IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.
ATTORNEY GENERAL DAVE YOST,

Plaintiff-Appellant,

v.

ORVILLE TOBACCO AND VAPE SHOP, LLC

Defendant-Appellee.

Case No.

On Appeal from the Wayne County Court of Appeals,
Ninth Appellate District

Court of Appeals Case No.: 2025 AP-X 000011

DEFENDANT-APPELLEE ORVILLE TOBACCO AND VAPE SHOP, LLC'S MEMORANDUM IN SUPPORT OF JURISDICTION

Drew Smith (0070188)
Assistant Attorney General
Consumer Protection Section
State Office Building, 11th Floor
615 West Superior Avenue
Cleveland, Ohio 44113-1899
Drew.smith@OhioAGO.gov

Counsel for Plaintiff-Appellant, the State of Ohio

Gregory P. Feldkamp (0084472)
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, OH 44114
(216) 566-5500
Gregory.Feldkamp@ThompsonHine.com

Eric N. Heyer (admitted Pro Hac Vice)
James C. Fraser (admitted Pro Hac Vice)
THOMPSON HINE LLP
1919 M Street, NW, Suite 700
Washington, DC 20036
(202) 331-8800
Eric.Heyer@ThompsonHine.com
James.Fraser@ThompsonHine.com

Counsel for Defendant-Appellee Orrville Tobacco and Vape Shop, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution and Statutes

Regulations

Other Authorities

DEFENDANT-APPELLEE ORVILLE TOBACCO AND VAPE SHOP, LLC'S MEMORANDUM IN SUPPORT OF JURISDICTION

INTRODUCTION

The substantial constitutional question of public interest in this case is the same as the one in two cases for which this Court has already accepted an appeal and that are pending before the Court— Case No. 2025-1510, *State of Ohio ex rel. Yost v. Central Tobacco and Stuff*, and Case No. 2026-0125, *State of Ohio ex rel. Yost v. Elevate Smoke, LLC.* That question is whether section 310 of the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 337(a), impliedly preempts the Ohio Attorney General's Consumer Sales Practices Act ("CSPA") claims against a tobacco retailer when those claims would not exist in the absence of the FDCA.

In the case *sub judice*, the trial court answered the question in the affirmative and dismissed the Attorney General's ("AG") claims as impliedly preempted by the FDCA. The trial court was correct. The AG's claims were based on the fact that Defendant/Appellant sold electronic cigarettes that were "adulterated" under the FDCA because they did not comply with the FDCA's premarket authorization requirement. But 21 U.S.C. § 337(a) says that only the United States can enforce the FDCA. And several courts, including the U.S. Supreme Court and the U.S. Court of Appeals for the Sixth Circuit, have held that section 337(a) impliedly preempts a state law claim that would not exist in the absence of the FDCA because such a claim seeks to enforce the FDCA. *See Buckman Co. v. Plaintiffs' Legal Committee,* 531 U.S. 341, 353 (2000); *Loreto v. Procter & Gamble Co.*, 515 F. App'x 576, 579 (6th Cir. Feb. 22, 2013).

A divided panel of the Court of Appeals, however, found no preemption of the AG's claims. Incredibly, the Court of Appeals did not even mention section 337(a), *Buckman*, or *Loreto*. Rather than address those authorities, the Court of Appeals held that the FDCA's "preservation" clause for tobacco products—21 U.S.C. § 387p(a)(1)(A)—allows a state-law claim that seeks to

enforce the FDCA's tobacco product requirements. But the preservation clause says no such thing. Moreover, such a reading of the preservation clause ignores the legislative history of the FDCA, and it renders meaningless the FDCA's express preemption clause for tobacco products, 21 U.S.C. § 387p(a)(2)(A).

The Court of Appeals also said that there was no preemption because Defendant could have avoided CSPA liability by posting "signage" next to the products at issue which explains the products are not authorized by FDA. But that theory of liability still depends on the existence of the FDCA. In any event, such "signage" constitutes "labeling" under the FDCA, and the FDCA expressly preempts any state law labeling requirement which is "different from, or in addition to, any [FDCA labeling] requirement." 21 U.S.C. § 387p(a)(2)(A).

In short, the Court of Appeals' decision was incorrect. This Court should grant Defendant's appeal and reverse the Court of Appeals' decision.

THIS CASE PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION OF PUBLIC AND GENERAL INTEREST

By accepting the appeals in Case Nos. 2025-1510 and 2026-0125, the Court has already determined that this case presents a substantial constitutional question of public and general interest. Defendant also notes the following.

First, because federal preemption is based on the Supremacy Clause of the United States Constitution, *see* U.S. Const. art. VI, cl. 2, preemption is a constitutional issue.

Second, there is a split in the Courts of Appeal on the preemption issue in this case. While the Court of Appeals below found that federal law does not preempt the AG's claims, the Courts of Appeal in the other two cases for which this Court has accepted an appeal found that federal law does preempt the AG's claims.

Third, the Court of Appeals' decision has the potential to mislead Ohio retailers about their legal obligations when selling FDA-regulated products. Under the Court of Appeals' reasoning, retailers who obtain products from wholesalers that are pre-packaged with FDCA compliant labels—including over-the-counter drugs, cosmetics, and food—will now have an obligation to determine whether additional information about the products should be provided via signage at the point of sale to avoid possible CSPA liability.

FACTUAL BACKGROUND

I. Constitutional Background

Under the Supremacy Clause of the United States Constitution, "Congress has the power to preempt state law." *State ex rel. Yost v. Volkswagen Aktiengesellschaft*, 165 Ohio St. 3d 213, 215, 2021-Ohio-2121, ¶ 11, 177 N.E.3d 242, 247 (2021).[1] "Congress may do so either expressly or impliedly." *Id*.; *accord City of Girard v. Youngstown Belt. Ry. Co.*, 134 Ohio St. 3d 79, 2012-Ohio-5370, ¶ 14, 979 N.E.2d 1273 (2012) ("Preemption may be either expressed or implied.").

"When Congress expressly preempts state law, it explicitly says so with clear statutory language." *Volkswagen*, 2021-Ohio-2121, ¶ 12. "When considering whether preemption is implied, courts look to congressional intent to determine whether Congress meant to preempt state law without saying as much." *Id*.

Implied preemption can include, *inter alia*, implied "field" preemption and implied "obstacle" preemption. *Id.* at ¶¶ 13-14. Implied field preemption "occurs when Congress has enacted a legislative and regulatory scheme that is so pervasive that Congress left no room for the States to supplement it." *Id.* at ¶ 13 (cleaned up). Implied obstacle preemption occurs when "the

[1] The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" U.S. Const. art. VI, cl. 2.

state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at ¶ 14 (cleaned up).

II. Statutory and Regulatory Background

Congress enacted the FDCA in 1938. Section 301 of the original FDCA (the "Prohibited Acts" section) prohibited the interstate distribution of "any food, drug, device, or cosmetic that is adulterated or misbranded." *See* Pub. L. No. 717, 52 Stat. 1040, 1042 (1938).

The FDCA includes several product-specific definitions of the terms "adulterated" and "misbranded." For example, a drug or device is "adulterated" if it is not manufactured in accordance with the FDA's current good manufacturing practice regulations. *See* 21 U.S.C. § 351(a)(2)(B); 21 C.F.R. § 210.1(b).[2]

Section 307 of the original FDCA—later codified at 21 U.S.C. § 337—said that only the United States could bring an action to enforce the Act. *See* 52 Stat. at 1046 ("All such proceedings for the enforcement, or to restrain violations of this Act shall be by and in the name of the United States."). In 1990, Congress amended section 337 to give states the authority to enforce certain FDCA provisions regarding misbranded food, so long as the FDA has decided not to bring its own enforcement action for the alleged violation. *See* Nutrition Labeling and Education Act of 1990, § 4, Pub. L. 101-535, 104 Stat. 2353, 2362 (creating 21 U.S.C. § 337(b)).

The original FDCA did not mention tobacco products. But in 1996, FDA adopted regulations classifying cigarettes and smokeless tobacco as drug delivery devices and deeming such products "misbranded" if sold to persons under 18, sold in vending machines accessible to

[2] The fact that a product is "adulterated" or "misbranded" does not necessarily mean that the product or its labeling is defective. *See, e.g.*, *United States v. Lit Drug Co.*, 333 F. Supp. 990, 998 (D.N.J. 1971) (observing that "a drug may be *pharmaceutically perfect* in content but still be regarded as adulterated under the law" where "any manufacturing, packing or holding method does not conform to [FDA's] current good manufacturing practice [regulations]") (emphasis added).

persons under 18, or advertised in publications whose readership was not predominantly above 18. *See* 61 Fed. Reg. 44396 (Aug. 28, 1996). When adopting those regulations, FDA said that the FDCA's express preemption provision for devices would preempt any state laws setting a minimum purchase age above 18 or setting access or advertising restrictions more stringent than those in the agency's regulations. *See id.* at 44548-49. FDA subsequently used its statutory authority to grant preemption exemptions to three states that had minimum purchase ages above 18. *See* 62 Fed. Reg. 63271 (Nov. 28, 1997).

In March 2000, the U.S. Supreme Court set aside FDA's tobacco regulations on the grounds that Congress did not intend to give FDA the authority to regulate tobacco products. *See FDA v. Brown & Williamson Tobacco Corp.* 529 U.S. 120 (2000). Nine years later, Congress amended the FDCA through the Tobacco Control Act ("TCA") to give FDA regulatory authority over tobacco products. Pub. L. No. 111-31, 123 Stat. 1776 (2009).

As amended by the TCA, section 301 of the FDCA (the "Prohibited Acts" section) prohibits the interstate distribution of "any food, drug, device, ***tobacco product***, or cosmetic that is adulterated or misbranded." 21 U.S.C. § 331(a) (emphasis added). As with other product categories, the FDCA includes tobacco-specific definitions of the terms "adulterated" and "misbranded." For example, a tobacco product is "adulterated" if it is a "new" tobacco product—*i.e.*, one not commercially marketed in the United States as of February 15, 2007—and FDA has not "authorized" the marketing of the product through the premarket review process. *See* 21 U.S.C. § 387b(6)(A); 21 U.S.C. § 387j(a). As another example, a tobacco product is "misbranded" if "in package form unless it bears a label containing" certain information and statements, including, among other things, "the name and place of business of the tobacco product manufacturer, packer,

or distributor," 21 U.S.C. § 387c(a)(2)(A), and the statement "sale only allowed in the United States," 21 U.S.C. § 387t(a)(1).

When writing the TCA, Congress relied heavily on FDA's 1996 attempt to regulate cigarettes and smokeless tobacco, including FDA's approach to preemption. *See* TCA, § 2(30), 21 U.S.C. § 387 notes (stating congressional approval of FDA's 1996 tobacco regulations); 21 U.S.C. § 387a-1(a) (requiring FDA to re-adopt many of those regulations); 21 U.S.C. § 387p(a)(2)(A) (tobacco product express preemption provision similar to device product express preemption provision); 21 U.S.C. § 387p(a)(1) & (a)(2)(B) (allowing states to adopt minimum purchase ages, access restrictions, and advertising restrictions more stringent than those under the FDCA).

ARGUMENT

Proposition of Law:

The Federal Food, Drug, and Cosmetic Act, as amended by the Tobacco Control Act, preempts a state-law claim that is based on the alleged sale of a new tobacco product that has not been authorized by the FDA.

I. Title 21 U.S.C. § 337(a) impliedly preempts the AG's claims because those claims would not exist in the absence of the FDCA.

21 U.S.C. § 337(a) provides that, with the exception of certain proceedings regarding food, "all such proceedings for the enforcement, or to restrain violations of this Act shall be by and in the name of the United States."

The U.S. Supreme Court and the U.S. Courts of Appeals for the First, Sixth, and Ninth Circuits have all held that section 337(a) impliedly preempts a state law claim that would not exist in the absence of the FDCA. *Buckman*, 531 U.S. at 353 (holding that section 337(a) impliedly preempts claims that "exist solely by virtue of the FDCA" in that "the existence of [the FDCA] is a critical element" of the claims); *Dicroce v. McNeil Nutritionals, LLC*, 82 F.4th 35, 40 (1st Cir. 2023) ("§ 337(a) preempts any state-law claim that exists solely by virtue of an FDCA infraction");

McDaniel v. Upshire-Smith Labs, 893 F.3d 941, 948 (6th Cir. 2018) (holding that section 337(a) impliedly preempted plaintiff's claims because "the existence of the FDA regulations" was "critical to [plaintiff's] case"); *Grand River Enters. Six Nations v. Knudsen*, No. 23-35494, 2024 U.S. App. LEXIS 14597, *5 (9th Cir. Jun. 14, 2024) (holding that section 337(a) preempted state attorney general's attempt to enforce an FDCA tobacco product provision); *Perez v. Nidek Co.*, 711 F.3d 1109, 1119 (9th Cir. 2013) (holding plaintiff's claim preempted because it "exists solely by virtue of the FDCA").

Those cases involved medical devices, dietary supplements, drugs, and tobacco products.[3] And their holdings make sense. As the Sixth Circuit observed in a drug case in which it found that section 337(a) impliedly preempted a state consumer protection act claim, the United States' exclusive enforcement authority "is thwarted if savvy plaintiffs can label as arising under a state law" a "claim that in substance seeks to enforce the FDCA." *Loreto*, 515 F. App'x at 579.

Here, the AG plays the role of the savvy plaintiff by arguing that his claim is purely one of state law—*i.e.*, the CSPA. But the AG's CSPA claims are based on the fact that the products at issue are allegedly "adulterated" under the FDCA because they lack FDA authorization.

In other words, the AG's claims would not exist in the absence of the FDCA. Therefore, section 337(a) impliedly preempts the AG's claims. *See, e.g.*, *Loreto*, 515 F. App'x at 579 ("[Plaintiff's] theory of liability depends entirely upon an FDCA violation—*i.e.*, the *only* reason Procter & Gamble's products were allegedly 'illegal' was because they failed to comply with FDCA labeling requirements. This theory is impliedly preempted by federal law.").

[3] *Buckman* and *Perez* involved medical devices; *McDaniel* involved a drug; *Dicroce* involved a dietary supplement; *Grand River* involved tobacco products.

The Ninth Circuit's *Grand River* decision is instructive. In that case, the Montana Attorney General initiated a state-law enforcement action against the plaintiff manufacturer because the plaintiff sold tobacco products that the FDA had deemed to be "adulterated" under the FDCA. 2024 U.S. App. LEXIS 14597, *2. The Ninth Circuit held that 21 U.S.C. § 337(a) impliedly preempted the AG's claim because the "claim exists solely by virtue of the FDCA." *Id.* at *5 (quoting *Buckman*, 531 U.S. at 353).

Also instructive is *Iowans for Alternatives to Smoking & Tobacco, Inc. v. Iowa Dep't of Revenue*, 781 F. Supp. 3d 724 (S.D. Iowa 2025). In that case, the Iowa legislature adopted a statute that banned the sale of some new tobacco products if the FDA had not authorized the sale of those products. *Id.* at 728. Applying 21 U.S.C. § 337(a), the court held that the FDCA impliedly preempted the Iowa statute because the Iowa statute depended on the existence of the FDCA:

> By expressly incorporating the [FDA authorization] process into the statutory framework and using it as the foundation for which products may be lawfully sold in Iowa, House File 2677 effectively transfers the FDA's enforcement discretion to the state. This approach conflicts with Section 337(a)'s reservation of enforcement authority to the federal government.

Id. at 740.

II. The TCA's "preservation/savings" provision does not allow Ohio to enforce the FDCA's tobacco product requirements.

The Court of Appeals below ignored section 337(a) and the case law applying that statute, including *Buckman*. Rather than address those authorities, the Court of Appeals said that 21 U.S.C. § 387p—the TCA's preservation/savings provision—preserves a State's right to regulate the "sale" of tobacco products. For at least four reasons, that reasoning is wrong.

First, when Congress adopts such provisions, it does so to ensure that a court will not find *field* preemption. *See, e.g.*, *Fisher v. NOS Communs.*, 495 F.3d 1052, 1058 (9th Cir. 2007) ("A savings clause is fundamentally incompatible with complete field preemption; if Congress

intended to preempt the entire field of telecommunications regulation, there would be nothing for section 414 to 'save,' and the provision would mere surplusage."); *Dooner v. DiDonato*, 971 A.2d 1187, 1197 (Pa. 2009) (noting that a "savings clause strongly negates the suggestion of field preemption" and "to find field preemption would excise the savings clause from the statute"); *Viva! Internet Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 162 P.3d 569, 577 (Cal. 2007) (noting that "inclusion of [a] savings clause in a statute negates field preemption"). But a savings clause does not shield state law from implied obstacle preemption—the type of preemption applicable here. *See Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (finding implied obstacle preemption even though the federal statute included a "savings clause").

Second, the Court of Appeals' interpretation of the preservation/savings provision would render the TCA's express preemption provision—21 U.S.C. § 387p(a)(2)(A)—a nullity.

For example, the FDCA requires tobacco product manufacturing facilities to register with the FDA, *see* 21 U.S.C. § 387e(b); and it authorizes the federal government, and only the federal government, to bring enforcement proceedings against anyone who sells a tobacco product manufactured in a non-FDA-registered facility.[4] But under the Court of Appeals' reading of section 387p, Ohio could enforce the section 387e(b) registration requirement through a "sales restriction" that prohibits the sale of tobacco products manufactured in non-FDA-registered facilities.

As another example, the FDCA requires the manufacturer or importer of certain tobacco products to pay a quarterly "user fee" to the FDA, *see* 21 U.S.C. § 387s; and it authorizes the federal government, and only the federal government, to bring enforcement proceedings against

[4] The FDCA deems any tobacco product to be "misbranded" if it was manufactured in a non-FDA-registered facility. *See* 21 U.S.C. § 387c(a)(6).

anyone who sells a tobacco product manufactured or imported by someone who has not paid the required user fee.[5] But under the Court of Appeals' reading of section 387p, Ohio could enforce the section 387s user fee requirement through a "sales restriction" that prohibits the sale of tobacco products manufactured or imported by a person who did not pay the required user fee.

The situations discussed in the two previous paragraph are no different from the situation here. The FDCA requires the manufacturer of any "new" tobacco product—including an e-cigarette—to obtain FDA marketing authorization through the premarket tobacco product application process under 21 U.S.C. § 387j. Through section 337(a), the FDCA also authorizes the federal government, and only the federal government, to bring enforcement proceedings against anyone who sells a new tobacco product that does not have FDA marketing authorization.[6] But under the Court of Appeals' reading of section 387p, Ohio can enforce the section 387j premarket authorization requirement through a "sales restriction" that prohibits the sale of tobacco products that require, but lack, FDA marketing authorization.

In short, under the Court of Appeals' reading of 21 U.S.C. § 387p, the express preemption clause would be meaningless because a State could circumvent that clause by styling any attempt to enforce the FDCA's premarket authorization, adulteration, misbranding, or registration requirements as nothing more than an effort to regulate tobacco product "sales." Such an interpretation is to be avoided. *See*, *e.g.*, *State ex rel. Carna v. Teays Valley Local Sch. Dist. Bd. of Educ.*, 131 Ohio St. 3d 478, 483, 2012-Ohio-1484, ¶ 19, 967 N.E.2d 193, 198 (2012) ("No part

[5] The FDCA deems any tobacco product to be "adulterated" if it was manufactured or imported by someone who has not paid the required user fee." *See* 21 U.S.C. § 387b(4).

[6] The FDCA deems any tobacco product to be "adulterated" if the product requires, but lacks, FDA premarket authorization. *See* 21 U.S.C. § 387b(6).

[of the statute] should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative."), quoting *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Educ.*, 95 Ohio St. 367, 373, 116 N.E. 516 (1917); *State v. Arnold*, 61 Ohio St. 3d 175, 178, 573 N.E.2d 1079, 1082 (1991) ("It is a cardinal rule of statutory construction that . . . [a statute] shall be . . . expounded, if practicable, as to give some effect to every part of it.") (citations omitted).

Third, the Court of Appeals' reading of the preservation/savings provision ignores the legislative history of the TCA. As discussed above, when the FDA attempted to regulate cigarettes and smokeless tobacco as drug delivery devices in 1996, states had to apply for exemptions to the FDCA's preemption provision for devices to adopt minimum purchase ages, vending machine access restrictions, and advertising restrictions more stringent than those in the FDA's regulations. And as discussed above, when Congress wrote the TCA in 2009 it relied on the work the FDA did in 1996. So, the best reading of the preservation/savings provision is that it applies only to age, access, and advertising restrictions.

Fourth, Congress understood from *Buckman* and its progeny that section 337(a) would impliedly preempt state law duties if the "existence of" the TCA was a "critical element" of those duties.

Courts must "assume that Congress is aware of existing [case] law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979)). So, courts must assume that Congress was aware of case law interpreting the FDCA—including *Buckman* and its progeny—when it enacted the TCA in 2009.

As noted above, in *Buckman*, the Supreme Court held that section 337(a) impliedly preempted the plaintiffs' state law claims because "the existence of [the FDCA] was a critical element" of the defendant's purported state law duties. 531 U.S. at 353. The Court reasoned that such "claims inevitably conflict with the FDA's responsibility" to enforce the FDCA "consistently with the [agency's] judgment and objectives." *Id.* at 350; *accord Nathan Kimmel v. DowElanco,* 275 F.3d 1199, 1206 (9th Cir. 2002) (stating that the "key factor identified by the Supreme Court in concluding that Buckman's claims were pre-empted was that 'the existence of [the FDCA was] a critical element in [the] case'").

In short, when Congress passed the TCA in 2009, it knew that section 337(a) would impliedly preempt any state law if the existence of the TCA was a critical element of a person's duties under that state law. Had Congress wanted to avoid implied preemption of state law duties or claims that depend on the existence of the TCA, it would have amended section 337 (as it did in 1990 with respect to state enforcement of certain FDCA food provisions). But Congress did not do so.

III. The Court of Appeals' "signage" theory does not defeat Defendant's preemption argument.

The Court of Appeals said the AG's claims are not preempted because Defendant could avoid liability by "displaying the products in a separate section [of its store] with signage indicating the vapes are unregulated by the FDA." App. Op. ¶ 31. But that theory of liability "would not exist in the absence of the FDCA." *Loreto*, 515 F. App'x at 579 (citing *Buckman*, 531 U.S. at 353). As such, the FDCA preempts the AG's claims to the extent he alleges Defendant had a duty to tell consumers that the FDA has not authorized the products at issue. *See Yimam v. Myle Vape, Inc.*, No. 2019 CA 8050B, 2020 D.C. Super. LEXIS 7, at *10-11 (D.C. Super. Ct. June 11, 2020) (holding that the FDCA impliedly preempted plaintiff's consumer protection statute claim that was

based on a theory that defendant had a duty to inform consumers that the FDA had not authorized its electronic cigarettes).

Indeed, at least two federal circuits (including the Sixth Circuit) have held that the FDCA impliedly preempts state law claims that are based on an allegation that the defendant had a duty to tell consumers that its products did not comply with FDA requirements. In *Loreto*, the plaintiffs based their state consumer protection law claim on an allegation that "Procter & Gamble omitted telling consumers that its products were 'illegal'" in that the product's "labeling did not comply with the FDCA's requirements." 515 F. App'x at 579. But the Sixth Circuit held that this "theory [was] impliedly preempted by federal law" because it "depend[ed] entirely upon an FDCA violation." *Id.*

In *Perez*, 711 F.3d 1109, the plaintiff underwent a surgical procedure using the defendant's medical device and later alleged that the manufacturer violated state law by failing to disclose that FDA had not approved the device for that procedure. *Id.* at 1111. The Ninth Circuit held that the FDCA preempted this state law claim. In doing so, the court reasoned that the state law "claim exist[ed] solely by virtue of the FDCA requirements," and therefore "conflict[ed] with the FDCA's enforcement scheme." *Id.* at 1119.

Moreover, the "signage" proposed by the Court of Appeals would constitute "labeling" under the FDCA, and the FDCA expressly preempts any state-law labeling requirement that is "different from, or in addition to, any [FDCA labeling] requirement." 21 U.S.C. § 387p(a)(2)(A).

The FDCA defines "labeling" as "all labels and other written, printed, or graphic matters (1) upon any article or any of its containers or wrappers, or (2) ***accompanying such article***." 21 U.S.C. § 321(m) (emphasis added). In *Kordel v. United States*, 335 U.S. 345 (1948), the U.S. Supreme Court held that product "labeling" included "pamphlets" that were "displayed in stores

in which the [defendant's] products were on sale." *Id.* at 346. The Court explained: "One article or thing is accompanied by another when it supplements or explains it, in the manner that a committee report of the Congress accompanies a bill. No physical attachment one to the other is necessary. It is the textual relationship that is significant." *Id.* at 351.

Based on *Kordel*, "courts have interpreted 'accompanying' broadly." *See* S. Tayor, et al., *Promoting Functional Foods and Nutraceuticals on the Internet*, 54 Food & Drug L.J. 423, 444 (1999) (collecting cases); *United States v. Innovative BioDefense, Inc.*, 2019 U.S. Dist. LEXIS 99683, *11 (C.D. Cal. Feb. 22, 2019) (collecting cases).

In short, the Court of Appeals' "signage" theory does not save Ohio's claims from preemption.

CONCLUSION

For the reasons discussed above, Defendant/Appellant requests that the Court accept this appeal.

Dated: May 6, 2026

/s/ James C. Fraser
Gregory P. Feldkamp (0084472)
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, OH 44114
(216) 566-5500
Gregory.Feldkamp@ThompsonHine.com

Eric N. Heyer (admitted Pro Hac Vice)
James C. Fraser (admitted Pro Hac Vice)
THOMPSON HINE LLP
1919 M Street, NW, Suite 700
Washington, DC 20036
(202) 331-8800
Eric.Heyer@ThompsonHine.com
James.Fraser@ThompsonHine.com

Counsel for Defendant-Appellee
Orrville Tobacco and Vape Shop, LLC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum in Support of Jurisdiction* was served on May 6, 2026, via e-mail on the following:

Drew Smith (0070188)
Assistant Attorney General
Consumer Protection Section
State Office Building, 11th Floor
615 West Superior Avenue
Cleveland, Ohio 44113-1899
Drew.smith@OhioAGO.gov

Counsel for Plaintiff-Appellant,
the State of Ohio

/s/ James C. Fraser
James C. Fraser