No. 22A474

IN THE

Supreme Court of the United States

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,

Applicants,

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,

Respondents.

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit

Application from The United States Court of Appeals for the Ninth Circuit (No. 22-56052)

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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INTRODUCTION

Within 14 days, California will shut the doors to one of the Nation's largest markets for flavored tobacco products and thereby ban a product (menthol cigarettes) that has been lawfully sold for nearly a century. There is no doubt that this will cause Applicants (not to mention countless others) irreparable harm. Indeed, California's Attorney General does not contest that fact.

There is also no doubt that by banning the sale of flavored tobacco products, California has flouted the express preemption clause of the Tobacco Control Act ("TCA"). In that statute, Congress explicitly said that states may not ban tobacco products for failing to meet a state's preferred tobacco product standard, including its preferred flavor requirement. The Attorney General responds that "tobacco product standards" are limited to manufacturing, and thus California's ban does not create a standard. But this Court has twice rejected California's attempt to evade preemption of state standards by styling the state law as a sales ban. *See R.J. Reynolds Tobacco Co. v. County of Los Angeles*, 29 F.4th 542, 561 (9th Cir. 2022) (Nelson, J., dissenting) ("*Los Angeles County*") (citing *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)). And the text of the TCA makes clear that tobacco product standards are not limited to manufacturing. Nothing the Attorney General argues changes those facts.

Finally, the equities in this case favor an injunction. As an initial matter, because California's law is preempted, it would be inequitable to let it go into effect. In addition, enjoining the law will merely preserve the status quo that has existed for

a century, thereby allowing this Court time to decide the merits without upending the status quo or letting loose the irreparable harm that California's law will inflict.

REASONS FOR GRANTING THE APPLICATION

All the injunction factors support enjoining California's ban on flavored tobacco products (SB793). The parties agree that, in evaluating a request for an injunction, this Court considers whether (i) the applicant will suffer irreparable harm, (ii) the applicant is likely to succeed on the merits, and (iii) the equities favor an injunction. *See* Appl. 11; Opp. 16. The Attorney General claims that a request for an injunction (as opposed to a stay) "demands a significantly higher justification" and a showing that "the legal rights at issue are 'indisputably clear,'" in part because "an injunction 'does not simply suspend judicial alteration of the status quo.'" Resp 16 (citing, e.g., *Respect Maine PAC v. McKee*, 562 U.S. 996 (2010)). Here, however, it is California that is attempting to alter the status quo—not Applicants. And this Court has repeatedly granted injunctions without invoking the Attorney General's preferred, more demanding standard. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296–97 (2021) (per curiam) (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020)); *Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) (citing same factors and considering whether there is a likelihood of granting certiorari and "fair prospect" of reversal).

But whichever adjectives one uses to describe the factors, Applicants here are entitled to an injunction because they face imminent, irreparable harm—a fact that the Attorney General does not contest; they are clearly correct on the merits and

likely to obtain relief from this Court; and an injunction is in the public interest because, among other reasons, it will preserve the century-old status quo given that SB793 has not yet taken effect.

I. ABSENT AN IMMEDIATE INJUNCTION, APPLICANTS FACE IRREPARABLE HARM.

The Attorney General does not dispute that absent immediate judicial intervention, Applicants stand to suffer significant and irreparable harm. As Applicants explained, they face three distinct forms of irreparable harm: *First*, being forced to comply with a preempted law itself constitutes irreparable harm. *See* Appl. 12. *Second*, SB793 will cause substantial financial harms that are irreparable because of California's sovereign immunity. *See* Appl. 13. *Third*, SB793 will cause loss of customer goodwill and reputational harms. *See* Appl. 13–14. This factor thus weighs strongly in favor of an injunction.

II. APPLICANTS ARE LIKELY TO OBTAIN RELIEF FROM THIS COURT.

A. Applicants Are Likely To Succeed on the Merits.

Applicants' opening brief explained that this Court is likely to grant certiorari and resolve this case in Applicants' favor because, among other things, the order below, and the earlier decision on which it relies, directly contravene this Court's decisions in *Engine Manufacturers* and *National Meat*. Those cases establish two propositions that control this case: (1) states and localities cannot avoid preemption of product "standards" by applying their own standards at the point of sale and (2) states and localities cannot circumvent preemption of manufacturing standards through the artifice of banning the sale of non-compliant products. Indeed, as Judge

Nelson explained in dissent in *Los Angeles County*, the Ninth Circuit has again made the same error for which it was twice reversed by this Court: "interpreting an express preemption clause to allow states and municipalities to defeat its entire purpose with a sales ban." *Los Angeles County*, 29 F.4th at 561 (Nelson, J., dissenting) (citing *Engine Manufacturers* and *National Meat*).

1. The TCA's preemption clause preempts California's flavor ban.

a. When the Attorney General finally gets around to addressing this Court's decisions in *Engine Manufacturers* and *National Meat* (on page 32 of his opposition), he has barely anything to say about them. His principal contention is that those cases do not establish categorical rules. But those cases do establish principles that govern preemption cases, and the Attorney General gives no persuasive reason why those principles do not apply here.

Indeed, the Attorney General's main argument for why California's flavor ban does not fall under the TCA's preemption clause is that "tobacco product standards" are limited to manufacturing. But this Court explicitly rejected a "manufacturing" limitation on product standards in *Engine Manufacturers,* explaining that "a standard is a standard even when not enforced through manufacturer-directed regulation." 541 U.S. at 254. In response, the Attorney General asserts that the "text and structure" of the Clean Air Act (at issue in *Engine Manufacturers*) "differ markedly from what Congress enacted in the TCA." Opp. 34. But the Clean Air Act, like the TCA, preempts state "standards." And applying the plain meaning of that

word, this Court concluded that a "standard" applies to the final product, not simply how it is made. *Engine Mfrs.*, 541 U.S. at 253–55. That holding controls here. Tobacco product standards can be enforced at the manufacturing stage and at the point of sale. But how a standard is enforced does not change the fact that there is a standard. The Attorney General offers no meaningful response.

The TCA's preservation clause does not change the analysis. *Contra* Opp. 34. To the contrary, the preservation clause is expressly and unambiguously limited by the preemption clause, not the other way around. *See* 21 U.S.C. § 387p(a)(1) (preservation clause applies "[e]xcept as provided in" the preemption clause); *Los Angeles County*, 29 F.4th at 564 (Nelson, J., dissenting); Appl. 21.

The Attorney General likewise fails to square his position with *National Meat*. In *National Meat*, this Court held that a state cannot use a sales ban as a workaround to an express preemption clause—even if that preemption clause (unlike the one in the TCA) *is* limited to manufacturing. 565 U.S. at 464. The Attorney General says that because the statute in *National Meat* (the FMIA) did not contain a savings clause, this Court's interpretation of the FMIA's preemption clause is immaterial. But the TCA's savings clause does not change the *meaning* of the preemption clause. Rather, the savings clause exempts from preemption certain state laws that fall *within the scope* of the preemption clause. Thus, what this Court said in *National Meat* fully applies here: "[I]f [California's] sales ban were to avoid the [act'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 [act's] preemption provision." *Nat'l Meat*, 565 U.S. at 464. The TCA must preempt sales bans, otherwise states can "make a mockery" of the preemption clause.

And there is no merit to the Attorney General's claim that California's ban does not "function as a command to manufacturers to structure their operations in any particular way." *See* Opp. 35. The core insight of *National Meat* is that a state law that bans the sale of a product manufactured a certain way necessarily functions as such a command. "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." *R.J. Reynolds Tobacco Co. v. City of Edina*, 482 F. Supp. 3d 875, 879 (D. Minn. 2020) (citing *Nat'l Meat*, 565 U.S. 452), *appeal pending*, No. 20-2852 (8th Cir. argued May 12, 2021). In that way, California's ban does regulate how tobacco products must be produced.[1]

b. The holdings of *Engine Manufacturers* and *National Meat* are sufficient to resolve this case, but even apart from those decisions, the Attorney General's arguments lack merit. Despite his acknowledgment that "'the task of statutory

[1] SB793 also regulates "manufacturing" because the definition of "flavored tobacco product" turns on whether the manufacturer adds an ingredient that imparts a characterizing flavor. The Attorney General argues that a product is not a flavored one solely because a manufacturer uses flavorings. Opp. 23 n.23. But the point remains that if a manufacturer adds an ingredient that creates a "characterizing flavor," then the product is a "flavored tobacco product." And though the ban applies to "retailers," that does not change the fact that SB793 reaches into the manufacturing process by telling manufacturers what ingredients they may not add.

construction must in the first instance focus on the plain wording of the [TCA's preemption] clause," the Attorney General's "manufacturing" limitation of tobacco product standards finds no grounding in the text of the TCA. *See* Opp. 19 (quoting *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62–63 (2002)).[2]

The Attorney General argues that "certain other provisions of the Act 'describe[] [tobacco product standards] in terms of the manufacturing and marketing stages.'" Opp. 22 (quoting *Los Angeles County*, 29 F.4th at 554). But that is not true. The Act describes "tobacco product standards" as regulating tobacco product "properties." § 387g(a)(4)(B)(i). "Properties" are not limited to manufacturing. *See* Appl. 17–19. And "there can be no dispute that a provision respecting the flavor of a tobacco product is a provision respecting a 'propert[y]' of that product." *Edina*, 482 F. Supp. 3d at 879.

Moreover, Congress's own "tobacco product standards" do not ban the *manufacture* of a specific class of products. Instead, Congress's standards are enforced primarily at the point of sale. 21 U.S.C. §§ 331(a), (c), 387b(5). Indeed, manufacturers can *disregard* federal standards if the products are exported. *Id.* § 381(e)(1). In addition, when Congress wanted to refer to "manufacturing standards"

[2] The Attorney General makes a passing reference to the "presumption against preemption." *See* Opp. 29. But even the Ninth Circuit said that the "focus is on the meaning of the TCA's text without any presumptive thumb on the scale." *Los Angeles County*, 29 F.4th at 553 n.6. Indeed, this Court has squarely held that if a "statute contains an express pre-emption clause, we do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause." *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016).

in the preemption clause, it did so explicitly. *Id.* § 387p(a)(2)(A) (separately listing "good *manufacturing* standards" (emphasis added)). The text of the TCA thus makes clear that "tobacco product standard" refers to the characteristics of a final product, *not* how it is manufactured.

The Attorney General also attempts to justify limiting "tobacco product standards" to manufacturing because he believes the eight categories listed in the TCA's preemption clause (tobacco product standards, labeling, modified risk tobacco products, etc.) each "relate most obviously to the production or marketing stages—and not the retail sale—of tobacco products." Opp. 20–21. But those categories are not directed solely at manufacturing.

For example, a product is a "modified risk tobacco product" if it "is *sold* or *distributed* for use to reduce harm or the risk of tobacco-related disease associated with commercially marketed tobacco products." 21 U.S.C. § 387k(b)(1) (emphasis added). Thus, a product that has been on the market for years without any changes to how it is made becomes a "modified risk tobacco product" if a manufacturer describes it as presenting less risk than other products. For instance, FDA issued a warning letter to JUUL for marketing unauthorized modified risk tobacco products—based on promotional statements about products that were already on the market.[3]

Labeling also extends beyond manufacturing. As courts have held, a product's website—which has nothing to do with manufacturing—can amount to labeling. *See*

[3] *See* FDA, *Warning Letter, JUUL Labs, Inc.* (Sept. 9, 2019), https://tinyurl.com/3hc2wcsb.

United States v. Innovative Biodefense, Inc., 2019 WL 2428670, at *4 (C.D. Cal. Feb. 22, 2019); *see also* 15 U.S.C. § 1333 (requiring importers to add labels); 21 U.S.C. § 321(m) (applying the same definition of "labeling" to drugs and tobacco products).

Moreover, contrary to the Attorney General's argument, Applicants' interpretation of "tobacco product standards" does not render "labeling" (or any other category) in the preemption clause "redundant." *See* Opp. 23. It is true that certain types of labeling are tobacco product standards. The TCA explicitly provides that labeling for "proper use" of a tobacco product is a "tobacco product standard." 21 U.S.C. § 387g(a)(4). But other types of labeling, unrelated to proper use, do not amount to a tobacco product standard. So a state law that required graphic warnings on cigarette packages would not amount to a "tobacco product standard," but would amount to a "labeling" requirement. Applicants' interpretation of "tobacco product standard" thus does not render any other preempted category redundant.

In fact, it is the Attorney General's interpretation of the preemption clause that renders the clause meaningless. If California (or any other state) can end-run the preemption clause by framing its law as banning the sale of a tobacco product that does not conform to California's tobacco product standards (or labeling requirements or modified-risk-tobacco-product requirements), then the preemption clause is a nullity. Indeed, the Attorney General practically admits that this is the case, saying that any conflict between state and federal standards would be resolved through "implied preemption," despite Congress's deliberate inclusion of an express preemption clause in the TCA. *See* Opp. 30. The Attorney General's interpretation of

the TCA's preemption provisions thus not only contradicts Congress's explicit words, but also this Court's decisions in *Engine Manufacturers* and *National Meat*.

c. The Attorney General also insists that "reading 'tobacco product standards' in the preemption clause to encompass sales restrictions would be at odds with the text of the surrounding clauses that … reserve the States' authority to impose requirements 'relating to the sale' of tobacco products." Opp. 23–24. Not at all. The preservation clause specifically lists requirements "relating to" and "prohibiting" the sale of tobacco products. The preemption clause then sweeps in "any" requirement about tobacco product standards, which naturally includes those "relating to" and "prohibiting" sales. The savings clause then saves one type of requirement: those "relating to sales." The plain meaning of the three clauses is that states may *regulate* sales based on tobacco product standards, but one thing they may not do is categorically *prohibit* such sales based on those standards.

2. The TCA's savings clause does not save California's ban.

a. As Applicants explained, the TCA carefully distinguishes between requirements "relating to sales," on the one hand, and those "prohibiting sales," on the other. Appl. 22–29. The TCA's savings clause does not save California's blanket prohibition because the clause saves "requirements relating to … sale[s]," not "requirements prohibiting sales." *See* 21 U.S.C. § 387p(a)(2)(A). But the Attorney General torpedoes that distinction, saying that requirements "relating to sales" include prohibitions. Opp. 25–26. That renders the preemption clause a dead letter—because states can simply enforce their preferred tobacco product standards through

sales prohibitions—once again contravening *Engine Manufacturers* and *National Meat*.

In addition, if "requirements relating to sales" included "prohibitions," Congress would not have made the deliberate choice to include "prohibiting" in the preservation clause but not in the savings clause.

Laying these two clauses side by side elucidates Congress's careful wording:

Preservation Clause:	Saving Clause:
"…requirements … *relating to* <u>*or prohibiting*</u> *the sale*, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age, information reporting to the State, or measures relating to fire safety standards for tobacco products."	"… requirements *relating to the sale*, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age, or relating to fire safety standards for tobacco products."
21 U.S.C. § 387p(a)(1) (emphasis added).	21 U.S.C. § 387p(a)(2)(B) (emphasis added).

In these phrases that are otherwise nearly identical, Congress plainly chose to include "or prohibiting" in the preservation clause but not in the savings clause. And that choice has consequences. Where, as here, "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

Indeed, last Term this Court made clear that the words "regulation[s]" and "prohibition[s]" must be given independent meaning, especially when used in the same statute. *See Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929 (2022). The Attorney

General argues that *Ysleta* "construed a different kind of statute." Opp. 27. But he points to no material difference between the Restoration Act (at issue in *Ysleta*) and the TCA. Both statutes recognize a "dichotomy between prohibition and regulation." *Ysleta*, 142 S. Ct. at 1938. And the only way to give meaning to that dichotomy in the TCA is to recognize that the savings clause does not save sales prohibitions.

The Attorney General also argues that the distinction between "requirements relating to sales" and "prohibitions of sales" is inadministrable because "[n]early any regulation can be characterized as a 'prohibition.'" Opp. 30. Such policy appeals are better directed at Congress, not this Court. *See Ysleta*, 142 S.Ct. at 1943–44. As this Court explained in *Ysleta*, when Congress adopts a distinction between regulations and prohibitions, courts must give effect to that distinction, regardless of whether it is difficult (in some cases) to do so. *Id.*; *see also Los Angeles County*, 29 F.4th at 566 (Nelson, J., dissenting) ("[t]hat the line might be hard to draw in some hypothetical future case is no reason to throw the baby out with the bathwater"). In any event, there is no question in this case that California's ban is a prohibition—it contains no exceptions.

There is also no merit to the Attorney General's contention that history mandates that this Court ignore Congress's distinction between requirements relating to the sale and requirements prohibiting the sale. It is true that states have long *regulated* tobacco sales. But from the early twentieth century until the turn of

the twenty-first, states did not entirely prohibit categories of tobacco products.[4] Rather, as of 2009, when Congress adopted the TCA, the key area where states had legislated on tobacco products was *regulating* sales (not *prohibiting* them).

b. Finally, as Judge Nelson explained in his dissent in *Los Angeles County*, the savings clause saves only age-based requirements. 29 F.4th at 565 (Nelson, J., dissenting). The savings clause says it saves only those "requirements relating to the sale, distribution, possession, … [and] use of, tobacco products *by individuals of any age*." 21 U.S.C. § 387p(a)(2)(B) (emphasis added). The Attorney General maintains that "of any age" is simply "clarifying language." Opp. 32. In other words, it makes clear that states "can enact regulations for … everyone." *Id.* But that renders "by individuals of any age" entirely superfluous: The savings clause means the same thing whether or not those five words are there. That is the definition of surplusage. *See Los Angeles County*, 29 F.4th at 565 (Nelson, J., dissenting); *Edina*, 482 F. Supp. 3d at 880 (concluding this interpretation "renders the phrase surplusage").[5]

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[4] *See* U.S. Dep't of Health & Human Servs., *Reducing Tobacco Use: A Report of the Surgeon General* 32 (2000) (cataloguing tobacco regulations).

[5] The Attorney General also suggests that "by individuals of any age" only applies to "use of" tobacco products. But the savings clause says the preemption clause does not apply to "requirements relating to the sale, distribution, … or use of, tobacco products by individuals of any age." § 387p(a)(2)(B). "[T]obacco products by individuals of any age" must apply to the entire list. Under the "series qualifier" canon, "when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a modifier at the end of the list normally applies to the entire series." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1169 (2021). Were it otherwise, the savings clause would be nonsensical. The clause would cover "requirements relating to the sale" [FULL STOP]. The reader would be left wondering, "Sale of what?"

B. At Least Four Justices Are Likely To Vote To Grant Certiorari.

As Applicants explained, four Justices should and likely will vote to grant certiorari. Appl. 29–38. The direct conflict between *Los Angeles County* (in which this Court has called for a response to the cert petition, *see* No. 22-338 (U.S. filed Nov. 22, 2022)) and this Court's decisions in *Engine Manufacturers* and *National Meat* is reason enough for this Court's intervention. In addition, the Ninth Circuit's reasoning in *Los Angeles County* conflicts with the reasoning of the First and Second Circuits. The Attorney General's attempts to reconcile those opinions fail. Moreover, the Attorney General does not dispute that this case presents exceptionally important issues or that this case presents an ideal vehicle.

1. The Ninth Circuit's decision in *Los Angeles County* conflicts with the reasoning of the First and Second Circuits. *See U.S. Smokeless Tobacco Mfg. Co. LLC v. City of New York*, 708 F.3d 428 (2d Cir. 2013); *NATO v. City of Providence*, 731 F.3d 71 (1st Cir. 2013) ("*NATO*"). The Attorney General concedes that neither the First nor Second Circuits upheld a total prohibition on flavored tobacco products. Opp. 36. Indeed, both courts emphasized that the laws at issue were not preempted because they were not total prohibitions. *U.S. Smokeless*, 708 F.3d at 431 (New York City's law "allows [flavored tobacco products] to be sold within New York City, although to a limited extent"); *NATO*, 731 F.3d at 74 (Providence's law "is not a blanket prohibition because it allows the sale of flavored tobacco products in smoking bars").

The only appellate court to have blessed a total prohibition is a divided Ninth Circuit. And that court's reasoning cannot be squared with this Court's precedents, the text of the TCA, or the reasoning of the other appellate courts.

2. The Attorney General does not dispute that this case presents issues of imperative public importance. As Applicants explained, the proper test for TCA preemption is critical for achieving Congress's objectives. Appl. 32–33. This case is also important because hundreds of jurisdictions have enacted similar laws, which have resulted in cases in four courts of appeals. Appl. 34. In addition, the case is important given the far-reaching implications of the decision below. Appl. 34–36. And the briefs filed in support of the application further underscore how important this case is. Brief of E-Cigarette Businesses and Trade Associations 6–17 (U.S. Dec. 1, 2022) (emphasizing the benefits of flavored e-cigarettes for adult smokers); Brief of Vapor Trade Association 12–21 (U.S. Dec. 2, 2022) (emphasizing the economic impact of SB793).

3. The Attorney General also does not dispute that this case presents an ideal vehicle. Further percolation of the question presented is not necessary; this issue was squarely pressed and passed upon below; this case cleanly presents the core legal question; and while this case is in a preliminary posture, the preemption issue is

purely legal and this Court has a separate petition before it presenting the same legal issue in a final judgment. *See* Appl. 36–37; *Los Angeles County*, No. 22-338 (U.S.).[6]

III. THE PUBLIC INTEREST AND EQUITIES FAVOR AN INJUNCTION.

The equities in this case also favor an injunction. To begin, because Applicants are right on the merits, the equities, by definition, support an injunction. Enjoining the enforcement of a preempted law cannot harm California; and the public has no interest in seeing an unconstitutional law enforced. Appl. 38 (collecting cases); *see United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012) ("Frustration of federal statutes and prerogatives are not in the public interest, and we discern no harm from the state's nonenforcement of invalid legislation.").[7]

The equities favor an injunction for numerous other reasons. *First*, the Attorney General admits that an injunction will preserve the status quo. Opp. 3. And preserving the status quo is the primary purpose of an injunction. *See* Appl. 38.

Second, the Attorney General does not contest that banning flavored tobacco products will harm the hundreds of thousands of adult consumers who prefer those products and countless manufacturers, distributors, and retailers like Applicants.

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[6] If this Court grants review in *Los Angeles County*, then it should grant an injunction in this case, hold this case for the resolution of *Los Angeles County*, and (assuming petitioners in *L.A. County* prevail), GVR in this case.

[7] The Attorney General appears to suggest that if SB793 is indeed unconstitutional, the equities do not necessarily favor an injunction. *See* Opp. 38 n.32. But for over 100 years this Court has recognized that federal courts may enjoin state officials who are about to enforce an unconstitutional act, in part because of the harm such enforcement would cause. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (relying on *Ex parte Young*, 209 U.S. 123, 156 (1908)).

Appl. 38–39. Instead, the Attorney General looks to years-old evidence that was before the legislature that enacted SB793. Opp. 38–40. But as Applicants explained, recent evidence shows that banning flavored tobacco products can actually *harm* public health. *See* Appl. 39 (citing RAI Services Company, *Comment from RAI Services Company* 29, 31, 80 (Aug. 3, 2022); *see also* Br. of E-Cigarette Businesses & Trade Ass'ns (Dec. 1, 2022) (explaining the threats to public health that SB793 poses). The Attorney General attempts to discount Applicants' argument because they cited a comment "prepared by its own corporate affiliate." Opp. 40. But that comment compiled voluminous peer-reviewed and third-party scientific evidence on flavored tobacco product bans and their impacts, which is the material for which Applicants cite the comment.

In any event, the Attorney General also ignores recent data showing that youth use of e-cigarettes is declining. In 2022, about 1.02 million *fewer* high-school and middle-school students used e-cigarettes compared to 2020.[8] And youth use of any tobacco products has also decreased,[9] leaving youth smoking rates at an all-time low.[10]

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[8] *Compare* Maria Cooper, et al., *Notes from the Field: E cigarette Use Among Middle and High School Students—United States, 2022* (Oct. 2022), https://tinyurl.com/44fk6y8p, *with* Teresa W. Wang, et al., *E cigarette Use Among Middle and High School Students—United States, 2020* (Sept. 2020), https://tinyurl.com/5763s6a9.

[9] CDC, *Smoking & Tobacco Use: Youth Data*, https://tinyurl.com/ycymmrfv.

[10] *Smoking Rates Decline Steeply in Teens in 2021*, Truth Initiative (Jan. 10, 2022), https://tinyurl.com/bcb97csk.

The Attorney General's suggestion that "flavored-tobacco bans have not materially contributed to any illicit trade," Opp. 40, is belied by voluminous evidence to the contrary that the Attorney General does not acknowledge, let alone grapple with. *See Comment from RAI Services Company*, *supra*, 89–101 (collecting numerous government, historical, and scientific sources showing that a largescale flavored tobacco product ban will severely exacerbate the existing illicit market).[11] And the only source the Attorney General cites for his illicit-trade argument is an FDA prediction that in turn relies on the belief that a *nationwide* standard would eliminate the potential for cross-border smuggling, which of course would not be eliminated by a single *statewide* ban like SB793. *See* Opp. 40 n.40; *Comment from RAI Services Company*, *supra*, 99–101 (explaining further flaws in the FDA regulatory analysis).

The Attorney General similarly fails to meaningfully respond to Applicants' additional arguments about SB793's potentially significant negative consequences—including (i) effects on communities of color, (ii) increased risky product tampering and self-mentholation, (iii) harm for adults who use menthol-flavored, cartridge-based electronic nicotine delivery system products and who may turn to combustible cigarettes in the wake of the flavor ban, (iv) consumer confusion regarding the risks

[11] For example, the U.S. Trade Representative has explained that "[b]anning all cigarettes—or any type of cigarette favored by a large portion of U.S. smokers—could significantly increase the existing black market for cigarettes and all the attendant contraband trafficking and other illegal activity." U.S. Trade Rep., *Measures Affecting The Production And Sale Of Clove Cigarettes: First Written Submission of the United States of America*, WTO 8 (Nov. 16, 2010), https://tinyurl.com/od8zktlf.

of tobacco products, and (iv) negative effects on the broader economy. Appl. 39–40 & n.8.

Lastly, the Attorney General's arguments about the time between SB793's enactment in August 2020 and today fall flat. If the ban really presented such an exigent public health imperative as the Attorney General now suggests, the Governor could have expedited the referendum, Cal. Const. art. II § 9(c) (allowing Governor to call a special statewide election for a qualified ballot measure), or the Legislature could have exempted the law from the referendum process altogether, *id.* § 9(a) (allowing "urgency statutes" to bypass the referendum process); *id.* art. IV, § 8(d).

In sum, the equities clearly favor an injunction.

IV. ALTERNATIVELY, THIS COURT SHOULD GRANT CERTIORARI AND ISSUE AN INJUNCTION PENDING REVIEW.

The Attorney General does not respond to Applicants' alternative request (or the reasons supporting the request) that this Court should treat this application as a petition for writ of certiorari, grant certiorari, and issue an injunction pending review. Appl. 40. Thus, the Court should follow that course of action.

CONCLUSION

This Court should grant the application. Alternatively, the Court should grant certiorari and issue an injunction pending resolution of the merits.

December 7, 2022

Respectfully submitted,

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