DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street Denver, CO 80202 Telephone: (303) 606-2300	
Plaintiff: Rocky Mountain Smoke Free Alliance, a Colorado corporation, v. **Defendant:** City of Denver AND Denver Department of Public Health and Environment.	▲ **COURT USE ONLY** ▲
Attorneys for Plaintiff: Joshua A. Weiss, # 49758 Bridget C. DuPey, #53958 Davina Reveles, #62041 BROWNSTEIN HYATT FARBER SCHRECK, LLP 675 15th Street, Suite 2900 Denver, CO 80202 Phone: 303.223.1100 Fax: 303.223.1111 Email: jweiss@bhfs.com; bdupey@bhfs.com; dreveles@bhfs.com	Case Number: Division:
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF	

Plaintiff Rocky Mountain Smoke Free Alliance ("Plaintiff" or "RMSFA"), through undersigned counsel, brings this Complaint against Defendant City of Denver ("Defendant" or the "City") and states and alleges as follows:

NATURE OF THE CASE

1. RMSFA brings this action against the City challenging Denver Revised Municipal Code Ordinance 24-1765 (the "Ordinance"), which bans the sale of flavored tobacco products, including flavored e-cigarettes, within Denver. The Ordinance is unconstitutional because its definition of "flavored tobacco product" is impermissibly vague, violating the Due Process Clause of the Colorado Constitution. It further imposes an unconstitutional presumption that burdens interstate commerce and restricts protected commercial speech. Finally, the Ordinance creates a carve-out for hookah tobacco in violation of the Equal Protection Clause of the U.S.

Constitution. RMSFA seeks declaratory judgement that the Ordinance is unconstitutional and injunctive relief prohibiting the City from enforcing the ban on flavored tobacco products.

PARTIES

1. Plaintiff RMSFA is a nonprofit corporation organized under Colorado law with its principal place of business in Denver, Colorado. RMFSA is a alliance of small business owners and manufacturers in Colorado's vaping industry, with 125 members.

2. Defendant City of Denver is a home rule city under Article XX, Section 6 of the Colorado Constitution and a political subdivision of the State of Colorado. It is located entirely in Denver County, Colorado.

3. Defendant Denver Department of Public Health and Environment ("DDPHE") is the City's local public and environmental health authority is tasked with enforcing the Ordinance. At all relevant times hereto, DDPHE acted in its official capacity under the laws of the State of Colorado.

JURISDICTION AND VENUE

4. Jurisdiction is proper under Section 9, Article VI of the Colorado Constitution, and Rule 57 of the Colorado Rules of Civil Procedure.

5. Venue is proper pursuant to C.R.C.P. 98(c) because this action concerns the City and County of Denver.

GENERAL ALLEGATIONS

6. For many, e-cigarettes or vapes provide a healthier alternative to traditional cigarettes because they do not contain tobacco and usually contain fewer harmful or potentially harmful chemicals ("HPHCs").[1] Research shows that e-cigarette use helps reduce cigarette consumption, supports smoking cessation, and alleviates craving and withdrawal symptoms.[2]

7. In December 2024, the Denver City Council passed the Ordinance amending Section 24-401 and Section 24-404 of the Denver Revised Municipal Code to ban the sale of flavored tobacco products.

8. On November 4, 2025, Denver voters approved Referendum 310, thereby retaining the ban.

[1] Jane A. Foster, *Consideration of Vaping Products as an Alternative to Adult Smoking: A Narrative Review*, SUBSTANCE ABUSE TREATMENT, PREVENTION, AND POLICY 2 (2023).
[2] *Id.* at 7.

9. The Ordinance took effect on January 1, 2026, and DDPHE began issuing fines and suspensions that same day.

10. The Ordinance amended Section 24-401 to define a flavored tobacco product as "any tobacco product that imparts a cooling sensation, numbing sensation, taste, or smell, other than the taste or smell of tobacco, that is distinguishable by an ordinary consumer either prior to or during the consumption of a tobacco product, including, but not limited to, any taste or smell relating to fruit, menthol, mint, wintergreen, chocolate, cocoa, vanilla, honey, or any candy, dessert, alcoholic beverage, herb, or spice." Denv. Rev. Mun. Code § 24-401(c).

11. Along with banning flavored tobacco products, Section 24-404 implements a presumption that a tobacco product is flavored if text or images are used "on the tobacco product's labeling or packaging to explicitly or implicitly indicate that the tobacco product imparts a flavor other than tobacco or imparts a cooling or numbing sensation during the consumption of that product." Denv. Rev. Mun. Code § 24-404(d)(2). The presumption also applies to public statements that impart the same. *Id.* at § 24-404(d)(1).

12. The Ordinance also outlaws flavored e-cigarettes containing nicotine. Pursuant to Section 24-401(m)(1), any product containing nicotine is classified as a "tobacco product," thereby subjecting all flavored nicotine-containing products to the ban, including flavored e-cigarettes.

13. RMSFA advocates on behalf of Colorado's vaping industry by championing sensible policies that provide adults with access to safer smoking alternatives.[3] Many of the organization's members, including Denver business owners and manufacturers, are directly harmed by the Ordinance as it reduces the types of products RMSFA's members can manufacture and sell in Denver, Colorado.

14. The interests at stake are germane to RMSFA's mission and the claims asserted here do not require the participation of individual member stores given the purely legal questions presented and the purely injunctive relief sought.

15. The city is expected to lose approximately $13 million in annual tax revenue, while illicit and unregulated sales of flavored tobacco products is expected to spike. Approximately 575 tobacco retailers in Denver have been adversely impacted by the ban.[4] Some retailers expect to lose over half of their business, while others are forced to shutter their business entirely.[5]

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[3] ROCKY MOUNTAIN SMOKE-FREE ALLIANCE, https://www.rmsfa.org/ (last visited Jan. 8, 2026).
[4] Tori Mason, *Denver's flavored vape ban sends customers across city lines*, CBS NEWS (January 5, 2026, at 10:31 MST), https://www.cbsnews.com/colorado/news/aurora-denver-flavored-vape-ban-colorado/
[5] *Id.*

16. Since the ban took effect, Denver has not experienced a decline in smoking; rather, the ban has merely created another hurdle to healthier smoking alternatives for Denver's adult citizens. Many Denver smokers worry they may revert to traditional cigarettes now that access to other options has been restricted.[6]

17. Moreover, workarounds exist whereby individuals can obtain flavorless nicotine liquids for use in vaporizing devices and add their own flavoring compounds after-the-fact in a less safe and unregulated fashion, without violating the Ordinance.

18. Days after the Ordinance was enacted, neighboring cities such as Aurora, Colorado saw an influx of Denver customers seeking flavored vape products.[7] Despite the City's intent to reduce tobacco use, Denver citizens continue to purchase flavored tobacco products. The ban has merely shifted sales to surrounding cities.

FIRST CLAIM FOR RELIEF
(Violation of the Colorado Constitution (Substantive Due Process – Void for Vagueness))

19. Plaintiff restates the foregoing paragraphs as if set forth fully herein.

20. The Colorado Constitution promises that "no person shall be deprived of life, liberty, or property without due process of law." Colo. Const. art. II, § 3. An unconstitutionally vague ordinance violates due process. *Kruse v. Town of Castle Rock*, 192 P.3d 591, 597 (Colo. App. 2008). A successful facial constitutional challenge under the void for vagueness doctrine must show that the ordinance is impermissibly vague in all its applications. *Id.* at 597–98.

21. An ordinance is unconstitutionally vague if it is so unclear that "persons of common intelligence must necessarily guess as to the meaning [of the ordinance] and differ as to its application." *Watso v. Colorado Dept. of Social Servs.*, 841 P.2d 299, 309 (Colo. 1992).

22. Courts give undefined terms their generally accepted meaning to be interpreted "in a reasonable and practical manner." *Id.* at 599. If the contested terms have a generally accepted meaning that provides sufficient guidance, then a person of common intelligence will not need to guess at their meaning. *Watso*, 841 P.2d at 309.

23. Section 24-401(c) includes the terms "cooling sensation" and "numbing sensation," which lack generally accepted meanings because they describe highly subjective experiences that vary significantly from person to person.

24. Indeed, myriad medical conditions exist – including conditions not yet fully understood, such as "long COVID" – that can result in meaningful changes in how sufferers taste or smell. Such a change would in turn materially alter the subjective evaluation of a product as defined by the Ordinance.

[6] Mason, *supra* note 3.
[7] Mason, *supra* note 3.

25. Moreover, Section 24-401(c) forces retailers and inspectors to speculate about what constitutes a "cooling" or "numbing" sensation, inevitably resulting in inconsistent enforcement across Denver.

26. Although some courts uphold provisions where contextual language supplies the contested terms with a sufficiently definite meaning, Section 24-401(c) fails to provide such clarity. *Kruse*, 192 P.3d at 598; *see also Lee v. Smith*, 772 P.2d 82, 86 (Colo. 1989) (rejecting a vagueness challenge to "reasonably should know" and "could use" language because the provision at issue applies an objective test and is only one non-dispositive factor among several in determining whether an item is drug paraphernalia).

27. Section 24-401(c) contains no contextual support to provide definitive meaning to its vague language. The section lacks supporting language or additional provisions to provide insight into the terms "cooling sensation" and "numbing sensation."

28. Indeed, the City and DDPHE contemplated consulting, among other resources, customer reviews online when making subjective determinations about whether a product imparts a cooling or numbing session. This leaves products and stores susceptible to false or misleading online conduct that would falsely portray to City officials that a product runs afoul of the Ordinance, even when it does not impart any impermissible flavor or sensation.

29. Additional terms in Section 24-401(c), such as "distinguishable" and "including but not limited to," fail to clarify what constitutes a flavored tobacco product. Instead, these terms generate further ambiguity into the City's definition.

30. Finally, due process demands that laws "provide standards to govern the actions of the [enforcers]." *Sessions v. Dimaya*, 584 U.S. 148, 156 (2018). To fall within the bounds of constitutionality, the language of an ordinance "must provide fair notice and set forth sufficiently definite standards to ensure uniform, nondiscriminatory enforcement." *Kruse*, 192 P.3d at 597.

31. Section 24-401(c) employs highly subjective terminology, granting inspectors over broad discretion. Consequently, determinations of whether a tobacco product is flavored will vary among inspectors, creating inconsistent application of the Ordinance in violation of due process.

32. Section 24-401(c) is therefore facially unconstitutional.

33. RMSFA and its members are thus entitled to declaratory and injunctive relief requested in the Prayer for Relief below.

SECOND CLAIM FOR RELIEF
(Violation of the U.S. Constitution (Equal Protection))

34. Plaintiff restates the foregoing paragraphs as if set forth fully herein.

35. The Equal Protection Clause of the U.S. Constitution prohibits states from denying "to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

36. Where an equal protection claim does not involve a traditionally suspect class or a fundamental right, the court must apply a rational basis standard of review. *People v. Blankenship*, 119 P. 3d 552, 554–55 (Colo. App. 2005). Under this level of review, an ordinance is unconstitutional if it treats similarly situated groups disparately and such treatment bears no rational relationship to a legitimate government purpose. *Id.* at 556. To implicate an equal protection claim, the two groups at issue must be similarly situated. *People v. Castillo*, 510 P.3d 561, 566 (Colo. App. 2022).

37. Section 24-404(b) of the Ordinance explicitly exempts hookah tobacco from the flavored tobacco ban, despite hookah containing flavorings and posing substantially greater health risks than e-cigarettes.[8]

38. Moreover, hookah and flavored tobacco retailers are similarly situated in that they often market their products as alternatives to traditional cigarettes, each targets adult consumers seeking flavored smoking experiences, and their products are typically used in social contexts.

39. The City asserts that concerns over underage smoking and long-term health risks spurred the implementation of the ban.[9] However, to accomplish the City's goal, it would be necessary to ban hookah, a flavored product more potent than a single cigarette.

40. Notably, many flavored e-cigarettes do not contain tobacco and therefore do not present the same health risks traditionally associated with tobacco use.[10] If the purpose of the Ordinance is to mitigate health risks, then it would logically include products such as hookah, which pose significant dangers to health, especially when a healthier alternative, such as flavored e-cigarettes, is prohibited.

41. By exempting hookah products, the City creates an arbitrary classification and discriminates against non-hookah tobacco retailers with no conceivable rational basis for such discrimination.

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[8] Smoking and Tobacco Use: Hookahs, THE CDC (Oct. 17, 2024), https://www.cdc.gov/tobacco/other-tobacco-products/hookahs.html (asserting that hookah exposes users to 1.7 times more nicotine than a single cigarette); *See also* Sankalp Yadav, *Decoding Waterpipe Tobacco Smoking: A Comprehensive Narrative Review Exploring Mechanics, Health Risks, Regulatory Challenges, and Public Health Imperatives*, CUREUS, 2 (January 12, 2024).

[9] Marco Cummings, *Denver's flavored tobacco ban: What voters need to know before November*, THE DENVER GAZETTE (June 18, 2025), https://www.denvergazette.com/2025/06/18/denvers-flavored-tobacco-ban-what-voters-need-to-know-before-november-1826eca7-77cf-4235-855d-788ce3c94366/

[10] Foster, *supra* note 1, at 1.

42. The Ordinance is therefore unconstitutional.

43. RMSFA and its members are thus entitled to declaratory and injunctive relief requested in the Prayer for Relief below.

THIRD CLAIM FOR RELIEF
(Violation of the U.S. Constitution (Dormant Commerce Clause))

44. Plaintiff restates the foregoing paragraphs as if set forth fully herein.

45. The U.S. Constitution's Commerce Clause impliedly restrains states from discriminating against out-of-state commerce and from imposing protectionist burdens favoring in-state retailers. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008). A local law that treats all entities the same and prohibits an item regardless of its origin is not discriminatory and will be upheld "*unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits*." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (emphasis added).

46. Under the Ordinance, out-of-state manufacturers and distributors of flavored tobacco products lose access to the Denver market entirely. Although the Ordinance is evenly applied to local and out-of-state manufacturers and retailers, the economic burden imposed by the Ordinance outweighs the asserted benefits.

47. Section 24-404 imposes an unconstitutional economic burden by creating a packaging- and marketing-based presumption.

48. Specifically, the Ordinance creates a presumption that a tobacco product is flavored if a manufacturer, retailer, or employee has "made a public statement or claim that the tobacco product imparts a flavor other than tobacco . . . used text or images or both on the tobacco products labeling or packaging to explicitly or implicitly indicate that the tobacco product imparts a flavor other than tobacco." Denv. Rev. Mun. Code § 24-404(d)(1)–(2). This provision forces out-of-city tobacco retailers to modify packaging for products entering the Denver market, increasing compliance costs and unconstitutionally burdening interstate commerce.

49. Although the Court might find the local benefit of protecting public health to be legitimate, the economic burden imposed by the ban far outweighs its marginal benefit.

50. The Ordinance is therefore unconstitutional.

51. RMSFA and its members are thus entitled to declaratory and injunctive relief requested in the Prayer for Relief below.

FOURTH CLAIM FOR RELIEF
(Violation of the Colorado and U.S. Constitutions (First Amendment))

52. Plaintiff restates the foregoing paragraphs as if set forth fully herein.

53. The Colorado Constitution and the U.S. Constitution prohibit the passage of laws that impairs freedom of speech. Colo. Const. art. III, § 10; U.S. Const. amend. I.

54. Commercial speech is subject to intermediate scrutiny, and courts apply the Central Hudson test, which asks: (1) whether the commercial speech concerns lawful activity and is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether "the speech restriction directly and materially advanc[e] the asserted governmental interest;" and (4) whether the speech restriction is more extensive than necessary to serve the interests that support it. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554–56 (2001); *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F. 3d 1061, 1068-75 (10th Cir. 2001).

55. Flavor statements and images on packaging constitute commercial speech intended to promote a product and thus are granted protections under the First Amendment of the U.S. Constitution, as well as the Colorado Constitution.

56. Under Section 24-404(d)(2), a tobacco product is presumed flavored if its packaging or public statements about the product explicitly or implicitly suggest a flavor other than tobacco.

57. The Ordinance's restrictions on the labeling and packaging of flavored tobacco products are unconstitutional because (1) packaging that accurately indicates that a flavored tobacco product is in fact flavored is not misleading, (2) although the City's interest in prohibiting packaging containing flavor-related content is likely substantial because it involves protecting public health, (3) the Ordinance does not directly and materially advance the asserted government interest because it is overly broad and fails to encompass all flavored and addictive products (*i.e.*, hookah tobacco), and (4) the Ordinance's overly broad language encompasses speech that "implicitly" or "explicitly" suggests flavor, capturing more speech than necessary to achieve the Ordinance's stated purpose.

58. There is no de minimis exception for a speech restriction that lacks sufficient tailoring or justification. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 529 (2001).

59. The Ordinance unconstitutionally chills speech by unjustifiably restricting what e-cigarette retailers are permitted to display on their product's packaging.

60. The Ordinance is therefore unconstitutional.

61. RMSFA and its members are thus entitled to declaratory and injunctive relief requested in the Prayer for Relief below.

FIFTH CLAIM FOR RELIEF
(Declaratory Judgment)

62. Plaintiff restates the foregoing paragraphs as if set forth fully herein.

63. The Ordinance does not prohibit the sale of flavor additives separately from nicotine-containing substance, which a customer can then add to his or her own nicotine source to impart the additive flavor.

64. The Ordinance also does not prohibit the sale of flavorless nicotine liquids for at-home use with personal vaporizers.

65. Agents of the City and DDPHE have declined to advise on the legality of any particular product or approach ahead of issuing citations.

66. Plaintiff's member stores have sought specific advice regarding the separate sales of flavor additives and flavorless nicotine liquids, but the City has declined to provide a substantive response.

67. Accordingly, a dispute and legal controversy exists over whether the separate sale of flavor additives and flavorless nicotine liquid violates the Ordinance.

68. RMSFA requests a declaratory judgment that the sale of separate flavor additives does not violate the Ordinance.

69. An actual and justiciable controversy exists between the City, DDPHE, and RMSFA regarding whether the sale of separate flavor additives is permissible under the Ordinance.

70. A declaratory judgment will terminate the controversy between the parties regarding the sale of separate flavor additives.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff asks the Court to enter judgment in its favor and against Defendant and to order the following relief:

A. A declaration that the Ordinance's definition of a flavored tobacco product in Section 24-401(c) is unconstitutionally vague on its face, rendering it void;

B. A declaration that the Ordinance's carve-out for hookah tobacco products is not rationally related to a legitimate government interest, thus violating the Equal Protection Clause of the U.S. Constitution;

C. A declaration that the Ordinance's packaging- and marketing-based presumption creates an unconstitutional economic burden on interstate commerce;

D. A declaration that the Ordinance's restrictions on labeling and packaging of flavored tobacco products violates the protection of commercial speech under the First Amendment of the U.S. Constitution, as well as the Colorado Constitution;

E. A declaration that the sale of separate flavor additives does not violate the Ordinance;

F. A permanent injunction prohibiting Defendant from enforcing the Ordinance's ban on flavored tobacco products or otherwise violating any provision of the U.S. or Colorado Constitutions; and

G. Any and all other relief that the Court deems just and proper.

DATED this ____ day of January, 2026.

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