No. 22A474

In the

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY, ET AL.

Petitioners,

v.

ROBERT BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA, ET AL.

Respondents.

On Application for Stay to the Honorable Elena Kagan, Associate Justice of the Supreme Court and Circuit Justice for the Ninth Circuit, from the United States Court of Appeals for the Ninth Circuit, No. 22-56052

MOTION OF THE PUBLIC HEALTH LAW CENTER, ACTION ON SMOKING AND HEALTH, CHANGELAB SOLUTIONS, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, LEGAL RESOURCE CENTER FOR PUBLIC HEALTH POLICY, AND THE PUBLIC HEALTH ADVOCACY INSTITUTE FOR LEAVE TO FILE THE ATTACHED BRIEF AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS' OPPOSITION TO THE EMERGENCY APPLICATION FOR A WRIT OF INJUCTION

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The Public Health Law Center, Public Health Law Center, Action on Smoking and Health, Changelab Solutions, the International Municipal Lawyers Association, Legal Resource Center for Public Health Policy, and the Public Health Advocacy Institute respectfully move for leave to file the attached brief as amici curiae in support of respondents and in opposition to the emergency application for a writ of injunction.

On November 29, 2022, R.J. Reynolds Tobacco Company and other tobacco companies filed an emergency application for a writ of injunction to stay California's Senate Bill 793 (S.B. 793) from going into effect on December 21, 2022. Due to the expedited nature of this matter, counsel for all parties were notified and provided their consent to the filing of this amicus brief the very next day. Justice Elena Kagan, Circuit Justice for the Ninth Circuit, ordered the State of California to file its response by December 6, 2022. Accordingly, amici respectfully request leave to file the enclosed brief on that same date and to file in unbound format on 8½-by-11-inch paper.

Amici curiae are six of the nation's leading nonprofit organizations supporting state and local government authority to protect public health. They are committed to supporting democratically enacted policies by state and local governments that educate the public about, and protect the public from, the devastating health consequences of tobacco. Amici submit this brief to protect the authority of state and local governments to enact public health measures regarding tobacco products that will protect their communities.

Amici have worked with governments at every level—Tribal, federal, state, and local—to implement policies to protect health. They have a deep knowledge of, and have participated in, the historic and critical role that local governments have played in protecting the health of their communities, including as related to tobacco products. Therefore, they are particularly well suited to address the role that state and local governments have historically played in tobacco control and how the TCA preserved that prominent role going forward. Particularly, the amici understand how the tobacco industry's efforts to expand the scope of the TCA's preemption would hamper local democratic measures to address public health and health equity—although Congress expressly "preserved" and "saved" the ability of state and local governments to do so in the TCA.

For the foregoing reasons, amici respectfully request that the Court grant leave to file the attached amicus brief at the time and in the format submitted.

Respectfully submitted,

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INTRODUCTION AND SUMMARY OF ARGUMENT [1]

California's S.B. 793 does one thing—it prohibits tobacco *retailers* from selling certain flavored tobacco products within the State's borders. Tobacco *manufacturers* can still make their products with whatever processes, ingredients, components, filters, and other properties they choose, so long as they are complying with federal regulations. The law does not require the manufacture of any special cigarette, cigar, vape product, or chew tobacco. And the law does not even prohibit the possession or use of flavored tobacco products in California. Nor does it prohibit the manufacture of any flavored tobacco products within the State. Instead, S.B. 793 simply provides that of all tobacco products that manufacturers place in the stream of commerce, some—those imparting a distinct non-tobacco taste or aroma—cannot be sold within its borders. That's it.

It is, therefore, a measure "relating to or prohibiting the sale" of tobacco products—which the Tobacco Control Act (TCA) explicitly allows states and local governments to adopt—and not a "product standard," which Congress has reserved to the Food and Drug Administration (FDA). *See* 21 U.S.C. § 387g, p. Thus, as every circuit to consider the question has held, the law is not preempted.

[1] All parties consent to the filing of this brief, and no counsel for any party authored it in whole or part and no person other than amici and their counsel made a monetary contribution to its preparation and submission.

California's elected leaders, following the Surgeon General's reporting, determined that S.B. 793 was necessary to reduce youth access to flavored tobacco. *See* DHHS, *Preventing Tobacco Use Among Youth and Young Adults: A Rep't of the Surgeon Gen.* 537–38 (2012), https://perma.cc/6EEU-PHH5 ("SG Rep't"). Flavors hook youth on nicotine, leading to deleterious and fatal health consequences. Tobacco companies have long used flavors to attract youth and get new generations addicted to their products. SG Rep't at 538. For these reasons, the State of California did what localities in the United States have had authority to do for over a century: it prohibited the sale of certain tobacco products. *See Austin v. Tennessee*, 179 U.S. 343, 362 (1900). And despite the tobacco industry's $20 million dollar attempt to nullify S.B. 793 through a referendum, the people of California resoundingly affirmed S.B. 793 by a near two-thirds majority. *See* Cal. Sec'y of State, Unofficial Election Results, Proposition 31 (Nov. 23, 2022), https://tinyurl.com/tm2p8ve8; CTFK, "California Voters Overwhelmingly Uphold Law Ending Sale of Flavored Tobacco Products, Delivering Huge Win for Kids Over Tobacco Industry," available at https://perma.cc/5WKC-WLJJ (Nov. 30, 2022).

California thereby joined 300 local jurisdictions across the country and at least two other states that have banned or restricted the sale of flavored tobacco products to curb youth use and protect the health and safety of their residents. CTFK, Fact Sheet (Oct. 23, 2020), https://perma.cc/JGX3-3VZP. The tobacco companies have

sued many of them—states, municipalities, counties, and townships, large and small. Yet no court in the country, including three circuit courts, has held that any of these regulations is preempted by the TCA. Undeterred, the tobacco companies continue to argue that these hundreds of local laws protecting vulnerable populations across the country should be invalidated, and now seek to place S.B. 973—a democratically enacted law affirmed by the resounding majority of California voters—on hold, in an effort to bolster their scorched-earth litigation tactics.

Given the threat to local public health regulation, amici submit this brief to explain why S.B. 793 is not a "product standard" and, hence, why it is not expressly preempted by the TCA. Under the TCA, a "product standard" is a restriction on the manufacturer; for example, specifying the ingredients the manufacturer may use. Like every other category mentioned in the TCA's preemption clause, a product standard is directed to manufacturers and to pre-market activities—not to retail sales bans, which are explicitly preserved for local governments. Adopting the tobacco industry's interpretation would enlarge the scope of the TCA's preemption clause in ways that could upend the historic power of local governments to regulate tobacco sales. Because the tobacco industry cannot succeed on the merits of its preemption claim, this Court should reject the industry's emergency plea to stay S.B. 793.

INTEREST OF AMICI CURIAE

Amici curiae are six of the nation's leading nonprofit organizations supporting state and local government authority to protect public health. They are committed to supporting democratically enacted policies by state and local governments that educate the public about, and protect the public from, the devastating health consequences of tobacco.[2] Tobacco use remains the leading preventable cause of death nationally, killing more than 480,000 Americans annually. DHHS, *The Health Consequences of Smoking—50 Years of Progress: A Rep't of the Surgeon Gen.* 678 (2014), https://perma.cc/L4P8-SGVP. Flavored tobacco products—especially menthol—have played a key role in this epidemic because flavored products provide a gateway for youth to initiate tobacco use, getting each new generation addicted. SG Rep't (2012) at 537–539.

Amici submit this brief to protect the authority of state and local governments to enact public health measures regarding tobacco products that will protect their communities. Amici recognize that local governments play a historic and critical role in protecting the health of their communities. Each community has a different experience with health concerns, even with respect to tobacco control. Various social groups—based on age, race, sexual orientation, income, history of tobacco-industry targeting, and intersections of these and other factors—may be more or less likely to

[2] A further description of each amicus is included as an addendum.

use tobacco products and may use different products. Because of these variations, state and local governments may determine that different approaches are necessary to address the health needs and advance health equity in their communities. And the TCA empowers them to do so. The tobacco industry's efforts to expand the scope of the TCA's preemption would hamper local democratic measures to address public health and health equity—notwithstanding the fact that Congress explicitly "preserved" and "saved" the ability of state and local governments to do so in the TCA.

To forward local democracy and public health, amici have worked with governments at every level—Tribal, federal, state, and local—to implement policies to protect health. Therefore, they are particularly well suited to address the role that state and local governments have historically played in tobacco control and how the TCA preserved that prominent role going forward.

ARGUMENT

I. The TCA preserved long-established state and local government authority over tobacco product sales within their borders.

State and local governments have a long and robust history of regulating and even prohibiting tobacco product sales, stretching back more than a century. The Supreme Court, in upholding Tennessee's ban on the sale of cigarettes in 1900, held that states were not "bound to furnish a market" for cigarettes, and could exercise their police powers to protect the health and welfare of their citizens, particularly youth, from the "deleterious" effects of smoking. *Austin*, 179 U.S. at 346, 348. The Court

found it untenable to "force [cigarettes] into the markets of a state, against its will." *Id.* at 362. Fast forward 120 years and state and local jurisdictions are again prohibiting or limiting the sale of tobacco products to protect the health of their citizens, particularly youth, even after the TCA in 2009. In the past decades, state and local governments have passed countless laws restricting and prohibiting the sale of tobacco products in various ways—prohibiting sales in vending machines, prohibiting sales near schools, prohibiting sales to those under 21 (even before the federal statute), and, as California has done, restricting sales of flavored tobacco products. *See Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1190–91 (11th Cir. 2017) (en banc) (discussing historic and recent state and local tobacco restrictions). Some localities have banned sales of cigarettes and vape products entirely from retail stores. *See, e.g.*, Beverly Hills, Cal., Mun. Code 4-2-2101, *et seq.*; Manhattan Beach, Cal., Ordinance 20-0007. The history of tobacco regulation is, indeed, largely one of state and local action, as the FDA lacked authority to regulate tobacco products until Congress enacted the TCA in 2009. And the TCA, while it finally gave the FDA authority to regulate tobacco, did not strip state and local governments of their historic police power to restrict tobacco sales.

A. The TCA expressly preserves local government authority over tobacco retail sales.

The text of the TCA explicitly states that it is "preserving" for the states and localities this historic power to adopt measures "relating to or prohibiting the sale" of

tobacco products, and it establishes only a narrow scope of preemption that does not infringe upon such power.

Section 916 of the TCA delineates the relationship between state and federal authority over tobacco products through three separate clauses.

First, the "preservation clause" makes clear that the FDA does not have exclusive authority, or even "primary" authority (as the tobacco industry asserts at RJR App. 4) in the area of tobacco control. Instead, the federal government sets the floor, and state and local governments can adopt their own regulations "with respect to tobacco products that [are] in addition to, or more stringent than," the FDA's rules, "including . . . [any] 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." 21 U.S.C. § 387p(a)(1).

Second, the preemption clause carves out eight limited exceptions to the preservation clause and reserves them to the FDA. These issues are of unique federal concern because they address the manufacturing stage before a product hits the market: "tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products." *Id.* § 387p(a)(2)(A).

Third, the savings clause provides an exception to the preemption clause, returning some authority to local governments even when they reach the eight

preempted areas. The preemption clause, it says, does "not apply to requirements relating to the sale" of tobacco products. *Id.* § 387p(a)(2)(B).

The upshot: while the TCA gave the FDA authority to set national standards for tobacco products (something it previously had no authority over), it expressly codified the right of state and local governments to be more protective than the national standard, and to restrict or prohibit tobacco sales within their jurisdictions. *Berger v. Philip Morris USA, Inc.*, 185 F. Supp. 3d 1324, 1335 (M.D. Fla. 2016), *aff'd sub nom. Cote v. R.J. Reynolds Tobacco Co.*, 909 F.3d 1094 (11th Cir. 2018) ("Although the federal government has chosen to regulate aspects of the cigarette industry while stopping *itself* short of banning cigarettes, it did not intend to force *the states* to accept that cigarettes must remain on *their* markets.").

Congress considered in earlier drafts of the TCA a more expansive preemption provision that would have invalidated local flavor prohibitions. But Congress rejected that approach. Instead, it decided to allow states and local governments to ban tobacco sales, either fully or as to certain products. As the Second Circuit detailed: "Earlier versions of § 907 would have expressly reserved to the federal government authority to ban the sale of entire categories of tobacco products." *See U.S. Smokeless Tobacco Mfg. Co. LLC v. City of New York*, 708 F.3d 428, 433 n.1 (2d Cir. 2013) (citing five previous drafts). "These draft versions of the provision that ultimately became § 907(d)(3) were eventually rewritten to deny such power only to the FDA,

and as enacted into law, this provision of the []TCA does not forbid such bans by state and local governments." *Id.*

Thus, contrary to the industry's argument, the TCA did not overturn the historic power of local governments to eliminate tobacco product sales in their entirety, or to restrict the sale of particular types of tobacco products. Nothing in the TCA says localities cannot "absolutely prohibit" such sales. RJR App. at 28. Quite the opposite: the TCA expressly preserved that power, courts have upheld it, and hundreds of localities have duly enacted laws doing just that.

B. The TCA only preempted local regulations that would force manufacturers to change their processes for each local jurisdiction.

The TCA's preemption clause bars state regulation of tobacco products only "narrowly," and focuses on one regulated entity—manufacturers. *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 82 (1st Cir. 2013). As the text, structure, and purpose of the statute all demonstrate, the TCA "reserves regulation at the manufacturing stage exclusively to the federal government, but allows states and localities to continue to regulate sales and other consumer-related aspects of the industry." *U.S. Smokeless Tobacco Mfg. Co.*, 7087 F.3d at 434.

Congress was concerned about the imposition of conflicting standards by various localities that would require tobacco manufacturers to make individualized products, apply separate labels, or follow unique processes for each jurisdiction that enacted a law. Accordingly, one of the articulated purposes of the TCA is "to authorize

the [FDA] to set *national standards* controlling the *manufacture* of tobacco products and the identity, public disclosure, and amount of ingredients used in such products." 21 U.S.C. § 387 note (emphasis added).

Looking to the text of the preemption clause, it is clear that each of the eight enumerated categories addresses the manufacture or premarket stage of tobacco products, not their sale at retail. For example, "premarket review" requires manufacturers to submit applications for new products, and requires the FDA to review "the components, ingredients, additives, and properties," as well as "the methods used in . . . the manufacture . . . of, [new] tobacco product[s]." 21 U.S.C. § 387j(b)(1). Similarly, "registration" is directed at persons who own or operate "any establishment . . . engaged in the manufacture, preparation, compounding, or processing of a tobacco product." *Id.* § 387e(b). The plaintiffs point to "labeling" (at RJR App. 24), but that too is a component of manufacturing because a tobacco product includes its packaging. *See* 21 C.F.R. § 1140.3 (defining "manufacturer" as including one who "labels a finished tobacco product"); *id.* § 1143.3(a)(1) (making it "unlawful for any person to manufacture . . . such product unless the tobacco product package bears the . . . required warning statement on the package label."). "Adulteration" also targets manufacturers and the conditions where they make tobacco products. A tobacco product is "adulterated" if, among other things, "it has been prepared, packed, or held under insanitary conditions . . . ." 21 U.S.C § 387b(2).

The preemption of "good manufacturing standards" speaks for itself—it also targets the manufacturers of tobacco products, not retail sellers. The same is true of "modified risk tobacco products"—*manufacturers* submit information to the FDA to prove a product has reduced risk to consumers and only then can it go to market as a modified risk product. *See* 21 U.S.C. § 387k.

This balance—between exclusive nationwide manufacturing standards and local sales control—is consistent with all of Congress's previous tobacco legislation that preceded the TCA. In previous acts, such as the Federal Cigarette Labeling and Advertising Act, Congress balanced strong local control with protecting manufacturers from having to redo their labels or revise their advertisements to comply with each local jurisdiction's proscription. And these previous enactments otherwise left intact local government authority to restrict and even fully prohibit tobacco sales. *See Graham*, 857 F.3d at 1187–88 (reviewing the six congressional statutes that preceded the TCA). Indeed, when the U.S. Supreme Court struck down one local government's decision to prohibit tobacco advertisements near schools—without requiring the manufacturer to change the content of the advertisements—Congress responded by clarifying that such local regulations were acceptable. *See Nat'l Ass'n of Tobacco Outlets*, 731 F.3d at 80 (explaining that 15 U.S.C. § 1334(c) "was enacted in response to a portion of the *Lorillard* Supreme Court decision."). So long as such an ordinance does not force manufacturers to make new ads for every jurisdiction, it is not

preempted. Here too manufacturers are not forced to make new products for each jurisdiction. While the TCA gave the FDA exclusive authority to standardize manufacturing regulations nationwide and the regulatory process to bring a product to market, consumer-retail sales provisions are still within state and local power. *U.S. Smokeless Tobacco Mfg.*, 708 F.3d at 434.

II. S.B. 793's restriction on the sale of flavored tobacco products is not a "product standard" preempted by the TCA.

Following the unique structure of the TCA, the Ninth Circuit rejected the industry's argument that flavor sales bans—specifically a Los Angeles County ordinance that is substantially similar to S.B. 973—constitute a preempted "product standard[]." *R.J. Reynolds Tobacco Co. v. County of Los Angles*, 29 F.4th 542, 553 (9th Cir. 2022). Its decision follows the text, structure, and history of the TCA.

A. S.B. 793 is not a "product standard" because it does not require manufacturers to create tobacco products in any particular way.

Alongside the other categories of manufacturing regulations that the TCA preempts (discussed *supra*), the TCA bars state and local governments from establishing "product standards." 21 U.S.C. § 387p(a)(2)(A). The TCA does not define a "product standard" but the text of § 907—describing existing and future product standards—as well as the structure of the TCA's preemption provisions, make plain that sales restrictions like California's are not "product standards."

Consider the two "product standards" that Congress set forth in § 907 of the TCA—they are both "standards" that manufacturers have to meet in making their "product[s]." The first product standard states that "a cigarette or any of its component parts (including the tobacco, filter, or paper) shall not *contain*, as a constituent (including a smoke constituent) or additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice." *Id.* § 387g(a)(1)(A) (emphasis added). This regulates the contents of cigarettes by dictating what manufacturers can put in cigarettes. The second product standard provides that a "tobacco product *manufacturer* shall not use tobacco . . . that *contains* a pesticide chemical residue that is" greater than a specific level. *Id.* § 387g(a)(1)(B) (emphasis added). Both of these can only be violated by the manufacturer.

In considering future "product standards," Congress directed the FDA to consider whether it was appropriate for the protection of public health to "require the reduction or elimination of an additive, constituent (including a smoke constituent), or other component of a tobacco product because . . . the additive, constituent, or other component is or may be harmful." *Id.* § 387g(a)(3)(B)(ii). The focus, again, is on the ingredients a manufacturer is allowed to use in making the product. *See also id.* § 387g(a)(4)(A) (describing the "content" of product standards as including "the reduction or elimination of other constituents"). The preemption of local "product standards" therefore prevents local mandates that require manufacturers to create

particular products or follow particular processes, not local decisions to prohibit sales of any existing products.

B. The industry's contrary arguments are wrong.

The industry makes two primary arguments to demonstrate that S.B. 973 is a "product standard"—both are wrong.

First, the industry relies on the fact that the TCA says future product standards may include "provisions respecting the construction, components, ingredients, additives, constituents, including smoke constituents, and properties of the tobacco product." RJR App. at 16–18 (quoting 21 U.S.C. § 387g(a)(4)(B)(i)). The industry contends that these words—particularly "properties"—means that any regulation about a flavor is necessarily a product standard. But, because a word is known by the company it keeps (noscitur a sociis), the reference to "properties" in section 387g(a)(4)(B)(i) is best understood as referring to manufacturing standards akin to all the preceding categories listed in the provision.

More critically, while a product standard may "include[] provisions respecting . . . properties" of a tobacco product, that doesn't mean that all regulations relating to "properties" of cigars, cigarettes, or vape products are deemed preempted "product standards." The TCA also says that future product standards may "include . . . a provision regarding sale," but not even the tobacco industry can contend that all sales restrictions (i.e., a law raising the cigarette sales age) amount to "product standards."

Nor does a "product standard" encompass any local measure "respecting the . . . properties of the tobacco product," as the industry argues. If so, localities' decisions to tax cigars differently than cigarettes would be a "product standard" (i.e., excise taxes depend on the item's weight and whether it is wrapped in paper or tobacco, "properties" of the product). *See, e.g.*, Cal. Revenue and Taxation Code § 30003. So too localities' decisions to prohibit e-cigarette sales would be a "product standard" (i.e., sales depends on the type of nicotine delivery system a product utilizes—a "propert[y]"—including whether the product produces smoke or whether nicotine is aerosolized or vaporized). *See, e.g.*, San Francisco Health Code § 19S.2. There would be no room for local authority if "product standard" were defined so expansively; the preemption provision would swallow the preservation clause and over one hundred years of history.

Second, the tobacco industry argues that allowing sales restrictions like S.B. 793 enables localities to do an end-run around the TCA's preemption of tobacco product standards. It argues that localities can in effect dictate product standards by banning sales of products with particular characteristics even if they do not directly regulate the manufacturing process. RJR App. at 19–21. This argument, however, improperly conflates manufacturing and sale, which § 916 treats distinctly. *See U.S. Smokeless Tobacco Mfg.*, 708 F.3d at 435 (rejecting industry's argument that sales bans are a "backdoor" to product standards because it would "collapse[] the distinction" between

sales and product standards in § 916). The industry claims that 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 telling a manufacturer that it may not sell [that product]," RJR App. at 20 (citation omitted)—but that is wrong. The State has not forbidden the tobacco industry from making products imparting non-tobacco flavor. Tobacco companies can do so, even in factories in Los Angeles or Sacramento. And they can sell them in any locality where it is legal.

To be sure, local sales regulations of all types may "have some effect on manufacturers' production decisions," but that does not convert them into "product standards." *U.S. Smokeless Tobacco Mfg.*, 708 F.3d at 435. That is because a manufacturer's decision to change production in response to localities' sales restrictions is its choice; it is not a regulation (or "product standard") it must follow. *See id.*; *Nat'l Ass'n of Tobacco Outlets*, 731 F.3d at 83 n.11 ("Given Congress' decision to exempt sales regulations from preemption, whether those regulations have an impact on manufacturing is irrelevant."). "[T]o run afoul of the preemption clause, the ordinance must 'function[] as a command to tobacco manufacturers to structure their operations in accordance with local prescribed standards.'" *Indep. Gas & Serv. Stations Ass'n v. Chicago*, 112 F. Supp. 3d 749, 754 (N.D. Ill., 2015) (quoting *U.S. Smokeless Tobacco Mfg.*, 708 F.3d at 434).

This is not a situation, as in *National Meat Association v. Harris*, where the sales restriction on non-conforming meat was meant to "help implement and enforce" the law's *separate* manufacturing standards which prohibited processing meat in a particular way. The law there was a "command [to companies] to structure their operations in the exact way" the law mandated. 565 U.S. 452, 463–64 (2012).

The industry's argument also ignores that, unlike in *National Meat* and other precedents it cites, Congress explicitly preserved the right of state and local governments to enact measures "relating to or prohibiting the sale" of tobacco products. 21 U.S.C. § 387p(a)(1). That language cannot be read out of the statute. As the Second Circuit concluded, the industry's "broad reading of the preemption clause . . . would render superfluous § 916's three-part structure, and in particular would vitiate the preservation clause's instruction that the Act not be 'construed to limit the authority of . . . a State or political subdivision of a State . . . to enact . . . and enforce any . . . measure . . . prohibiting the sale . . . of tobacco products.'" *U.S. Smokeless Mfg.*, 708 F.3d at 434 (quoting 21 U.S.C. § 387p(a)(1)). Congress could have allowed states and localities only time, place, and manner "requirements related to the sale" of tobacco products, as the industry argues is allowed. RJR App. at 14. In other parts of the statute (e.g., respecting advertising) Congress allowed only time, place, and manner restrictions. *See* 15 U.S.C. § 1334(c). It did not do that for sales. Its decision to explicitly preserve sales bans and restrictions must be honored.

The TCA's scheme is like a menu. The FDA regulates manufacturers, establishing the menu of products allowed on the market—including their ingredients, how they are made, and their labeling. Localities can't change the menu—they cannot mandate the chef make any substitutions or alterations—but nor are they required to order every item. While manufacturers are allowed to make any products permitted by federal regulations, localities get to choose which of those products go on the shelves of their stores to be sold to their citizenry.

C. No circuit court has ever concluded that a ban on the sale of flavored tobacco products is a "product standard."

No circuit court has ever concluded that a restriction on the sale of flavored tobacco products constitutes a "product standard." To the contrary, the First, Second, and Ninth Circuits concluded that prohibitions on sales of flavored products are not "product standards." *County of Los Angles*, 29 F.4th at 553 (concluding that the Los Angeles County's flavor sales restrictions did not impose a new product standard); *Nat'l Ass'n of Tobacco Outlets*, 731 F.3d at 82 (same); *U.S. Smokeless Tobacco Mfg.*, 708 F.3d at 434–35 (same). District courts outside these circuits have reached the same conclusion, including the lower court here. *See, e.g.*, *Indeps. Gas*, 112 F. Supp. 3d at 754 (Chicago's ordinance not preempted because it "regulates flavored tobacco

products without regard for how they are manufactured"). *But see RJR v. City of Edina*, 482 F. Supp. 3d 875 (D. Minn. 2020) (appeal pending).[3]

The tobacco industry wants to paint the Ninth Circuit's decision in *Los Angeles County*, as departing from the First and Second Circuits' precedents. RJR App. at 30–32. Not so. The industry is playing a semantic game: it characterizes the S.B. 973 and the Los Angeles County ordinance reviewed by the Ninth Circuit as "prohibition[s]" and the laws considered by the First and Second Circuits as mere "restrictions." But restrictions on sale "will always prohibit sale under certain circumstances, namely when the requirements . . . are not met." *Indeps. Gas*, 112 F. Supp. at 753. And S.B. 793 could likewise be characterized as a "restriction" on the sale of tobacco products; stores can sell tobacco products and are just restricted from selling those that have a non-tobacco taste or aroma.[4] Regardless, this false distinction cannot stand given the TCA's express preservation of states' power to enact laws "relating to or prohibiting the sale . . . of tobacco products." 21 U.S.C. § 387p(a)(1). Critically, the First and Second Circuit precedents did not turn on whether the ordinance was a prohibition

[3] The district court in *City of Edina* held that the city's flavor ordinance was not preempted because of the TCA's savings clause. Though the district court stated that it thought the ordinance constituted a "product standard,"—the only court in the entire country to do so—that discussion was dicta, as it was not necessary for the court's decision given that it upheld the ordinance under the savings clause.

[4] For this same reason, S.B. 793 is a "requirement relating to the sale" of tobacco products and falls within the TCA's savings clause. Amici adopt the State's argument as to the savings clause and the reasoning as to the savings clause in *Los Angeles County*.

or restriction but held that the flavor ordinances were not preempted because they did not direct which ingredients manufacturers may use. The Ninth Circuit agreed.

The tobacco industry has lost every challenge on this issue in myriad courts across the country. Yet—without oral argument, full briefing, or more than a few days for this Court to review—the tobacco industry asks the Court to enjoin California's popular and life-saving law while it pushes its universally-rejected preemption claim once again. This Court should decline.

CONCLUSION

Amici respectfully request that this Court deny the application.

Respectfully submitted,

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ADDENDUM: IDENTITY OF *AMICI CURIAE*

The **Public Health Law Center** is a public interest legal resource center dedicated to improving health through the power of law and policy, grounded in the belief that everyone deserves to be healthy. Located at the Mitchell Hamline School of Law in Saint Paul, Minnesota, the Center helps local, state, national, Tribal, and global leaders promote health by strengthening public policies. For twenty years, the Center has worked with public officials and community leaders to develop, implement, and defend effective public health laws and policies, including those designed to reduce commercial tobacco use, improve the nation's diet, encourage physical activity, protect the nation's public health infrastructure, and promote health equity. The Center is particularly well-suited to address the scope of preemption under the TCA and the historic role local governments have played and continue to play in tobacco regulation. The Center has been involved with more than sixty briefs as amicus curiae filed in the highest courts in the United States and before international bodies.

Action on Smoking and Health (ASH) is the nation's oldest anti-tobacco organization. ASH is dedicated to ending the global death, disease, and damage caused by tobacco consumption and nicotine addiction through public policy, litigation, and public education. The marketing and sale of tobacco products is a violation of basic human rights, and ASH works to end the tobacco epidemic by attacking its root—the tobacco industry.

ChangeLab Solutions works across the nation to advance equitable laws and policies that ensure healthy lives for all. With more than two decades of experience in enacting policy, systems, and environmental changes at local and state levels, ChangeLab Solutions focuses on eliminating health disparities by addressing the social determinants of health. ChangeLab Solutions is an interdisciplinary team of lawyers, planners, policy analysts, public health practitioners, and other professionals who collaborate with community-based organizations, local and state governments, and anchor institutions to create thriving, just communities. ChangeLab Solutions supports communities across the country in the development, adoption, implementation, and enforcement of laws and policies that advance tobacco-related health equity, including laws prohibiting the sale of menthol cigarettes and other flavored tobacco products.

International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The **Legal Resource Center for Public Health Policy** (LRC) at the University of Maryland Francis King Carey School of Law provides technical legal assistance on a wide-range of public health issues, including tobacco regulation. In addition, the LRC works closely with state agencies such as the Office of the Comptroller and the Office of the Attorney General. Established in 2001, the LRC offers legal guidance to state and local governments, legislators, non-governmental organizations, health advocacy groups, and Maryland residents.

The **Public Health Advocacy Institute** (PHAI) has an interest in this case based on its mission to improve public health by reducing the use of and exposure to tobacco products in the United States. A 501(c)(3) since 1979, PHAI has experience in tobacco control issues generally, as well as longstanding and specific expertise in tobacco litigation and public health.