Nos. 24-6404, 24-6431 & 24-6684

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAN MONTENEGRO, *et al.*,
Plaintiffs-Appellants,
v.
CVS PHARMACY, INC., *et al.*,
Defendants-Appellees.

BENZOYL PEROXIDE ACNE TREATMENT DRUG PRODUCTS APPELLANTS,
Plaintiffs-Appellants,
v.
ALCHEMEE, LLC, *et al.*,
Defendants-Appellees.

ALAN MONTENEGRO, *et al.*,
Plaintiffs-Appellants,
v.
RB HEALTH (US), LLC, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Central District of California, Nos. 2:24-cv-01876, 2:24-cv-01834, 2:24-cv-01878
Hon. Stanley Blumenfeld, Jr., District Judge

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING DEFENDANTS-APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber and its members have a strong interest in this appeal. In the specific context of over-the-counter (OTC) drugs regulated by FDA monographs, the Chamber's members have a strong interest in the certainty and stability provided by FDA's uniform, national regime for drug product labels. An important reason why Congress chose to prevent states from creating their own labeling requirements for these

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

products is to protect the stability and predictability of monograph labeling requirements for manufacturers and retailers—and for consumers, who benefit from the clarity and nationwide consistency produced by FDA's monograph regime. More broadly, the Chamber's members have a strong interest in ensuring that Congress's preemption provisions are interpreted properly to cut off improper litigation and to ensure uniform regulation of matters that Congress chose to govern by federal law alone. If Plaintiffs' attempt to circumvent Congress's express preemption rules were to succeed, the business community would incur unwarranted costs and liability risks that ultimately would cause harm to consumers.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the Federal Food, Drug, and Cosmetic Act (FDCA), Congress tasked FDA with the responsibility to regulate the labeling and sale of drugs. For certain nonprescription drugs, FDA promulgates a type of regulation called a monograph, which sets forth requirements with which drugs must comply in order to be deemed safe and effective and sold in the United States. *See* 21 C.F.R. § 330.1 *et seq.*; 21 U.S.C. § 355h. Congress has chosen to restrict states from imposing any requirements

different from the federal requirements set forth in such a monograph. Specifically, 21 U.S.C. § 379r(a) bars states from "establish[ing] or continu[ing] in effect any requirement" that relates to an OTC drug that "is different from or in addition to, or that is otherwise not identical with," the requirements applicable under federal law. Materially identical preemption language is used in several other federal regulatory statutes. *See, e.g.*, 21 U.S.C. § 379s(a) (prohibiting any state cosmetic labeling or packaging requirement "that is different from or in addition to, or that is otherwise not identical with," federal requirements); 21 U.S.C. § 360k(a) (provision related to medical devices that prohibits states from establishing requirements "different from, or in addition to" any requirements applicable under federal law).

Pursuant to its statutory authority, FDA issued a monograph to govern the topical acne medicines here. That monograph prescribes the exact phrases, categories, directions, descriptive terms, and ingredients that must (or in some cases, may) be listed on the packaging for certain OTC acne treatments. *See* 21 C.F.R. § 333.350; 21 C.F.R. § 330.1(d), (e), (f), (g). It is undisputed that the challenged products here conformed to those federal requirements. Federal law thus deems the products

"generally recognized as safe and effective" and "not misbranded." 21 C.F.R. § 333.301(a).

Although the products here contained all the labeling that the monograph requires, Plaintiffs sued Defendants, claiming that Defendants should have said more. Plaintiffs' central contention was that Defendants should have warned consumers of the alleged degradation potential of benzoyl peroxide (BPO), a common ingredient in Defendants' OTC acne treatments. Plaintiffs later also argued that Defendants violated state law by selling these products in the first place. Plaintiffs claimed that they were economically harmed because they bought the products when they otherwise would not have or paid more for the products than they otherwise would have.

Applying the straightforward preemption language that Congress enacted, the district court dismissed Plaintiffs' claims. 1-ER-13-19. The court explained that Plaintiffs' demands in the name of state law—to stop selling the products or to provide specific labels regarding the potential presence of benzene—would impose state-specific requirements that are different from, or in addition to, those established by the FDCA and FDA regulations. 1-ER-16-18. The court explained that FDA's monograph set

out the exact warnings required on the labels of OTC acne products, including those containing BPO. *Id.* Because that monograph does not specify a warning for benzene, the court reasoned, Plaintiffs' demands would impose an additional requirement beyond those established under federal law.

The court rejected Plaintiffs' argument that their claims merely paralleled the general federal prohibitions on adulterated or misbranded drugs. As the court explained, that argument improperly second-guessed FDA's application of those general prohibitions to these specific products in the monograph. 1-ER-18-19. And the court noted that Plaintiffs' adulteration contention "contradicts the central theory of their FAC (i.e., false advertising for failure to warn) because no additional warning could transform a criminally adulterated drug into a legal, commercial product." 1-ER-19. Put simply, the court refused to allow Plaintiffs' misbranding and adulteration theories to be used to circumvent the express preemption language enacted by Congress.

The district court's analysis is correct, and Congress's choice to preempt state-law claims like Plaintiffs' is sound.

First, the district court was correct to dismiss Plaintiffs' claims on preemption grounds. As the court recognized, FDA has promulgated a monograph—a regulation with the force of federal law—that sets forth the exact warnings required on product labels for OTC acne treatments, like the products here. So long as the products comply with those monograph requirements, they may be sold. Plaintiffs' claims would upend that scheme by imposing different labeling requirements beyond those required by federal law, or by prohibiting the sale of those products altogether.

Plaintiffs cannot avoid preemption by pointing to the general federal prohibitions on adulteration and misbranding. FDA made a specific judgment, applying its scientific expertise and exercising its congressionally delegated authority, that OTC acne treatments containing BPO are safe and effective, and are *not* adulterated or misbranded, when they contain the warnings and requirements specified by the monograph. Congress created a specific path to allow FDA to change those warnings when necessary, but FDA has not done so. *See* 21 U.S.C. § 355h(b)(4); *see also* 21 C.F.R. § 10.30 (allowing a person to petition FDA to make a national requirement).

Plaintiffs' claims contradict both FDA's and Congress's judgment. Pretending that state-law claims are merely parallel because they recite the federal prohibitions on adulteration and misbranding—when the claims contradict how FDA has applied those prohibitions to the specific products at issue, in a way that carries the force of federal law—would nullify Congress's preemption provision. Moreover, it would create a circuit split in how the federal courts of appeals interpret this preemption language.

Second, while the plain language of Congress's preemption provision resolves this case, it bears emphasis that Congress made the right choice to promote uniformity in interstate commerce and to preempt different state labeling regimes. Under Plaintiffs' theory, states would be able to impose one-off labeling requirements that vary from FDA's specific requirements. That fragmented framework would mean that identical products governed by a single FDA monograph could bear different warnings in different states and would lead to manufacturers overloading their product labels with unwarranted warnings. Such inconsistency and over-warning would cause consumer confusion,

contrary to Congress's intent to implement a uniform, nationwide regime.

The district court's dismissal on preemption grounds should be affirmed.

ARGUMENT

I. Federal Law Preempts Plaintiffs' Claims.

The district court properly dismissed Plaintiffs' claims as preempted. Section 379r(a) provides that no state can establish or continue any requirement for the labeling of an OTC drug that is different from or in addition to, or that is not identical with, FDA labeling requirements. Plaintiffs' claims here attempt to impose requirements that FDA did not adopt.

A. Congress preempted all requirements that are not identical to federal requirements.

The FDCA expressly preempts any state law that establishes or continues in effect any requirement for OTC drugs "that is different from or in addition to, or that is otherwise not identical with, a requirement under this chapter." 21 U.S.C. § 379r(a)(2). As the plain statutory text makes clear, states cannot supplement FDA monographs at all. "[A]ny requirement relating to public information or any other form of public

communication relating to a warning of any kind for a drug" is foreclosed in the OTC drug context unless it is identical to the federal requirements. *Id.* § 379r(c)(2).

Congress regularly employs this language to bar all state requirements that differ from the federal requirements. Materially identical preemption provisions appear, for example, in federal statutes governing cosmetics and medical devices. *See supra* p.3 (quoting 21 U.S.C. §§ 379s(a), 360k(a)). And federal courts of appeals regularly enforce the plain language of those provisions to hold state-law claims preempted. *See, e.g.*, *Critcher v. L'Oreal USA, Inc.* 959 F.3d 31, 36-37 (2d Cir. 2020) (21 U.S.C. § 379s(a) preempted plaintiffs' consumer protection claims against cosmetics company, where plaintiffs claimed they were unable to dispense all of the liquid product from their individual containers); *Weber v. Allergan, Inc.*, 940 F.3d 1106, 1111-12 (9th Cir. 2019) (21 U.S.C. § 360k(a) preempted plaintiffs' tort claims against medical device company for health problems allegedly caused by breast implants).

Turning to the regime here for OTC drugs, FDA has set forth express requirements under its congressionally delegated authority. In

2010, FDA issued a final monograph for certain acne products with "benzoyl peroxide, in concentrations of 2.5 to 10 percent." Classification of Benzoyl Peroxide as Safe and Effective; Final Rule, 75 Fed. Reg. 9767, 9769 (Mar. 4, 2010). In 2021, after Congress revamped the monograph process in the CARES Act, *see* 21 U.S.C. § 355h, FDA issued a final administrative order incorporating that monograph. *See* FDA, Final Administrative Order, No. OTC000013: Over-the-Counter Monograph M006: Topical Acne Drug Products for Over-the-Counter Human Use (Nov. 23, 2021); *see also* 21 U.S.C. § 355h(b)(8).

"Like a recipe," this monograph "provides the conditions under which" an OTC drug—like one including BPO—is generally recognized as safe and effective. *Nat'l Res. Def. Council, Inc. v. FDA*, 710 F.3d 71, 75 (2d Cir. 2013), *as amended* (Mar. 21, 2013). Here, the monograph sets out how much BPO can be in a topical acne product. *See* 21 C.F.R. § 333.310(a) (permitting up to 10% BPO as active ingredient). It provides specific indications and directions that the label can contain. *Id.* § 333.350(a), (c). And it provides specific warnings that the label must contain. *Id.* § 333.350(b).

As the district court found, Plaintiffs did not allege that the product labels at issue here violated the FDA monograph that governed the products. 1-ER-18. That is reason enough to affirm. Where a drug is "in conformity with the requirements for nonprescription use of a final monograph," it is "deemed to be generally recognized as safe and effective." 21 U.S.C. § 355h(a)(1); *see also* 21 C.F.R. § 333.350; 21 C.F.R. § 330.1(d), (e), (f), (g) (requiring drugs to be labeled and advertised in compliance with their relevant monograph). Such a drug is not misbranded or otherwise unlawful.

Other courts addressing similar claims have reached this result. In *Williams v. Galderma Laboratories, L.P.*, 2024 WL 4213220 (N.D. Ill. Sept. 17, 2024), for example, the plaintiffs alleged an analogous claim—that the BPO in the defendant's OTC acne treatments degrades into benzene, thereby rendering those treatments adulterated and misbranded. *See id.* at *3. The court ruled that a state-law failure-to-warn claim concerning the presence or potential presence of benzene was "preempted because it would be an 'addition' not required by federal law." *Id.* (quoting 21 U.S.C. § 379r(a)). In *Smoter v. Mentholatum Co.*, 2025 WL 273437 (N.D. Ill. Jan. 17, 2025), the court also dismissed similar claims

as preempted, even when framed as an alleged failure to comply with FDA-issued "current good manufacturing practices." *Id.* at *2-3. And in *Eisman v. Johnson & Johnson Consumer, Inc.*, 2025 WL 241024 (C.D. Cal. Jan. 17, 2025), the court dismissed as preempted a claim challenging the alleged presence of benzene in OTC shampoo because the FDA "monograph expressly permits Coal Tar to be an active ingredient" even though coal tar was claimed to contain benzene. *Id.* at *3.

The district court in this case simply applied the statute's plain text, just as these other courts did. Where, as here, "FDA tellingly did not require a warning" in a monograph, Plaintiffs cannot fault Defendants for failing to include such a warning. *Goldstein v. Walmart, Inc.*, 637 F. Supp. 3d 95, 110 (S.D.N.Y. 2022). Because Defendants sold their products in full compliance with federal law, Plaintiffs' claims are preempted.

B. Plaintiffs cannot avoid preemption by reframing their claims as parallel to the general prohibitions on misbranded and adulterated drugs.

To try to avoid preemption, Plaintiffs attempt to recast their claims as based on the FDCA's general prohibitions on the sale of adulterated and misbranded drugs. Their circular reasoning is as follows: the monograph provides that "a BPO product 'is generally recognized as safe

and effective and is not misbranded if it meets each of the conditions' in this subpart ***and*** each general condition established in § 330.1 of this chapter." Opening Br. 15 (quoting § 333.301(a)). Section 330.1, in turn, requires all products to be "labeled in compliance with chapter V of the" FDCA. Opening Br. 16 (quoting § 330.1(c)(1)). And Chapter V "proscribes the sale of misbranded and adulterated drugs." *Id.* (citing 21 U.S.C. §§ 351, 352). So, according to Plaintiffs, the regulatory guarantee that a product is "not misbranded" if it complies with the relevant regulations is no safe harbor at all. Plaintiffs can always evade § 379r(a) and bring state-law claims challenging products that fully complied with the applicable monograph by the mere expedient of alleging that the product was misbranded under general federal principles.

That reasoning would eviscerate Congress's preemption provision and render it "inoperative or superfluous," contravening Supreme Court precedent. *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). The Supreme Court has directed courts to interpret laws "as a symmetrical and coherent regulatory scheme." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995). All parts should be interpreted together "into an harmonious whole." *FTC v.*

Mandel Bros., 359 U.S. 385, 389 (1959); *see also Corley*, 556 U.S. at 314 ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (cleaned up) (quoting *Hibbs*, 542 U.S. at 101)). Here, the regulatory monograph and statutory preemption provision work in harmony to ensure that products bear uniform warnings. Plaintiff's approach would upend that scheme.

Plaintiffs' position is also inconsistent with specific provisions of the FDCA that establish that compliance with a monograph means that a product is *not* misbranded or adulterated. The provision in Chapter V proscribing the sale of misbranded drugs, for example, explains that a drug "liable to deterioration," as Plaintiffs claim the products here are, is *not* misbranded when "packaged in such form and manner, and its label bears a statement of such precautions, as [FDA] shall by regulations require." 21 U.S.C. § 352(h). Here, the products fully complied with everything that the monograph required. And compliance with the monograph is how drugs establish that they satisfy the federal standards.

Precisely for that reason, courts have regularly rejected efforts to evade the statutory preemption provision by broad reference to misbranding prohibitions. In *Critcher v. L'Oreal USA, Inc.*, for example, the plaintiffs argued that their state-law claims merely sought to "enforce the general FDCA requirement[] … that labels not be 'false and misleading in any particular.'" 959 F.3d at 37-38 (citing 21 U.S.C. § 362(a)). The Second Circuit rejected that argument. "FDA has promulgated rules regulating what must be included on labels," and those regulations "have therefore stated, with specificity, what information is necessary to avoid misleading consumers." *Id.* Allowing plaintiffs to pursue claims alleging a need for "*additional* labeling requirements" would "disrupt what Congress intended to be a uniform—and federally-led—regulatory scheme." *Id.*

Similarly, in *Durnford v. MusclePharm Corp.*, this Court relied on a nearly identical preemption provision to dismiss claims that a nutritional supplement company failed to accurately measure and disclose the total amount of protein in one of its products. *See* 907 F.3d 595 (9th Cir. 2018). In dismissing the plaintiffs' claims on preemption grounds, this Court ruled that the FDCA and FDA regulations "foreclose

the possibility of liability under state law." *Id.* at 602. And the Court was not persuaded by the plaintiffs' attempts to evade preemption by characterizing their protein measurement claim as a misbranding theory, reasoning that the FDCA's food-specific prohibition on "false or misleading statements *in general* does not alter our analysis." *Id.*; *see also Turek v. Gen. Mills, Inc.*, 662 F.3d 423, 427 (7th Cir. 2011) (rejecting state-law claims where plaintiffs wanted additional disclaimers added; those additional disclaimers were "not identical to the labeling requirements imposed on such products by federal law, and so they are barred").

In the benzene cases discussed above as well, various plaintiffs have repeatedly attempted, to no avail, to frame their state-law claims as parallel to broad federal requirements. In *Williams*, the plaintiff argued "that Differin is misbranded under the FDCA because its label does not disclose or warn that it contains benzene." 2024 WL 4213220, at *3. The court rejected that argument. "Federal labeling regulations do not require such a statement," so the state-law "claim on this basis is preempted." *Id.* And in *Smoter*, the plaintiffs asserted that the products were "adulterated because they omit" an additional stabilizer ingredient.

2025 WL 273437, at*2. But that "theory of the case would impose a further state law requirement on [the defendants] to produce monograph-compliant products only if they also added a separate ingredient appearing nowhere in the monograph." *Id.* Adopting that theory would be "inconsistent with the preemptive effect of the FDCA and FDA regulations on OTC drug manufacturing, which forbid state regulations not 'identical' to federal requirements." *Id.* (quoting 21 U.S.C. § 379r(a)).

Plaintiffs here are simply rehashing a playbook that courts have properly rejected. Appellate courts uniformly interpret the broad preemption language found in Section 379r to prevent state claims like these from moving forward where the product label complied with federal law. Consistent with that unbroken line of precedent, this Court should affirm the decision below.

II. Congress's Decision to Empower FDA to Impose Uniform Labeling Requirements Is Good Policy.

"Congress ma[kes] a policy judgment in selecting the words of" a statutory provision, and courts "are in no position to contradict it." *In re Hokulani Square, Inc.*, 776 F.3d 1083, 1088 (9th Cir. 2015). In enacting the preemption provision here, Congress demonstrated its intent to provide consumers with labels that effectively and uniformly convey

crucial health and safety information. Permitting states to impose "[d]ifferent or additional requirements" would not only "work against [the] national marketplace," but also "confuse consumers, raise prices, [and] undermine public confidence in our regulatory system." S. Rep. No. 105-43, at 64 (1997).

A. Non-uniform safety and labeling requirements would generate consumer confusion.

One inevitable consequence of permitting each state to impose its own labeling requirements is consumer confusion. Consumers typically purchase OTC products on their own, so it is especially important for them to be able to understand what they are purchasing. If different brands of the same OTC drug bore different warnings, consumers would be confused about the actual risks associated with those products and could be led to believe, incorrectly, that certain equivalent products are safer than others or otherwise not equivalent.

FDA has designed OTC drug labels to facilitate consumer understanding. In adopting a standardized "Drug Facts" label for all OTC products in 1999, FDA emphasized the importance of clear, readable labels with "the least amount of information possible to assure proper self-selection and use" of the medication. 64 Fed. Reg. 13,254, 13,269

(Mar. 17, 1999). Jumbled warnings that change from brand to brand and state to state would undermine the goal of assuring proper self-selection and use of OTC medication.

Moreover, if labels were overloaded with disclaimers to avoid potential litigation or liability, this could cause consumers to discount all the warnings. For decades, FDA has expressed concern that, for OTC products, "if labeling contains too many required statements, … the impact of all warning statements on the label will be reduced." General Labeling Conditions, 40 Fed. Reg. 11,717, 11,717 (Mar. 13, 1975). Indeed, FDA considers overwarning to be a concern even for prescription drug labels. When working with manufacturers to develop an appropriate label, FDA ensures that there is a "hierarchy of label information … designed to 'prevent overwarning' so that less important information does not 'overshadow' more important information." *Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. 299, 304 (2019) (quoting 73 Fed. Reg. 49,603, 49,605-49,606 (Aug. 22, 2008)). FDA further seeks to ensure that labels "exclude 'exaggeration of risk, or inclusion of speculative or hypothetical risks,' that 'could discourage appropriate use of a beneficial drug.'" *Id.* (brackets omitted) (quoting 73 Fed. Reg. 2848, 2851 (Jan. 16,

2008)). Allowing states to tack on additional warnings would weaken the important warnings that FDA has chosen and would risk discouraging the appropriate use of a safe and effective drug.

The accompanying Senate Report to the bill that established § 379r highlighted exactly these concerns. "Different or additional requirements a[t] the State or local level can work against our national marketplace, confuse consumers, raise prices, undermine public confidence in our regulatory system and in products important to the public health, and result in divergent public health protection throughout the country." S. Rep. No. 105-43, at 64. Congress considered these risks and determined that uniformity was necessary.

That choice was wise. Because "[n]onprescription drugs are subject to careful and comprehensive regulation by the FDA," there would be little benefit to any extra layer of regulation. *Id.* Congress thus made the choice to bar states from "impos[ing] different or additional requirements that relate to the subject matter covered by … Federal laws as they apply to nonprescription drugs and cosmetics," including "requirements imposed on product manufacture or composition, labeling, advertising, or any other form of public notification or communication." *Id.*

B. A patchwork of different labeling regimes would increase costs for businesses providing needed medications.

Allowing idiosyncratic labeling requirements under state law would also increase regulatory compliance and litigation costs. The concern that a regulatory patchwork would "raise prices" for OTC products was top of mind when Congress enacted the preemption provision here. S. Rep. No. 105-43, at 64. Minimizing costs to consumers by limiting litigation over requirements that FDA chose not to impose is a worthwhile goal that Congress properly pursued.

Navigating a labyrinth of varying state requirements would impose higher costs and burdens on pharmaceutical manufacturers and, ultimately, on consumers. If each state could have its own unique labeling requirements, companies would have to perform continuous monitoring across 50 states, engage in frequent legal consultations, and undertake label redesigns. As the Seventh Circuit put it, "[m]anufacturers might have to print 50 different labels, driving consumers who buy [] products in more than one state crazy." *Turek*, 662 F.3d at 426. Such an approach would increase costs for all manufacturers, large and small, and could force small and mid-sized

firms out of the market altogether. The result would be to reduce the availability of affordable FDA-approved products for ordinary consumers.

Opening the door to state-law litigation over requirements that FDA chose not to impose would also force drug manufacturers and retailers to engage in costly legal battles to defend against state-specific claims that may differ from jurisdiction to jurisdiction. This is no small risk. The U.S. tort system's commercial liability costs totaled $347 billion in 2021, an increase of 19 percent over the year before. *See* U.S. Chamber of Com. Inst. for Legal Reform, Tort Costs for Small Businesses 3 (Dec. 2023), *available at* https://instituteforlegalreform.com/research/tort-costs-for-small-businesses/. Those costs are often passed onto consumers, who face higher prices and fewer valuable products to choose from.

Congress wisely determined that the costs of a patchwork regulatory system were too high to foist on businesses and consumers. It accordingly adopted, "as a general rule, the requirement of national uniformity in the regulation of nonprescription drugs." *Goldstein*, 637 F. Supp. 3d at 104 (quoting S. Rep. No. 105-43, at 64). "Under the legislation, national uniformity is provided for all of the types of

requirements for nonprescription drugs … under State laws that are related to requirements included in the Federal laws, e.g., requirements to prevent adulteration or misbranding or other illegal marketing or to issue public notice about the safety of constituents." *Id.* (quoting S. Rep. No. 105-43, at 64). Simply put, Congress chose to preempt "[s]tate suits seeking to require product labels inconsistent with the federal objective of national uniformity." *Silva v. Haleon US Inc.*, 758 F. Supp. 3d 1082, 1088 (N.D. Cal. 2024) (quoting *Eckler v. Neutrogena Corp.*, 238 Cal. App. 4th 433 (2015)). That policy choice should be respected.

CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

s/Jeffrey S. Bucholtz

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CERTIFICATE OF COMPLIANCE

I certify that:

This brief complies with the length limitations of Fed. R. App. P. 29(a)(5) and Ninth Circuit Rule 32-1 because this brief contains 4,264 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word in 14-point Century Schoolbook font.

Date: April 28, 2025

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