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**BRIEF OF *AMICI CURIAE* PUBLIC HEALTH, MEDICAL,
AND COMMUNITY ORGANIZATIONS IN SUPPORT OF
APPELLEES**

Of Counsel

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Amici public health, medical, and community organizations submit this brief in support of Appellees and urge the Court to affirm the trial court’s declaratory judgment that Section 9.681 of the Ohio Revised Code (“R.C. 9.681”) violates municipalities’ right to Home Rule under Article XVIII, Section 3 of the Ohio Constitution, and its grant of a permanent injunction barring enforcement of R.C. 9.681 against Appellees. *Amici* received written consent from all parties prior to filing this brief.

INTERESTS OF *AMICI CURIAE*

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

As is evident from the description of *amici* included in the Appendix to this brief, each of these groups works daily to reduce the devastating public health harms caused by tobacco and nicotine products (collectively, “tobacco products”), the leading cause of preventable death in America, responsible for 480,000 deaths per year.¹ *Amici* include physicians who counsel their young patients and their parents about the hazards of tobacco use, organizations with formal programs to urge users to quit, and groups representing parents and families struggling to free young people from nicotine addiction. Each of the *amici* has a direct and immediate interest in preserving municipalities’ home rule authority to regulate tobacco products, including through the enactment of laws restricting the sale of flavored tobacco products. *Amici* also have specific expertise in the role that flavored tobacco products play in enticing young people to use tobacco. Thus, *amici* are particularly well suited to inform the Court of the substantial public health benefits that Columbus’s prohibition on the

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

sale of flavored tobacco products and other local tobacco control laws provide to residents.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the Supreme Court has declared, “tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). Ninety percent of adult smokers begin smoking in their teens,² a fact long-understood by the tobacco industry. As the U.S. Court of Appeals for the D.C. Circuit noted, “[b]usinesses seeking to make a profit selling tobacco products . . . face powerful economic incentives to reach younger customers.” *Prohibition Juice Co. v. FDA*, 45 F.4th 8, 12 (D.C. Cir. 2022).

The tobacco industry also understands that flavors are essential to successfully market its products to young people. For all tobacco

² Office of the Surgeon General (“OSG”), U.S. Dep’t of Health & Human Servs. (“HHS”), *The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General* 708 (2014), https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf.

products—including cigarettes, e-cigarettes, and cigars—flavors significantly increase the appeal of tobacco products to youth. Data from the U.S. Food and Drug Administration (“FDA”) and National Institutes of Health’s Population Assessment of Tobacco and Health (“PATH”) study found that almost 80% of 12-to-17 year-olds who had ever used a tobacco product initiated their use with a flavored product.³ The FDA has concluded that “the availability of tobacco products with flavors at these developmental stages attracts youth to initiate use of tobacco products and may result in lifelong use.”⁴

By enacting Ordinance 3253-2022 (“Flavors Ordinance”), Columbus sought to protect its residents—and particularly its young people—from the continuing scourge of flavored tobacco products that lure millions into a lifetime of addiction and contribute so significantly to disease and death. Rather than encourage this and similar live-saving

³ Bridget K. Ambrose et al., *Flavored Tobacco Product Use Among US Youth Aged 12-17 Years, 2013-2014*, 314 J. Am. Med. Ass’n 1871, 1872 (2015), <https://jamanetwork.com/journals/jama/fullarticle/2464690>.

⁴ Regulation of Flavors in Tobacco Products, 83 Fed. Reg. 12,294, 12,295 (proposed Mar. 21, 2018).

measures, the General Assembly responded by overriding a veto by the Governor to enact R.C. 9.681, a law that purports to preempt all existing and future municipal regulation of tobacco products, including long-standing local laws like tobacco retail licensure requirements, without setting forth any regulations of its own.

However, as the trial court properly found, R.C. 9.681 does not qualify as a general law and thus is an unconstitutional infringement on municipalities' authority under the Home Rule Amendment (OHIO CONST. art. XVIII, § 3). R.C. 9.681 does not qualify as a general law under the Home Rule Amendment for at least two independent reasons. First, it sets forth *no new regulations* and instead “purport[s] only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations.” *Canton* at ¶ 21 (third general law requirement). In fact, R.C. 9.681's sole purpose and effect is “to preempt political subdivisions from the regulation of tobacco products and alternative nicotine products.” R.C. 9.681(D); *see also Dayton v. State*, 151 Ohio St.3d 168, 2017-Ohio-6909, ¶ 20 (clarifying that under this “*Canton*

prong, this court . . . must analyze the contested [statutory] provisions individually”).

Second, R.C. 9.681 fails to qualify as a general law because it does not “prescribe a rule of conduct upon citizens generally.” *Canton* at ¶ 21 (fourth general law requirement). Like the statute in *Dayton*, R.C. 9.681 is “phrased in terms of what a local authority” – not citizens – “shall or shall not do. . . . [It] merely limit[s] municipal authority to enforce other substantive laws.” *Dayton* at ¶ 44 (French, J., concurring).

The Home Rule Amendment, as recognized by the State Supreme Court, was intended, in part, to give “municipalities . . . *additional power to enact local health and safety measures* not in conflict with general laws” *Am. Financial Servs. Ass’n v. Cleveland*, 112 Ohio St. 3d 170 ¶ 27 (emphasis added).⁵ R.C. 9.681 violates this purpose by stripping

⁵ Although the Supreme Court determined that the state statute at issue in *Am. Financial Servs. Ass’n v. Cleveland* was a general law, that determination was based in part on the parties’ agreement that the statute “involve[d] the use of police power” regulating certain lending practices. 112 Ohio St. 3d 170 ¶ 27. Here, in contrast, as Appellees argued and the court below agreed, R.C. 9.681 only restricts what municipalities can do and thus is not a general law under *Canton*.

municipalities of their authority to step in where the state has failed to act – in this instance, protecting residents from the harms of tobacco products, including flavored ones.

It is important that the Court consider this constitutional issue with a full understanding of the public health benefits of the exercise of local authority to regulate tobacco products, as guaranteed by the Ohio Constitution. Thus, in this brief, *amici* focus primarily on the significant public health benefits afforded by the Flavors Ordinance, which includes protection against the public health harms of (I) menthol cigarettes, (II) flavored e-cigarettes, and (III) flavored cigars. The brief then discusses (IV) other long-standing local tobacco control laws that would be invalidated if R.C. 9.681 is left to stand before concluding with a (V) section rebutting the State’s argument that local tobacco control laws hinder economic activity.

ARGUMENT

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

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

A. Menthol cigarettes increase youth initiation of smoking.

Tobacco smoke can be harsh and unappealing to novice smokers, a fact well-understood by the industry. As the FDA has found, “[m]enthol’s flavor and sensory effects reduce the harshness of cigarette smoking and make it easier for new users, particularly youth and young adults, to continue experimenting and progress to regular use.”⁶ Thus, young smokers are more likely to use menthol cigarettes than any other age group. According to the FDA, “[t]he disproportionate use of menthol cigarettes by youth and young adult smokers compared to older adults has

⁶ Tobacco Product Standard for Menthol in Cigarettes, 87 Fed. Reg. 26,454, 26,455 (proposed May 4, 2022) (“Proposed Menthol Rule”).

been consistent over time and across multiple studies with nationally representative populations.”⁷ The National Survey on Drug Use and Health has also found that preference for menthol among cigarette smokers is inversely correlated with age.⁸ Data shows that half of youth (ages 12-17) who ever tried smoking initiated with menthol cigarettes.⁹ Additionally, the Truth Initiative’s Young Adult Cohort Study, a national study of 18-34 year olds, found that 52% of new young adult smokers initiated with menthol cigarettes.¹⁰

Moreover, the FDA’s Tobacco Products Scientific Advisory Committee (“TPSAC”), after an extensive study of the public health impact of menthol cigarettes, concluded in a 2011 Report that menthol cigarettes not only increase the number of children who experiment with

⁷ *Id.* at 26,462.

⁸ Cristine D. Delnevo et al., *Banning Menthol Cigarettes: A Social Justice Issue Long Overdue*, 22 *Nicotine & Tobacco Res.* 1673, 1673 (2020), <https://academic.oup.com/ntr/article/22/10/1673/5906409>.

⁹ Ambrose et al., *supra* note 3, at 1872.

¹⁰ Joanne D’Silva et al., *Differences in Subjective Experiences to First Use of Menthol and Nonmenthol Cigarettes in a National Sample of Young Adult Cigarette Smokers*, 20 *Nicotine & Tobacco Res.* 1062, 1064 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6093322/>.

cigarettes but also that young people who initiate with menthol are more likely to become addicted and long-term daily smokers.¹¹ Menthol cigarettes function as a starter product for the young and are critical to the tobacco industry's efforts to recruit "replacement smokers" for the one-half of long-term smokers who eventually die from tobacco-related disease.¹²

The impact of menthol cigarettes in attracting and addicting young people has long-term, adverse health effects. The FDA has found that "smoking cigarettes during adolescence is associated with lasting cognitive and behavioral impairments, including effects on working memory in smoking teens and alterations in the prefrontal attentional

¹¹ TPSAC, FDA, *Menthol Cigarettes and Public Health: Review of the Scientific Evidence and Recommendations* 136, 199-202 (2011), <https://wayback.archive-it.org/7993/20170405201731/https://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM269697.pdf>.

¹² See OSG, HHS, *The Health Consequences of Smoking - 50 Years of Progress: A Report of the Surgeon General*, Executive Summary 14-15 (2014), <https://www.hhs.gov/sites/default/files/consequences-smoking-exec-summary.pdf>.

network in young adult smokers.”¹³ “Use of tobacco products,” according to the FDA, “puts youth and young adults at greater risk for future health issues, such as coronary artery disease, cancer, and other known tobacco-related diseases.”¹⁴

The devastating health impact of menthol cigarettes is most starkly shown by a recent study by researchers from the University of Michigan. With the same methodology used by TPSAC, the study estimates that during the 38-year period from 1980-2018, menthol cigarettes were responsible for 10.1 million extra smokers (approximately 266,000 extra smokers every year) and 378,000 additional smoking related deaths (almost 10,000 additional deaths per year).¹⁵

¹³ Regulation of Flavors in Tobacco Products, *supra* note 4, 83 Fed. Reg. at 12,295.

¹⁴ *Id.*

¹⁵ Thuy T.T. Le & David Mendez, *An Estimation of the Harm of Menthol Cigarettes in the United States from 1980 to 2018*, 31 Tobacco Control 564, 566 (2022), <https://tobaccocontrol.bmj.com/content/early/2021/02/09/tobaccocontrol-2020-056256.info>.

B. Menthol cigarettes increase addiction and reduce cessation.

Among middle and high school students, menthol cigarette use is associated with greater smoking frequency and intention to continue smoking, as compared to non-menthol smoking.¹⁶ PATH study data also shows that youth menthol smokers have significantly higher levels of certain dependence measures,¹⁷ and that initiation with a menthol-flavored cigarette is associated with a higher relative risk of daily smoking.¹⁸ The FDA has found both that “[y]outh and young adults are particularly susceptible to becoming addicted to nicotine” and that “[m]enthol enhances the effects of nicotine in the brain by affecting

¹⁶ Sunday Azagba et al., *Cigarette Smoking Behavior Among Menthol and Nonmenthol Adolescent Smokers*, 66 J. Adolescent Health 545, 549 (2020), <https://pubmed.ncbi.nlm.nih.gov/31964612/>.

¹⁷ Sam N. Cwalina et al., *Adolescent Menthol Cigarette Use and Risk of Nicotine Dependence: Findings from the National Population Assessment on Tobacco and Health (PATH) Study*, 206 Drug & Alcohol Dependence 1, 3 (2019), <https://www.sciencedirect.com/science/article/pii/S0376871619304922>.

¹⁸ Andrea C. Villanti et al., *Association of Flavored Tobacco Use With Tobacco Initiation and Subsequent Use Among US Youth and Adults, 2013-2015*, 2 JAMA Network Open 1, 12 (2019), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2753396>.

mechanisms involved in nicotine addiction.”¹⁹

Menthol smokers also have a harder time stopping smoking. The 2020 Surgeon General’s Report on smoking cessation cited numerous studies finding an association between menthol use and lower cessation rates.²⁰ Research analyzing four waves of PATH study data shows that among daily smokers, menthol cigarette smokers have a 24% lower likelihood of quitting as compared to non-menthol smokers.²¹ Among daily smokers, African American menthol smokers had a 53% lower chance of quitting compared to African American non-menthol smokers, while White menthol smokers had 22% lower odds of quitting compared to White non-menthol smokers.²² Thus, menthol cigarettes not only lead to greater initiation of smoking; menthol also intensifies the addiction that

¹⁹ Proposed Menthol Rule, 87 Fed. Reg. at 26,464.

²⁰ OSG, HHS, *Smoking Cessation: A Report of the Surgeon General* 16-17 (2020), <https://www.hhs.gov/sites/default/files/2020-cessation-sgr-full-report.pdf>.

²¹ Sarah D. Mills et al., *The Relationship Between Menthol Cigarette Use, Smoking Cessation and Relapse: Findings from Waves 1 to 4 of the Population Assessment of Tobacco and Health Study*, 23 *Nicotine & Tobacco Res.* 966, 970 (2020), <https://doi.org/10.1093/ntr/ntaa212>.

²² *Id.*

maintains smoking.

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

Menthol cigarettes have played an especially pernicious role in causing disease and death in the African-American community, a fact recognized by the Columbus City Council. *See* Ordinance 3253-2022 (“[F]lavored tobacco products . . . disproportionately impact the 85% of African American smokers . . . who smoke menthols as a result of targeted marketing practices.”).

Since at least the 1950s, the tobacco industry has targeted African Americans with marketing for menthol cigarettes through magazine advertising, sponsorship of community and music events, and youthful imagery and marketing in the retail environment.²³ For example, the industry has strategically placed menthol cigarette advertisements featuring Black models in magazines with high Black readership. One

²³ *See generally* Campaign for Tobacco-Free Kids et al., *Stopping Menthol, Saving Lives: Ending Big Tobacco’s Predatory Marketing to Black Communities* 7-9 (2021), https://www.tobaccofreekids.org/assets/content/what_we_do/industry_watch/menthol-report/2021_02_tfk-menthol-report.pdf.

study found that from 1998-2002, *Ebony* was 9.8 times more likely than *People* magazine to carry ads for menthol cigarettes.²⁴

The industry also marketed menthol brands in popular musical and other community events, such as R.J. Reynolds' Salem Summer Street Scenes festivals, Brown & Williamson's Kool Jazz Festival, and Philip Morris' Club Benson & Hedges promotional bar nights, which targeted clubs frequented by Black Americans.²⁵ R.J. Reynolds estimated that it reached at least half of African Americans in five cities through their street festivals.²⁶ As TPSAC concluded, menthol cigarettes are

²⁴ Hope Landrine et al., *Cigarette Advertising in Black, Latino and White Magazines, 1998-2002: An Exploratory Investigation*, 15 *Ethnicity & Disease* 63, 65 (2005), <https://pubmed.ncbi.nlm.nih.gov/15720050/>.

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

²⁶ Yerger et al., *supra* note 25, at 25.

“disproportionately marketed per capita to African Americans. African Americans have been the subjects of specifically tailored menthol marketing strategies and messages.”²⁷

To this day, Black neighborhoods have a disproportionate concentration of menthol cigarette advertising and cheaper pricing of menthol cigarettes. The 2018 California Tobacco Retail Surveillance Study found significantly more menthol advertisements at stores with a higher proportion of African American residents and in neighborhoods with higher proportions of school-age youth.²⁸ A 2021 study found that in Los Angeles County, stores located in predominantly African American neighborhoods had significantly higher odds of selling Newport cigarettes (the most popular menthol brand) than stores in Hispanic or non-Hispanic

²⁷ TPSAC, *supra* note 11, at 92.

²⁸ Nina Schleicher et al., *California Tobacco Retail Surveillance Study 2018*, at 3, 22 (2019), <https://www.cdph.ca.gov/Programs/CCDCPHP/DCDIC/CTCB/CDPH%20Document%20Library/ResearchandEvaluation/Reports/CaliforniaTobaccoRetailSurveillanceStudyReport-2018.pdf>.

white neighborhoods.²⁹ The study also found that the estimated price of a Newport single pack was \$0.38 higher in non-Hispanic White neighborhoods than African American neighborhoods.³⁰

The tobacco industry's use of menthol cigarettes to target African Americans has paid lucrative, but tragic, dividends. In the early 1950s, 5% of African American smokers preferred menthol brands.³¹ In 2018, 85% of African American smokers smoked menthol cigarettes, compared to 29% of Whites.³² A recent study found that among the African-American community, menthol cigarettes were responsible for 1.5 million extra smokers, 157,000 smoking-related premature deaths, and 1.5

²⁹ Sabrina L. Smiley et al., *Retail Marketing of Menthol Cigarettes in Los Angeles, California: a Challenge to Health Equity*, 18 Preventing Chronic Disease (2021), https://www.cdc.gov/PCD/issues/2021/20_0144.htm.

³⁰ *Id.*

³¹ See Phillip S. Gardiner, *The African Americanization of Menthol Cigarette Use in the United States*, 6 (Supp 1) Nicotine & Tobacco Res. S55, S59 (2004), <https://pubmed.ncbi.nlm.nih.gov/14982709/>; B.W. Roper, *A Study of People's Cigarette Smoking Habits and Attitudes Volume I*, Truth Tobacco Industry Documents (1953), <https://www.industrydocuments.ucsf.edu/tobacco/docs/#id=fhcv0035>.

³² Delnevo et al., *supra* note 8, at 1674 tbl.1.

million excess life-years lost between 1980 and 2018.³³ Similar disparities exist in Ohio. The Centers for Disease Control and Prevention (“CDC”) estimates that 83% of Black smokers in Ohio use menthol compared to 33.8% of all Ohio adult smokers.³⁴

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

The most dramatic surge in youth usage of flavored tobacco products has occurred with e-cigarettes, the most commonly used tobacco product among U.S. youth since 2014.³⁵ In December 2018, Surgeon General Jerome Adams issued an advisory on e-cigarette use among

³³ David Mendez & Thuy T.T. Le, *Consequences of a Match Made in Hell: The Harm Caused by Menthol Smoking to the African American Population Over 1980-2018*, 31 Tobacco Control 569, 570 (2021), <https://tobaccocontrol.bmj.com/content/tobaccocontrol/31/4/569.full.pdf>.

³⁴ CDC, *Menthol Facts – Ohio*, https://www.cdc.gov/tobacco/basic_information/menthol/state-menthol-fact-sheets.html#OH (Feb. 16, 2024).

³⁵ Jan Birdsey et al., *Tobacco Product Use Among U.S. Middle and High School Students – National Youth Tobacco Survey, 2023*, 72 Morbidity & Mortality Wkly. Rep. 1173, 1177 (2023), <https://www.cdc.gov/mmwr/volumes/72/wr/pdfs/mm7244a1-H.pdf>.

youth, declaring the growing problem an “epidemic.”³⁶ Youth e-cigarette use remains a serious public health concern today, with over 1.6 million youth, including 7.8% of high schoolers, reporting current e-cigarette use in 2024.³⁷ In Ohio, 20% of high schoolers reported current use of an e-cigarette in 2021 (the most recent year with available data).³⁸

Young people are not just experimenting with e-cigarettes—they are using them frequently. In 2024, 42.1% of high school e-cigarette users reported using them on at least 20 of the preceding 30 days, and even more alarming, 29.7% of high school e-cigarette users reported *daily* use, a strong indication of nicotine addiction.³⁹ Roughly 430,000 middle and

³⁶ OSG, HHS, *Surgeon General’s Advisory on E-Cigarette Use Among Youth* (2018), <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>.

³⁷ Eunice Park-Lee et al., *E-Cigarette and Nicotine Pouch Use Among Middle and High School Students – United States, 2024*, 73 *Morbidity & Mortality Wkly. Rep.* 774, 775 tbl. (2024), <https://www.cdc.gov/mmwr/volumes/73/wr/pdfs/mm7335a3-H.pdf>.

³⁸ Ohio Department of Health, *Highlights from the 2021 Ohio Youth Risk Behavior Survey/Youth Tobacco Survey*, at 1-3 (noting higher youth e-cigarette prevalence rates in Ohio than in the U.S.), <https://bit.ly/43gRSR8>.

³⁹ Park-Lee et al., *supra* note 37, at 775 tbl.

high school students are vaping on a daily basis.⁴⁰

As U.S. Courts of Appeals have recognized, flavored e-cigarettes “especially appeal to children,” *Breeze Smoke, LLC v. FDA*, 18 F.4th 499, 505 (6th Cir 2021), and “lie at the heart of the problem” of youth e-cigarette use. *Prohibition Juice*, 45 F.4th at 11. The 2020 Surgeon General Report on smoking cessation notes that “the role of flavors in promoting initiation of tobacco product use among youth is well established . . . and appealing flavor is cited by youth as one of the main reasons for using e-cigarettes.”⁴¹ According to the 2024 NYTS, 87.6% of current middle and high school e-cigarette users had used a flavored product in the past month.⁴²

Flavored e-cigarettes typically contain nicotine, which is “among the most addictive substances used by humans.” *Nicopure Labs, LLC v. FDA*, 944 F3d 267, 270 (D.C. Cir. 2019). Nicotine can also result in

⁴⁰ *Id.*

⁴¹ OSG, *Smoking Cessation*, *supra* note 20, at 611.

⁴² Park-Lee et al., *supra* note 37, at 774.

lasting damage to adolescent brain development.⁴³ According to the Surgeon General, “[n]icotine exposure during adolescence can impact learning, memory and attention,” and “can also increase risk for future addiction to other drugs.”⁴⁴ The Surgeon General has warned that “[t]he use of products containing nicotine in any form among youth, including in e-cigarettes, is unsafe.”⁴⁵

Use of e-cigarettes may also function as a gateway to the use of traditional cigarettes and other combustible tobacco products, thereby undermining decades of progress in curbing youth smoking. A 2018 report by the National Academies of Science, Engineering and Medicine found “substantial evidence that e-cigarette use increases [the] risk of ever using

⁴³ OSG, *Surgeon General’s Advisory on E-Cigarette Use Among Youth*, *supra* note 36.

⁴⁴ *Id.*

⁴⁵ OSG, HHS, *E-Cigarette Use Among Youth and Young Adults, A Report of the Surgeon General* 5 (2016), https://e-cigarettes.surgeongeneral.gov/documents/2016_SGR_Full_Report_non-508.pdf.

combustible tobacco cigarettes among youth and young adults.”⁴⁶ A nationally representative analysis found that from 2013 to 2016, youth e-cigarette use was associated with more than four times the odds of trying combustible cigarettes and nearly three times the odds of current combustible cigarette use.⁴⁷

Finally, there is little evidence that e-cigarettes, particularly flavored e-cigarettes, yield any public health benefits. The leading U.S. public health authorities, including the Surgeon General, the U.S. Preventive Services Task Force, the CDC, and the National Academies of Science, Engineering and Medicine, have all determined there is insufficient

⁴⁶ Nat’l Acads. of Sci., Eng’g & Med., *Public Health Consequences of E-Cigarettes* 10 (2018), https://www.ncbi.nlm.nih.gov/books/NBK507171/pdf/Bookshelf_NBK507171.pdf.

⁴⁷ Kaitlin M. Berry et al., *Association of Electronic Cigarette Use with Subsequent Initiation of Tobacco Cigarettes in US Youths*, 2 JAMA Network Open 1, 7 (2019), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2723425>.

evidence to recommend any e-cigarettes for smoking cessation.⁴⁸ The FDA has also repeatedly found that there is little evidence that flavors in e-cigarettes aid smokers to stop smoking. *See e.g., Avail Vapor v. FDA*, 55 F.4th 409, 421 (4th Cir. 2022).

Thus, the Flavors Ordinance provides Columbus residents, particularly youth, with substantial protection from the addictive and other harmful effects of flavored e-cigarettes.

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

Like other flavored tobacco products, flavored cigar smoking presents substantial health risks—risks that are particularly concerning given the prevalence of cigar use among children and the tobacco

⁴⁸ OSG, *Smoking Cessation*, *supra* note 20, at 7; U.S. Preventive Servs. Task Force, *Interventions for Tobacco Smoking Cessation in Adults, Including Pregnant Persons: USPSTF Recommendation Statement*, 325 J. Am. Med. Ass’n 265 (2021), <https://jamanetwork.com/journals/jama/fullarticle/2775287>; CDC, *Adult Smoking Cessation – The Use of E-Cigarettes*, https://www.cdc.gov/tobacco/data_statistics/sgr/2020-smoking-cessation/fact-sheets/adult-smoking-cessation-e-cigarettes-use/index.html (Jan. 23, 2020); Nat’l Acads. of Sci., Eng’g & Med., *supra* note 46, at 10.

industry's efforts to market cigars to youth. Historically, cigar manufacturers designed flavored cigars to serve as “starter” smokes for young people because the flavors helped mask the harshness, making the products easier to smoke.⁴⁹ According to an industry publication, “[w]hile different cigars target a variety of markets, all flavored tobacco products tend to appeal primarily to younger consumers.”⁵⁰ The vice president of one distributor commented, “[f]or a while it felt as if we were operating a Baskin-Robbins ice cream store” in reference to the huge variety of cigar flavors available—and an apparent allusion to flavors that appeal to youth.⁵¹ The FDA has determined that young people are far more likely

⁴⁹ Ganna Kostygina et al., *Tobacco Industry Use of Flavours to Recruit New Users of Little Cigars and Cigarillos*, 25 *Tobacco Control* 66, 67, 69 (2016), <https://tobaccocontrol.bmj.com/content/25/1/66>.

⁵⁰ Melissa Niksic, *Flavored Smokes: Mmmmm...More Profits?*, *Tobacco Retailer* (Apr 2007), https://web.archive.org/web/20081121103907/http://www.tobaccoretailer.com/uploads/Features/2007/0407_flavored_smokes.asp.

⁵¹ *Id.*

than older smokers to prefer flavored cigars.⁵²

In 2009, Congress enacted the Family Smoking Prevention and Tobacco Control Act, Pub. L. 111-31, 123 Stat. 1776 et. seq., which included a prohibition on flavored cigarettes (other than menthol). The cigar industry responded to this law by flooding the market with a dizzying array of new, small, cheap, mass-produced cigars, many virtually indistinguishable from cigarettes,⁵³ in flavors like Mango Lemonade, Rocky Road, and Iced Donut.⁵⁴ From 2008 to 2015, the number of unique cigar flavor names more than doubled, and dollar sales of flavored cigars increased by nearly 50%, increasing flavored cigars' share of the overall

⁵² See Deeming Tobacco Products to be Subject to the Federal Food, Drug and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act, 79 Fed. Reg. 23,141, 23,146 (proposed Apr. 25, 2014) (“[S]ugar preference is strongest among youth and young adults and declines with age.”).

⁵³ Under the Tobacco Control Act, the essential difference between a cigarette and a cigar is that a cigar contains tobacco in the wrapper, while a cigarette does not. *Compare* 15 USC § 1332(1)(a) (defining “cigarette”) with 21 CFR § 1143.1 (defining “cigar”).

⁵⁴ See Campaign for Tobacco-Free Kids, Not Your Grandfather's Cigar: Cheap and Sweet Cigars Lure America's Kids 8-11 (Oct. 4, 2023), https://www.tobaccofreekids.org/press-releases/2023_10_04_cigar-report.

cigar market to 52.1% in 2015.⁵⁵

The result of this reorientation of cigars toward the youth market has been predictable. The rate of cigar use among high school students now hovers near the cigarette rate.⁵⁶ In 2023, the CDC reported that 280,000 high school students currently used cigars,⁵⁷ and that 70.7% of high school cigar smokers used flavored cigars.⁵⁸

Moreover, as with menthol cigarettes, years of research document greater cigar availability and more cigar marketing, including for flavored cigars and through price promotions, in Black neighborhoods.⁵⁹ Thus, it is not surprising that cigar smoking rates among Black non-Hispanic high schoolers is higher than that of white non-Hispanic high schoolers.⁶⁰

⁵⁵ Cristine D. Delnevo et al., *Changes in the Mass-Merchandise Cigar Market Since the Tobacco Control Act*, 3 (2 Supp. 1) Tobacco Reg. Sci. 1, 4, 10 tbl.2 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5351883/pdf/nihms852155.pdf>.

⁵⁶ Birdsey et al., *supra* note 35, at 1178 tbl.2.

⁵⁷ *Id.*

⁵⁸ *Id.* at supp. tbl. 2, <https://stacks.cdc.gov/view/cdc/134701>.

⁵⁹ Campaign for Tobacco-Free Kids et al., *Stopping Menthol*, *supra* note 23, at 10.

⁶⁰ Birdsey et al., *supra* note 35, at 1178 tbl.2.

As the FDA has found, “[a]ll cigars pose serious negative health risks.”⁶¹ In 2010 alone, regular cigar smoking was responsible for “approximately 9,000 premature deaths or almost 140,000 years of potential life lost among adults 35 years or older.”⁶² According to the FDA, “[a]ll cigar smokers have an increased risk of oral, esophageal, laryngeal, and lung cancer compared to non-tobacco users,” as well as “other adverse health effects, such as increased risk of heart and pulmonary disease,” “a marked increase in risk for chronic obstructive pulmonary disease (COPD),” a higher risk of death from COPD, and “a higher risk of fatal and nonfatal stroke” compared to non-smokers.⁶³

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

⁶¹ Deeming Tobacco Products to be Subject to the Federal Food, Drug and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act, 81 Fed. Reg. 28,974, 29,020 (May 10, 2016).

⁶² *Id.*

⁶³ *Id.*

IV. R.C. 9.681 Would Invalidate Other Critical and Long-Standing Municipal Tobacco Control Measures.

Although this brief focuses primarily on the Flavors Ordinance, R.C. 9.681 also purports to preempt all other municipal tobacco control laws, including laws, like those enacted by some of the municipal Appellees, requiring retailers to obtain a license before selling tobacco products in a jurisdiction and smoke-free laws that provide protection from second-hand smoke beyond what the state law guarantees, such as in public parks. *See, e.g.*, Amended Compl. §§ 71, 101, 146-148, 180, 198, 260, 295. Like the Flavors Ordinance, these laws provide important public health protections to municipal residents. For example, researchers have concluded that tobacco retail licensure laws can “be an effective policy approach to reduce the availability of tobacco and tobacco marketing . . . [,] decrease tobacco-related disparities in low socioeconomic communities,” and reduce the number of tobacco outlets near schools.⁶⁴

⁶⁴ Hannah G. Lawman et al., *Tobacco Retail Licensing and Density 3 Years After License Regulations in Philadelphia, Pennsylvania (2012-2019)*, 110 Am. J. Pub. Health 547, 552 (2020), <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2019.305512>.

If left to stand, R.C. 9.681 would eliminate these important tobacco control laws.

V. Reductions in Tobacco Use Through Tobacco Control Laws Do Not Hinder Economic Activity.

In its brief (at 20) – but notably absent from the statute itself – the State argues that R.C. 9.681 “serves the overriding State interest in eliminating a patchwork of local ordinances that hinder economic activity” Therefore “the third prong of the *Canton* general-law test” (state statute sets forth policy, sanitary or similar regulations) “is satisfied, even if the statute limits the legislative authority of municipalities.” *Id.* 21 (citing *Dayton*, 2017-Ohio-6909, ¶ 20). This argument, however, is based on a faulty premise. Research consistently demonstrates that reductions in tobacco product sales, including in response to tobacco control laws like flavored tobacco product restrictions, do not hinder economic activity.

Tobacco control restrictions, which result in reductions in use of tobacco products, do not harm the economy nor tobacco retailers. While these laws often decrease people’s spending on tobacco products, those expenditures, as the National Cancer Institute and World Health

Organization have concluded, “do not disappear from the economy; rather, they are redistributed to the consumption and production of other goods and services, generating income and employment in other sectors.”⁶⁵ In fact, tobacco companies and their retailer allies have known this for decades. An industry-sponsored report concluded that “if consumers were faced with no available tobacco products, they would reallocate their spending to other goods and services. This reallocated spending would generate additional business opportunities in other sectors of the economy along with the associated employment and incomes.”⁶⁶

And despite claims to the contrary, *see Br. of Amici Curiae Ohio Council of Retail Merchants et al.* 10-12, research shows that retailers are

⁶⁵ U.S. National Cancer Institute & World Health Organization, *The Economics of Tobacco and Tobacco Control*, National Cancer Institute Tobacco Control Monograph 21, at 554 (2016), https://cancercontrol.cancer.gov/brp/tcrb/monographs/21/docs/m21_complete.pdf.

⁶⁶ Chase Econometrics, *The economic impact of the tobacco industry on the United States economy in 1983, Vol. 1: The impacts on the national economy*, at V-3, <https://www.industrydocuments.ucsf.edu/tobacco/docs/#id=rrcw0026>.

able to successfully adapt to various tobacco control policies, including restrictions on the sale of flavored tobacco products. For example, in a 2023 report, researchers from the University of Illinois Chicago and the Truth Initiative examined the effects of flavored tobacco sales restrictions and found:

no evidence that flavored tobacco sales restrictions have a negative and significant impact on businesses that sell tobacco and vaping products. In fact, results of the analyses show that businesses that sell tobacco products successfully adapt to changes in market conditions, including the implementation of FTP [flavored tobacco product] sales restrictions on tobacco products.”⁶⁷

Moreover, by reducing tobacco consumption, local laws result in healthcare savings for both the State (by reducing Medicaid spending) and its residents. In Ohio, smoking is directly responsible for \$6.56 billion in annual health care costs, including \$1.85 billion in Medicaid costs, and \$14.4 billion in lost productivity from smoking-caused premature death

⁶⁷ John A. Tauras et al., *The Effects of Tobacco Flavor Restrictions on Tobacco Retail Businesses*, Tobacconomics 11 (2023), <https://www.tobacconomics.org/files/research/882/the-effects-of-tobacco-flavor-bans-on-tobacco-retail-businesses-oct-2023-final-md.pdf> (emphasis added).

and illness.⁶⁸ Tobacco use, therefore, imposes not just an enormous health burden on Ohio and its residents, but an economic one as well.

Because tobacco control laws, including flavor restrictions, do not impede economic activity, R.C. 9.681 serves no legitimate state interest. Instead, it simply limits municipalities' authority to enact effective public health measures – in violation of the Home Rule Amendment.

CONCLUSION

R.C. 9.681 is an unconstitutional attempt to limit municipal powers. Instead of setting forth any new regulations, it seeks only to invalidate municipal laws that provide critical protections against the health harms of tobacco products, particularly flavored tobacco products. For this and the reasons presented by Appellees, the Court should affirm the trial court judgment.

Dated: October 7, 2024

⁶⁸ Campaign for Tobacco-Free Kids, *The Toll of Tobacco in Ohio* (last updated Aug. 16, 2024), <https://www.tobaccofreekids.org/problem/toll-us/ohio>.

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APPENDIX

Description of *Amici Curiae*

1. African American Tobacco Control Leadership Council

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

2. American Cancer Society Cancer Action Network

The American Cancer Society Cancer Action Network (“ACS CAN”) is committed to ensuring everyone has a fair and just opportunity to prevent, find, treat, and survive cancer. Our advocacy includes support for evidence-based tobacco control measures such as Columbus’s prohibition on the sale of flavored products. ACS CAN currently has 1,941 tobacco control advocates in Ohio; 221 of these advocates are from Franklin County.

3. American Heart Association

The American Heart Association (“AHA”) is the nation’s oldest and largest voluntary organization dedicated to fighting heart disease and stroke. Founded in 1924, the organization now includes more than 40 million volunteers and supporters with offices nationwide. The Association funds innovative research, advocates for the public’s health, and shares lifesaving resources. AHA has long been active in ensuring policies that promote longer, healthier lives for all, and recognizes that preemptive state laws limiting local authority are often a barrier to that goal.

4. American Lung Association

The American Lung Association is the nation’s oldest voluntary health organization working to save lives by improving lung health and preventing lung disease. The American Lung Association has long been active in research, education and public policy advocacy regarding the adverse health effects caused by tobacco use. This includes supporting the rights of local communities to pass strong tobacco control policies to prevent and reduce tobacco use.

5. American Medical Association

The American Medical Association (“AMA”) is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents, and medical students in the United States are represented in the AMA’s policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes.

6. Association of Ohio Health Commissioners

The Association of Ohio Health Commissioners (“AOHC”) is the statewide association that represents the 111 local health departments in Ohio. The mission of AOHC is to promote strong local public health leadership, form meaningful relationships with local, state and federal public health stakeholders, and advocate for an effective and efficient local governmental public health system.

7. Campaign for Tobacco-Free Kids

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

8. National LGBTQI+ Cancer Network

The mission of the National LGBTQI+ Cancer Network is to improve the lives of LGBTQI+ individuals on the cancer journey and those at risk through educational, training, and advocacy initiatives. LGBTQI+ communities are disproportionately impacted by flavored tobacco products, which in turn impacts community rates of cancer. As such, LGBTQI+ communities have a strong interest in responsible public health policy.

9. Ohio Chapter, American Academy of Pediatrics

The Ohio Chapter, American Academy of Pediatrics (“Ohio AAP”) promotes the health, safety and well-being of children and adolescents so they may reach their full potential. The Ohio AAP accomplishes this by addressing the needs of children, their families, and their communities, and by supporting Chapter members through advocacy, education, research, service, and improving the systems through which they deliver pediatric care. The Ohio AAP works to curb tobacco exposure to children from infancy through adolescence with advocacy and programs on smoking dangers and cessation for family members, and works to promote the dangers of tobacco use on long term health.

10. Ohio State Medical Association

The Ohio State Medical Association (“OSMA”) is a nonprofit professional association established in 1835 and is comprised of physicians, resident physicians, and medical students in Ohio. The OSMA’s membership includes most Ohio physicians engaged in the private practice of medicine. The OSMA’s purposes are to improve

public health through education, encourage interchange of ideas among members, and maintain and advance the standards of practice by requiring members to adhere to the concepts of professional ethics.

11. Parents Against Vaping E-Cigarettes

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

12. Preventing Tobacco Addiction Foundation

Founded in 1996, the Preventing Tobacco Addiction Foundation and its advocacy arm, Tobacco 21, have been the major driving forces behind increasing the sales age for all nicotine products to 21 nationwide. They also helped lead the 2003 effort to ban indoor smoking in Columbus and ten surrounding suburbs leading to a

statewide ban, and helped direct the successful effort to persuade a unanimous Columbus City Council to end the sale of flavored nicotine and tobacco products in 2022.

13. Public Health Law Center

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

14. The Breathing Association

The Breathing Association, a 118 year old non-profit and the oldest free clinic in the State of Ohio, provides low income people with free healthcare and other social services like utility assistance. Specializing in lung health and pulmonary diseases, The Breathing Association's Certified Tobacco Treatment Specialists provide prevention, education and tobacco cessation to youth and adults. In addition, for the last two years, The Breathing Association has been contracted by local public health agencies, tobacco free advocates and hospitals to provide the community with a tobacco awareness campaign to bring awareness, education and cessation services through their Tobacco Treatment Center of Ohio, located in Columbus Ohio.

15. The Center for Black Health and Equity

Since 2000, The Center for Black Health and Equity has been a leading advocate and capacity building institution that addresses social justice and health equity issues relative to commercial tobacco use. For more than 20 years these products have taken more

than one million Black lives with targeting and misinformation by the tobacco industry. It is the opinion of The Center that local municipalities should have the authority afforded them in the Ohio Constitution and continue to enforce ordinances enacted to restrict access to menthol products in their communities. Our mission is to facilitate programs and services to benefit communities and people of African descent. In fulfillment of our mission, we build community capacity, develop community infrastructure, and advocate for equity-centered policies.

16. Truth Initiative

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