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INTRODUCTION

As the U.S. Supreme Court has recognized, “the thousands of premature deaths that occur each year because of tobacco use” constitute “one of the most troubling public health problems facing our Nation” *FDA v. Brown & Williamson*, 529 U.S. 120, 125 (2000). Indeed, tobacco product use remains the leading cause of preventable death in the U.S., resulting in more than 490,000 deaths per year.¹ The tobacco industry has long understood that “young people are an important and often crucial segment of the tobacco market” since “[v]irtually all new users of tobacco products are under the minimum legal age to purchase such products.” Family Smoking Prevention and Tobacco Control Act, Pub. L. 111-31, 123 Stat. 1776, 1777-78 § 2(4) & (24) (2009) (“Tobacco Control Act” or “TCA”), 21 U.S.C. § 387 note (4) & (24). Today, youth tobacco use is fueled by e-cigarettes, particularly flavored disposables like the Blueberry Raspberry Gami- and Strawmelon-flavored products sold by Appellee Central Tobacco and Stuff Inc. (“Central Tobacco”) (Compl. ¶¶ 21, 24).²

Although only 39 e-cigarettes are currently legal to sell under federal law—all tobacco- or menthol-flavored—the market is dominated by disposables available in a variety of kid-friendly flavors. *See infra* 8. By enforcing Ohio’s Consumer Sales Practices Act against the sale of illegal flavored disposable e-cigarettes that have been deceptively marketed as legal for sale in the U.S., the State has sought to protect its citizens, particularly its young people, from the harms of such

¹ Office of the Surgeon General (“OSG”), U.S. Dep’t of Health & Human Servs. (“HHS”), *Eliminating Tobacco-Related Disease and Death: Addressing Disparities: A Report of the Surgeon General* 9 (2024), <https://www.hhs.gov/sites/default/files/2024-sgr-tobacco-related-health-disparities-full-report.pdf>.

² Eunice Park-Lee et al., *E-Cigarette and Nicotine Pouch Use Among Middle and High School Students – United States, 2024*, 73 Morbidity & Mortality Wkly. Rep. 774, 774 (2024), <https://www.cdc.gov/mmwr/volumes/73/wr/pdfs/mm7335a3-H.pdf>.

products. Contrary to the majority holding below, the State’s actions are entirely consistent with federal law.

The majority below committed two errors that warrant this Court’s review: (1) It failed to assess whether the presumption against preemption applies (it does), and (2) it did not analyze the Tobacco Control Act’s preservation provision (21 U.S.C. § 387p), which broadly preserves state regulatory authority over tobacco sales. Given the enormous public health stakes at issue—whether states are preempted from enforcing state law against federally unauthorized, youth-appealing flavored e-cigarettes—this case involves a question of great public and general interest. For these reasons, and those presented in the Attorney General’s Memorandum, *Amici* respectfully ask this Court to grant jurisdiction and reverse the judgment below.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are the City of Columbus and the following ten public health and medical organizations: African American Tobacco Control Leadership Council, American Cancer Society Cancer Action Network, American Heart Association, American Lung Association, Campaign for Tobacco-Free Kids, LGBTQIA+ Cancer Network, Parents Against Vaping, Preventing Tobacco Addiction Foundation, Public Health Law Center, and Truth Initiative (collectively, “Public Health and Municipal *Amici*”).

The Public Health and Municipal *Amici* work daily to reduce the devastating harms of tobacco products, including e-cigarettes. *Amici* include organizations with formal programs urging users to quit, groups representing parents and families struggling to free young people from nicotine addiction, and the City of Columbus, which has enacted and enforces a robust set of tobacco control laws, including a ban on the sale of flavored e-cigarettes and other tobacco products. Each of the *Amici* has a direct and immediate interest in curbing the sale of flavored

disposable e-cigarettes as well as substantial expertise in the role these products play in enticing young people to use tobacco. Many of the *Amici* also have a long-standing interest—and have played an active role in—defending the TCA’s broad protection of state and local authority to take action to protect communities from the adverse effects of tobacco products on public health. For example, some of the *Amici* have made and joined *amicus* filings addressing the scope of the TCA’s Preservation of State and local authority provision (21 U.S.C. § 387p) in the U.S. Supreme Court and U.S. Court of Appeals for the First, Second, Eighth, and Ninth Circuits.³ Thus, *Amici* are particularly well suited to inform the Court of the substantial public health benefits of protecting the State’s actions here, and why such actions are not preempted by federal law.

STATEMENT OF THE CASE AND FACTS

The Public Health and Municipal *Amici* defer to the statement of the case and facts set forth in Appellant Attorney General Dave Yost’s Memorandum in Support of Jurisdiction.

THIS CASE IS OF GREAT PUBLIC AND GENERAL INTEREST

I. Central Tobacco’s Flavored Disposable E-Cigarettes Harm Ohioans, Particularly Youth.

As Congress recognized, the use of tobacco products is a “pediatric disease of considerable proportions.” TCA § 2(1), 21 U.S.C. § 387 note (1). This is because “[b]usinesses seeking to make a profit selling tobacco products . . . face powerful economic incentives to reach younger

³ Mot. for Leave and Br. of Pub. Health, Med., & Community Grps. as *Amici Curiae* in Opp. to Emergency App. for Inj., *R.J. Reynolds Tobacco Co. v. Bonta*, No. 22A474 (U.S. Dec. 6, 2022); Br. of Pub. Health & Med. Grps. as *Amici Curiae* in Supp. of Appellees (May 14, 2021), *R.J. Reynolds Tobacco Co. v. County of Los Angeles*, 29 F.4th 542 (9th Cir. 2022) (No. 20-55930), ECF No. 29; Br. of *Amici Curiae* Pub. Health Law Ctr. et al. in Supp. of Defs.-Appelles and Affirmance (Dec. 2, 2020), *R.J. Reynolds Tobacco Co. v. City of Edina*, 60 F.4th 1170 (8th Cir. 2023) (No. 20-2852); *Amici Curiae* Br. in Supp. of Appellees (June 7, 2013), *Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013) (No. 13-1053); Br. for *Amici Curiae* Tobacco Control Legal Consortium et al., in Supp. of Appellants (Apr. 19, 2011), *23-23 94th Grocery Corp. v. New York City Bd. Of Health*, 685 F.3d 174 (2d Cir. 2012) (No. 11-91-cv), ECF No. 82-2.

customers.” *Prohibition Juice Co. v. FDA*, 45 F.4th 8, 12 (D.C. Cir. 2022) (upholding FDA marketing denial orders of flavored e-cigarette applications). Today, tobacco use by young people is primarily driven by e-cigarettes, which have been the most popular tobacco product among youth since 2014.⁴

Over 1.6 million youth nationwide, including 7.8% of high schoolers, reported current e-cigarette use in 2024.⁵ Rates are significantly higher in Ohio. In 2023 (the most recent year with available data), 18.8% of Ohio high schoolers, including 27.5% of 12th graders, were current e-cigarette users.⁶

Young people are not only experimenting with e-cigarettes—they are using them frequently. In 2024, 42.1% of U.S. high school e-cigarette users reported using them on at least 20 of the preceding 30 days, and even more alarming, 29.7% of U.S. high school e-cigarette users reported *daily* use, a strong indicator of nicotine addiction.⁷ Roughly 430,000 U.S. middle and high school students are vaping on a daily basis.⁸ In Ohio in 2023, 7.7% of *all* high schoolers,

⁴ Jan 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>.

⁵ Park-Lee et al., *supra* note 2, at 774.

⁶ Ohio Youth Surveys, *YRBS/YTS High School Tobacco and Electronic Vapor Product Use 2023*, at 13, <https://youthsurveys.ohio.gov/reports-and-insights/yrbs-yts-reports/2023/yrbs-yts-high-school-tobacco-and-electronic-vapor-product-use-2023> (accessed Nov. 25, 2025); *see also* Ohio Dep’t of Health, *Tobacco Use Among Youth, 2023*, at 5, https://odh.ohio.gov/wps/wcm/connect/gov/4c3d1666-e8f3-4771-9dc1-28b887f9b00d/Tobacco+Use+Among+Youth+in+Ohio+2023+PPT.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_79GCH8013HMOA06A2E16IV2082-4c3d1666-e8f3-4771-9dc1-28b887f9b00d-pEeSGNX (accessed Nov. 25, 2025). The Ohio surveys use the term “electronic vapor product” rather than the synonymous “e-cigarette.” This brief uses the term “e-cigarette” throughout.

⁷ Park-Lee et al., *supra* note 2, at 775 tbl.

⁸ *Id.*

including 15.3% of 12th graders, reported using e-cigarettes on 20 of the preceding 30 days, and 5.5% of high schoolers, including more than one-in-ten 12th graders (10.2%), reported daily use.⁹

Flavored e-cigarettes, particularly disposables like the Lost Mary Blueberry Raspberry Gami- and Breeze Smoke Strawmelon-flavored products sold by Central Tobacco (Compl. ¶¶ 21, 24), are driving the high rates of youth use. As courts have recognized, flavored e-cigarettes “especially appeal to children,” *Breeze Smoke, LLC v. FDA*, 18 F.4th 499, 505 (6th Cir. 2021), and “lie at the heart of the problem” of youth e-cigarette use. *Prohibition Juice*, 45 F.4th at 11. A 2020 Surgeon General’s Report noted 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.”¹⁰ In 2024, 87.6% of current U.S. middle and high school e-cigarette users reported using a flavored product.¹¹

Moreover, the disposable e-cigarettes sold by Central Tobacco are the favorite device type among youth.¹² In 2024, 55.6% of current U.S. youth e-cigarette users (870,000 students) reported use of a disposable device.¹³

Most e-cigarettes “contain high concentrations of nicotine,”¹⁴ which is “among the most addictive substances used by humans.” *Nicopure Labs, LLC v. FDA*, 944 F.3d 267, 270 (D.C. Cir.

⁹ Ohio Youth Surveys, *supra* note 6, at 15, 17.

¹⁰ OSG, HHS, *Smoking Cessation: A Report of the Surgeon General* 611 (2020), <https://www.hhs.gov/sites/default/files/2020-cessation-sgr-full-report.pdf>.

¹¹ Park-Lee et al., *supra* note 2 at 774.

¹² Disposables are a type of e-cigarette that “come pre-filled” with nicotine-containing liquid and “are not designed to be refilled.” U.S. Centers for Disease Control and Prevention, *About E-Cigarettes (Vapes)* (Oct. 24, 2024), <https://www.cdc.gov/tobacco/e-cigarettes/about.html>.

¹³ Park-Lee et al., *supra* note 2 at 774.

¹⁴ OSG, HHS, *Sound the Alarm: Youth Vaping Can Harm* 2 (2025), <https://www.hhs.gov/sites/default/files/osg-youth-vaping-data-sheet.pdf>.

2019). According to the U.S. Centers for Disease Control and Prevention (“CDC”), adolescent brains are particularly sensitive to nicotine, and exposure during this critical period can “harm the parts of an adolescent’s brain that control attention, learning, mood, and impulse control.”¹⁵

Many e-cigarettes also contain other harmful chemicals. The Office of the Surgeon General recently noted that “[r]esearch has detected arsenic along with other toxic metals in vapes, e.g., chromium, antimony, nickel, lead, tin, and aluminum” and that “[i]norganic arsenic and antimony are classified as carcinogenic and can lead to an increased risk of cancer and disruption of hormones.”¹⁶ FDA also recently warned that illegal e-cigarettes “frequently contain chemicals such as formaldehyde, lead, and acrolein—materials more commonly found in industrial textiles and pesticides.”¹⁷

Finally, there is little evidence that e-cigarettes, particularly flavored e-cigarettes, yield any public health benefit. The leading public health authorities in the U.S., including the Surgeon General, the U.S. Preventive Services Task Force, the CDC, and the National Academies of Science, Engineering and Medicine, have all concluded that there is insufficient evidence to recommend any e-cigarettes for smoking cessation.¹⁸ The FDA has also repeatedly found that there

¹⁵ CDC, *E-Cigarette Use Among Youth* (Oct. 17, 2024), <https://www.cdc.gov/tobacco/e-cigarettes/youth.html>.

¹⁶ OSG, *Sound the Alarm*, *supra* note 14, at 3.

¹⁷ FDA, *A Statement from FDA Commissioner Marty Makary, M.D., M.P.H.: Encouraging Retailers to Stop Selling Illegal Vapes* (Sept. 30, 2025), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-marty-makary-md-mph-encouraging-retailers-stop-selling-illegal-vapes> (“Makary Statement”).

¹⁸ OSG, *Smoking Cessation*, *supra* note 10 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/sgr/2020-smoking-cessation/factsheets/pdfs/adult-smoking-cessation-e-cigarettes-use-h.pdf> (accessed Nov. 19, 2025); Nat’l

is little evidence that flavors in e-cigarettes aid smokers to stop smoking. For example, in upholding FDA marketing denial orders for flavored e-cigarettes, the U.S. Court of Appeals for the Fourth Circuit noted FDA’s conclusion that “[t]he literature was conflicting and inconclusive on whether flavors actually promoted switching [from cigarettes to e-cigarettes] or cessation by adult smokers.” *Avail Vapor, LLC v. FDA*, 55 F. 4th 409, 421 (4th Cir. 2022).

Thus, the State’s actions to enforce Ohio’s Consumer Sales Practices Act against Central Tobacco’s illegal flavored disposable e-cigarettes provides Ohioans, particularly Ohio youth, with much-needed protection from the addictive and other harmful effects of such products.

II. Enforcement of State Law Against Federally Illegal, Deceptively Marketed E-Cigarettes Provides Critical Protection to Ohioans.

Federal law requires all tobacco products, including e-cigarettes, that were not commercially marketed before February 15, 2007 to receive FDA authorization prior to introduction. 21 U.S.C. § 387j. To date, FDA has authorized only 39 e-cigarette products, all of which are either tobacco- or menthol-flavored.¹⁹ According to FDA, these 39 products “are the only e-cigarettes that may be lawfully sold in the United States.”²⁰ Meanwhile, FDA has denied authorization to millions of flavored e-cigarettes that have failed to demonstrate that they satisfy

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.

¹⁹ FDA, *E-Cigarettes, Vapes, and other Electronic Nicotine Delivery Systems (ENDS)*, <https://www.fda.gov/tobacco-products/products-ingredients-components/e-cigarettes-vapes-and-other-electronic-nicotine-delivery-systems-ends> (last updated July 17, 2025).

²⁰ FDA, *E-Cigarettes Authorized by the FDA*, <https://digitalmedia.hhs.gov/tobacco/hosted/Authorized-E-Cig-July2025.pdf> (last updated July 2025).

the “appropriate for the protection of the public health” statutory standard. *See FDA v. Wages & White Lions Invs., L.L.C.*, 604 U.S. 542, 562 (2025).²¹

FDA and its federal partners have taken important enforcement actions against unauthorized flavored e-cigarettes, including through large-scale seizures, injunctions, and civil monetary penalties.²² Nonetheless, the e-cigarette market remains overrun with illegal flavored disposable products like those sold by Central Tobacco. The CDC Foundation concluded that during the 6-month period ending May 18, 2025, 7,066 unique e-cigarettes were sold in the U.S., of which 6,593 (93.3%) were disposable.²³ It also found that as of May 18, 2025, 81.3% of all e-cigarettes sold were flavored, including 94.7% of disposables.²⁴ For its part, FDA recently estimated that “as many as 54% of all vaping products sold nationally are illegal.”²⁵ These

²¹ See also Brian King, Dir., FDA Ctr. for Tobacco Prods., *A Year in Review: FDA’s Progress on Tobacco Product Regulation in 2024* (Jan. 14, 2025), <https://www.fda.gov/tobacco-products/ctp-newsroom/year-review-fdas-progress-tobacco-product-regulation-2024>.

²² See, e.g., FDA, *Advisory and Enforcement Actions Against Industry for Unauthorized Tobacco Products*, <https://www.fda.gov/tobacco-products/compliance-enforcement-training/advisory-and-enforcement-actions-against-industry-unauthorized-tobacco-products> (last updated Oct. 14, 2025); FDA News Release, *HHS, CBP Seize \$86.5 Million Worth of Illegal E-Cigarettes in Largest-Ever Operation* (Sept. 10, 2025), <https://www.fda.gov/news-events/press-announcements/hhs-cbp-seize-865-million-worth-illegal-e-cigarettes-largest-ever-operation>; King, *Year in Review*, *supra* note 21.

²³ CDC Found., *Monitoring E-Cigarette Sales: National Trends 1* (Aug. 2025), https://tobaccomonitoring.org/wp-content/uploads/2025/08/National-E-Cigarette-Sales-Data-Brief_05.18.25.pdf (data from Circana). This is likely a significant underestimate because it only includes e-cigarette sales data from convenience stores, gas stations, and other retail store chains, but not internet and tobacco-specialty stores, including vape shops. See Alex Liber et al., *How Complete Are Tobacco Sales Data? Assessing the Comprehensiveness of US Tobacco Product Retail Sales Data Through Comparisons to Excise Tax Collections*, 26 *Nicotine & Tobacco Res.* 1103, 1103 (2023), <https://pmc.ncbi.nlm.nih.gov/articles/PMC11260888/pdf/ntad214.pdf> (noting that “sales data do not include sales from online retailers, stores on Native American reservations, or specialty stores such as tobacconists and vape shops.”).

²⁴ CDC Found., *supra* note 23, at 1.

²⁵ Makary Statement, *supra* note 17. This may also be an underestimate as it uses Nielsen IQ data, which does not cover sales made in tobacco specialty stores, including vape shops, or online

unauthorized products threaten youth, with the Office of the Surgeon General noting that “[m]any vaping products accessible to youth are not authorized by the FDA and are illegally marketed.”²⁶

Enforcement of state laws against illegal flavored disposable e-cigarettes can contribute substantially to the removal of these products from the market and thereby enhance public health. State attorneys general have recognized the importance of state action. For example, Attorney General Keith Ellison of Minnesota noted in January 2025 that “despite the fact that new e-cigarettes require FDA approval, the U.S. market has been flooded with flavored disposable e-cigarettes” that “are designed to appeal to and are marketed to youth.”²⁷ He went on to note that “[d]espite the federal government’s efforts to control the proliferation of these products [flavored disposable e-cigarettes], they remain widely available and represent an ongoing threat to youth.”²⁸ Many states, including Ohio, have taken action against flavored disposable e-cigarettes, including through the formation of a bipartisan coalition of ten attorneys general that “are taking steps to enforce their respective licensing and consumer protection laws to go after the companies responsible for importing, distributing, selling and marketing flavored disposable e-cigarettes.”²⁹ Thus, as recognized by various state chief law enforcement officers, enforcement of state law can

retailers. See OSG, *Sound the Alarm*, *supra* note 14, at 6 n.5; Liber et al., *supra* note 23, at 1103.

²⁶ OSG, *Sound the Alarm*, *supra* note 14, at 3.

²⁷ Minnesota Attorney General Keith Ellison, *Attorney General Ellison sues e-cigarette manufacturer; launches investigation of another* (Jan. 15, 2025), https://www.ag.state.mn.us/Office/Communications/2025/01/16_HighLightVapes.asp.

²⁸ *Id.*

²⁹ Illinois Attorney General Kwame Raoul, *Attorney General Raoul Continues Crackdown on Illicit Flavored Disposable E-Cigarette Products as Part of Bipartisan, National Collaboration* (Jan. 16, 2025), <https://illinoisattorneygeneral.gov/news/story/attorney-general-raoul-continues-crackdown-on-illicit-flavored-disposable-e-cigarette-products-as-part-of-bipartisan-national-collaboration>.

contribute to clearing the market of the overwhelming number of federally unauthorized and illegal youth-appealing flavored disposable e-cigarettes that are at issue here.

ARGUMENT

Appellant’s Proposition of Law:

Neither the federal Food, Drug, and Cosmetic Act, nor the federal Tobacco Control Act, preempts state-law claims alleging that the sale of illegal tobacco products violates Ohio’s Consumer Sales Practices Act.

A majority of the Fifth District held that federal law preempts the State’s claims that Central Tobacco violated Ohio’s Consumer Sales Practices Act by selling flavored disposable e-cigarettes that lack federal authorization and deceptively failing to inform consumers that such products were illegal. *State ex rel. Att’y Gen. Dave Yost v. Cent. Tobacco & Stuff Inc.*, 2025-Ohio-4613, ¶¶ 41, 46 (5th Dist.) (“App. Opp.”). That was a misreading of federal law. The State’s actions fit neatly within—and further the purpose of—the federal Tobacco Control Act’s unique Preservation of State and local authority provisions (21 U.S.C. § 387p). In finding the State’s actions preempted, the Fifth District majority committed two errors that warrant this Court’s review. First, it failed to assess whether the presumption against preemption applies (it does). Second, it did not analyze the Tobacco Control Act’s preservation provision, which broadly preserves state authority over tobacco sales, and which is necessary to resolving the present case.

I. The Tobacco Control Act Broadly Preserves State Authority to Regulate Tobacco Product Sales.

In the Tobacco Control Act, “Congress made an explicit decision to ‘preserve for the states a robust role in regulating, and even banning, sales of tobacco products.’” *R.J. Reynolds Tobacco Co. v. County of Los Angeles*, 29 F.4th 542, 550 (9th Cir. 2022) (“*L.A. County*”) (quoting *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428, 436 (2d Cir. 2013)). It did so through the statute’s “unique three-layered preservation provision,” 21 U.S.C. § 387p. *Id.*

First, the Preservation Clause, 21 U.S.C. § 387p(a)(1), broadly preserves state regulatory authority over tobacco products, including over “sales” of such products.³⁰ “Essentially, the Preservation Clause tells us that there is no ‘field preemption’ for the TCA—states and cities are free to go above and beyond the requirements of the TCA to curb tobacco use.” *R.J. Reynolds Tobacco Co. v. Edina*, 60 F.4th 1170, 1174 (8th Cir. 2023).

The “Preemption Clause,” 21 U.S.C. § 387p(2)(A), then “limits that general principle” by providing that States “cannot create any rule ‘which is different from, or in addition to’ the TCA’s requirements ‘relating to tobacco product standards’ and tobacco ‘adulteration.’” *Edina*, 60 F.4th at 1174 (quoting 21 U.S.C. 387p(a)(2)(A)).³¹

However, the “Savings Clause then qualifies the Preemption Clause’s scope” by specifying that “‘subparagraph (A) [the Preemption Clause] does not apply to requirements relating to the sale, distribution, . . . or use of, tobacco products by individuals of any age.’” *Id.* (quoting 21 U.S.C. § 387p(a)(2)(B)).³² Thus, as at least six federal courts, including four circuit courts, have

³⁰ 21 U.S.C. § 387p(a)(1) in full: “Except as provided in paragraph (2)(A), nothing in this subchapter, or rules promulgated under this subchapter, shall be construed to limit the authority of a Federal agency (including the Armed Forces), a State or political subdivision of a State, or the government of an Indian tribe to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this subchapter, including a law, rule, regulation, or other measure relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age, information reporting to the State, or measures relating to fire safety standards for tobacco products. No provision of this subchapter shall limit or otherwise affect any State, tribal, or local taxation of tobacco products.”

³¹ 21 U.S.C. § 387p(a)(2)(A) in full: “No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.”

³² 21 U.S.C. § 387p(a)(2)(B) in full: “Subparagraph (A) does not apply to requirements relating to the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age, or relating to fire safety standards for tobacco products. Information disclosed to a State under subparagraph (A)

held, states are fully empowered to regulate tobacco product sales. *Edina*, 60 F.4th at 1175-79 (8th Cir. 2023); *L.A. County*, 29 F.4th at 552-61 (9th Cir. 2022); *U.S. Smokeless Tobacco Mfg. Co.*, 708 F.3d at 435-36 (2d Cir. 2013); *Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 81-83 (1st Cir. 2013); *Utah Vapor Bus. Ass’n Inc. v. Utah*, 792 F. Supp. 3d 1226, 1230-1240 (D. Utah 2025); *Indeps. Gas & Serv. Stations Assn’s, Inc. v. City of Chicago*, 112 F. Supp. 3d 749, 752-54 (N.D. Ill. 2015).

II. The Fifth District Majority Erred in Not Analyzing the Presumption Against Preemption Doctrine or the Tobacco Control Act’s Broad Preservation of State and Local Authority.

Any preemption analysis must “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The presumption is particularly strong when, as here, “Congress has ‘legislated . . . in a field in which the States have traditionally occupied.’” *Id.* (quoting *Rice*, 331 U.S. at 230). The “regulation of health and safety matters is primarily, and historically, a matter of local concern,” *Hillsborough Cty. v. Automated Med. Labs. Inc.*, 471 U.S. 707, 719 (1985), and specifically, “states and localities have historically played a primary role in regulating the sale of tobacco products.” *L.A. County*, 29 F.4th at 555; *see also Austin v. Tennessee*, 179 U.S. 343, 348-49 (1900) (“[W]e think it within the province of the [State] legislature to say how far [cigarettes] may be sold, or to prohibit their sale entirely . . . provided no discrimination be used . . . and there be no reason to doubt that the act in question is designed for the protection of the public health.”). The 2009 Tobacco Control Act, which was enacted against this “historical

that is exempt from disclosure under section 552(b)(4) of title 5 shall be treated as a trade secret and confidential information by the State.”

backdrop,” “effectively *carves out* federal power from a historical body of state and local authority by setting the floor for production and marketing standards, while still preserving states and localities’ broad power over regulation of the sales of those products.” *L.A. County*, 29 F.4th at 555 (emphasis in original) (internal quotations omitted). Therefore, “[b]ecause the TCA implicates the States’ traditional use of its police power, we must assume that the TCA does not preempt that authority unless it was the ‘clear and manifest purpose of Congress.’” *Edina*, 60 F.4th at 1178 (quoting *Altria Grp. Inc. v. Good*, 555 U.S. 70, 77 (2008)).

Rather than a clear Congressional intent to preempt—a finding that would be required to find preemption in this context—the Tobacco Control Act’s “preservation and savings clauses . . . explicitly and repeatedly reiterate[] local authority over product sales.” *L.A. County*, 29 F.4th at 558. Thus, the presumption against preemption has not been overcome.

Nevertheless, the Fifth District majority failed to even assess whether this presumption applies, even though a case it principally relies on in finding preemption, *Buckman Co. v. Plaintiff’s Legal Comm.*, 531 U.S. 341 (2001), *did* assess the applicability of the presumption. The Court in *Buckman* began its preemption analysis with this query, concluding that “no presumption against pre-emption obtains in this case” because “[p]olicing fraud against federal agencies is hardly ‘a field which the States have traditionally occupied.’” *Id.* at 347-48 (quoting *Rice*, 331 U.S. at 230). In contrast, the Fifth District majority here did not do this analysis. If it had, it would have concluded that the presumption does apply, given the historical primary role States have played in regulating tobacco sales. *See Edina*, 60 F.4th at 1176-77 (applying presumption in determining that Tobacco Control Act does not preempt local sales restriction).

The Fifth District majority also erred in failing to engage with the Tobacco Control Act’s unique broad state and local preservation provision, 21 U.S.C. § 387p. This provision distinguishes

the present case from *Buckman* and *Loreto v. P&G*, 515 Fed. Appx 576 (6th Cir. 2013), the two cases the Fifth District majority principally relied on in finding that the State’s actions were impliedly preempted. *See* App. Op. ¶¶ 37-41. Although the Tobacco Control Act amended—and added a new chapter to—the federal Food, Drug, and Cosmetic Act (“FDCA”), the statute at issue in *Buckman* and *Loreto*, the courts in those cases neither interpreted nor applied the broad statutory preservation of state authority in the Tobacco Control Act. Those cases concerned federal regulation of devices and drugs, respectively, which are subject to completely different statutory schemes than tobacco products.

For example, the FDCA provisions at issue in *Buckman* did not expressly reserve to States any role in policing fraud against the FDA, the subject of the state claim there. The Court in *Buckman* found that allowing for “this sort of litigation would exert an extraneous pull on the scheme established by Congress, and it is therefore pre-empted by that scheme.” *Buckman*, 531 U.S. at 353. Here, in contrast, Ohio’s actions—regulating deceptive tobacco sales—is entirely consistent with the federal statutory scheme and expressly preserved by federal statute. Whereas the *Buckman* holding is based on the potential for conflict between state and federal determinations of “fraud on the FDA,” here it is uncontested that Central Tobacco sold products not among the 39 FDA authorized products and therefore misrepresented the legality of its products in violation of Ohio’s Consumer Sales Practices Act. Thus, rather than exerting the “extraneous pull” on the federal statutory scheme found in *Buckman*, the State’s actions here complement the federal tobacco regulatory scheme established by Congress.

Moreover, in *Loreto*, an unpublished opinion that does not constitute binding authority within the Sixth Circuit, *see Aleisa v. GOJO Indus., Inc.*, 538 F. Supp. 3d 764, 774 (N.D. Ohio 2021), the plaintiff “brought suit over a labeling claim that fell within the exclusive regulatory

authority of the FDA.” App. Opp. ¶ 75 (King, J., dissenting); *Loreto* 515 Fed. Appx. at 579 (“Plaintiffs allege that Procter & Gamble omitted telling consumers that its products were ‘illegal’ . . . because their labeling did not comply with the FDCA’s requirements.”). That is distinct from the present situation in which the State is attempting to halt deceptive sales—not “enforce an FDA decision or take regulatory action that is exclusive to the FDA.” App. Opp. ¶ 76 (King, J., dissenting). The State is not alleging that Central Tobacco failed to comply with federal labeling requirements; nor is it seeking to change the label on the products. Instead, it alleges that Central Tobacco, by choosing to sell products that are illegal under federal law, deceptively held out that its products are legal for sale, when in fact they are not. That is entirely consistent with the TCA’s broad preservation of state authority over tobacco sales. Additionally, *Loreto* addressed the question of whether a private right of action would have the effect of thwarting federal law (and concluded that it did). 515 Fed. Appx. at 578-79. Here, there is no private right of action at issue and the State’s actions would advance—rather than thwart—the TCA’s regulatory scheme. As the U.S. Court of Appeals for the Ninth Circuit observed in the *L.A. County* case, consideration of the Tobacco Control Act’s scheme, and particularly its unique protection of state prerogatives, is critical: “Rather than following precedent interpreting very different federal statutory language, we must instead be guided by the TCA’s unique text, framework, and history.” 29 F.4th at 558.

CONCLUSION

For the foregoing reasons, and those presented in the Attorney General’s Memorandum, the Court should accept jurisdiction and reverse the Fifth District’s decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this day,
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