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Testimony in Support of Section 2 of House Bill 2563

**Presented to the House Committee on Federal and State Affairs
By Kansas Attorney General Derek Schmidt**

February 13, 2020

Chairman Barker and Members of the Committee:

Thank you for the opportunity to submit this testimony in support of Section 2 of House Bill 2563. I express no position on the other provisions included in this bill.

Section 2 of this bill is identical to House Bill 2450, which I requested and testified in favor of before the House Judiciary Committee last month. That section seeks to amend the Clean Indoor Air Act to include a prohibition on indoor use of an electronic cigarette in all places where the current language of the Act prohibits smoking.

This loophole in Kansas law first came to my attention in 2011, when my office was asked for a legal opinion as to whether the then year-old prohibition on indoor smoking also covered the use of an electronic cigarette. After performing the legal analysis, we concluded that the existing language of the statute did not cover the use of e-cigarettes. A copy of that opinion, Attorney General Opinion No. 2011-015, is attached to my testimony.

Over the past year, the Kansas Department of Health and Environment has identified two confirmed deaths linked to vaping. In addition, KDHE has 27 probable or confirmed illnesses. In recent months as we have been involved in discussions with KDHE, the Kansas Department of Education and others about ways to address the current public health concerns related to vaping, I was reminded of the opinion that was issued during the first year I was serving in this office. It seemed to me that a logical place to begin the conversation about ways to address vaping would be to close this loophole in the Clean Indoor Air Act.

Medical professionals have suggested that secondhand vape aerosol particles, like secondhand smoke, are harmful to people who inhale them. One recent study noted that fumes from e-cigarettes, like secondhand smoke from burning tobacco, contain a variety of harmful chemicals, including nicotine, heavy metals, aldehydes, glycerin, and flavoring substances that are inhaled by people who do not vape but are present where others are vaping.

E-cigarette use among high school students jumped 78% between 2017 and 2018, and young people who use e-cigarettes are four times more likely to start smoking cigarettes than those who do not vape, according to the Truth Initiative, the country's largest nonprofit public health organization committed to ending tobacco use. More than one-fourth of high school students, many of whom were never smokers, are now estimated to vape. A recent study by the Dana-Farber Cancer Institute found that about one-third of middle- and high-school students report being exposed to secondhand vaping aerosols in 2018, a sharp increase from prior years.

Again, we believe this provision is a logical first step that the Legislature can take to stem the tide of increased vaping, because it uses the existing well-established and largely popular framework of the Clean Indoor Air Act to protect Kansans from the effects of secondhand vape aerosol particles. I am aware that other efforts are underway within the education and public health communities, and we are engaged in those ongoing conversations.

I appreciate the committee's attention to this legislation.

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STATE OF KANSAS
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October 31, 2011

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ATTORNEY GENERAL OPINION NO. 2011- 015

Mr. Gary E. Rebenstorf
Director of Law and City Attorney
City Hall
455 North Main, 13th Floor
Wichita, Kansas 67202

Re: Crimes and Punishments—Crimes Involving Violations of Personal Rights—
Kansas Indoor Clean Air Act; Definitions

Synopsis: An individual using an electronic cigarette inside a public building is not “smoking” within the meaning of the Kansas Indoor Clean Air Act. Cited herein: K.S.A. 2010 Supp. 21-4009; 21-4010; 21-4012; 31-602; K.S.A. 50-6a02; K.S.A. 2010 Supp. 79-3301.

* * *

Dear Mr. Rebenstorf:

You inquire whether a patron using an electronic cigarette inside a public building is “smoking” within the meaning of the Kansas Indoor Clean Air Act¹ (“the Act”). The Act provides:

No person shall smoke in an enclosed area or at a public meeting including, but not limited to:

- (1) Public places;
- (2) taxicabs and limousines;
- (3) restrooms, lobbies, hallways and other common areas in public and private buildings, condominiums and other multiple-residential facilities;
- (4) restrooms, lobbies and other common areas in hotels and motels and in at least 80% of the sleeping quarters within a hotel or motel that may be rented to guests;
- (5) access points of all buildings and facilities not exempted pursuant to subsection (d); and

¹ K.S.A. 2010 Supp. 21-4009 *et seq.*

(6) any place of employment.²

The penalties for violation of the Act range from a fine of \$100 for a first violation to a fine of \$500 for the third or subsequent violation within one year.³

Electronic cigarettes (“e-cigarettes”) are electronic devices that resemble regular cigarettes, but produce “smoke” by vaporizing a liquid nicotine solution.⁴ E-cigarettes contain a heating element that is triggered by the user inhaling, and the heat vaporizes the nicotine solution. E-cigarettes do not contain actual tobacco leaf, do not emit vapor unless the user is inhaling, and do not require ignition by a lighter or match.⁵

In *Sottera, Inc. v. FDA*, the United States Court of Appeals for the District of Columbia Circuit upheld a lower court’s decision that the Food and Drug Administration (FDA) is authorized to regulate e-cigarettes in the same fashion as it regulates ordinary tobacco products.⁶ The court based its decision on the federal Tobacco Act,⁷ which defines “tobacco product” to include any product “derived from tobacco.”⁸ Under this broad definition, products that contain nicotine but not actual tobacco leaf, such as e-cigarettes, would nonetheless be classified as tobacco products because nicotine is *derived from* tobacco. The concurring opinion in this case noted that absent the Tobacco Act’s broad definition, e-cigarettes would not be considered tobacco products.⁹ The statutory definition, coupled with an absence of congressional intent to define tobacco as a drug, led the appellate court to affirm the lower court’s holding that e-cigarettes are within the definition of “tobacco products” under the Tobacco Act.¹⁰

Although the holding in *Sottera* is based upon a federal statute that is not relevant to your inquiry, the court’s methodology is nonetheless instructive to our analysis. First, we note that the Kansas Indoor Clean Air Act is intended to improve the health of Kansans by reducing their exposure to chemicals in second-hand smoke.¹¹ The legislative record of the Act does not suggest any contrary intent. Whether e-cigarettes emit chemicals similar to those of regular tobacco cigarettes is a question of fact that we do not address. However, if e-cigarettes do emit such chemicals, then banning the emission of such chemicals inside a public building would be consistent with the intent of the Act.

Second, we turn to Kansas statutes to determine whether an individual using an e-

² K.S.A. 2010 Supp. 21-4010(a), as amended by L. 2011, Ch.114, Sec. 98. This statute was amended during the 2011 legislative session to add an exception for charity cigar dinners, but the amendments are irrelevant to our analysis.

³ K.S.A. 2010 Supp. 21-4012(d).

⁴ <http://www.njoy.com/pages/FAQs.html>, accessed on October 21, 2011.

⁵ *Id.*

⁶ 627 F.3d 891 (D.C. Cir. 2010), *aff’g Smoking Everywhere, Inc. v. FDA*, 680 F. Supp. 2d 62 (D.D.C. 2010).

⁷ Pub. L. 111-31, 123 Stat. 1776 (2009).

⁸ 21 U.S.C. § 321(rr)(1).

⁹ 627 F.3d at 899 (Garland, J., concurring).

¹⁰ *Id.* at 898-899.

¹¹ See, e.g., *Minutes*, House Health and Human Services Committee, March 10 and 12, 2009.

cigarette in a public building is “smoking” within meaning of the Act. As noted above, the Act prohibits smoking at a public meeting or within enclosed spaces. “Smoking” is defined by the Act as “possession of a *lighted cigarette, cigar, pipe or burning tobacco in any other form or device designed for the use of tobacco.*”¹² Thus, if an e-cigarette is a “lighted cigarette, cigar, pipe or burning tobacco in any other form or device,” then the possession of an e-cigarette inside a public building would be a violation of the Act.

As noted above, the *Sottera* court held that e-cigarettes can be regulated as tobacco products because of the broad federal definition of “tobacco products,” which included any product “derived from tobacco.” We note that the Act does not define “cigarette,” and Kansas law offers no broadly-applicable definition of tobacco products. The term “cigarette” is defined in other Kansas statutes pertaining to fire safety standards, consumer protection and taxation, but those definitions are expressly limited to application within their respective acts.¹³ Absent a definition within the Act, we presume that the legislature used the words in their ordinary and common meaning.¹⁴ To determine the ordinary and common meaning of “cigarette,” we turn to the Merriam-Webster Dictionary, which defines the term as follows: “a slender roll of *cut tobacco* enclosed in *paper* and meant to be smoked.”¹⁵

E-cigarettes do not contain cut tobacco, and are not enclosed in paper. Thus, e-cigarettes do not fall within the ordinary and common definition of “cigarette.” Furthermore, “smoking” as defined by the Act requires possession of a “lighted” cigarette or “burning tobacco.”¹⁶ “Lighted” is an adjective derived from the verb “light,” which the Merriam-Webster Dictionary defines as “to take fire; to ignite something (as a cigarette).”¹⁷ E-cigarettes use a heating element to heat nicotine liquid, but they are not ignited by flame and do not burn tobacco.¹⁸ Thus, an e-cigarette in use is not a “lighted cigarette” or a form of “burning tobacco” based upon the ordinary and common meanings of those terms.

In conclusion, it is possible that e-cigarettes emit the same types of chemicals the Kansas Legislature intended to ban from indoor areas open to the public through enactment of the Kansas Indoor Clean Air Act. This is a question of fact that we do not address. Even if e-cigarettes emit such chemicals, the Act does not define “cigarettes” in a manner that would include e-cigarettes within the statutory ban, and the common meaning of “cigarettes” does not include e-cigarettes.

In our opinion, the Kansas Indoor Clean Air Act does not apply to e-cigarettes because the Act fails to define “cigarette,” and based upon the ordinary and common definition of

¹² K.S.A. 2010 Supp. 4009(o) (emphasis added).

¹³ K.S.A. 2010 Supp. 31-602(b); K.S.A. 50-6a02(d); K.S.A. 2010 Supp. 79-3301(c).

¹⁴ *Rogers v. Shanahan*, 221 Kan. 221, 223-24 (1976).

¹⁵ <http://www.merriam-webster.com/dictionary/cigarette>, accessed on October 21, 2011 (emphasis added).

¹⁶ K.S.A. 2010 Supp. 4009(o).

¹⁷ <http://www.merriam-webster.com/dictionary/lighted>, accessed on October 21, 2011.

¹⁸ <http://www.njoy.com/pages/FAQs.html>, accessed on October 21, 2011.

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the word, an e-cigarette would not be considered a "cigarette" subject to the Act. The Act does define "smoking," but the definition does not include a product that is not a traditional cigarette and does not burn tobacco. If the Kansas Legislature wishes to extend the Act to cover e-cigarettes, it may amend the Act to define "cigarette" to include e-cigarettes, or it may amend the definition of "smoking" to include the use of e-cigarettes.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Attorney General

/s/Sarah Fertig

Sarah Fertig
Assistant Attorney General

/s/Lisa Mendoza

Lisa Mendoza
Assistant Attorney General

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