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Amici public health, medical, and community organizations submit this brief in support of Plaintiffs and urge the Court to issue a temporary restraining order and preliminary injunction against Defendants to prevent enforcement of Section 9.681 of the Ohio Revised Code (“R.C. 9.681”).

INTERESTS OF *AMICI CURIAE*

Amici are the following national, state, and local public health, medical, and community groups: African American Tobacco Control Leadership Council, American Cancer Society Cancer Action Network, American Heart Association, American Lung Association, Campaign for Tobacco-Free Kids, National LGBT Cancer Network, Ohio Chapter of the American Academy of Pediatrics, Parents Against Vaping E-Cigarettes, Preventing Tobacco Addiction Foundation, Public Health Law Center, The Center for Black Health and Equity, and Truth Initiative.

As is evident from the description of *amici* included in the Addendum to their motion for leave, each of these groups works daily to reduce the devastating public health harms caused by tobacco products, the leading cause of preventable death in America, responsible for 480,000 deaths per year.¹ *Amici* include physicians who counsel their young patients and their parents about the hazards of tobacco use, organizations with formal programs to urge users to quit, and groups representing parents and families struggling to free young people from nicotine addiction. Each of these *amici* has a direct and immediate interest in preserving municipalities’ home rule authority to regulate tobacco products, including through the enactment of laws restricting the sale of flavored tobacco products, as well as specific expertise in the role that flavored tobacco products

¹ U.S. Food & Drug Admin., *Health Effects of Tobacco Use*, <https://www.fda.gov/tobacco-products/public-health-education/health-effects-tobacco-use> (Mar. 23, 2022).

play in enticing young people to use tobacco.² Thus, *amici* are particularly well suited to inform the Court of the substantial public health benefits that would result from a preliminary injunction to prevent R.C. 9.681 from going into effect, thus allowing Columbus residents to derive the public health benefits of the City’s prohibition on the sale of flavored tobacco products and other local tobacco control laws.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the Supreme Court has declared, “tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). Ninety percent of adult smokers begin smoking in their teens,³ a fact long-understood by the tobacco industry. As the U.S. Court of Appeals for the D.C. Circuit noted, “[b]usinesses seeking to make a profit selling tobacco products . . . face powerful economic incentives to reach younger customers.” *Prohibition Juice Co. v. FDA*, 45 F.4th 8, 12 (D.C. Cir. 2022).

The tobacco industry also understands that to successfully market its products to young people, flavors are essential. For all tobacco products—including cigarettes, e-cigarettes, and cigars—flavors significantly increase the appeal of tobacco products to youth. Data from the U.S. Food and Drug Administration (“FDA”) and National Institutes of Health’s Population Assessment of Tobacco and Health (“PATH”) study found that almost 80% of 12-to-17 year-olds who had ever

² This brief adopts Columbus Ordinance 3253-2022’s definition of the term “tobacco product,” which includes “any product that is made from or derived from tobacco or that contains nicotine in any form . . .” and encompasses both “tobacco products” and “alternative nicotine products” as those terms are used in R.C. 9.681.

³ Office of the Surgeon General (“OSG”), U.S. Dep’t of Health & Human Servs. (“HHS”), *The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General* 708 (2014), https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf.

used a tobacco product initiated their use with a flavored product.⁴ The FDA has concluded that “the availability of tobacco products with flavors at these developmental stages attracts youth to initiate use of tobacco products and may result in lifelong use.”⁵

By enacting Ordinance 3253-2022 (“Flavors Ordinance”), Columbus sought to protect its residents—and particularly its young people—from the continuing scourge of flavored tobacco products that lure millions into a lifetime of addiction and contribute so significantly to disease and death. Rather than encourage this and similar live-saving measures, the General Assembly responded by overriding a veto by the Governor to enact R.C. 9.681, a law that purports to preempt all existing and future municipal regulation of tobacco products.

However, as Plaintiffs argue, R.C. 9.681 is an unlawful infringement on Ohio municipalities’ constitutional home rule authority. It does not qualify as a general law under Ohio’s Home Rule Amendment (OHIO CONST. art. XVIII, § 3), and is thus “an unconstitutional attempt to limit the legislative home-rule powers of” municipalities. *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶ 10.⁶ For this reason, Plaintiffs are likely to succeed on the merits and the Court should grant its motion for a preliminary injunction.

⁴ Bridget K. Ambrose et al., *Flavored Tobacco Product Use Among US Youth Aged 12-17 Years, 2013-2014*, 314 J. Am. Med. Ass’n 1871, 1872 (2015), <https://jamanetwork.com/journals/jama/fullarticle/2464690>.

⁵ Regulation of Flavors in Tobacco Products, 83 Fed. Reg. 12,294, 12,295 (proposed Mar. 21, 2018).

⁶ Specifically, R.C. 9.681 fails the third and fourth factors outlined in *Canton*. R.C. 9.681 fails the third *Canton* factor because it does not “set forth police, sanitary, or similar regulations” and instead “purport[s] only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations.” *Canton* at ¶ 21. In fact, R.C. 9.681 sets forth *no new regulations* whatsoever; its sole purpose and effect is “to preempt political subdivisions from the regulation of tobacco products and alternative nicotine products.” R.C. 9.681(D); *see also Dayton v. State*, 151 Ohio St.3d 168, 2017-Ohio-6909, ¶ 20 (clarifying that under this “*Canton* prong, this court . . . must analyze the contested [statutory] provisions individually”). R.C. 9.681 also fails the fourth *Canton* factor because it does not “prescribe a rule of conduct upon citizens generally.” *Canton* at ¶ 21. R.C. 9.681 is “phrased in terms of what a local authority” – not citizens – “shall

A preliminary injunction barring enforcement of R.C. 9681 would also serve the public interest, a key factor in the preliminary injunction analysis. *See State ex. rel. Bowling v. DeWine*, 10th Dist. Franklin No. 21AP-380, 2021-Ohio-2902, ¶ 60. An injunction would allow municipalities to continue to provide their residents with critical protections from the harms of tobacco products. In this brief, *amici* focus specifically on the significant public health benefits afforded by the Flavors Ordinance—benefits that, absent relief here, R.C. 9.681 would remove. As explained in detail below, these benefits include protection against the public health harms of (1) menthol cigarettes, (2) flavored e-cigarettes, and (3) flavored cigars.⁷

ARGUMENT

I. The Flavors Ordinance Affords Columbus Residents Greater Protection Against the Public Health Harms of Menthol Cigarettes.

Menthol cigarettes are a substantial threat to public health because they increase the risk of youth initiation of smoking, increase addiction, and disproportionately harm the Black community, thus exacerbating serious existing health disparities.

A. Menthol cigarettes increase youth initiation of smoking.

Tobacco smoke can be harsh and unappealing to novice smokers, a fact well-understood by the industry. As the FDA has found, “[m]enthol’s flavor and sensory effects reduce the harshness of cigarette smoking and make it easier for new users, particularly youth and young

or shall not do. . . . [It] merely limit[s] municipal authority to enforce other substantive laws.” *Dayton* at ¶ 44 (French, J., concurring). Thus, R.C. 9.681 does not qualify as a general law.

⁷ Although this brief focuses primarily on the Flavors Ordinance, R.C. 9.681 also purports to preempt all other municipal tobacco control laws, including tobacco retail licensure laws, which many of the Plaintiffs have enacted. Research shows these licensure laws can “be an effective policy approach to reduce the availability of tobacco marketing and advertising and decrease tobacco-related disparities in low socioeconomic communities.” Hannah G. Lawman et al., *Tobacco Retail Licensing and Density 3 Years After License Regulations in Philadelphia, Pennsylvania (2012-2019)*, 110 Am. J. Pub. Health 547, 552 (2020), <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2019.305512>.

adults, to continue experimenting and progress to regular use.”⁸ Thus, young smokers are more likely to use menthol cigarettes than any other age group. According to the FDA, “[t]he disproportionate use of menthol cigarettes by youth and young adult smokers compared to older adults has been consistent over time and across multiple studies with nationally representative populations.”⁹ The National Survey on Drug Use and Health has also found that preference for menthol among cigarette smokers is inversely correlated with age.¹⁰ Data shows that half of youth (ages 12-17) who ever tried smoking initiated with menthol cigarettes.¹¹ Additionally, the Truth Initiative’s Young Adult Cohort Study, a national study of 18-34 year olds, found that 52% of new young adult smokers initiated with menthol cigarettes.¹²

Moreover, the FDA’s Tobacco Products Scientific Advisory Committee (“TPSAC”), after an extensive study of the public health impact of menthol cigarettes, concluded in a 2011 Report that menthol cigarettes not only increase the number of children who experiment with cigarettes but also that young people who initiate with menthol are more likely to become addicted and long-term daily smokers.¹³ Menthol cigarettes function as a starter product for the young and are critical to the tobacco industry’s efforts to recruit “replacement smokers” for the one-half of long-term

⁸ Tobacco Product Standard for Menthol in Cigarettes, 87 Fed. Reg. 26,454, 26,455 (proposed May 4, 2022) (“Proposed Menthol Rule”).

⁹ *Id.* at 26,462.

¹⁰ Cristine D. Delnevo et al., *Banning Menthol Cigarettes: A Social Justice Issue Long Overdue*, 22 Nicotine & Tobacco Res. 1673, 1673 (2020), <https://academic.oup.com/ntr/article/22/10/1673/5906409>.

¹¹ Ambrose et al., *supra* note 4, at 1872.

¹² Joanne D’Silva et al., *Differences in Subjective Experiences to First Use of Menthol and Nonmenthol Cigarettes in a National Sample of Young Adult Cigarette Smokers*, 20 Nicotine & Tobacco Res. 1062, 1064 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6093322/>.

¹³ TPSAC, FDA, *Menthol Cigarettes and Public Health: Review of the Scientific Evidence and Recommendations* 136, 199-202 (2011), <https://wayback.archive-it.org/7993/20170405201731/https://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM269697.pdf>.

smokers who eventually die from tobacco-related disease.¹⁴

The impact of menthol cigarettes in attracting and addicting young people has long-term, adverse health effects. The FDA has found that “smoking cigarettes during adolescence is associated with lasting cognitive and behavioral impairments, including effects on working memory in smoking teens and alterations in the prefrontal attentional network in young adult smokers.”¹⁵ “Use of tobacco products,” according to the FDA, “puts youth and young adults at greater risk for future health issues, such as coronary artery disease, cancer, and other known tobacco-related diseases.”¹⁶

The devastating health impact of menthol cigarettes is most starkly shown by a recent study by researchers from the University of Michigan. With the same methodology used by TPSAC, the study estimates that during the 38-year period from 1980-2018, menthol cigarettes were responsible for 10.1 million extra smokers (approximately 266,000 extra smokers every year) and 378,000 additional smoking related deaths (almost 10,000 additional deaths per year).¹⁷

B. Menthol cigarettes increase addiction and reduce cessation.

Among middle and high school students, menthol cigarette use is associated with greater smoking frequency and intention to continue smoking, as compared to non-menthol smoking.¹⁸ PATH study data also shows that youth menthol smokers have significantly higher levels of certain

¹⁴ See OSG, HHS, *The Health Consequences of Smoking - 50 Years of Progress: A Report of the Surgeon General*, Executive Summary 14-15 (2014), <https://www.hhs.gov/sites/default/files/consequences-smoking-exec-summary.pdf>.

¹⁵ Regulation of Flavors in Tobacco Products, *supra* note 5, 83 Fed. Reg. at 12,295.

¹⁶ *Id.*

¹⁷ Thuy T.T. Le & David Mendez, *An Estimation of the Harm of Menthol Cigarettes in the United States from 1980 to 2018*, 31 Tobacco Control 564, 566 (2022), <https://tobaccocontrol.bmj.com/content/early/2021/02/09/tobaccocontrol-2020-056256.info>.

¹⁸ Sunday Azagba et al., *Cigarette Smoking Behavior Among Menthol and Nonmenthol Adolescent Smokers*, 66 J. Adolescent Health 545, 549 (2020), <https://pubmed.ncbi.nlm.nih.gov/31964612/>.

dependence measures,¹⁹ and that initiation with a menthol-flavored cigarette is associated with a higher relative risk of daily smoking.²⁰ The FDA has found both that “[y]outh and young adults are particularly susceptible to becoming addicted to nicotine” and that “[m]enthol enhances the effects of nicotine in the brain by affecting mechanisms involved in nicotine addiction.”²¹

Menthol smokers also have a harder time stopping smoking. The 2020 Surgeon General’s Report on smoking cessation cited numerous studies finding an association between menthol use and lower cessation rates.²² Research analyzing four waves of PATH study data shows that among daily smokers, menthol cigarette smokers have a 24% lower likelihood of quitting as compared to non-menthol smokers.²³ Among daily smokers, African American menthol smokers had a 53% lower chance of quitting compared to African American non-menthol smokers, while White menthol smokers had 22% lower odds of quitting compared to White non-menthol smokers.²⁴ Thus, menthol cigarettes not only lead to greater initiation of smoking; menthol also intensifies the addiction that maintains smoking.

C. Menthol cigarettes have led to significant health disparities for African Americans.

Menthol cigarettes have played an especially pernicious role in causing disease and death

¹⁹ Sam N. Cwalina et al., *Adolescent Menthol Cigarette Use and Risk of Nicotine Dependence: Findings from the National Population Assessment on Tobacco and Health (PATH) Study*, 206 *Drug & Alcohol Dependence* 1, 3 (2019), <https://www.sciencedirect.com/science/article/pii/S0376871619304922>.

²⁰ Andrea C. Villanti et al., *Association of Flavored Tobacco Use With Tobacco Initiation and Subsequent Use Among US Youth and Adults, 2013-2015*, 2 *JAMA Network Open* 1, 12 (2019), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2753396>.

²¹ Proposed Menthol Rule, 87 Fed. Reg. at 26,464.

²² OSG, HHS, *Smoking Cessation: A Report of the Surgeon General* 16-17 (2020), <https://www.hhs.gov/sites/default/files/2020-cessation-sgr-full-report.pdf>.

²³ Sarah D. Mills et al., *The Relationship Between Menthol Cigarette Use, Smoking Cessation and Relapse: Findings from Waves 1 to 4 of the Population Assessment of Tobacco and Health Study*, 23 *Nicotine & Tobacco Res.* 966, 970 (2020), <https://doi.org/10.1093/ntr/ntaa212>.

²⁴ *Id.*

in the African-American community, a fact recognized by the Columbus City Council. *See* Ordinance 3253-2022 (“[F]lavored tobacco products . . . disproportionately impact the 85% of African American smokers . . . who smoke menthols as a result of targeted marketing practices.”).

Since at least the 1950s, the tobacco industry has targeted African Americans with marketing for menthol cigarettes through magazine advertising, sponsorship of community and music events, and youthful imagery and marketing in the retail environment.²⁵ For example, the industry has strategically placed menthol cigarette advertisements featuring Black models in magazines with high Black readership. One study found that from 1998-2002, *Ebony* was 9.8 times more likely than *People* magazine to carry ads for menthol cigarettes.²⁶

The industry also marketed menthol brands in popular musical and other community events. Industry-sponsored events included R.J. Reynolds’ Salem Summer Street Scenes festivals, Brown & Williamson’s Kool Jazz Festival, and Philip Morris’ Club Benson & Hedges promotional bar nights, which targeted clubs frequented by Black Americans.²⁷ R.J. Reynolds estimated that it reached at least half of African Americans in five cities through their street festivals.²⁸ As TPSAC concluded, menthol cigarettes are “disproportionately marketed per capita to African Americans.

²⁵ *See generally* Campaign for Tobacco-Free Kids et al., *Stopping Menthol, Saving Lives: Ending Big Tobacco’s Predatory Marketing to Black Communities* 7-9 (2021), https://www.tobaccofreekids.org/assets/content/what_we_do/industry_watch/menthol-report/2021_02_tfk-menthol-report.pdf.

²⁶ Hope Landrine et al., *Cigarette Advertising in Black, Latino and White Magazines, 1998-2002: An Exploratory Investigation*, 15 *Ethnicity & Disease* 63, 65 (2005), <https://pubmed.ncbi.nlm.nih.gov/15720050/>.

²⁷ Navid Hafez & Pamela M. Ling, *Finding the Kool Mixx: How Brown & Williamson used Music Marketing to Sell Cigarettes*, 15 *Tobacco Control* 359, 360 (2006), <https://tobaccocontrol.bmj.com/content/15/5/359>; Valerie B. Yerger et al., *Racialized Geography, Corporate Activity, and Health Disparities: Tobacco Industry Targeting of Inner Cities*, 18 (Supp 4) *J. Health Care Poor & Underserved* 10, 25 (2007), <https://pubmed.ncbi.nlm.nih.gov/18065850/>; *see also* R.J. Reynolds, *Black Street Scenes 1993 Review and Recommendations*, in *Truth Tobacco Industry Documents*, <http://legacy.library.ucsf.edu/tid/onb19d00>.

²⁸ Yerger et al., *supra* note 27, at 25.

African Americans have been the subjects of specifically tailored menthol marketing strategies and messages.”²⁹

To this day, Black neighborhoods have a disproportionate concentration of menthol cigarette advertising and cheaper pricing of menthol cigarettes. The 2018 California Tobacco Retail Surveillance Study found significantly more menthol advertisements at stores with a higher proportion of African American residents and in neighborhoods with higher proportions of school-age youth.³⁰ A 2021 study found that in Los Angeles County, stores located in predominantly African American neighborhoods had significantly higher odds of selling Newport cigarettes (the most popular menthol brand) than stores in Hispanic or non-Hispanic white neighborhoods.³¹ The study also found that the estimated price of a Newport single pack was \$0.38 higher in non-Hispanic White neighborhoods than African American neighborhoods.³²

The tobacco industry’s use of menthol cigarettes to target African Americans has paid lucrative, but tragic, dividends. In the early 1950s, 5% of African American smokers preferred menthol brands.³³ In 2018, 85% of African American smokers smoked menthol cigarettes, compared to 29% of Whites.³⁴ A recent study found that among the African-American community,

²⁹ TPSAC, *supra* note 13, at 92.

³⁰ Nina Schleicher et al., *California Tobacco Retail Surveillance Study 2018*, at 3, 22 (2019), <https://www.cdph.ca.gov/Programs/CCDCPHP/DCDIC/CTCB/CDPH%20Document%20Library/ResearchandEvaluation/Reports/CaliforniaTobaccoRetailSurveillanceStudyReport-2018.pdf>.

³¹ Sabrina L. Smiley et al., *Retail Marketing of Menthol Cigarettes in Los Angeles, California: a Challenge to Health Equity*, 18 Preventing Chronic Disease (2021), https://www.cdc.gov/PCD/issues/2021/20_0144.htm.

³² *Id.*

³³ See Phillip S. Gardiner, *The African Americanization of Menthol Cigarette Use in the United States*, 6 (Supp 1) Nicotine & Tobacco Res. S55, S59 (2004), <https://pubmed.ncbi.nlm.nih.gov/14982709/>; B.W. Roper, *A Study of People’s Cigarette Smoking Habits and Attitudes Volume I*, Truth Tobacco Industry Documents (1953), <https://www.industrydocuments.ucsf.edu/tobacco/docs/#id=fhcv0035>.

³⁴ Delnevo et al., *supra* note 10, at 1674 tbl.1.

menthol cigarettes were responsible for 1.5 million extra smokers, 157,000 smoking-related premature deaths, and 1.5 million excess life-years lost between 1980 and 2018.³⁵ Similar disparities exist in Ohio. The Centers for Disease Control and Prevention (“CDC”) estimates that 83% of Black smokers in Ohio use menthol compared to 33.8% of all Ohio adult smokers.³⁶

II. The Flavors Ordinance Provides Columbus Residents with Greater Protection Against the Health Harms of Flavored E-Cigarettes.

The most dramatic surge in youth usage of flavored tobacco products has occurred with e-cigarettes, the most commonly used tobacco product among U.S. youth since 2014.³⁷ In December 2018, Surgeon General Jerome Adams issued an advisory on e-cigarette use among youth, declaring the growing problem an “epidemic.”³⁸ Youth e-cigarette use remains a serious public health concern today, with over 2.1 million youth, including 10% of high schoolers, reporting current e-cigarette use in 2023.³⁹ In Ohio, the rates are even higher. In 2021 (the most recent year with available data), 20% of Ohio high schoolers reported current use of an e-cigarette.⁴⁰

Young people are not just experimenting with e-cigarettes—they are using them frequently. In 2023, 39.7% of high school e-cigarette users reported using them on at least 20 of the preceding 30 days, and even more alarming, 29.9% of high school e-cigarette users reported *daily* use, a

³⁵ David Mendez & Thuy T.T. Le, *Consequences of a Match Made in Hell: The Harm Caused by Menthol Smoking to the African American Population Over 1980-2018*, 31 Tobacco Control 569, 570 (2021), <https://tobaccocontrol.bmj.com/content/tobaccocontrol/31/4/569.full.pdf>.

³⁶ CDC, *Menthol Facts – Ohio*, https://www.cdc.gov/tobacco/basic_information/menthol/state-menthol-fact-sheets.html#OH (Feb. 16, 2024).

³⁷ Jane Birdsey et al., *Tobacco Product Use Among U.S. Middle and High School Students – National Youth Tobacco Survey, 2023*, 72 Morbidity & Mortality Wkly. Rep. 1173, 1177 (2023), <https://www.cdc.gov/mmwr/volumes/72/wr/pdfs/mm7244a1-H.pdf>.

³⁸ OSG, HHS, *Surgeon General’s Advisory on E-Cigarette Use Among Youth 2* (2018), <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>.

³⁹ Birdsey et al., *supra* note 37, at 1173.

⁴⁰ Ohio Department of Health, *Highlights from the 2021 Ohio Youth Risk Behavior Survey/Youth Tobacco Survey*, at 1-3 (noting higher youth e-cigarette prevalence rates in Ohio than in the U.S.), <https://bit.ly/43gRSR8>.

strong indication of nicotine addiction.⁴¹ Roughly 530,000 middle and high school students are vaping on a daily basis.⁴²

As several U.S. Courts of Appeals have recognized, flavored e-cigarettes “especially appeal to children” and are largely driving the alarming rates of youth e-cigarette use. *Breeze Smoke, LLC v. FDA*, 18 F.4th 499, 505 (6th Cir 2021); *see also Prohibition Juice*, 45 F.4th at 11 (“Flavored tobacco products lie at the heart of the problem” of youth e-cigarette use.). The 2020 Surgeon General Report on smoking cessation notes that “the role of flavors in promoting initiation of tobacco product use among youth is well established . . . and appealing flavor is cited by youth as one of the main reasons for using e-cigarettes.”⁴³ According to the 2023 NYTS, 89.4% of current middle and high school e-cigarette users had used a flavored product in the past month.⁴⁴

Flavored e-cigarettes typically contain nicotine, which is “among the most addictive substances used by humans.” *Nicopure Labs, LLC v. FDA*, 944 F3d 267, 270 (D.C. Cir. 2019). Nicotine can also result in lasting damage to adolescent brain development.⁴⁵ According to the Surgeon General, “[n]icotine exposure during adolescence can impact learning, memory and attention,” and “can also increase risk for future addiction to other drugs.”⁴⁶ The Surgeon General has warned that “[t]he use of products containing nicotine in any form among youth, including in e-cigarettes, is unsafe.”⁴⁷

Use of e-cigarettes may also function as a gateway to the use of traditional cigarettes and

⁴¹ Birdsey et al., *supra* note 37, at 1180 tbl.3.

⁴² *Id.*

⁴³ OSG, *Smoking Cessation*, *supra* note 22, at 611.

⁴⁴ Birdsey et al., *supra* note 37, at 1173.

⁴⁵ OSG, *Surgeon General’s Advisory on E-Cigarette Use Among Youth*, *supra* note 38, at 1.

⁴⁶ *Id.*

⁴⁷ OSG, HHS, *E-Cigarette Use Among Youth and Young Adults, A Report of the Surgeon General* 5 (2016), https://e-cigarettes.surgeongeneral.gov/documents/2016_SGR_Full_Report_non-508.pdf.

other combustible tobacco products, thereby undermining decades of progress in curbing youth smoking. A 2018 report by the National Academies of Science, Engineering and Medicine found “substantial evidence that e-cigarette use increases [the] risk of ever using combustible tobacco cigarettes among youth and young adults.”⁴⁸ A nationally representative analysis found that from 2013 to 2016, youth e-cigarette use was associated with more than four times the odds of trying combustible cigarettes and nearly three times the odds of current combustible cigarette use.⁴⁹

Finally, there is little evidence that e-cigarettes, particularly flavored e-cigarettes, yield any public health benefits. The leading U.S. public health authorities, including the Surgeon General, the U.S. Preventive Services Task Force, the CDC, and the National Academies of Science, Engineering and Medicine, have all determined there is insufficient evidence to recommend any e-cigarettes for smoking cessation.⁵⁰ The FDA has also repeatedly found that there is little evidence that flavors in e-cigarettes aid smokers to stop smoking. *See e.g., Avail Vapor v. FDA*, 55 F.4th 409, 421 (4th Cir. 2022).

Thus, a preliminary injunction barring enforcement of R.C. 9.681 will allow Columbus to continue providing its residents, particularly its youth, with substantial protection from the addictive and other harmful effects of flavored e-cigarettes.

⁴⁸ Nat’l Acads. of Sci., Eng’g & Med., *Public Health Consequences of E-Cigarettes* 10 (2018), https://www.ncbi.nlm.nih.gov/books/NBK507171/pdf/Bookshelf_NBK507171.pdf.

⁴⁹ Kaitlin M. Berry et al., *Association of Electronic Cigarette Use with Subsequent Initiation of Tobacco Cigarettes in US Youths*, 2 JAMA Network Open 1, 7 (2019), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2723425>.

⁵⁰ OSG, *Smoking Cessation*, *supra* note 22, at 7; U.S. Preventive Servs. Task Force, *Interventions for Tobacco Smoking Cessation in Adults, Including Pregnant Persons: USPSTF Recommendation Statement*, 325 J. Am. Med. Ass’n 265 (2021), <https://jamanetwork.com/journals/jama/fullarticle/2775287>; CDC, *Adult Smoking Cessation – The Use of E-Cigarettes*, https://www.cdc.gov/tobacco/data_statistics/sgr/2020-smoking-cessation/fact-sheets/adult-smoking-cessation-e-cigarettes-use/index.html (Jan. 23, 2020); Nat’l Acads. of Sci., Eng’g & Med., *supra* note 48, at 10.

III. The Flavors Ordinance Provides Columbus Residents Greater Protection Against the Health Harms of Flavored Cigars.

Like other flavored tobacco products, flavored cigar smoking presents substantial health risks—risks that are particularly concerning given the prevalence of cigar use among children and the tobacco industry’s efforts to market cigars to youth. Historically, cigar manufacturers designed flavored cigars to serve as “starter” smokes for young people because the flavors helped mask the harshness, making the products easier to smoke.⁵¹ According to an industry publication, “[w]hile different cigars target a variety of markets, all flavored tobacco products tend to appeal primarily to younger consumers.”⁵² The vice president of one distributor commented, “[f]or a while it felt as if we were operating a Baskin-Robbins ice cream store” in reference to the huge variety of cigar flavors available—and an apparent allusion to flavors that appeal to youth.⁵³ The FDA has determined that young people are far more likely than older smokers to prefer flavored cigars.⁵⁴

In 2009, Congress enacted the Family Smoking Prevention and Tobacco Control Act, Pub. L. 111-31, 123 Stat. 1776 et. seq., which included a prohibition on flavored cigarettes (other than menthol). The cigar industry responded to this law by flooding the market with a dizzying array of new, small, cheap, mass-produced cigars, many virtually indistinguishable from cigarettes,⁵⁵ in

⁵¹ Ganna Kostygina et al., *Tobacco Industry Use of Flavours to Recruit New Users of Little Cigars and Cigarillos*, 25 Tobacco Control 66, 67, 69 (2016), <https://tobaccocontrol.bmj.com/content/25/1/66>.

⁵² Melissa Niksic, *Flavored Smokes: Mmmmm...More Profits?*, Tobacco Retailer (Apr 2007), https://web.archive.org/web/20081121103907/http://www.tobaccoretailer.com/uploads/Features/2007/0407_flavored_smokes.asp.

⁵³ *Id.*

⁵⁴ See Deeming Tobacco Products to be Subject to the Federal Food, Drug and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act, 79 Fed. Reg. 23,141, 23,146 (proposed Apr. 25, 2014) (“[S]ugar preference is strongest among youth and young adults and declines with age.”).

⁵⁵ Under the Tobacco Control Act, the essential difference between a cigarette and a cigar is that a cigar contains tobacco in the wrapper, while a cigarette does not. *Compare* 15 USC § 1332(1)(a) (defining “cigarette”) *with* 21 CFR § 1143.1 (defining “cigar”).

flavors like Mango Lemonade, Rocky Road, and Iced Donut.⁵⁶ From 2008 to 2015, the number of unique cigar flavor names more than doubled, and dollar sales of flavored cigars increased by nearly 50%, increasing flavored cigars' share of the overall cigar market to 52.1% in 2015.⁵⁷

The result of this reorientation of cigars toward the youth market has been predictable. The rate of cigar use among high school students now hovers near the cigarette rate.⁵⁸ In November 2023, the CDC reported that 280,000 high school students currently used cigars,⁵⁹ and that 70.7% of high school cigar smokers used flavored cigars.⁶⁰

Moreover, as with menthol cigarettes, years of research have documented greater cigar availability and more cigar marketing, including for flavored cigars and through price promotions, in Black neighborhoods.⁶¹ Thus, it is not surprising that Black high schoolers smoke cigars at 2.3 times the rate of white high schoolers.⁶²

As the FDA has found, “[a]ll cigars pose serious negative health risks.”⁶³ In 2010 alone, regular cigar smoking was responsible for “approximately 9,000 premature deaths or almost 140,000 years of potential life lost among adults 35 years or older.”⁶⁴ According to the FDA, “[a]ll cigar smokers have an increased risk of oral, esophageal, laryngeal, and lung cancer compared to

⁵⁶ See Campaign for Tobacco-Free Kids, Not Your Grandfather's Cigar: Cheap and Sweet Cigars Lure America's Kids 8-11 (Oct. 4, 2023), https://www.tobaccofreekids.org/press-releases/2023_10_04_cigar-report.

⁵⁷ Cristine D. Delnevo et al., *Changes in the Mass-Merchandise Cigar Market Since the Tobacco Control Act*, 3 (2 Supp. 1) Tobacco Reg. Sci. 1, 4, 10 tbl.2 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5351883/pdf/nihms852155.pdf>.

⁵⁸ Birdsey et al., *supra* note 37, at 1178 tbl.2.

⁵⁹ *Id.*

⁶⁰ *Id.* at supp. tbl. 2, <https://stacks.cdc.gov/view/cdc/134701>.

⁶¹ Campaign for Tobacco-Free Kids et al., *Stopping Menthol*, *supra* note 25, at 10.

⁶² Birdsey et al., *supra* note 37, at 1178 tbl.2.

⁶³ Deeming Tobacco Products to be Subject to the Federal Food, Drug and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act, 81 Fed. Reg. 28,974, 29,020 (May 10, 2016).

⁶⁴ *Id.*

non-tobacco users,” as well as “other adverse health effects, such as increased risk of heart and pulmonary disease,” “a marked increase in risk for chronic obstructive pulmonary disease (COPD),” a higher risk of death from COPD, and “a higher risk of fatal and nonfatal stroke” compared to non-smokers.⁶⁵

Thus, there is no question that the Flavor Ordinance affords Columbus residents with greater protection from the adverse public health impact of flavored cigars, particularly on youth.

CONCLUSION

A preliminary injunction would serve the public interest by allowing Ohio municipalities to continue to provide greater protection against the health harms of tobacco products, particularly flavored tobacco products. For this and the reasons presented by Plaintiffs, the Court should issue a temporary restraining order and preliminary injunction against R.C. 9.681

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Respectfully submitted,

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⁶⁵ *Id.*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed using the Court's e-Filing system, which will send a copy of the foregoing to all counsel of record. Additionally, a true and accurate copy of the foregoing was served on April 12, 2024, upon the following via electronic mail:

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