v. Simms*,
7 232 Ariz. 489, 495, ¶ 21 (App. 2013). The State must show either “1) probable success on the
8 merits and the possibility of irreparable injury; or 2) the presence of serious questions and ‘the
9 balance of hardships tips sharply’ in [its] favor.” *Id.* (quoting *Shoen v. Shoen*, 167 Ariz. 58, 63
10 (App.1990)). Because the State seeks to enjoin future conduct, it must also show that it is likely
11 that Eonsmoke will engage in the conduct in the future, “an inquiry for which the defendant’s
12 past conduct is relevant.” *TP Racing*, 232 Ariz. at 495, ¶ 21 (citing *State ex rel. Babbitt v.*
13 *Goodyear Tire & Rubber Co.*, 128 Ariz. 483, 486-87 (App. 1981). Further, to the extent
14 Eonsmoke claims that it has already ceased its challenged conduct, voluntary cessation of illegal
15 conduct does not “automatically moot the injunctive remedy.” *Goodyear Tire*, 128 Ariz. at 486.

16 For the reasons explained below, the State should prevail under either one of the two
17 prongs described by *TP Racing* and *Shoen*. It can prove probable success on the merits and
18 irreparable injury, while also proving the presence of serious questions and a balance of
19 hardships sharply in its favor.

20 **A. Likelihood of Success**

21 **1. The State’s legal theory has clear support in the CFA and appellate**
22 **precedents.**

23 As a matter of law, the State is likely to succeed given the facts that are outlined in this
24 motion and will be presented at a hearing. The CFA provides broad powers to the Arizona
25 Attorney General’s Office to prosecute civil cases against a wide variety of misconduct. A key
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1 provision is A.R.S. § 44-1522(A), which declares the following conduct to be an unlawful
2 practice under Arizona law:

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4 The act, use or employment by any person of any deception,
5 deceptive or unfair act or practice, fraud, false pretense, false
6 promise, misrepresentation, or concealment, suppression or omission
7 of any material fact with intent that others rely on such concealment,
8 suppression or omission, in connection with the sale or
 advertisement of any merchandise whether or not any person has in
 fact been misled, deceived or damaged thereby . . .

9 Reinforcing this strong language is subsection (C), which provides that “the courts may
10 use as a guide interpretations given by the federal trade commission and the federal courts to 15
11 United States Code sections 45, 52 and 55(a)(1).” A.R.S. § 44-1522(C). The appellate courts of
12 Arizona recognize the CFA as a “broadly drafted remedial provision designed to eliminate
13 unlawful practices in merchant-consumer transactions.” *Madsen v. W. Am. Mortg. Co.*, 143
14 Ariz. 614, 618 (App. 1985).

15 The State of Arizona’s legal theory in this motion is not novel or unique. Other states
16 have invoked their consumer-fraud statutes against companies for misrepresenting their products
17 as legal under federal law. For example, the State of Maryland asserted the same theory
18 successfully and was affirmed on appeal in *T-UP, Inc. v. Consumer Prot. Div. (Office of the*
19 *Attorney General)*, 801 A.2d 173, 194 (Md. 2002). In that case, the Maryland Attorney General
20 sued a company that was marketing medical treatments, and argued that the company
21 deceptively held out its products as legal. *Id.* at 193-94. In affirming the decision of the lower
22 court, the appellate court noted that the lower court had concluded that the FDA had not deemed
23 the defendants’ products as “approved for human beings.” *Id.* at 194. The appellate court also
24 upheld Maryland’s determination that the deception occurred through an implied representation
25 of lawfulness. *Id.* at 193 (“The Agency found that the appellants’ recommendations for
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1 intravenous administration of T-UP constituted an implied representation that intravenous
2 administration of the product is lawful.”).

3 A similar outcome occurred very recently, in *State of Tennessee ex rel. Slatery v. HRC*
4 *Medical Centers, Inc.*, 2019 WL 3992735 (App. Tenn. Aug. 23, 2019). The defendants in that
5 case were marketing a hormone replacement treatment. *Id.* at *1. The State of Tennessee sued
6 under its Consumer Protection Act, alleging in part that the defendants were deceptive in
7 advertising their product as having been “approved by the U.S. Food and Drug Administration.”
8 *Id.* at *11. The Court of Appeals of Tennessee affirmed judgment in the State’s favor. *Id.* at 18-
9 19. The outcomes in both *HRC Medical Centers* and *T-UP, Inc.* reinforce the propriety of this
10 Court granting a preliminary injunction on the basis that Eonsmoke falsely presents its products
11 to the Arizona public as lawful. The FDA has already concluded that Eonsmoke’s products are
12 not legal, and has communicated this determination to Eonsmoke. (Ex. 9, Ltr. dated Oct. 24,
13 2019).

14 **2. Eonsmoke currently offers illegal products to Arizonans**

15 The facts clearly prove that Eonsmoke currently offers a significant volume of illegal
16 products to the citizens of this state. The presence of its products, in other words, is not sporadic
17 or a matter of happenstance. The State located them throughout Arizona, both in urban centers
18 like Phoenix and Tucson, and rural towns like Show Low and Payson. Investigators easily
19 obtained a good variety of Eonsmoke’s flavored pods and vaping devices. Furthermore, a
20 sixteen-year-old youth volunteer was able to purchase an Eonsmoke device, effortlessly and
21 without even using a fake ID.

22 Eonsmoke cannot dispute the point that these products are illegal under federal law. The
23 FDA confirmed as much in writing, in its October 24, 2019 letter. It listed 96 prohibited items
24 under federal law that the FDA had investigated and identified as having been produced and
25 marketed by Eonsmoke. The regulations and statutes cited by the FDA in declaring these items
26 illegal are also clear, unambiguous, and squarely apply to the vaping industry. Only a few
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1 weeks ago, the United States Court of Appeals for the District of Columbia rejected a number of
2 constitutional and statutory arguments that had challenged the FDA's ability to regulate the
3 vaping industry. *Nicopure Labs, LLC v. FDA*, --- F.3d ---, 2019 WL 6704930 (D.C. Cir. Dec.
4 10, 2019). Although the merits of *Nicopure* are not squarely at issue in this motion, the D.C.
5 Circuit explained that the FDA's authority to regulate e-cigarettes stems from the Family
6 Smoking Prevention and Tobacco Control Act (the "TCA"), which Congress passed in 2009.
7 *Id.* at *1 (noting that the Act "requires FDA premarket review of all new tobacco products,
8 including e-cigarettes").

9 Pursuant to this authority, on May 10, 2016, the FDA promulgated a rule deeming any
10 "new items" produced by vaping companies to be tobacco products, and subjecting all of them
11 to be subject to the FDA's process for premarket review. *Id.* at *3 (citing 81 Fed. Reg. 28,974
12 (May 10, 2016) (the "Deeming Rule")). The FDA defined "new items" as any items introduced
13 to the market after August 8, 2016. Thus, when Eonsmoke came to the FDA's attention, the
14 FDA demanded the company provide information on which if any of its products were already
15 on the market as of August 8, 2016. (Ex. 8, FDA Ltr. dated Oct. 12, 2018). Eonsmoke
16 obviously failed to meet this burden as to 96 different products, as reflected by the FDA's 2019
17 letter. Moreover, those products include dozens of flavored pods that appeal to youth, such as
18 "Lush Ice" and "Pink Lemonade." (Ex. 9, FDA Ltr. dated Oct. 24, 2019).

19 Eonsmoke was subject to the FDA's regulation upon the issuance of the FDA's Deeming
20 Rule. The vaping industry's challenge to the Deeming Rule has failed. *Nicopure, supra.*
21 Therefore, Eonsmoke's products are illegal and should not be available for purchase in any
22 Arizona location.

23 The facts are clear that Eonsmoke markets products in Arizona that are illegal. The law
24 is clear that the products are indeed illegal. The State has thus demonstrated that it is likely to
25 succeed at trial on the merits of its claim that Eonsmoke is violating the CFA by falsely holding
26 out to Arizona consumers that its illegal products are legal.

1 **B. Irreparable Harm**

2 The evidence of irreparable harm is strong. The State’s burden under Arizona law on this
3 factor is to show an irreparable injury “not remediable by damages.” *IB Property Holdings*, 228
4 Ariz. at 65, ¶ 10. If a defendant can show that monetary damages may be adequate, injunctive
5 relief may not be appropriate. *Id.* (citing *Cracchiolo v. State*, 135 Ariz. 243, 247 (App. 1983)).
6 The State has filed this action to protect the public, and especially Arizona’s youth, from a
7 public health crisis. Arizona’s Bureau of Tobacco and Chronic Disease describes the situation
8 in Arizona schools as an epidemic.⁸ The D.C. Circuit’s opening line in *Nicopure* states,
9 “Nicotine is among the most addictive substances used by humans.” *Nicopure, supra* at *1.
10 Congress has found that the use by children of tobacco products—which includes vaping—is “a
11 pediatric disease of considerable proportions that results in new generations of tobacco-
12 dependent children and adults.” *Id.* (quoting the Family Smoking Prevention and Tobacco
13 Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1777, § 2(1) (2009)).

14 While this is the clear national consensus on the dangers of nicotine even when it is
15 vaped, the State’s physical evidence here reinforces the need for an injunction. Just one bag of
16 confiscated vape items from a school district in Gilbert reflects the irreparable harm that is at
17 stake. (Ex. 6). Each item in that bag reflects an Arizona teenager who is a current e-cigarette
18 user, a number of which are apparently users of Eonsmoke’s products. Thanks to nicotine’s
19 extremely addictive nature, it is highly likely that a lifetime of addiction will ensue for each of
20 those teenagers. The overall harm to each new, addicted child is impossible to accurately
21 measure, much less the corresponding costs imposed upon the State of Arizona as a whole. The
22 State reserves the right to present testimony at an evidentiary hearing from Arizona parents or
23 children as to how the vaping epidemic has affected their lives. The State also reserves the right
24 to present testimony that Arizona schools are absorbing the burden of enforcing vaping

25 ⁸ Arizona Department of Health Services, Bureau of Tobacco and Chronic Disease,
26 *Biennial Report 2017-2018* at 3 (<https://tinyurl.com/t9j6y2k>) (accessed on Dec. 27, 2019) (“We
27 are accelerating our efforts to halt the epidemic of vape use among youth.”).

1 prohibitions on their campuses. The State of Arizona cannot possibly quantify enough monetary
2 damages that would account for these harms, nor could Eonsmoke pay such a judgment in
3 whole. The harm is ongoing, on a daily basis, and it cannot be remedied by monetary damages
4 alone. A preliminary injunction is the sole remedy to cut off Eonsmoke's on-going contribution
5 to that harm.

6 **C. Balance of Hardships**

7 The most obvious evidence of hardship imposed on the State if an injunction does not
8 issue is each new addict created by an Eonsmoke product, particularly when the new addict is a
9 young person. Multiple studies show that teens who had used e-cigarettes by the ninth grade
10 were more likely than others to start smoking cigarettes within the next year.⁹ Enabling a new
11 generation of smokers to fall prey to the dangers of cigarette smoking carries with it an
12 enormous cost to the State.¹⁰ After the Big Tobacco litigation of the 1990s revealed and
13 established the highly detrimental effects of cigarette smoking, health agencies throughout the
14 country have worked to deter people from smoking, especially teens. The Arizona Department
15 of Health has spent years working diligently to reduce tobacco use among Arizona youth.¹¹
16 These efforts resulted in a drop in tobacco use by 68 percent over the past ten years. *Id.* The
17 conduct of e-cigarette manufacturers like Eonsmoke has undermined that progress.

18 Equally damaging to the State would be the legal precedent created in Arizona if the
19 Court denies injunctive relief, given the FDA's declaration that Eonsmoke's products are illegal.
20 If the State is not permitted to protect its citizens from deceptive and unfair conduct in the

21 ⁹ National Institute of Health, *Vaping Devices: Vaping Among Teens*
22 (<https://tinyurl.com/slhouzq>) (accessed on December 27, 2019).

23 ¹⁰ Centers for Disease Control and Prevention, *Economic Trends in Tobacco*, last updated
24 July 23, 2019 (<https://tinyurl.com/y8y599kb>) (accessed on Dec. 27, 2019) ("Smoking-related
25 illness in the United States costs more than \$300 billion each year.").

26 ¹¹ Arizona Department of Health Services, Bureau of Tobacco and Chronic Disease,
27 *Biennial Report 2017-2018* at 6 (<https://tinyurl.com/t9j6y2k>) (accessed on Dec. 27, 2019).

1 advertisement and sale of products deemed unlawful by the federal government, the damage
2 from Eonsmoke's conduct could reverberate into other industries and corporate behavior.

3 As to the hardship imposed on Eonsmoke, it is in no respect distinct from the burden
4 already placed on the company by the FDA. The FDA has informed Eonsmoke that its products
5 are unlawful, that they must be removed from the market, and that the company must submit its
6 products to the premarket review process. The State merely expects Eonsmoke to remove the
7 threat to Arizona consumers created by its own unlawful conduct. The balance of hardships
8 under these circumstances clearly favors the State and the granting of a preliminary injunction.

9 **D. Public Policy**

10 Public policy clearly favors the protection of consumers against products that are
11 declared by a government authority to be unlawful, especially when the purpose of the
12 government's authority (here, the FDA) and the regulations at issue is to protect the public
13 health. Moreover, Congress expressly authorized the FDA to regulate all new tobacco products,
14 including e-cigarettes by passage of the TCA. 21 U.S.C. § 387a(b). In addition, the Arizona
15 Legislature has criminalized the specific act of providing "a vapor product" to a minor. A.R.S. §
16 13-3622(A). Thus, public policy points squarely against the unfettered distribution of vaping
17 devices in Arizona without FDA oversight, and weighs heavily in favor of the issuance of an
18 injunction.

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CONCLUSION

For the reasons stated, the State respectfully requests the Court to issue a preliminary injunction against Eonsmoke.

Respectfully submitted this 7th day of January, 2020.

MARK BRNOVICH
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