APPENDIX
LOWER COURT ORDERS, OPINIONS, AND PLEADINGS

INDEX OF APPENDICES

Page

APPENDIX A

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. J. REYNOLDS TOBACCO COMPANY; et al., Plaintiffs-Appellants, v. ROB BONTA, in his official capacity as Attorney General of California; SUMMER STEPHAN, in her official capacity as District Attorney for the County of San Diego, Defendants-Appellees.	No. 22-56052 D.C. No. 3:22-cv-01755-CAB-WVG Southern District of California, San Diego ORDER

Before: WARDLAW and W. FLETCHER, Circuit Judges.

The emergency motion for injunction pending appeal (Docket Entry No. 14) is denied. *See R.J. Reynolds Tobacco Co. v. County of Los Angeles*, 29 F.4th 542 (9th Cir. 2022).

The existing briefing schedule remains in effect.

AC/MOATT

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

R.J. REYNOLDS TOBACCO COMPANY, *et al.*,

Plaintiffs,

v.

ROBERT BONTA, in his official capacity as Attorney General of California; and SUMMER STEPHAN, in her official capacity as District Attorney for the County of San Diego,

Defendants.

Case No. 22-cv-01755-CAB-WVG

Hon. Cathy Ann Bencivengo

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND INJUNCTION PENDING APPEAL AND GRANTING THE PARTIES' JOINT MOTION TO VACATE THE BRIEFING SCHEDULE

[Doc. Nos. 13, 18]

In this matter, Plaintiffs ask the Court to declare that California Senate Bill 793 ("S.B. 793") is invalid and unenforceable. Plaintiffs moved for a preliminary injunction and an injunction pending appeal on enforcement of S.B. 793 based on their express preemption claim. [Doc. No. 13.] Plaintiffs acquiesced in the denial of that motion because, at this time, their express preemption claim is foreclosed in this Court by Ninth Circuit precedent. [Doc No. 13-1 (citing *R.J. Reynolds Tobacco Co. v. County of Los Angeles*, 29 F.4th 542 (9th Cir. 2022), *cert. pending*, No. 22-338 (U.S. filed Oct. 7, 2022)).] Plaintiffs preserved their claim and their requests for injunctive relief for appeal. Defendants oppose Plaintiffs' motion.

Upon review of the record, the Court finds that the Ninth Circuit's decision in *County of Los Angeles* currently forecloses Plaintiffs' express preemption claim in this Court. This Court therefore must deny the motion for a preliminary injunction and an injunction pending appeal. Plaintiffs have nevertheless preserved their claim and Defendants have preserved their defenses and arguments for further appellate review.

The parties have also jointly moved to vacate the briefing schedule on Plaintiffs' motion for a preliminary injunction and an injunction pending appeal.

Accordingly, the joint motion to vacate the briefing schedule on Plaintiffs' motion for a preliminary injunction and an injunction pending appeal [Doc. No. 18] is **GRANTED**, and Plaintiffs' motion for a preliminary injunction and an injunction pending appeal [Doc. No. 13] is **DENIED**.

IT IS SO ORDERED.

Dated: November 15, 2022

Hon. Cathy Ann Bencivengo
United States District Judge

APPENDIX C

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

R.J. REYNOLDS TOBACCO COMPANY, *et al.*,

Plaintiffs,

v.

ROBERT BONTA, in his official capacity as Attorney General of California; and SUMMER STEPHAN, in her official capacity as District Attorney for the County of San Diego,

Defendants.

Case No. 3:22-cv-01755-BEN-MSB

Hon. Roger T. Benitez

NOTICE OF MOTION AND PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND INJUNCTION PENDING APPEAL

Hearing Date: December 12, 2022
Time: 10:30 A.M.
Courtroom: 5A

Complaint Filed: November 9, 2022

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, Plaintiffs R.J. Reynolds Tobacco Company; R.J. Reynolds Vapor Company; American Snuff Company, LLC; Santa Fe Natural Tobacco Company, Inc.; Modoral Brands Inc.; Neighborhood Market Association, Inc.; and Morija, LLC dba Vapin' the 619 will and hereby do move this Court, under Federal Rule of Civil Procedure 65, for the issuance of a preliminary injunction on the First Claim for Relief of Plaintiffs' Complaint (express preemption). ECF No. 1. Plaintiffs seek a preliminary injunction enjoining Defendants from implementing or enforcing California Senate Bill 793's ("SB793") prohibition on flavored tobacco products, which was signed into law on August 28, 2020, suspended by referendum, approved by referendum on November 8, 2022, and which will take effect no later than December 21, 2022.

Plaintiffs further will and hereby do move for an injunction pending appeal of this Court's inevitable denial of the motion for a preliminary injunction. *See* Fed. R. App. Proc. 8(a).

Plaintiffs recognize that, at this time, their express preemption claim is foreclosed in this Court under Ninth Circuit precedent and that this Court therefore must deny the motion for a preliminary injunction and the motion for an injunction pending appeal. *See R.J. Reynolds Tobacco Co. v. County of Los Angeles*, 29 F.4th 542 (9th Cir. 2022) ("*Los Angeles County*"), *cert. pending*, No. 22-338 (U.S. filed Oct. 7, 2022). Nonetheless, Plaintiffs believe that *Los Angeles County* was wrongly decided and the plaintiffs in *Los Angeles County* (which include some of the Plaintiffs in this case) have sought Supreme Court review. Plaintiffs in this case preserve (for appellate review) their claim that the Tobacco Control Act expressly preempts California's SB793 and wish to seek relief from a higher court as quickly as possible.

This Motion is based on this Notice of Motion, the concurrently filed Memorandum of Points and Authorities, the declarations submitted, and the pleadings and papers on file in this action. Given that SB793 will go into effect no

later than December 21, 2022, Plaintiffs request that this Court rule expeditiously on this motion, but no later than November 23, 2022. In a concurrently submitted unopposed ex parte application, Plaintiffs have also requested that this Court shorten the briefing schedule so that Plaintiffs may timely seek relief in a higher court. In particular, Plaintiffs propose that any opposition be filed by November 17, 2022 and any reply be filed by 2 days from the opposition's filing.

Dated: November 10, 2022

Respectfully submitted,

JONES DAY

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

R.J. REYNOLDS TOBACCO COMPANY *et al.*,

Plaintiffs,

v.

ROBERT BONTA, in his official capacity as Attorney General of California; and SUMMER STEPHAN, in her official capacity as District Attorney for the County of San Diego,

Defendants.

Case No. 3:22-cv-01755-BEN-MSB
Hon. Roger T. Benitez

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND INJUNCTION PENDING APPEAL

Hearing Date: December 12, 2022
Time: 10:30 A.M.
Courtroom: 5A

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONS, STATUTES, AND LEGISLATIVE MATERIALS

RULES AND REGULATORY MATERIALS

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs move for a preliminary injunction and an injunction pending appeal enjoining enforcement of SB793, 2019–2020 Reg. Sess. (Cal. 2020), California's ban on the retail sale of tobacco products with a characterizing flavor other than tobacco. Because the ban is scheduled to go into effect no later than December 21, 2022, and because this Court is bound by Ninth Circuit precedent to reject this motion, Plaintiffs respectfully request that this Court deny the motion by November 23, 2022 so that Plaintiffs can promptly seek relief on appeal.

Plaintiffs originally challenged SB793 in this Court shortly after the law's enactment in 2020. *See R.J. Reynolds Tobacco Co. v. Becerra*, No. 20-CV-1990 (S.D. Cal. filed Oct. 9, 2020) ("*Becerra*"). While that case was pending, a referendum challenging SB793 qualified for the November 2022 ballot, thereby suspending operation of SB793 unless and until "approved by a majority of voters." *R.J. Reynolds Tobacco Co. v. Becerra*, No. 20-CV-1990, 2021 WL 3472697, at *1 (S.D. Cal. Aug. 6, 2021). This Court therefore dismissed the lawsuit as unripe. *Id.* The election has now occurred and the voters have approved SB793. *See* Cal. Sec'y of State, State Ballot Measures – Statewide Results, https://tinyurl.com/224csfnk (last visited Nov. 10, 2022) (reporting that as of 5:40 p.m. on Nov. 9, 2022, 100% of precincts had partially reported results, and 62.3% of voters approved SB793); *see also 2022 California midterm election: Live results*, L.A. Times, https://tinyurl.com/jdbxbdxw (last visited Nov. 9, 2022) (reporting that SB793 has been approved). SB793 will therefore take effect no later than December 21, 2022. *See* Cal. Const. art. II, § 10(a); Cal. Elec. Code § 15501(b). Once the law takes effect, Plaintiffs will be forced to halt retail sales, and distribution for retail resale, of flavored tobacco products in one of the Nation's largest markets. The case is thus ripe.

Plaintiffs seek a preliminary injunction and an injunction pending appeal because the federal Tobacco Control Act expressly preempts California's flavor ban, Plaintiffs face irreparable harm, and the equities favor an injunction. Nonetheless,

Plaintiffs recognize that, at this time, their express preemption claim is foreclosed by Ninth Circuit precedent and that this Court therefore must deny this motion. *See R.J. Reynolds Tobacco Co. v. County of Los Angeles*, 29 F.4th 542 (9th Cir. 2022) ("*Los Angeles County*"), *cert. pending*, No. 22-338 (U.S. filed Oct. 7, 2022). Plaintiffs thus acquiesce in the denial of their motion while preserving their arguments for appeal, and respectfully request that this Court rule on this motion no later than November 23, 2022.[1]

Plaintiffs further respectfully move for an injunction pending appeal of this Court's inevitable denial of the motion for a preliminary injunction. *See* Fed. R. App. Proc. 8(a). Plaintiffs recognize, however, that this Court is bound to deny a motion for an injunction pending appeal for the same reason it is bound to deny the motion for a preliminary injunction. Accordingly Plaintiffs likewise acquiesce in the denial of their motion for an injunction pending appeal while preserving their arguments for appeal.

BACKGROUND

1. California Senate Bill 793

SB793 states that tobacco retailers "shall not sell, offer for sale, or possess with the intent to sell or offer for sale, a flavored tobacco product or a tobacco product flavor enhancer." SB793 § 104559.5(b)(1). California defines a "[t]obacco product" as "[a] product containing, made, or derived from tobacco or nicotine that is intended for human consumption," including "cigarettes," "chewing tobacco," "snuff," and e-cigarettes. Cal. Health & Safety Code § 104495(a)(8)(A)(i), (a)(8)(A)(ii).

SB793 defines "[f]lavored tobacco product" as "any tobacco product that contains a constituent that imparts a characterizing flavor." SB793 § 104559.5(a)(4).

[1] In a separate, unopposed ex parte application, Plaintiffs request that this Court shorten the briefing schedule for this motion. As explained in that application, the parties have conferred consistent with this Court's rules, and agree that Defendants will file an opposition within 7 days of the filing of this motion and Plaintiffs will file a reply within 2 days after the filing of the opposition.

SB793 defines "[c]haracterizing flavor" as "a distinguishable taste or aroma, or both, other than the taste or aroma of tobacco, imparted by a tobacco product or any byproduct produced by the tobacco product," including "menthol." *Id.* § 104559.5(a)(1). SB793 thus bans tobacco retailers in California from selling nearly any type of tobacco product with a characterizing flavor other than tobacco, including menthol cigarettes or menthol e-cigarettes, and subjects them to criminal penalties. SB793 would ban a flavored product even if FDA has authorized it to be sold after considering whether it is "appropriate for the protection of the public health."[2] And SB793 would ban flavored products even if FDA has authorized manufacturers to market them as presenting lower health risks when compared to using combustible cigarettes.[3] Anyone who violates the law "is guilty of an infraction" and faces a $250 fine per violation. *Id.* § 104559.5(f).

SB793 will ban Plaintiffs from selling and distributing many of their products within California. Plaintiffs R.J. Reynolds Tobacco Company, R.J. Reynolds Vapor Company, American Snuff Company, LLC, Santa Fe Natural Tobacco Company, Inc., and Modoral Brands Inc. (collectively, "Reynolds") manufacture numerous "[f]lavored tobacco product[s]," including menthol cigarettes, menthol-flavored e-cigarettes, various flavored smokeless tobacco products, and other flavored tobacco products (such as pouches and lozenges with nicotine), that they distribute for resale to consumers within California. Silva Decl. ¶¶ 6–7 (filed concurrently); Canary-Garner Decl. ¶¶ 4–5 (same). Retailer Vapin' the 619 and members of the Neighborhood Market Association sell "flavored tobacco product[s]." Sylvester Decl. ¶¶ 1–4 (same); Mansour Decl. ¶ 5 (same). Plaintiffs would continue to sell and

[2] *E.g.*, FDA Decision Summary PM000011 (Nov. 10, 2015), https://tinyurl.com/mw56k4ps (authorizing a mint snus product).

[3] *E.g.*, FDA News Release, *FDA Grants First-Ever Modified Risk Orders to Eight Smokeless Tobacco Products* (Oct. 22, 2019) (authorizing marketing of eight flavored snus products as having "a lower risk [than cigarettes] of" certain diseases), https://tinyurl.com/y6ruvbdz; *see also* FDA, *Modified Risk Granted Orders* (Mar. 11, 2022), https://tinyurl.com/y2bvbzxv.

distribute these products for resale in California but for SB793.

2. Procedural History

SB793 was enacted on August 28, 2020, and was originally set to go into effect on January 21, 2021.

Plaintiffs (and others) sued in this Court to invalidate SB793. *Becerra*, 2021 WL 3472697, at *1. While that case was pending, a referendum challenging the law qualified for the November 8, 2022 ballot, *see* Proposition 31, https://tinyurl.com/2s3v32z8 (last visited Nov. 8, 2022), thereby suspending operation of SB793 unless and until "approved by a majority of voters." *Wilde v. City of Dunsmuir*, 9 Cal. 5th 1105, 1111 (2020); *see also* Cal. Const. art. IV, § 8(c)(2). This Court dismissed that case as unripe, explaining that because Proposition 31 had qualified for the ballot, SB793 "will never be enforceable against Plaintiffs (or anyone) if it does not survive the referendum set to go forward on November 8, 2022." *Becerra*, 2021 WL 3472697, at *1. The injury Plaintiffs faced from SB793 was thus "contingent on the outcome of the referendum." *Id.* at *1–2.

November 8, 2022, has now come and gone. At the ballot box, voters approved SB793. *See supra* p.1. SB793 will therefore now take effect five days after the Secretary of State certifies the results. *See* Cal. Const. art. II, § 10(a). And certification must occur by December 16, 2022. Cal. Elec. Code § 15501(b). Thus, SB793 will be enforceable no later than December 21, 2022. Accordingly, Plaintiffs will soon be forced to halt sales and distribution of flavored tobacco products in California.

ARGUMENT

This case is now ripe for adjudication and, but for the Ninth Circuit's 2-1 decision in *Los Angeles County*, 29 F.4th 542, Plaintiffs would be entitled to a preliminary injunction and an injunction pending appeal.

First, this case is now ripe because there is no doubt that SB793 will take effect by no later than December 21, 2022. This Court previously dismissed a challenge to

SB793 after a referendum temporarily suspended operation of SB793. *Becerra*, 2021 WL 3472697, at *1. But now that voters have approved SB793, *see supra* p.1, it will go into effect five days after the Secretary of State certifies the election results, which must occur by December 16, 2022. Cal. Const. art. II, § 10(a); Cal. Elec. Code § 15501(b). Thus, absent judicial intervention, SB793 will be enforceable, and therefore harm Plaintiffs, no later than December 21, 2022. *See Arizona v. Atchison, Topeka & Santa Fe R.R.*, 656 F.2d 398, 402–03 (9th Cir. 1981) (challenge to statute ripe before its effective date).

Second, but for the Ninth Circuit's decision in *Los Angeles County*, this would be a quintessential case warranting preliminary injunctive relief. A plaintiff is entitled to a preliminary injunction if (1) "he is likely to succeed on the merits," (2) he "is likely to suffer irreparable harm" absent preliminary relief, (3) "the balance of equities tips in his favor," and (4) an "injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Under the Ninth Circuit's "sliding scale" test, injunctive relief is also appropriate where the plaintiff raises "serious questions" as to the merits and "the balance of hardships tips sharply in [plaintiff's] favor." *Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1103 n.4 (9th Cir. 2016). The standard is the same for an injunction pending appeal. *See Tandon v. Newsom*, 992 F.3d 916, 919 (9th Cir. 2021)

As to the merits, the federal Tobacco Control Act ("TCA") preempts state laws (like SB793) that regulate the flavors that manufacturers can add to tobacco products, and does not save from preemption laws (like SB793) prohibiting the sale of such products. 21 U.S.C. § 387p(a). Moreover, Plaintiffs here satisfy the other factors for a preliminary injunction. Without an injunction, Plaintiffs and numerous Californians will face serious, uncompensable injuries. For example, if SB793 goes into effect, Vapin' the 619 will likely have to close shop completely and lay off its employees. Many members of NMA are in the same boat. In addition, Modoral, which manufactures only flavored tobacco products, will be entirely cut off from one of the

Nation's largest markets. And other Reynolds entities will need to spend tens of millions of dollars to compete for former users of their flavored products who do not wish to stop using tobacco products. None of these injuries can be compensated with monetary damages given California's sovereign immunity. By contrast, the State will suffer little or no harm from a preliminary injunction or injunction pending appeal because it would merely maintain the status quo temporarily.

The plaintiffs in *Los Angeles County* (including several Plaintiffs in this case) have sought Supreme Court review of that decision. And Plaintiffs here preserve their express preemption claim for appellate review. Plaintiffs recognize, however, that absent further direction from the Supreme Court, this Court is bound by *Los Angeles County* to reject the merits of their express preemption claim and therefore to deny the motion for a preliminary injunction and injunction pending appeal. Plaintiffs request that this Court do so promptly—but no later than November 23, 2022—so that Plaintiffs can seek relief from a higher court.

I. THOUGH PLAINTIFFS' EXPRESS PREEMPTION CLAIM ON THE MERITS IS FORECLOSED BY NINTH CIRCUIT PRECEDENT, THAT PRECEDENT IS WRONG.

Plaintiffs recognize that their express preemption claim is foreclosed in this Court by *Los Angeles County*, 29 F.4th 542. To preserve their arguments for appellate review, Plaintiffs explain below that (i) the Ninth Circuit's interpretation of the TCA's preemption clause is incorrect, (ii) SB793 falls within the TCA's preemption clause even under the Ninth Circuit's erroneous decision, and (iii) the Ninth Circuit's alternative holding concerning the TCA's savings clause is likewise incorrect.

A. The Ninth Circuit's interpretation of the TCA's preemption clause is wrong.

Under the federal Tobacco Control Act, states and localities have broad authority to regulate the sale of tobacco products. They can raise the minimum purchase age, restrict sales to particular times and locations, and enforce licensing

regimes. But one thing they cannot do is completely prohibit the sale of those products for failing to meet state or local "tobacco product standards." That is because the TCA's preemption clause specifically denies states and localities the power to enact "*any*" "requirement which is different from, or in addition to," federal "tobacco product standards." 21 U.S.C. § 387p(a)(2)(A) (emphasis added). Despite that clause, however, the Ninth Circuit held that a state or locality can evade preemption by simply framing its law as a ban on the sale of products that do not meet the state or local standard. *Los Angeles County*, 29 F.4th at 542.

That decision was wrong. Indeed, as Judge Nelson's dissent in *Los Angeles County* noted, "[i]n the last two decades, the Supreme Court has twice reversed [the Ninth Circuit] for failing to find California regulations expressly preempted." *Id.* at 562 (Nelson, J., dissenting) (citing first *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004); and then *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452 (2012)).

1. The TCA's preemption clause preempts "*any*" local "requirement which is different from, or in addition to," federal "tobacco product standards." 21 U.S.C. § 387p(a)(2)(A) (emphasis added). Nonetheless, the Ninth Circuit held that as long as a local law enforcing such a requirement is framed as a sales ban, the local law is not preempted. The court explained that Los Angeles's Ordinance was "merely banning the *sale* of a certain type of tobacco product, not dictating how that product must be *produced*." 29 F.4th at 556 (emphasis added). That, in the Ninth Circuit's view, was dispositive, because "tobacco product standards" do not include sales regulations or prohibitions.

The Ninth Circuit's holding conflicts with the Supreme Court's repeated admonition that states and localities cannot evade preemption by simply enforcing their standards at the point of sale. In *Engine Manufacturers*, the Court rejected the Ninth Circuit's atextual limitation on such a preemption clause. There, California prohibited the purchase of cars that did not meet local emission standards. 541 U.S.

at 248–49. The Clean Air Act, however, expressly preempted states from adopting "*standard[s]* relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a) (emphasis added). California argued that a "standard" was only "a 'production mandate'" applicable to manufacturers; thus, the *purchase* requirement was not preempted. 541 U.S. at 254–55. But the Court specifically rejected that attempt to "engraft onto th[e] meaning of 'standard' a limiting component" found nowhere in the statutory text. *Id.* at 253. Instead, looking to the dictionary definition of "standard," the Court concluded that a "standard" applies to the final product, not simply how it is made. *Id.* Standards "target" the product itself, which means preempted "standard-enforcement efforts … can be directed to manufacturers or purchasers." *Id.* In other words, "a standard is a standard even when not enforced through manufacturer-directed regulation." *Id.* at 254.

The same is true when it comes to "tobacco product standards." A tobacco product *standard* applies to the final product, not simply to how the product is made. *See* 21 U.S.C. § 387g(a)(4)(B)(i). A sales ban and a manufacturing ban are just different ways of enforcing a standard. In either case, what is being enforced is a *standard* (no flavors in tobacco products). The Ninth Circuit's conclusion that tobacco product standards in the TCA are limited to production regulations is thus irreconcilable with *Engine Manufacturers*.

It is also irreconcilable with the TCA's plain text. The TCA specifically says that tobacco product standards can govern a tobacco product's "properties," "constituents," and "additives." *Id.* § 387g(a)(4)(B)(i). Those words likewise refer to the final product—*not* merely the production of the product. In other words, a tobacco product standard governs *what* may be produced, not just *how* it may be produced.

Indeed, the TCA makes it patently clear that the type of law at issue here (and in *Los Angeles County*)—a ban on flavored tobacco products—is a paradigmatic "tobacco product standard." One of only two tobacco product standards in the Act is a ban on flavored cigarettes (other than tobacco and menthol). *Id.* § 387g. Moreover,

the statute also expressly describes "tobacco product standards" as encompassing "provisions respecting the construction, components, *ingredients, additives, constituents, ... and properties* of the tobacco product," *id.* § 387g(a)(4)(B)(i) (emphasis added)—which plainly covers the regulation of flavors. *See, e.g.*, *R.J. Reynolds Tobacco Co. v. City of Edina*, 482 F. Supp. 3d 875, 879 (D. Minn. 2020) ("[T]here can be no dispute that a provision respecting the flavor of a tobacco product is a provision respecting a 'propert[y]' of that product."), *appeal pending*, No. 20-2852 (8th Cir. argued May 12, 2021).[4]

Thus, the Ninth Circuit's artificial limitation of "tobacco product standards" not only conflicts with *Engine Manufacturers* but also the text of the TCA itself.

2. Even if tobacco product standards were somehow limited to production mandates (they are not), the Ninth Circuit's decision conflicts with *National Meat*, 565 U.S. 452. In *National Meat*, California banned slaughterhouses from selling meat from animals that could not walk. Manufacturers argued that the Federal Meat Inspection Act (FMIA) preempted California's law. That Act prohibited states from adopting "[r]equirements … with respect to premises, facilities and operations of any establishment … which are in addition to, or different than those made under [the FMIA]." *Id.* at 458. Unlike here, this preemption provision was in fact textually limited to production mandates. And like Los Angeles County argued, California argued in *National Meat* that its rule was not preempted because it regulated sales, not manufacturing. *Id.* at 463.

The Supreme Court, however, unanimously rejected the argument. "[I]f the

[4] FDA too has repeatedly concluded that restrictions on flavors—including sales bans—are tobacco product standards. *See* FDA, *Tobacco Product Standard for Menthol in Cigarettes*, 87 Fed. Reg. 26,454, 26,456 (May 4, 2022) (invoking its "authorities to revise or issue tobacco product standards" to propose a rule, titled "Tobacco Product Standard for Menthol in Cigarettes," which would prohibit menthol-flavored cigarettes); FDA, *Illicit Trade in Tobacco Products after Implementation of an FDA Product Standard* 4 (Mar. 15, 2018) (explaining FDA was "considering establishing a product standard prohibiting the manufacture, *sale*, and distribution of tobacco products with certain characterizing flavors" (emphasis added)).

sales ban were to avoid the FMIA's preemption clause, then any State could impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved. That would make a mockery of the FMIA's preemption provision." *Id.* at 464.

So too here. "[E]ven if it were necessary to show a direct ban on [production], [California's] Ordinance is in effect such a ban. There is little difference between the government telling a manufacturer that it may not add an ingredient that imparts a flavor to a tobacco product and the government telling a manufacturer that it may not sell a tobacco product if it has added an ingredient that imparts a flavor." *Edina*, 482 F. Supp. 3d at 879 (citing *Nat'l Meat*, 565 U.S. at 464). In that way, California's ban does regulate how tobacco products must be produced. *Id.*

B. Even under *Los Angeles County*, SB793 falls under the TCA's preemption clause.

Even under *Los Angeles County*'s (erroneous) interpretation of the TCA's preemption clause, SB793 qualifies as a preempted tobacco product standard (though Plaintiffs recognize that under *Los Angeles County*, SB793 would nonetheless be saved by the TCA's savings clause, *see infra* Part I.C.). The Ninth Circuit interpreted "tobacco product standards" to be limited to requirements dictating "how [a] product must be produced." 29 F.4th at 556. That is incorrect for the reasons discussed above. But even under that interpretation, SB793 falls squarely within the preemption clause, because SB793 indisputably reaches into and regulates how "flavored tobacco products" must be produced. SB793 bans "[f]lavored tobacco products." SB793 § 104559.5(b). SB793 defines "flavored tobacco product" as a product that "contains a *constituent* that imparts a characterizing flavor." *Id.* § 104559.5(a)(4) (emphasis added). And SB793 in turn defines a "[c]onstituent" as "any ingredient, substance, chemical, or compound … *that is added by the manufacturer* … during the processing, manufacture, or packing of the tobacco product." *Id.* § 104559.5(a)(2) (emphasis added).

In other words, SB793 only applies to products where a manufacturer adds flavor as part of the manufacturing process. That clearly tells manufacturers how to produce their products. Thus, even under the Ninth Circuit's interpretation of the TCA, SB793 falls under the TCA's preemption clause.

Los Angeles County looked to the Second Circuit's decision in *U.S. Smokeless Tobacco Manufacturing Co. v. City of New York*, 708 F.3d 428, 434–35 (2d Cir. 2013). And that court explicitly said that a law that regulates manufacturing (such as SB793) would fall under the TCA's preemption clause. The Second Circuit explained:

> The line between regulating the sale of a finished product and establishing product standards will not always be easy to draw. Any finished product can be described in terms of its components or method of manufacture. "Flavored tobacco products" are no exception, and can arguably be described *either* [1] *as a category of finished product or* [2] *as products that are manufactured with ingredients that impart a flavor.*

Id. (emphasis added). There the Second Circuit upheld New York City's law only because it fell within the first category: "Whether a product is governed by [New York City's law] depends on its characteristics as an end product, and not on whether it was manufactured in a particular way or with particular ingredients." *Id.* at 435. SB793, in contrast, expressly turns on how the product is manufactured and therefore falls within the Second Circuit's second, preempted category. As a result, SB793 falls under the TCA's preemption clause even under the reasoning of the Second Circuit and *Los Angeles County*.

C. *Los Angeles County* misinterpreted the TCA's savings clause.

Even if SB793 falls under the TCA's preemption clause as interpreted by *Los Angeles County*, *Los Angeles County*'s alternative holding concerning the scope of the savings clause would still bind this Court on the merits of Plaintiffs' express-preemption claim. But *Los Angeles County*'s interpretation of the savings clause is also incorrect. The TCA distinguishes between requirements "relating to" the sale of tobacco products, on the one hand, and requirements "prohibiting" their sale, on the

other. *Id.* § 387p(a)(1). The savings clause saves the first type of requirement, but not the second, and so does not save the State's absolute ban. 21 U.S.C. § 387p(a)(2)(B). The Ninth Circuit's contrary conclusion renders the preemption clause a complete nullity, which defies *Engine Manufacturers* and *National Meat*. The interpretation also fails to give effect to Congress's explicit distinction between requirements "relating to" the sale of tobacco products and requirements "prohibiting" their sale. That conflicts with the Supreme Court's decision in *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929 (2022).

1. In *Ysleta*, the Supreme Court held that the words "regulations" and "prohibitions" must be given independent meaning, especially when used in the same statute. 142 S. Ct. at 1938. *Ysleta* interpreted the Restoration Act's bar on Indian Tribes' offering "gaming activities which are prohibited by the laws of … Texas." *Id.* at 1935 (quoting 101 Stat. 668). Texas argued that this provision subjected Tribes to all Texas gaming *regulations* (not just the outright prohibitions). The Court rejected that reading, relying on a separate provision of the Act that says the Act is not a "grant of civil or criminal regulatory jurisdiction to … Texas." *Id.* at 1935–36 (quoting 101 Stat. at 669).

"Perhaps the most striking feature about [the Act's] language," the Court reasoned, "is its dichotomy between prohibition and regulation." *Id.* at 1938. "[T]o prohibit something means to 'forbid,' 'prevent,' or 'effectively stop' it …." *Id.* (quoting *Webster's Third Int'l Dictionary* 1813 (1986)). By contrast, "to regulate something is usually understood to mean to 'fix the time, amount, degree, or rate' of an activity 'according to rule[s].'" *Id.* (quoting *Webster's Third* 1913). "Frequently, then, the two words are 'not synonymous.'" *Id.* (quoting *Black's Law Dictionary* 1212 (6th ed. 1990)). The Court further highlighted its "usual presumption that 'differences in language like this convey differences in meaning.'" *Id.* at 1939 (quoting *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017)). And *Ysleta* emphasized that a construction that renders "regulations simultaneously

both (permissible) prohibitions and (impermissible) regulations" had to be rejected. *Id.* Accordingly, laws that "merely regulate[]" gaming do not apply to the Tribe. *Id.* at 1937.

2. The Ninth Circuit's interpretation of the TCA—that it saves sales prohibitions—conflicts with *Ysleta*. Foremost, the savings clause only saves "requirements relating to the sale" of tobacco products. 21 U.S.C. § 387p(a)(2)(B). Under *Ysleta*, that cannot include prohibitions, since the TCA's text explicitly distinguishes between requirements "relating to the sale" and requirements "prohibiting the sale."

The TCA's preservation clause provides: "Except as provided in [the preemption clause], nothing [in the TCA] shall be construed to limit the authority of" state and local governments, federal agencies, the military, and Indian tribes, "to enact … any law … with respect to tobacco products that is in addition to, or more stringent than, requirements established under [the TCA], including a law … *relating to or prohibiting* the sale, distribution, [or] possession" of "tobacco products by individuals of any age." *Id.* § 387p(a)(1) (emphasis added). It thus gives state and local governments, federal agencies, the military, and Indian tribes broad authority, including the authority to adopt requirements "relating to *or* prohibiting" the sale of tobacco products. But as its text also makes clear, it is subject to the exception set forth in the preemption clause.

The preemption clause, then, takes away from state and local governments (but not others) part of the broad power conferred by the preservation clause. Under the preemption clause, state and local governments cannot enact "*any requirement* which is different from, or in addition to," federal tobacco product standards. *Id.* § 387p(a)(2)(A) (emphasis added). The capacious phrase "any requirement" sweeps in both requirements "relating to" and "prohibiting" the sale of tobacco products—both are preempted if they are "different from, or in addition to," federal tobacco product standards.

Finally, the savings clause restores only part of what the preemption clause takes away. It says the preemption clause "does not apply to requirements *relating to* the sale" of tobacco products. *Id.* § 387p(a)(2)(B) (emphasis added). But absent is any reference to the power to impose requirements "*prohibiting* the sale" of tobacco products—meaning that state and local governments still lack that power.

Congress's decision to use "relating to or prohibiting" sales in the preservation clause, but to omit "or prohibiting" from the nearly identical phrase in the savings clause, shows that Congress deliberately excluded sales prohibitions from the class of non-preempted laws in the savings clause. Congress generally "acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another." *Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021). And "[c]ourts are required to give effect to Congress' express inclusions and exclusions." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018).

The only way to reconcile the TCA's preemption-related clauses is to recognize that while local governments have broad authority to regulate the sales process, one thing they may not do is absolutely prohibit the sale of products that fail to meet their preferred product standards. The Ninth Circuit's contrary reading renders the TCA "a jumble." *Ysleta*, 142 S. Ct. at 1939. And it leaves the preemption clause with "no work to perform, its terms dead letters all." *Id.*; *see also supra* Part I.A.1., I.A.2. (explaining that this interpretation also conflicts with *Engine Manufacturers* and *National Meat*).

* * *

Thus, under the correct interpretation of the TCA and the Supreme Court's express preemption precedents, Plaintiffs are likely to prevail on the merits. Plaintiffs preserve this argument on the merits for further appellate review. Because of the Ninth Circuit's contrary decision in *Los Angeles County*, though, Plaintiffs recognize that, absent further direction from the Supreme Court, this Court must deny the motion for a preliminary injunction and injunction pending appeal. *Rutherford v.*

Crosby, 438 F.3d 1087, 1093 (11th Cir. 2006) (refusing to grant injunction in light of circuit precedent even though Supreme Court was considering the merits of the claim in another case); *Neville v. Johnson*, 440 F.3d 221, 222 (5th Cir. 2006) (same).

II. THE BAN WILL IRREPARABLY HARM PLAINTIFFS.

Preliminary injunctive relief requires irreparable injury, "irrespective of the magnitude of the injury." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999); *see also Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012) (courts "have long recognized" that when, as here, "the threatened harm is more than de minimis, it is not so much the magnitude but the irreparability that counts for purposes of" temporary relief); *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 600 (6th Cir. 2014) ("a loss for which there is no remedy" because of sovereign immunity is "an irreparable harm"). First, the inability to recover monetary damages because of sovereign immunity typically renders the harm suffered irreparable. *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (irreparable harm where "no guarantee of eventual recovery for financial harm"). That is why "complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part and concurring in the judgment). Further, unlawful government enforcement action can do irreparable injury to a business's goodwill and reputation. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001). Finally, being forced to comply with an unconstitutional law is by definition irreparable harm. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (irreparable harm when government enforces a preempted law); *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009) (similar).

Here, Plaintiffs stand to suffer these three distinct forms of irreparable harm.

First, SB793 will cause Plaintiffs substantial, unrecoverable financial losses. Vapin' the 619 will likely have to close up shop completely and lay off its employees.

Sylvester Decl. ¶¶ 7–8. Numerous other retailers in the NMA face the same fate. Mansour Decl. ¶ 7. Moreover, Modoral, which exclusively manufactures "flavored tobacco products," will be cut off from one of the largest markets in the United States and thereby lose substantial revenue. *See* Canary-Garner Decl. ¶ 8. And other Reynolds entities will have to spend tens of millions of dollars to compete for former users of their flavored products who do not wish to stop using tobacco products. Canary-Garner Decl. ¶ 7; Silva Decl. ¶ 9. These financial injuries are irreparable because money damages are unavailable for preemption-based claims under § 1983 and the TCA, *see Holley v. Cal. Dep't of Corr.*, 599 F.3d 1108, 1111 (9th Cir. 2010), so Plaintiffs would not be able to obtain compensation for their significant, ongoing losses if this Court (or a higher court) were to invalidate California's law.

Second, Plaintiffs stand to lose customer goodwill and suffer harm to their reputation as a result of California's absolute ban of products they either manufacture or sell, which cannot be compensated for through monetary damages (even if sovereign immunity did not separately bar recovery of monetary damages in this case). Silva Decl. ¶ 9; Canary-Garner Decl. ¶ 9; *see also Stuhlbarg Int'l Sales Co.*, 240 F.3d at 841.

Third, because California's law is preempted, it is invalid under the Supremacy Clause and therefore unconstitutional. *See supra* Part I. Being forced to comply with such an unconstitutional law constitutes irreparable harm per se. *See Morales*, 504 U.S. at 381.

III. THE EQUITIES AND PUBLIC INTEREST FAVOR PLAINTIFFS.

Where, as here, "the Government is the opposing party," the last two factors "merge": the government's interest is the public interest. *Nken v. Holder*, 556 U.S. 418, 435 (2009); *see Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 103 (D.C. Cir. 2021). Here, those merged factors weigh decisively in favor of preliminary relief.

Foremost, the primary purpose of preliminary injunctive relief is preservation of the status quo. *See Ramos v. Wolf*, 975 F.3d 872, 887 (9th Cir. 2020). Staying

SB793's effect will preserve the status quo that has existed for decades. A small delay of a controversial and unconstitutional law will not cause the state any harm. Moreover, the government "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). And since SB793 is preempted, it is unlawful and should not go into effect.

The public interest also favors a stay. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). It is also in the public interest to prevent the state from violating federal law. *See Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013). The balance of harms thus strongly supports a stay. Abruptly banning flavored tobacco products from the market while a petition for certiorari regarding the dispositive legal question is pending would harm the hundreds of thousands of adult tobacco users who use such products (and which Congress and FDA have allowed to remain on the market) and the companies like Plaintiffs who manufacture and sell those products.

Moreover, as FDA has recognized, there is already a widespread illicit trade in tobacco products. *See* FDA, *Deeming Tobacco Products*, 81 Fed. Reg. 28,973, 29,007 (May 10, 2016). If consumers cannot obtain flavored tobacco products from reputable establishments because of California's ban, they may well try to obtain them from illicit sources. Not only could an increased illicit trade present potential risks to consumers, but it would almost certainly lead to an increase in associated crimes. Scientific studies and the experiences of other countries that have banned flavored tobacco products confirm as much. *See* RAI Services Company, *Comment from RAI Services Company* 83–101 (Aug. 3, 2022), https://www.regulations.gov/comment/FDA-2021-N-1349-175111 (discussing the risks of an increased illicit trade based on FDA's proposed federal ban of menthol as a characterizing flavor in cigarettes).

The ban could also cause significant negative consequences for vulnerable

populations, including communities of color, and especially African Americans. *See id.* at 102–18. Because African American smokers overwhelmingly prefer menthol cigarettes, California's ban would disproportionately harm African Americans, including by exposing them to negative encounters with law enforcement. *See id.* at 102–07 (discussing how FDA's proposed menthol ban will disproportionately harm African Americans).

SB793 also may cause consumers to engage in risky product tampering and self-mentholation, given the relative ease of converting regular cigarettes to mentholated cigarettes and the ready availability of products suitable for mentholating cigarettes. *See id.* at 118–20. Moreover, because SB793 will severely restrict the availability of menthol-flavored cartridge-based electronic nicotine delivery system products, adults who use those products may turn to combustible cigarettes. *See id.* at 79–82. And the ban may cause consumer confusion regarding the risks of tobacco products, potentially leading to more use of non-flavored tobacco products because consumers will naturally interpret that action as implying that flavored products are especially risky (as compared with non-flavored products that remain on the market), *see id.* at 122–28. Add to that the broader economic costs—to tobacco growers, wholesalers, and those whom they employ, as well as to state and federal tax revenues—and it is clear that the public interest favors a stay.

CONCLUSION

Plaintiffs acquiesce in the denial of their motion for a preliminary injunction in light of binding circuit precedent, but preserve their express preemption claim for further appellate review. Plaintiffs also acquiesce in the denial of an injunction pending appeal for the same reasons and with the same reservation. Plaintiffs request that this Court rule on this motion no later than November 23, 2022.

Dated: November 10, 2022

Respectfully submitted,

JONES DAY

By: /*s/ Steven N. Geise*

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

R.J. REYNOLDS TOBACCO COMPANY, *et al.*,

Plaintiffs,

v.

ROBERT BONTA, in his official capacity as Attorney General of California; and SUMMER STEPHAN, in her official capacity as District Attorney for the County of San Diego,

Defendants.

Case No. 3:22-cv-01755-BEN-MSB

DECLARATION OF MARTIN F. SILVA

DECLARATION OF MARTIN F. SILVA

I, MARTIN F. SILVA, declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

Introduction & Background

1. I am the President of Reynolds Brands Inc. and President of Lorillard Licensing Company LLC, both of which are direct wholly owned subsidiaries of R.J. Reynolds Tobacco Company ("RJRT"). RJRT is an indirect wholly owned subsidiary of Reynolds American, Inc. RJRT was founded in 1875 and today is the second-largest tobacco company in the United States and manufactures several leading brands of cigarettes (such as Newport and Camel). I have a Diploma of Technology–Management Systems, from the British Columbia Institute of Technology.

2. I joined the Reynolds American organization in November 2019, as Senior Vice President of Digital Marketing and Commercial Activation of a Reynolds American subsidiary. In January 2021, my role expanded to include responsibility for National Sales and Trade Marketing. In my current positions as President of Reynolds Brands Inc. and President of Lorillard Licensing Company LLC, which I have held since June 1, 2022, I have responsibility for the marketing of RJRT's portfolio of premium cigarette brands (Newport and Camel), including overall brand strategic planning, product development, and advertising and marketing communications with consumers, including packaging and point-of-sale marketing at retail.

3. As President of Reynolds Brands Inc. and President of Lorillard Licensing Company LLC, I sit on the Marketing Leadership Team, which gives me access to and knowledge of the marketing of American Snuff Company's ("ASC") smokeless tobacco products (such as its flagship Grizzly brand), including overall brand strategic planning, product development, and advertising and marketing communications with consumers, including packaging and point-of-sale marketing at retail.

4. I am also Senior Vice President of Santa Fe Natural Tobacco Company, Inc. ("SFNTC"), a position that I have held since June 1, 2022. In that capacity, I have responsibility for the marketing of SFNTC's Natural American Spirit cigarettes, including overall brand strategic planning, product development, and advertising and marketing communications with consumers, including packaging and point-of-sale marketing at retail.

5. This declaration describes the substantial financial losses that will be incurred by RJRT, ASC, and SFNTC as a result of the State of California's recent ban on flavored tobacco products. SB793 § 104559.5(b)(1) ("the Act"). It is my understanding that the Act makes it illegal for tobacco retailers to sell or offer for sale "flavored tobacco product[s]" as defined in the Act (including menthol cigarettes) within the State of California. *See id.*

Substantial Financial Losses

6. As noted above, it is my understanding that the Act bans tobacco retailers from selling or offering to sell flavored tobacco products—including flavored tobacco products manufactured and sold by RJRT, ASC, and SFNTC—to any consumer within the State of California.

7. RJRT, ASC, and SFNTC manufacture flavored tobacco products and distributes those products for resale. Because of SB793, RJRT, ASC, and SFNTC will need to stop distributing those products for resale within the State of California. But for SB793, RJRT, ASC, and SFNTC would continue distributing such products for resale in the State of California after the effective date of the Act.

8. Based on my positions and involvement with RJRT, ASC, and SFNTC, I have access to and responsibilities for financial and sales data and forecasts related to flavored tobacco products for each entity. I base the following figures and estimations on my personal knowledge as a senior executive of these companies.

9. I estimate that RJRT, ASC, and SFNTC will be forced to spend tens of millions of dollars on new marketing-related activities in order to

compete within the State of California for former users of the companies' flavored tobacco products who do not wish to stop using tobacco products. If the Act is not enjoined, RJRT, ASC, and SFNTC will incur these financial injuries.

10. RJRT, ASC, and SFNTC also will lose customer goodwill and suffer harm to their reputations if the Act is not enjoined. Based on my industry experience and personal knowledge relating to tobacco products, I believe that, once flavored tobacco products manufactured by RJRT, ASC, and SFNTC are removed from store shelves, some consumers will resort to using other tobacco products and may never pledge the same brand loyalty they once had to these products, even if SB793 is ultimately invalidated.

11. In addition, these companies will likely lose relationships it has taken years to build with retailers. If these products are removed from store shelves, they may never return (even if SB793 is ultimately invalidated) because at least some retailers will likely devote that empty shelf space to products manufactured by other manufacturers. I believe this loss of goodwill and reputation may be irreversible.

Summary and Conclusion

12. For the reasons described above, absent relief from the Court, RJRT, ASC, and SFNTC will suffer financial injuries, loss of customer goodwill, and harm to their reputations if the Act takes effect and during the period while the legality of the Act is determined.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 9, 2022.

Martin F. Silva

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

R.J. REYNOLDS TOBACCO COMPANY, *et al.*,

Plaintiffs,

v.

ROBERT BONTA, in his official capacity as Attorney General of California; and SUMMER STEPHAN, in her official capacity as District Attorney for the County of San Diego,

Defendants.

Case No. 3:22-cv-01755-BEN-MSB

DECLARATION OF CHRISTY L. CANARY-GARNER

DECLARATION OF CHRISTY L. CANARY-GARNER

I, CHRISTY L. CANARY-GARNER, declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

Introduction & Background

1. I am Vice President, Business Management, at R.J. Reynolds Vapor Company ("RJRV"), a position that I have held since 2018. RJRV is an indirect wholly owned subsidiary of Reynolds American, Inc. I have been employed by RJRV from 2018 to the present. Prior to that, I was employed for fourteen years by R.J. Reynolds Tobacco Company, another subsidiary of Reynolds American, Inc. And before that, I worked for over eleven years at Brown & Williamson Tobacco, which merged with R.J. Reynolds Tobacco Company in 2004. As Vice President, Business Management, at RJRV, I am responsible for the commercial business management of the Vuse brand, including portfolio design; promotion strategy; volume and share; and financial P&L delivery. I also have access to the company's sales data.

2. I am also a Vice President at Modoral Brands Inc. ("Modoral"), a position that I have held since 2021. Modoral is a subsidiary of RAI Innovations Company; RAI Innovations Company is a subsidiary of Reynolds American Inc. In my role at Modoral, I have access to the company's sales data.

3. This declaration describes the substantial financial losses that will be incurred by RJRV and Modoral as a result of the State of California's recent ban on flavored tobacco products. SB793 § 104559.5(b)(1) ("the Act"). It is my understanding that the Act makes it illegal for tobacco retailers to sell or offer for sale "flavored tobacco product[s]" as defined in the Act (including menthol-flavored vapor products and flavored nicotine lozenges and pouches) within the State of California. *See id.*

Substantial Financial Losses

4. RJRV manufactures tobacco- and menthol-flavored vapor products under the brand name "VUSE," and distributes those products for resale. Because of

SB793, RJRV will need to stop distributing its menthol-flavored products for resale within the State of California. But for SB793, RJRV would continue distributing such products for resale in the State of California after the effective date of the Act.

5. Modoral manufactures flavored tobacco products, including nicotine lozenges and pouches, under the brand name "VELO" and distributes those products for resale. Because of SB793, Modoral will need to stop distributing those products for resale within the State of California. But for SB793, Modoral would continue distributing such products for resale in the State of California after the effective date of the Act.

6. Based on my positions and involvement with RJRV and Modoral, I have access to and responsibilities for financial and sales data and forecasts related to RJRV's menthol-flavored vapor products and Modoral's flavored nicotine lozenges and pouches. I base the following figures and estimations on my personal knowledge as a senior executive of these companies.

7. I estimate that RJRV will have to spend millions of dollars on marketing-related activities to compete within the State of California for former consumers of menthol Vuse products who do not wish to stop using tobacco products. If the Act is not enjoined, RJRV will incur these financial injuries.

8. I estimate that Modoral will lose millions of dollars in gross revenue per year because none of its products will be allowed to be legally sold within the State of California. This represents a significant percentage of Modoral's overall yearly revenue. If the Act is not enjoined, Modoral will incur these financial injuries.

9. RJRV and Modoral also will lose customer goodwill and suffer harm to their reputations if the Act is not enjoined. Based on my industry experience and personal knowledge relating to vapor products, I believe that, once menthol Vuse and flavored VELO products are removed from store shelves, some consumers will resort to using other, non-RJRV and non-Modoral tobacco products and may never pledge

the same brand loyalty they once had to Vuse or VELO products, even if SB793 is ultimately invalidated.

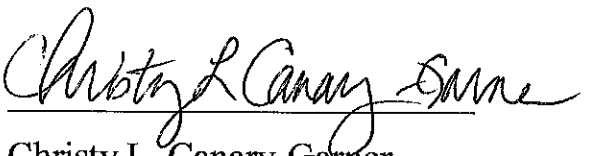
10. In addition, RJRV and Modoral will likely lose relationships it has taken years to build with retailers. If RJRV and Modoral's flavored tobacco products are removed from store shelves, they may never return (even if SB793 is ultimately invalidated) because at least some retailers will likely devote that empty shelf space to other, non-RJRV and non-Modoral tobacco products. I believe this loss of goodwill and reputation may be irreversible.

Summary and Conclusion

11. For the reasons described above, absent relief from the Court, RJRV and Modoral will suffer financial injuries, loss of goodwill, and harm to their reputations if the Act takes effect and during the period while the legality of the Act is determined.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 9, 2022.



Christy L. Canary-Garner

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Defendants.

Case No. 3:22-cv-01755-BEN-MSB

DECLARATION OF MOLLY SYLVESTER

DECLARATION OF MOLLY SYLVESTER

I, MOLLY SYLVESTER, declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

1. I am the owner, Managing Member, and CEO of MORIJA, LLC, dba Vapin' the 619 ("Vapin' the 619"), a California corporation headquartered in El Cajon, California. Vapin' the 619 has a retail establishment located on Clairemont Mesa Boulevard in San Diego, California, which derives its revenue from the sale of vaping devices and flavored e-liquids that may be aerosolized in vaping devices ("flavored vapor products").

2. I have been the CEO of Vapin' the 619 since 2015. In that capacity, I have responsibility for, among other things, the sale of flavored vapor products.

3. This declaration describes the substantial financial losses that will be incurred by Vapin' the 619 as a result of the State of California's recent ban on flavored tobacco products. *See* SB793 § 104559.5(b)(1) ("the Act"). It is my understanding that the Act makes it illegal for tobacco retailers to sell or offer for sale "flavored tobacco product[s]" as defined in the Act within the State of California. *See id.*

4. Vapin' the 619 is a tobacco retailer as defined in the Act and sells tobacco products that are subject to the Act's prohibition on flavored tobacco products. Because of SB793, Vapin' the 619 will need to stop selling and offering for sale those products. But for SB793, Vapin' the 619 would continue to sell such products after the Act takes effect.

5. Based on my position, involvement, and ownership, I have access to and responsibilities for financial and sales data and forecasts related to flavored tobacco products sold by Vapin' the 619. I base the following figures and estimations on my personal knowledge as co-owner and CEO of Vapin' the 619.

6. Based on prior year revenues, I estimate that Vapin' the 619's total annual revenue from the sale of flavored tobacco products within the State of California amounts to hundreds of thousands of dollars. If the Act is not enjoined, Vapin' the 619 will incur substantial losses in revenue from the sale of such products.

7. More significantly, if the Act is not enjoined, Vapin' the 619 likely will have to close permanently. Most of the store's revenues are attributable to the sale of flavored e-liquids that will be illegal under the Act. Only approximately 3% of the store's sales are attributable to tobacco-flavored e-liquids, which are the only e-liquids that can be sold once the Act goes into effect. The store cannot stay in business selling only vapor devices and tobacco-flavored e-liquids.

8. When Vapin' the 619 closes, it will need to lay off the store's several employees. In addition, the store's inventory of flavored vapor tobacco products will be rendered worthless.

9. For the reasons described above, absent relief from the Court, Vapin' the 619 will suffer a devastating loss in revenue, be forced to shut down, and have to lay off several employees if the Act takes effect during the period while its legality is determined.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 9, 2022.

DocuSigned by:
Molly Sylvester
857CAED519044D3...

MOLLY SYLVESTER

APPENDIX G

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

R.J. REYNOLDS TOBACCO COMPANY, *et al.*,

Plaintiffs,

v.

ROBERT BONTA, in his official capacity as Attorney General of California; and SUMMER STEPHAN, in her official capacity as District Attorney for the County of San Diego,

Defendants.

Case No. 3:22-cv-01755-BEN-MSB

DECLARATION OF MARLON MANSOUR

DECLARATION OF MARLON MANSOUR

I, MARLON MANSOUR, declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

1. I am the President and Chief Executive Officer of the Neighborhood Market Association, Inc. ("NMA"). NMA is a local non-profit industry trade association consisting of various family-owned businesses within San Diego County, California, and other communities within California, Nevada, and Arizona. Most of NMA's member companies are located in the State of California, including MORIJA, LLC dba Vapin' the 619, a co-plaintiff in this case.

2. NMA is committed to advancing the interests of independently owned tobacco retailers, wholesalers, and manufacturers, including grocery and convenience stores and vape and smoke shops. NMA supports rational regulations and policies that protect the public health and ensure that tobacco products are not accessible to minors, while enabling the continued growth of small businesses within the diverse industry.

3. In my capacity as president and CEO of NMA, I have responsibility for communicating with NMA members on a regular basis and advocating for NMA members' interests.

4. This declaration describes the substantial financial losses that will be incurred by members of NMA as a result of the State of California's ban on flavored tobacco products. *See* SB793 § 104559.5(b)(1) ("the Act"). It is my understanding that the Act makes it illegal for tobacco retailers to sell or offer for sale "flavored tobacco product[s]" as defined in the Act within the State of California. *See id.*

5. Many of NMA's members are tobacco retailers who sell flavored tobacco products, including those manufactured by co-plaintiffs R.J. Reynolds Tobacco Company, R.J. Reynolds Vapor Company, American Snuff Company, LLC, Santa Fe Natural Tobacco Company, Inc. and Modoral Brands Inc. Moreover, many of NMA's members—including Vapin' the 619—are small businesses who maintain an inventory of primarily or exclusively flavored tobacco products. But for the Act, those members of NMA who

currently sell flavored tobacco products would continue to do so to consumers over the age of 21 in California.

6. Over the past several years, a number of California localities have enacted and enforced similar flavored-tobacco bans. My assessment of the impact of California's ban on NMA's members is based in part on the experiences that NMA's members and other retailers have had with those county- and city-level measures.

7. If the Act is not enjoined, many of NMA's members will likely face financial ruin. This is particularly true for tobacco and vape retailers, because those entities are heavily reliant on revenues from the sale of flavored tobacco products. I expect that, if not enjoined, the Act could lead to a wave of store closures, significant loss of income, and even personal bankruptcy filings by many tobacco and vape retail owners throughout the State of California. Many individuals employed by retailers forced to close their business or suffer loss of income will lose their jobs. Currently, the NMA has over 600 members and we estimate that dozens of them will go out of business. Hundreds will suffer revenue losses estimated at 25-35% of their total revenues.

8. For the reasons described above, absent relief from the Court, NMA's members will suffer devastating losses in revenue while attempting to comply with the Act after it takes effect and during the period while the legality of the Act is determined. Even worse, many members will face permanent closure, and numerous Californians will lose their jobs.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 9, 2022.

DocuSigned by:
Marlon Mansour
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MARLON MANSOUR