

DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street Denver, CO 80202 Telephone: (303) 606-2300	▲ COURT USE ONLY ▲
Plaintiff: Rocky Mountain Smoke Free Alliance, a Colorado corporation, v. Defendant: City of Denver AND Denver Department of Public Health and Environment.	
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MOTION OF NON-PROFIT PUBLIC HEALTH, MEDICAL AND COMMUNITY ASSOCIATIONS FOR LEAVE TO FILE BRIEF <i>AMICI CURIAE</i> IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS	

Proposed *amici*, by and through undersigned counsel, hereby move this Court for leave to file the attached 15-page brief *amici curiae* in support of Defendants' motion to dismiss. **Exhibit 1.**

CONFERRAL

Counsel certifies that in accordance with C.R.C.P. § 121, 1-11, the same has conferred with the parties' counsel regarding this motion. Counsel for Defendants does not oppose this motion. Counsel for Plaintiff stated that he opposes the filing of the *amicus* brief, but does not oppose the number of pages (15 pages) or the date filed (one day following Defendants' motion to dismiss).

MOTION

Amici are twenty-seven national and Colorado medical, public health, and community organizations: Action on Smoking and Health (ASH); African American Tobacco Control Leadership Council (AATCLC); American Academy of Pediatrics – Colorado Chapter (AAP-CO); American Cancer Society Cancer Action Network (ACS CAN); American Heart Association; American Lung Association; Americans for Nonsmokers' Rights (ANR); Black Economic Opportunities Council; Campaign for Tobacco-Free Kids; Center for African American Health; Colorado Black Round Table; Colorado Dental Association; John and Sharon Bailey Basketball Classic; Joint Effort Community Sports; NAACP CO-MT-WY; NAACP Aurora Branch; NAACP Denver Branch; Parents Against Vaping (PAVe); Public Health Law Center; Servicios de la Raza; Servicios Sigure; Tepeyac Community Health Center; The Cancer Network; The Center for Black Health & Equity; The Colorado Academy of Family Physicians; The Colorado Nurses Association; and Truth Initiative. A description of each of the *amici* is provided in **Exhibit 2**. *Amici* assert that flavored tobacco products play a key role in enticing new users, primarily youth, to a lifetime of addiction. They also recognize that states and localities play a frontline role in mitigating these harms. They strongly support the Denver ordinance prohibiting the retail sale of flavored tobacco products that Plaintiff seeks to nullify

through this suit and have strong interests in allowing its lifesaving provisions to remain in effect.

Good cause exists for granting this motion. The attached *amicus* brief will aid the Court's resolution of Defendants' motion because proposed *amici* have substantial expertise in the harms of tobacco products and in the public health benefits of the challenged ordinance, both of which bear on Plaintiff's constitutional claims. *See Exhibit 1*. For example, the beneficial local public health impact of the Denver ordinance is directly relevant to the Plaintiff's dormant Commerce Clause claim.

Moreover, *amici* bring a public interest perspective that is not available from the City Defendants. From organizations with programs to assist individuals to quit the use of tobacco products, to those representing physicians who counsel young patients and their families about the hazards of tobacco use, to those with parents struggling to free their children and other young people from nicotine addiction, each of these organizations works on a daily basis to reduce the devastating health harms of tobacco products, including flavored tobacco products.

Further, there is a long history of Colorado district courts permitting *amicus* participation. *See, e.g., In re Special Assessments for Paving Dist. No. 3, in City of Golden*, 95 P.2d 806, 807-08 (Colo. 1939) (noting that bondholders "asked permission to appear as amicus curiae, which request was accorded by the district court" and that "the trial court ... in due course announced his opinion in general accord with the position of amicus curiae"); *Oborne v. Bd. of Cnty. Comm'rs of Douglas Cnty.*, 764 P.2d 397, 399 (Colo. App. 1988) (noting that "the [Colorado Oil and Gas Conservation] Commission, the State Board of Land Commissioners, and the Independent Petroleum Association of Mountain States were allowed to appear before the trial court as *amici curiae*."); *Lobato v. Taylor*, 13 P.3d 821, 828 (Colo. App. 2000), *rev'd on other*

grounds, 71 P.3d 938 (Colo. 2002) (noting that, “[o]n appeal ... amici argue, as they did in the trial court, that...”).

Proposed *amici* also request acceptance of their brief one day after Defendants’ submission of their motion. Under the briefing schedule provided by the Colorado Rules of Civil Procedure, the filing of the *amicus* brief one day after Defendant’s motion to dismiss allow *amici* the ability to fully ascertain the City’s arguments and address only arguments raised, while also affording Plaintiff ample opportunity to respond to all the arguments raised. Proposed *amici* also request the Court’s acceptance of the 15-page brief, which is necessary to address the multiple constitutional claims made by the Plaintiff to an extent helpful to the court. Significantly, no party objects to the number of pages and the date of filing (although, as noted, Plaintiffs object to the filing of the *amicus* brief).

For the reasons stated above, proposed *amici* respectfully request this Court grant leave to file the *amicus* brief attached hereto as **Exhibit 1**.

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2026, the foregoing Motion of Non-Profit Public Health, Medical and Community Associations For Leave to File Brief Amici Curiae in Support of Defendants' Motion to Dismiss, Exhibit 1, Exhibit 2, and proposed Order were filed via Colorado Courts E-Filing, which will serve a true and correct copy to the following:

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EXHIBIT 1

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Amici national and Colorado public health, medical, and community organizations submit this brief urging the Court to grant Defendant's motion to dismiss.

IDENTITY OF AMICI CURIAE AND THEIR INTEREST IN THE CASE

Amici are twenty-seven national and state public health, medical, and community organizations working on a daily basis to reduce tobacco-related disease and mortality: Action on Smoking and Health (ASH); African American Tobacco Control Leadership Council (AATCLC); American Academy of Pediatrics – Colorado Chapter (AAP-CO); American Cancer Society Cancer Action Network (ACS CAN); American Heart Association; American Lung Association; Americans for Nonsmokers' Rights (ANR); Black Economic Opportunities Council; Campaign for Tobacco-Free Kids; Center for African American Health; Colorado Black Round Table; Colorado Dental Association; John and Sharon Bailey Basketball Classic; Joint Effort Community Sports; NAACP CO-MT-WY; NAACP Aurora Branch; NAACP Denver Branch; Parents Against Vaping (PAVe); Public Health Law Center; Servicios de la Raza; Servicios Sigue; Tepeyac Community Health Center; The Cancer Network; The Center for Black Health & Equity; The Colorado Academy of Family Physicians; The Colorado Nurses Association; and Truth Initiative. They include organizations with programs to assist individuals to quit the use of tobacco products, those representing physicians who counsel young patients and their families about the hazards of tobacco use, and parents struggling to free their children and other young people from nicotine addiction. *Amici* recognize that flavored tobacco products play a key role in enticing new users, primarily youth, to a lifetime of addiction, and that states and localities play a frontline role in mitigating these harms. Like the overwhelming majority of Denver voters who voted to approve Referendum 310 and uphold Denver ordinance number 24-1765 (Denver Flavor Law), they support the Denver Flavor Law and have strong interests in allowing its lifesaving provisions to remain in effect.

INTRODUCTION AND SUMMARY OF ARGUMENT

The use of tobacco products is the leading cause of preventable death in the United States, resulting in 490,000 deaths every year.¹ Ninety percent of adults who smoke begin smoking in their teens, a fact the tobacco industry has long understood.² The industry also knows that to successfully market their addictive products to young people, flavors are essential. In enacting its Flavor Law, Denver acted to protect its young people from a lifetime of addiction and adverse health consequences from tobacco products. Denver voters then upheld the Flavor Law—with over 70 percent voting in favor—in a referendum on the law held in November 2025.³

Plaintiff presents a laundry list of constitutional objections to the ordinance, none of which has merit. First, as an association of in-state businesses, Plaintiff lacks standing to challenge impacts to out-of-state business under the dormant Commerce Clause. Regardless, the dormant Commerce Clause does not prevent a city from regulating the sale of a product on non-discriminatory terms, as Plaintiff acknowledges is the case here. Second, the ordinance is purposefully broad—not unconstitutionally vague. Third, even though hookah presents its own public health concerns, the city's focus on other tobacco products is a constitutionally permissible policy choice. Finally, Plaintiff lacks standing to raise free speech concerns, but even if it had standing and a protected speech interest, the ordinance would still be appropriately

¹ U.S. DEP'T OF HEALTH & HUM. SERVS., *Eliminating Tobacco-Related Disease and Death: Addressing Disparities: A Report of the Surgeon General* (2024), <https://www.hhs.gov/sites/default/files/2024-sgr-tobacco-related-health-disparities-full-report.pdf>.

² U.S. DEP'T OF HEALTH & HUM. SERVS., *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General* (2024), https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf.

³ Denver Election Results, 2025 Coordinated Election, Referendum 310, <https://denvergov.org/electionresults#/results/20251104>.

tailored and therefore constitutional. Plaintiff’s constitutional claims should be dismissed, and Denver should be allowed to continue to protect its residents, particularly its youth, from the health hazards of flavored tobacco products.⁴

ARGUMENT

I. Plaintiff Lacks Standing to Raise Its Dormant Commerce Clause Claims, But Even If It Had Standing, The Dormant Commerce Clause Does Not Prevent States from Regulating the Sale of Goods—Especially Tobacco Products—within its Borders on Nondiscriminatory Terms

The United States Constitution provides Congress with the authority “[t]o regulate Commerce ... among the several states.” U.S. Const. art. I, § 8, cl. 3. Although this provision contains no express limitation on the authority of states to regulate commerce, the United States Supreme Court has interpreted this clause to “contain a further, negative command, known as the dormant Commerce Clause.” *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). The dormant Commerce Clause can “forbid[] the enforcement of ‘certain state economic regulations even when Congress has failed to legislate on the subject.’” *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 368 (2023) (quoting *Id.*) (cleaned up). However, “extreme caution” is needed before employing the dormant Commerce Clause—a “limited authority” that is employed against “especially discriminatory” state laws. *Nat’l Pork Producers*, 598 U.S. at 390. Under this clause, “no State may use its laws to discriminate *purposefully* against out-of-state economic interests.” *Id.* at 364 (emphasis added). For instance, state laws that require out-of-state manufacturers to sell (or affirm they sell) goods at the same price as in neighboring states have repeatedly been found unconstitutional. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S.

⁴ This brief does not address Plaintiff’s declaratory judgment claim, but *amici* support dismissal of that claim on the grounds asserted by the City.

511, 520 (1935); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989).

Here, however, Plaintiff is not an out-of-state economic interest, but rather a “nonprofit corporation organized under Colorado law with its principal place of business in Denver, Colorado” that represents “Colorado’s vaping industry.” *See* Compl. ¶ 1. Because “[t]he proper inquiry on standing is whether *the plaintiff* has suffered injury in fact,” *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977) (emphasis added)—and not whether another plaintiff might have one—this Court lacks jurisdiction over Plaintiff’s dormant Commerce Clause claims, which allege harms to “out-of-state manufacturers and distributors of flavored tobacco products.” *See* Compl. ¶ 46.

But even if Plaintiff had standing, the Complaint acknowledges that “the Ordinance is evenly applied to local and out-of-state manufacturers and retailers.” Compl. ¶ 46.⁵ This concession is fatal to Plaintiff’s claim. Plaintiff relies on *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) for the proposition that the ordinance can be overturned if its burden on interstate commerce is “clearly excessive in relation to the putative local benefits.” *See* Compl. ¶ 45. But the “*Pike* line of cases ... has never before yielded such a result” as to “prevent a State from regulating the sale of an ordinary consumer good within its own borders on nondiscriminatory terms.” *Nat’l Pork Producers*, 598 U.S. at 391. And this undoubtedly must remain so when the ordinance does *precisely* what Congress, through the Family Smoking

⁵ In fact, the ordinance negatively impacts notable in-state businesses, like Philip Morris International’s new \$600 million ZYN nicotine pouch factory, located just outside Denver city limits in Aurora, Colorado. 9News, *\$600M Colorado factory starts Zyn pouch production*, <https://www.9news.com/article/money/business/zyn-pouches-aurora-plant/73-6e740844-21d9-48be-a60b-48dba928726e>. Philip Morris International sells flavored ZYN nicotine pouches, a highly-addictive product with growing popularity with young people, *see* Park-Lee, E., *infra* n. 7, offered in flavors like “coffee” and “cinnamon.”

Prevention and Tobacco Control Act, expressly permits “states, localities, and tribal entities” to do with respect to the tobacco products market: “restrict or opt out of that market altogether.” *R.J. Reynolds Tobacco Co. v. Cnty. of Los Angeles*, 29 F.4th 542, 555 (9th Cir. 2022) (interpreting 21 U.S.C. § 387p(a)). Accordingly, a federal district court in California rejected similar dormant Commerce Clause arguments, finding that a California prohibition of the retail sale of flavored tobacco products did not “attempt[] to treat any out-of-state entities differently from in-state entities” and that “[a]ll manufacturers, regardless of geographic location, are now potentially restricted in the marketability and sale of flavored tobacco products.” *R.J. Reynolds Tobacco Co. v. Bonta*, 661 F. Supp. 3d 1009, 1015 (S.D. Cal. 2023), *aff’d*, No. 23-55349, 2023 WL 4546550 (9th Cir. June 28, 2023). Plaintiff’s claim fails for the same reasons.

Whatever the costs that may legitimately be taken into account under *Pike*,⁶ they are far outweighed by the public health benefits of the Denver Flavor Law. Flavored tobacco products play a major role in youth initiation and use of tobacco products. *Eight out of ten* youth who have ever used tobacco initiated with a flavored product.⁷ E-cigarettes, for example, are available in thousands of kid-friendly flavors, like cotton candy, bubble gum and pink lemonade, which have driven their popularity among youth. Of the 1.6 million middle and high school students reporting current e-cigarette use in 2024, *nearly nine in ten* reported use of flavored products.⁸ Cigars are also available in a variety of kid-friendly flavors like “Berry Fusion” and “Iced

⁶ Data indicate that flavor bans have minimal impact on tobacco retailers. *See* Tauras, J.A. & Chaloupka, F.J., *The Economic Effects of Cigarette Sales and Flavor Bans on Tobacco Retail Businesses*, (June 7, 2023), <https://www.economicsforhealth.org/files/research/865/final-report-cigarette-sales-flavor-bans-and-business-05.23.23-md.pdf>.

⁷ Ambrose, BK, et al., “Flavored Tobacco Product Use Among US Youth Aged 12-17 Years, 2013-2014,” *Journal of the American Medical Association*, published online October 26, 2015.

⁸ Park-Lee, E., et al., *E-Cigarette and Nicotine Pouch Use Among Middle and High School Students — United States, 2024*, MMWR 73(35):774-778, September 5, 2024, <https://www.cdc.gov/mmwr/volumes/73/wr/pdfs/mm7335a3-H.pdf>.

Donut,” and can cost as little as 3 for 99 cents.⁹ *Seven out of ten* high school students who smoke cigars use flavored cigars.¹⁰ And even non-sweet flavors increase youth appeal. Menthol in cigarettes cools and numbs the throat, masking the harshness of cigarette smoke and making these types of cigarettes more appealing to youth.¹¹ *Half* of all youth who have ever smoked initiated with menthol cigarettes.¹²

Data also demonstrate that flavored tobacco products fuel tobacco-related health disparities. Following decades of the tobacco industry targeting Black communities with marketing for menthol cigarettes,¹³ 88 percent of Black people who smoke use menthol cigarettes, compared to only 31 percent of White people who smoke.¹⁴ Compounding these inequities, menthol cigarettes are more addictive and harder to quit than unflavored cigarettes.¹⁵

Accordingly, a U.S. Surgeon General report aptly concluded that “[p]rohibiting flavors, including menthol, in tobacco products can benefit public health by reducing initiation among

⁹ Delnevo, CD, et al., “*Changes in the Mass-Merchandise Cigar Market Since the Tobacco Control Act*,” 3 Tobacco Reg. Sci., S8 (2017).

¹⁰ Birdsey, J., et al., *Tobacco Product Use Among U.S. Middle and High School Students — National Youth Tobacco Survey, 2023*, 72 MMWR 1173 (Nov. 3, 2023), <https://www.cdc.gov/mmwr/volumes/72/wr/mm7244a1.htm>.

¹¹ U.S. FOOD & DRUG ADMIN., *Preliminary Scientific Evaluation of the Possible Public Health Effects of Menthol versus Nonmenthol Cigarettes* (2013).

¹² Ambrose, BK, *supra* n. 7.

¹³ See, e.g., Campaign for Tobacco Free Kids, et al., *Stopping menthol, saving lives: ending Big Tobacco’s predatory marketing to Black communities* (Feb. 2021), https://assets.tobaccofreekids.org/content/what_we_do/industry_watch/menthol-report/2021_02_tfk-menthol-report.pdf; Hafez, N. & Ling, P.M., “Finding the Kool Mixx: how Brown & Williamson Used Music Marketing to Sell Cigarettes,” Tobacco Control 359 (2006).

¹⁴ U.S. DEPT. OF HEALTH AND HUMAN SERV., *supra* n. 1 at 74.

¹⁵ See, e.g., Alsharari, S.D., J.R. King, J.C. Nordman, et al., “Effects of Menthol on Nicotine Pharmacokinetic, Pharmacology and Dependence in Mice,” PLoS ONE 10(9): e0137070, <https://doi.org/10.1371/journal.pone.0137070>.

young people and promoting cessation among adults.”¹⁶ Plaintiff’s “compliance costs,” *see* Compl. ¶ 48, are a small price to pay for Denver’s residents, particularly its young people, to realize these overwhelming public health benefits.

II. The Terms “Cooling Sensation” and “Numbing Sensation” Are Broad, Not Unconstitutionally Vague

If a law “does not implicate constitutionally protected expression, the law may be declared facially void for vagueness only if there is ‘no reliable way’ to interpret, or ‘grave uncertainty’ about, its scope.” *People v. Graves*, 368 P.3d 317, 326 (Colo. 2016) (quoting *Johnson v. United States*, 576 U.S. 591, 598-92 (2015)). However, “[g]enerality is not the equivalent of vagueness.” *Watso v. Colorado Dep’t of Soc. Servs.*, 841 P.2d 299, 309 (Colo. 1992). “[S]tatutory standards frequently contain broad terms to ensure their applicability to varied circumstances.” *Id.* (quoting *People v. Becker*, 759 P.2d 26, 31 (Colo. 1988)). The Constitution demands “[n]either scientific nor mathematical certainty” in legislation. *Watso*, 841 P.2d at 309 (citing *Sellon v. City of Manitou Springs*, 745 P.2d 229, 233 (Colo. 1987)). And “the mere fact that close cases can be envisioned” does not “render[] a statute vague.” *United States v. Williams*, 553 U.S. 285, 305 (2008). Further, “the level of specificity required” of a law is lower when its violation results in “civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.” *Rocky Mountain Retail Mgmt., LLC v. City of Northglenn*, 393 P.3d 533, 539 (Colo. 2017) (quoting *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982)).

The ordinance’s ban of the retail sale of tobacco products with “cooling sensation [or] numbing sensation ... other than the taste or smell of tobacco [and] that is distinguishable by an

¹⁶ U.S. DEP’T OF HEALTH AND HUMAN SERV., *Smoking Cessation: A Report of the Surgeon General*, Atlanta, GA (2020), <https://www.hhs.gov/sites/default/files/2020-cessation-sgr-full-report.pdf>.

ordinary consumer...” easily satisfies the Due Process Clause because there are “reliable way[s]” to interpret these terms and no “grave uncertainty” as to their scope. *See Graves*, 368 P.3d at 326 (citation omitted).

First, there are reliable ways to interpret these terms because ordinary evidence can resolve whether something has a “cooling” or “numbing” sensation. In other states with similar bans, courts have upheld localities’ use of a simple “smell test” to determine if a tobacco product is flavored. *See Cumberland Farms, Inc. v. Bd. of Health of Yarmouth*, 144 N.E.3d 319 (Mass. App. Ct. 2020). The ordinance itself expressly limits its applicability to “cooling sensation” and “numbing sensations” that are “distinguishable by an ordinary consumer.” *See Denver Rev. Mun. Code* § 24-401(c). And even lay witnesses can testify regarding “appearance, taste, and ... smell.” *People v. Graybeal*, 155 P.3d 614, 619 (Colo. App. 2007); C.R.E. 701.¹⁷ Consequently, in rejecting a similar Due Process claim, a federal district court in California held that “[a] reasonable person could determine if a product is flavored either by observing the packaging or ingredients, where the packaging indicates that the product is flavored, or, where the labeling is unclear, by assessing with his or her senses if the product has a taste or aroma apart from tobacco.” *California Smoke Shops Ass’n v. City of Fresno*, No. 1:25-cv-00590-KES-HBK, 2025 WL 2636384, at *14 (E.D. Cal. Sept. 12, 2025); *see also CA Smoke & Vape Ass’n, Inc. v. Cnty. of Los Angeles*, No. 2:20-cv-4065 DSF (KSX), 2020 WL 4390384, at *6 (C.D. Cal. June 9, 2020). The same is true here.

Second, there is no grave uncertainty as to the ordinance’s scope because “[i]t will likely be clear to tobacco retailers when a tobacco product imparts a characterizing flavor, at least in

¹⁷ This includes “numbing” and “cooling” sensations. According to a U.S. Surgeon General report, “flavor is a combination of retronasal olfactory sensations, somatosensory perceptions, and taste.” U.S. DEPT. OF HEALTH AND HUMAN SERV., *supra* n. 1 at 258.

the vast majority of situations.” *California Smoke Shops Ass’n*, 2025 WL 2636384, at *14. There are tobacco products that obviously impart a “cooling” or “numbing” sensation, like ZYN Chill, which FDA concluded has a characterizing flavor due to the presence and amount of a synthetic cooling agent.¹⁸ Indeed, both menthol and synthetic cooling agents impart a cooling sensation by activating the same receptor.¹⁹

At bottom, Plaintiff considers the ordinance’s use of the terms vague because they are “subjective” and may vary “from person to person.” Compl. ¶ 23. But the same could be said about whether someone is an “apparently intoxicated person,” see *Enterprises Costiphx Enters., Inc. v. City of Lakewood*, 728 P.2d 358, 359 (Colo. App. 1986), whether educational material is a “controversial learning resource,” see *Bd. of Educ. of Jefferson Cnty. Sch. Dist. R-1 v. Wilder*, 960 P.2d 695, 704 (Colo. 1998), or whether conduct is “lewd,” *Graves*, 368 P.3d at 329, yet Colorado courts have all found those terms to satisfy the Due Process Clause.

Moreover, these broad terms have been shown to be necessary to achieve the public health objectives of tobacco flavor laws. Flavor bans that referred simply to “menthol” were quickly circumvented by tobacco companies who responded with new products without menthol that offered nearly identical sensations.²⁰ The U.S. Surgeon General has recommended that, to counter these efforts to evade regulation, policymakers “could broaden definitions in flavored

¹⁸ U.S. FOOD & DRUG ADMIN., Technical Project Lead Review of Zyn (Jan. 13, 2025), https://www.accessdata.fda.gov/static/searchtobacco/ZYN/PMTA_TPL_PM593-PM612_Zyn_01_13_2025_Redacted.pdf.

¹⁹ McKemy, D.D., et al., “Identification of a Cold Receptor Reveals a General Role for TRP Channels in Thermosensation,” *Nature* 2002, 416:52-58; U.S. DEPT. OF HEALTH AND HUMAN SERV., *supra* n. 1 at 301.

²⁰ Jewett, Christina et al., “R.J. Reynolds Pivots to New Cigarette Pitches as Flavor Ban Takes Effect,” N.Y. Times, Jan. 11, 2023.

sales prohibitions to include products with somatosensory properties such as cooling.”²¹

Denver’s decision to do so was wise—not unconstitutional.

III. While Not the Policy Choice That *Amici* Prefer, the City’s Differing Treatment of Hookah and E-Cigarettes Nevertheless Satisfies the Equal Protection Clause’s Low Bar

Plaintiff asserts that, by exempting flavored hookah tobacco products, yet banning sale of flavored e-cigarettes, the Denver Flavor Law violates the Equal Protection Clause. The Equal Protection Clause, however, “must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.” *Romer v. Evans*, 517 U.S. 620, 631 (1996) (citations omitted). Given this, “if a law neither burdens a fundamental right nor targets a suspect class,” the law will be upheld “so long as it bears a rational relation to some legitimate end.” *United States v. Skrametti*, 605 U.S. 495, 510 (2025) (quoting *Romer*, 517 U.S. at 631). Distinctions in tobacco control laws are, therefore, assessed under a rational basis test, *see, e.g., Goodpaster v. City of Indianapolis*, 736 F.3d 1060 (7th Cir. 2013), which Plaintiff appears to recognize. See Compl. ¶41. Courts “generally afford ... ‘wide latitude’ under this rational basis review, acknowledging that ‘the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.’” *Skrametti*, 605 U.S. at 510 (quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985)).

Plaintiff correctly asserts that use of hookah poses risks to public health. *See* Compl. ¶ 37. Indeed, research indicates that hookah smoking is linked to many of the same adverse health effects as cigarette smoking, such as lung, bladder and oral cancers and heart disease.²²

²¹ U.S. DEPT. OF HEALTH AND HUMAN SERV., *supra* n. 1 at 778.

²² U.S. DEP’T OF HEALTH AND HUMAN SERV., *Preventing Tobacco Use Among Youth and Young Adults, A Report of the Surgeon General* (2012), <http://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/index.html>;

Nonetheless, e-cigarettes undeniably pose a more *urgent* and *widespread* public health concern, particularly with respect to youth. Since 2014, e-cigarettes have been the most commonly used tobacco product among youth. At the end of 2018, the U.S. Surgeon General issued an advisory declaring the growing problem an “epidemic” and calling for “aggressive steps to protect our children from these highly potent products that risk exposing a new generation of young people to nicotine.”²³ By 2019, more than one in four high school students nationwide reported current use of e-cigarettes.²⁴ While youth use rates have since declined, they remain unacceptably high. As of 2024, 7.8 percent of high school students and 3.5 percent of middle school students reported current use of e-cigarettes.²⁵ In contrast, 0.8 percent of high school students and 0.6 percent of middle school students reported current use of hookah.²⁶ In Denver specifically, 6.5 percent of high school students reported current use of e-cigarettes, compared to only half of one percent reporting current use of hookah.²⁷ Moreover, the overwhelming majority of youth e-cigarette users (87.6 percent) use flavored products.²⁸ A retail sales ban directed at e-cigarettes is therefore an entirely rational policy choice.

Knishkowsky, B., Amitai, Y., “Waterpipe (Narghile) Smoking: An Emerging Health Risk Behavior,” 116 *Pediatrics* e113 (2005).

²³ U.S. DEP’T OF HEALTH & HUMAN SERVS., *Surgeon General’s Advisory on E-Cigarette Use Among Youth*, (Dec. 18, 2018), <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>.

²⁴ Wang, Teresa W., et al, “Tobacco Product Use and Associated Factors Among Middle and High School Students - United States, 2019,” 68 *Morbidity & Mortality Wkly Rep.* 1, (Nov. 6, 2019), <https://pmc.ncbi.nlm.nih.gov/articles/PMC6903396/>.

²⁵ Jamal, A., et al., “Tobacco Product Use Among Middle and High School Students — National Youth Tobacco Survey, United States, 2024,” 73 *Morbidity & Mortality Wkly Rep.* 917, (Oct. 17, 2024), <https://www.cdc.gov/mmwr/volumes/73/wr/pdfs/mm7341a2-H.pdf>.

²⁶ *Id.*

²⁷ Colo. Dep’t of Pub. Health & Env’t, *Healthy Kids Colorado Survey Dashboard* (2023), <https://cdphe.colorado.gov/healthy-kids-colorado-survey-information/healthy-kids-colorado-survey-dashboard>.

²⁸ Park-Lee, E., *supra* n. 8.

While *amici* encourage the city to restrict flavored hookah in the near future, Denver need not expose its youth to the risks of flavored e-cigarettes in the meantime. As the United States Supreme Court has long observed, legislative “reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.” *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 489 (1955) (citing *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935)). “The legislature may select one phase of one field and apply a remedy there, neglecting the others.” *Williamson*, 348 U.S. at 489 (citing *A.F. of L. v. American Sash Co.*, 335 U.S. 538 (1949)). Plaintiff would have the court enjoin enforcement of the Denver Flavor Law, *see* Compl. ¶43 and Prayer for Relief, exposing Denver residents to the harms of flavored e-cigarettes, cigars and menthol cigarettes, simply because Denver did not include hookah tobacco in the law’s coverage. Here, the city has opted to focus now on addressing the harms of flavored e-cigarettes and most other flavored tobacco products. That current focus is entirely lawful.

IV. Plaintiff Lacks Standing to Bring Speech Claims, but Even if Plaintiff Did Have Standing and a Protected Speech Interest, the Ordinance Would Still Be Constitutional

Plaintiff alleges that the ordinance “unjustifiably restrict[s] what e-cigarette retailers are permitted to display on their product’s packaging” in violation of their rights to free speech, *see* Compl. ¶ 59, because the ordinance creates a rebuttable presumption that a product is flavored if a manufacturer or retailer’s public statements, use of images, or actions directed at consumers indicate, or would reasonably lead consumers to believe, that the product is flavored. *See* Denver Rev. Mun. Code § 24-404(d). But the Flavor Law does not implicate any protected speech interest. Plaintiff’s complaint raises two possible categories of speech allegedly affected by the Denver Flavor Law: (1) commercial speech accurately describing flavored tobacco products as

flavored, and (2) commercial speech inaccurately describing unflavored tobacco products as flavored. Under either instance, Plaintiff asserts no legitimate protected speech interest.

To the extent Plaintiff asserts a protected speech interest in describing flavored tobacco products as flavored, that speech is not affected by the ordinance at all. Presumption or no presumption, the ordinance bans the retail sale of flavored tobacco products. If Plaintiff describes flavored tobacco products as flavored, it is the ordinance's sales prohibition that bans those products, not the ordinance's presumption. The presumption is of no consequence to that type of speech, and Plaintiff lacks standing to pursue such a claim because Plaintiff cannot be injured by the ordinance in that manner. *See Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977) (standing requires an "injury in fact").

To the extent Plaintiff asserts a protected speech interest in describing flavored tobacco products as unflavored, that speech is constitutionally unprotected. This is because there is a "commonsense distinction" between commercial speech—speech that "occurs in an area traditionally subject to government regulation"—and other types of speech. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York* ("*Central Hudson*"), 447 U.S. 557, 562 (1980) (citation omitted). "The First Amendment's concern for commercial speech is based on the informational function of advertising." *Central Hudson*, 447 U.S. at 563 (citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)). "Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity," including "communication more likely to deceive the public

than to inform it” or “commercial speech related to illegal activity.” *Central Hudson*, 447 U.S. at 563-64 (citations omitted).²⁹

Hence, “[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations ... it is well established that the Government may restrict speech without affronting the First Amendment.” *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)). Additionally, the Government may restrict commercial speech “when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.” *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376, 389 (1973). Thus, any restriction by the ordinance on marketing unflavored tobacco as flavored (a false claim), or on advertising the sale of flavored tobacco (an illegal transaction), is done without infringing upon the First Amendment.³⁰ For this reason, Plaintiff also lacks standing to challenge these concerns. *See Wimberly*, 570 P.2d at 539 (standing requires injury to a “legally protected right”).

But even if the Court finds that Plaintiff has standing and a protected speech interest, the ordinance easily satisfies the *Central Hudson* test. For the reasons articulated *supra*, the City’s interest in preventing death and disease caused by tobacco products is clearly “substantial.”

²⁹ Plaintiff’s complaint does not identify any case law supporting its argument that the Colorado Constitution protects this speech. The Colorado Constitution, however, is likewise not infringed by restrictions on “commercial speech related to illegal activities.” *Parrish v. Lamm*, 758 P.2d 1356, 1365 (Colo. 1988) (quoting *High Gear & Toke Shop v. Beacom*, 689 P.2d 624 (Colo. 1984)).

³⁰ Moreover, describing flavored tobacco products as unflavored is arguably *already* unlawful under Colorado law. The Colorado Consumer Protection Act prohibits “[e]ither knowingly or recklessly mak[ing] a false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods, food, services, or property...” Colo. Rev. Stat. § 6-1-105(1) (e). And flavor is undoubtedly a “characteristic” of a good. *See, e.g.,* Colo. Rev. Stat. § 35-12-103(24) (expressly identifying “flavor” as a “desirable characteristic[] of plants”).

Central Hudson, 447 U.S. at 564. And, as also explained *supra*, determining which tobacco products are flavored is often, but not always, cut and dry. The ordinance “directly advances” the City’s interest, *id.*, by turning, in part, to those who should be expected to intimately know the characteristics of their tobacco products—tobacco manufacturers and tobacco retailers—in determining what is flavored. Finally, the City’s interest could not “be served as well by a more limited restriction,” *id.*, because it is already as limited as possible: it is merely a presumption. In an appropriate instance, Plaintiff would be able to show that its products are not actually flavored.

CONCLUSION

The Denver Flavor Law will prevent countless local youth from becoming addicted to tobacco products and save lives. For the reasons stated above, Plaintiff’s constitutional claims should be dismissed.

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2026, I filed the foregoing Brief of Amici Non-Profit Public Health, Medical, and Community Associations in Support of Defendants' Motion to Dismiss via Colorado Courts E-Filing, which will send a true and correct copy to the following:

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EXHIBIT 2

Description of Proposed *Amici Curiae*

1. Action on Smoking and Health (ASH)

Founded in 1967, Action on Smoking and Health (ASH) is America's oldest anti-tobacco organization, dedicated to a world with ZERO tobacco deaths. Because tobacco is the leading cause of preventable death worldwide, ASH supports bold solutions proportionate to the magnitude of the problem.

2. African American Tobacco Control Leadership Council (AATCLC)

The African American Tobacco Control Leadership Council ("AATCLC") is our country's leading public health education and advocacy organization taking on Big Tobacco to save Black lives. Formed in 2008, the AATCLC is composed of a cadre of dedicated community activists, academics, public health advocates and researchers dedicated to removing menthol and flavored little cigars from the Black community.

3. American Academy of Pediatrics – Colorado Chapter (AAP-CO)

With over 800 members statewide, the American Academy of Pediatrics – Colorado Chapter (AAP-CO) has a long history of working tirelessly on behalf of children, families and pediatric professionals. Through advocacy, education and networking opportunities, AAP-CO aims to improve the lives and well-being of Colorado's infants, children, adolescents and young adults across Colorado.

4. American Cancer Society Cancer Action Network (ACS CAN)

The American Cancer Society Cancer Action Network ("ACS CAN") is committed to ensuring everyone has a fair and just opportunity to prevent, find, treat, and survive cancer. Our advocacy includes support for evidence-based tobacco control measures such as Denver's prohibition on the sale of flavored products. ACS CAN currently has 541 tobacco control advocates in Colorado; 115 of these advocates are from the City of Denver.

5. American Heart Association

The American Heart Association ("AHA") is the nation's oldest and largest voluntary organization dedicated to fighting heart disease and stroke. Founded in 1924, the organization now includes more than 35 million volunteers and supporters with offices nationwide. The Association funds innovative research, advocates for the public's health, and shares lifesaving resources. For more than 40 years AHA's volunteer advocates and staff have been active in policies promoting longer, healthier lives for all.

6. American Lung Association

The American Lung Association is the nation's oldest voluntary health organization

working to save lives by improving lung health and preventing lung disease. The American Lung Association has long been active in research, education and public policy advocacy regarding the adverse health effects caused by tobacco use and exposure to secondhand smoke. This includes supporting efforts to end the sale of all flavored tobacco products.

7. Americans for Nonsmokers' Rights (ANR)

Americans for Nonsmokers' Rights (ANR) is a national non-profit tobacco control advocacy organization based in Berkeley, California. Since its formation in 1976, ANR has been dedicated to protecting nonsmokers' rights to breathe smokefree air in enclosed public places and workplaces and to preventing youth addiction to tobacco and other nicotine products like electronic or e-cigarettes and other flavored products. ANR represents a national constituency of individuals and organizations concerned about the health risks that tobacco and other nicotine products pose to the health and safety of smokers and nonsmokers alike and committed to reducing and preventing tobacco and e-cigarette use.

8. Black Economic Opportunities Council

BEOC is Black business initiative focused on bringing corporate Colorado and the Black business community together to discuss issues of equity, opportunity and community benefits in the Colorado business landscape.

9. Campaign for Tobacco-Free Kids

The Campaign for Tobacco-Free Kids is a leading force in the fight to reduce tobacco use and its deadly toll in the United States and around the world. The Campaign envisions a future free of the death and disease caused by tobacco, and it works to save lives by advocating for public policies that prevent kids from using tobacco products, help smokers quit, educate the public about the dangers of smoking and tobacco use, and protect everyone from secondhand smoke.

10. Center for African American Health

Center for African American Health's mission is to empower the Black community to make informed health decisions that benefit the whole person through education, collaboration and advocacy.

11. Colorado Black Round Table

CBRT is the premiere Black community organization in Colorado. CBRT is an advocacy organization that includes elected officials, businesses, heads of community organizations, pastors and faith leaders, serving sororities, fraternities, health/mental health, and senior and youth serving organizations. CBRT focuses on advocacy, authentic

information, community action, positive change and healing.

12. Colorado Dental Association

The Colorado Dental Association is the professional association of dentists that fosters the success of a diverse membership and advances the oral health of the public. The Colorado Dental Association is the recognized leading advocate for oral health in Colorado.

13. John and Sharon Bailey Basketball Classic

The John and Sharon Bailey Basketball Classic is a special hoops event held annually in the memory of Former Denver Public Schools Board Member and Administrator, Dr. Sharon Bailey. Girls and Boys Basketball teams from George Washington and Denver East compete on the 3rd Saturday in November each year prior to the official start of the high school basketball season.

14. Joint Effort Community Sports

Joint Effort Community Sports Program is a youth development program focused on creating advocacy, information and sports program opportunities for Denver Metro Area youth.

15. NAACP CO-MT-WY

The NAACP Colorado-Montana-Wyoming State Conference (also known as the Rocky Mountain NAACP) serves local branches across these three states, focusing on civil rights advocacy and social justice in the region. It is led by regional president, Pastor Mayes.

16. NAACP Aurora Branch

The NAACP Aurora Branch's mission is to achieve equity, political rights, and social inclusion by advancing policies and practices that expand human and civil rights, eliminate discrimination, and accelerate the well-being, education, and economic security of Black people and all persons of color. We are committed to a world without racism where Black people enjoy equitable opportunities in thriving communities. Our work is rooted in racial equity, civic engagement, and supportive policies and institutions for all marginalized people.

17. NAACP Denver Branch

NAACP Denver Branch's mission is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination.

18. Parents Against Vaping (PAVe)

Parents Against Vaping E-cigarettes was founded by three moms in 2018 as a grassroots response to the youth vaping epidemic. Parents Against Vaping, a volunteer-powered education and advocacy nonprofit, is the first and only national parent voice in the fight against youth tobacco use and the predatory behavior of the tobacco industry. Parents Against Vaping educates parents across the country and supports ending the sale of all flavored tobacco products.

19. Public Health Law Center

The Public Health Law Center is a public interest legal resource center dedicated to improving health through the power of law and policy, grounded in the belief that everyone deserves to be healthy. Located at the Mitchell Hamline School of Law in Saint Paul, Minnesota, the Center helps local, state, national, Tribal, and global leaders promote health by strengthening public policies. For more than twenty-five years, the Center has worked with public officials and community leaders to develop, implement, and defend effective public health laws and policies, including those designed to reduce commercial tobacco use, improve the nation's diet, encourage physical activity, enhance climate justice, protect the nation's public health infrastructure, and promote health equity.

20. Servicios de la Raza

Servicios de La Raza envisions a future where individuals facing instability within systems of injustice find support, healing, and empowerment. The organization's vision is to build and cultivate a thriving Colorado community in which all members have the opportunities, and the support systems to achieve equity, self-sufficiency, and self-determination to lead a healthy quality of life.

21. Servicios Sigue

Servicios Sigue is dedicated to building political power in the Latino community to ensure our voices and values are represented at every level of government and in the policies that define our nation. Our mission is to enhance and promote the cultural, economic, and political voice of the Colorado Latino Chicano Mexicano community.

22. Tepeyac Community Health Center

Tepeyac Community Health Center is a non-profit community health center in Denver that has been providing affordable and accessible integrated care for more than 30 years. We believe in the transformative power of health. We offer a wide variety of services from preventive care to mental health counseling to routine dental care exams.

23. The Cancer Network

The mission of The Cancer Network is to improve the lives of LGBTQIA+ individuals on

the cancer journey and those at risk through educational, training, and advocacy initiatives. LGBTQIA+ communities are disproportionately impacted by flavored tobacco products, which in turn impacts community rates of cancer. As such, LGBTQIA+ communities have a strong interest in responsible public health policy.

24. The Center for Black Health & Equity

Since 2000, The Center for Black Health and Equity has been a leading advocate and capacity building institution that addresses social justice and health equity issues relative to commercial tobacco use. For more than 20 years these products have taken more than one million Black lives with targeting and misinformation by the tobacco industry. Our mission is to facilitate programs and services to benefit communities and people of African descent. In fulfillment of our mission, we build community capacity, develop community infrastructure, and advocate for equity-centered policies.

25. The Colorado Academy of Family Physicians

The Colorado Academy of Family Physicians is the only organization dedicated solely to family physicians in the state of Colorado. Our academy was founded in 1948 and currently represents over 2,500 practicing and retired family physicians, family medicine residents, and medical students who work with their patients to improve their health and the health of their communities, especially vulnerable populations such as underage youth.

26. The Colorado Nurses Association

The Colorado Nurses Association is the professional organization representing all of Colorado's Registered Nurses. Our mission includes improving health for all.

27. Truth Initiative

The Truth Initiative Foundation, d/b/a Truth Initiative, is a 501(c)(3) Delaware corporation created in 1999 out of a 1998 master settlement agreement that resolved litigation brought by 46 states, five U.S. territories, and the District of Columbia against the major U.S. cigarette companies. Truth Initiative studies and supports programs in the United States to reduce youth tobacco use and to prevent diseases associated with tobacco use.