IN THE DISTRICT COURT OF PLATTE COUNTY, NEBRASKA

THE STATE OF NEBRASKA, ex rel. MICHAEL T. HILGERS, Attorney General, Plaintiff, v. CHASING CLOUDS VAPE COLLECTIVE LLC, a Nebraska Limited Liability Company, Defendant.	Case No. CI 23-432 **BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**

COMES NOW, Defendant Chasing Clouds Vape Collective LLC ("Chasing Clouds"), and, pursuant to Neb. Ct. R. Pldg. §§ 6-1112(b)(1) and (6), moves the Court to dismiss this case. As argued below, the Court should find that this action brought by the State of Nebraska, ex rel. Michael T. Hilgers' (the "Attorney General" or the "State") must be dismissed because many of the legal theories asserted fail to state a claim for which relief can be granted, and others fail to present a justiciable controversy sufficient to invoke the Court's subject matter jurisdiction.

Introduction

The State's Complaint against Chasing Clouds is 31 pages long. It spans 132 paragraphs, incorporates by reference the entirety of 32 online publications, and asserts 21 civil claims, styled as "counts." The Attorney General filed nearly identical complaints against 9 other companies on the same day he filed this Complaint. He announced these filings in the media—claiming it is his belief that these products should not be sold at all. But not once in these pleadings does the Attorney General ever state what he publicly claims—that Chasing Clouds' products are illegal.

Nor can he. It is the law that Chasing Clouds' hemp products are legal. They are legal under federal law. They are legal under the laws of this State. And

nothing the Attorney General claims—whether in the media or in this Court—changes that fact.

If these products were illegal, this action would be criminal in nature—not civil—and brought pursuant to Nebraska's Uniform Controlled Substances Act, Neb. Rev. Stat. §§ 28-401–456.01 & 28-458–476. The State knows this. That is why the Attorney General brought the claims he did, that is why he did not bring the claims he did not. Nonetheless, the State's Complaint, in practice, seeks to render illegal products that are clearly not. To do this, the Attorney General relies on vague statutory schemes designed to protect consumers from deception and then distorts those statutes beyond recognition.

There are straightforward reasons the State's legal theories fail. The statute the Attorney General primarily relies upon has an express carve out that prevents its application when the conduct at issue is regulated by some other source of law. Other claims are moot, as Chasing Clouds no longer engages in several specific business practices the State complains of. And the Attorney General does not have the power to abrogate by fiat what protections the United States Constitution affords commercial speech.

As shown below, the State's claims are legally infirm and must be dismissed. Accordingly, Chasing Clouds asks the Court to grant this Motion.

Background

Chasing Clouds is a business that sells, among other things, edible hemp products, flower, and electronic cigarette—or "vape"—supplies that contain variants of the chemical tetrahydrocannabinol ("THC"), including its variants known as "Delta-8" and "Delta-9."

On October 25, 2023, the Attorney General filed this action as well as nine other similar actions against other companies in the State. The Attorney General preceded these actions with no advance warning or other communications, nor did Chasing Clouds receive any warning from any other state agency. The State's Complaint places five specific products at issue:

- Medicated Nerds Nerdy Bears ("Nerdy Bears") (Complaint, ¶¶ 93, 94(b), 95(e))

- Neon Buttr Exotic Diamond ("Neon Buttr") (*Id.* at ¶¶ 94(a), 95(a))
- Cook Rope Rainbow ("Cook Rope") (*Id.* at ¶ 95(b)
- Hixotic the Jeffrey Snozzberry ("Hixotic") (*Id.* at ¶ 95(c))
- Dimo Rockets Lemon Pound Cake ("Dimo Rockets") (*Id.* at ¶ 95(d))

Of these, Nerdy Bears, Cook Rope, and Hixtotic are edible, Neon Buttr is smoked with an electronic cigarette, and Dimo Rockets are a flower-based product. (*See id.*)

On December 11, 2023, though Chasing Clouds had not yet been served, it wrote the Attorney General to provide updates regarding its business practices. As detailed below, since this letter, Chasing Clouds has taken actions that moot several of this lawsuit's claims.

The State's complaint asserts 21 legal theories—many of which place overlapping alleged conduct at issue. For this Motion's purposes, they can be grouped as follows:

Nebraska Consumer Protection Act (Unfairness), Neb. Rev. Stat. §§ 59-1601–59-1623 ("NCPA")

- Two counts that charge Chasing Clouds with "unfair acts or practices" for selling its products "without consideration for age restriction or youth buyers." (Count I & Count II; Complaint, ¶¶ 105(a) & 105(b))
- Three counts that claim Chasing Clouds markets its products to youth—using "imagery or depictions that are likely to attract or induce youth," "consumable products that are similar to food products . . . marketed toward children," and "products at retail sale that are likely to attract consumption by children." (Count III, Count IV, & Count V; Complaint, ¶¶ 105(c), 105(d), & 105(e))
- Four counts that charge that Chasing Clouds failed to disclose concentrations of THC in its products. (Count VI, Count VII,

Count VIII, and Count IX; Complaint, ¶¶ 105(f), 105(g), 105(h), 105(i))

- One count that charges that Chasing Clouds sells products that are dangerous to minors. (Count X; Complaint, ¶ 105(j))

Nebraska Consumer Protection Act (Deception), Neb. Rev. Stat. §§ 59-1601–59-1623

- One count that charges that Chasing Clouds sells products that are similar to products that are marketed towards children. (Count XI; Complaint, ¶ 114(a))
- Four Counts that charge that Chasing Clouds failed to disclose concentrations of THC in its products. (Count XII, Count XIII, Count XIV, Count XV; Complaint, ¶¶ 114(b), 114(c), 114(d), 114(d))

Nebraska Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. §§ 87-301–87-306

- One count that charges that Chasing Clouds sells products that are similar to products that are marketed towards children. (Count XVI; Complaint, ¶ 120(a))
- Four Counts that charge that Chasing Clouds failed to disclose the presence or concentrations of THC in its products. (Count XVII, Count XVIII, Count XIX, Count XX; Complaint, ¶¶ 121(a), 121(b), 122(a), 122(b))

Nebraska Pure Food Act, Neb. Rev. Stat. §§ 81-2,239–81-2,292

- One count that charges that Chasing Clouds "adulterated food products with THC, and used labeling that failed to disclose concentrations of THC in its products, or were misbranded and false or misleading". (Count XXI; Complaint, ¶¶ 130(a), 131(a)-(c))

Legal Standards

Chasing Clouds primarily brings this motion pursuant to both Neb. Ct. R. Pldg. § 6-1112(b)(1) and (b)(6), as some claims fail to present facts that invoke the Court's subject matter jurisdiction, and the others fail to state a claim for which relief can be granted.

Rule 12(b)(6)

This Motion primarily involves Rule 12(b)(6). "A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint, not the claim's substantive merits." *Shadow Ridge Ltd. P'ship v. Ryan (In re Estate of Ryan)*, 302 Neb. 821, 825, 925 N.W.2d 336, 340 (2019). "To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face." *Id.* The Court, however, "is not obliged to accept as true a legal conclusion couched as a factual allegation, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Chaney v. Evnen*, 307 Neb. 512, 520, 949 N.W.2d 761, 769 (2020). On a Rule 12(b)(6) motion, the Court can consider materials taken from outside the complaint if they "are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings." *DMK Biodiesel, LLC v. McCoy*, 285 Neb. 974, 980, 830 N.W.2d 490, 496 (2013).

Rule 12(b)(1)

In this brief's Section C, Chasing Clouds also raises a challenge to the Attorney General's claims under Nebraska's Uniform Deceptive Trade Practices Act, §§ 87-301–87-306 ("DTPA") pursuant to Rule 12(b)(1). A Rule 12(b)(1) motion challenges whether the case presents a dispute that falls within the Court's subject matter jurisdiction. *See Washington v. Conley*, 273 Neb. 908, 912-13, 734 N.W.2d 306, 300-11 (2007). A Rule 12(b)(1) challenge can either attack only the complaint, a "facial challenge," or the basic facts underlying the claimed dispute, a "factual challenge." *Id.* "A motion to dismiss becomes a factual challenge to the court's subject matter jurisdiction when the moving party supports its motion by presenting affidavits or other evidence properly brought before the court." *Id.* at 913, 734 N.W.2d at 311.

For the purposes of challenging the Court's subject matter jurisdiction, Chasing Clouds offers accompanying evidence via affidavit. On a Rule 12(b)(1) motion, "evidence may likewise be received without converting a motion to dismiss into a motion for summary judgment." *Zapata v. Kelly's Carpet, Ltd.*, No. A-16-1172, 2017 Neb. App. LEXIS 221, *11 (Neb. Ct. App. Nov. 14, 2017) (collecting cases). In response, the party opposing the motion must then offer affidavits or other relevant evidence to support its burden of establishing subject matter jurisdiction." *Id.*

Argument

A. Chasing Clouds' Products Are Legal

In December 2018, President Donald J. Trump signed the 2018 Farm Bill into law. *See* 2018 Farm Bill, Public Law No: 115-334. The 2018 Farm Bill removed "hemp" from the definition of "marijuana," the latter of which is prohibited by the federal Controlled Substances Act. *See id*. The Bill defined "hemp" as

> Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

Id.

In 2019, Nebraska's Unicameral followed suit. The Unicameral passed and Gov. Pete J. Ricketts signed into law the Nebraska Hemp Farming Act, found at Neb. Rev. Stat. §§ 2-501–519. The Act includes a statement of policy that provides its purposes are, to name a few: "[a]lign state law with federal law regarding the cultivation, handling, marketing, and processing of hemp and hemp products," "[p]romote the expansion of Nebraska's hemp industry to the maximum extent permitted by law and allow farmers and businesses to cultivate, handle, and process hemp and sell hemp products for commercial purposes"; and "[r]eturn Nebraska to the forefront of the hemp industry." Neb. Rev. Stat. § 2-502.

Like its federal counterpart, the Nebraska Hemp Farming Act defines "hemp" as:

> Cannabis sativa L. and any part of such plant, including the viable seeds of such plant and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

Neb. Rev. Stat. § 2-503(13). The Act's definition of hemp continues by stating "[n]otwithstanding any other provision of law, hemp shall not be considered a controlled substance under the Uniform Controlled Substances Act." *Id.* Moreover, the Act specifically makes it legal "[t]o possess, transport, sell, and purchase lawfully produced hemp products." Neb. Rev. Stat. § 2-504(1)(b).

Unmentioned by these two laws—both federal and state—is any reference to the Delta-8 variant of THC, or any other THC variant.

Against this, the State's Complaint attempts to draw a distinction—found nowhere in the statute—between THC variants that are "naturally-occurring" and those that are "synthetically-produced"—proposing that synthetic THCs somehow warrant special, heightened scrutiny under the law. (*See* Complaint, ¶¶ 55-83.) But the law creates no such distinction. Instead, the law regulates the THC chemical itself, without regard to the chemical's source. *See* Neb. Rev. Stat. § 2-503(13). Even so, the Attorney General's allegations about a distinction between naturally-occurring and synthetic THC have no bearing on the legal theories at issue in his Complaint. And at no point has the State or Attorney General ever accused Chasing Clouds of violating either the federal Controlled Substances Act or Nebraska's Uniform Controlled Substances Act. (*See* Chasing Clouds' Motion to Strike and accompanying Brief.)

B. Nebraska's Consumer Protection Acts (Counts I–XV)

Fifteen of the Attorney General's claims involve Nebraska's Consumer Protection Act (the "NCPA"), a statutory scheme found at Neb. Rev. Stat. §§ 59-1601–59-1623. As shown below, these claims fail for threshold legal reasons and therefore must be dismissed.

1. Background on the Consumer Protection Act and Clarification on the Attorney General's Proposed Standard

The NCPA contains Nebraska's state-law equivalent of the United States' Sherman Antitrust Act, 15 U.S.C. §§ 1–7, as well as the Federal Trade Commission Act, 15 U.S.C. §§ 41–58. *Salem Grain Co. v. Consol. Grain & Barge Co.*, 297 Neb. 682, 689-90, 900 N.W.2d 909, 916-17 (2017). The Attorney General's NCPA claims spring from Neb. Rev. Stat. § 59-1602, which contains one lone sentence: "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful."

Section 59-1602 does not define "unfair," or "deceptive." *State ex rel. Stenberg v. Consumer's Choice Foods, Inc.*, 276 Neb. 481, 489, 755 N.W.2d 583, 590 (2008). Nor did the Legislature define those words elsewhere in the NCPA. *See* Neb. Rev. Stat. §§ 59-1601–59-1623. "Trade" and "commerce" are defined as "the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska." Neb. Rev. Stat. § 59-1601(2). So, "[t]o be actionable under the NCPA, the unfair or deceptive act or practice must have an impact on the public interest." *Hage v. Gen Serv. Bureau*, 306 F. Supp. 2d 883, 889 (D. Neb. 2003).

Despite the Legislature's silence as to the meaning of "unfair," the Attorney General takes license to invent his own standard. At the Complaint's paragraph 102, it alleges that "[a]n act or practice is unfair if that act or practice is offensive to public policy, immoral, unethical, oppressive, unscrupulous, or causes substantial injury to consumers." (Complaint, ¶ 102 (emphasis added).) The Attorney General does not cite authority or explain how he arrived at this definition. But he is paraphrasing a proposition of law that derives from *Raad v. Wal-Mart Stores*, a 1998 decision from the United States District Court for the District of Nebraska. 13 F. Supp. 2d 1003, 1014 (D. Neb. 1998).

That the Complaint's paragraph 102 is not a quotation is telling. In *Raad*, one merchant sued another under the NCPA, alleging that the other engaged in unfair business practices. *Id.* at 488-89. Faced with no Nebraska precedent on the meanings of "unfair" or "deceptive," the court turned to federal appellate authority on consumer protection statutory schemes from Massachusetts, Connecticut, North Carolina, and Louisiana. *Id.* at 1011-14. From those states'

authority, the *Raad* court fashioned the following definition—that "in order to prove an 'unfair' practice when merchants have entered into a contract, the plaintiff must either prove that the practice: (1) fell within some common-law, statutory, or other established concept of unfairness or (2) was immoral, unethical, oppressive, or unscrupulous." *Id.* at 1014.

Ten years later, the Nebraska Supreme Court cited *Raad* it its opinion in an NCPA case, this time brought by the Attorney General on behalf of Nebraska consumers. *See Stenberg*, 276 Neb. at 489-90, 755 N.W.2d at 590-91. Noting first that *Raad* involved an NCPA action between merchants, and that it had never defined what constituted "unfair or deceptive acts" in consumer cases, the Court approvingly cited *Raad*'s core holding—that a retailer's practice can be "unfair" when it "(1) fell within some common-law, statutory, or other established concept of unfairness or (2) was immoral, unethical, oppressive, or unscrupulous"—and extended its application to suits brought on behalf of consumers. *Id.*

What *Raad* and *Stenberg* do not hold is that the NCPA is a strict liability statute, or that the State meets its pleading burden by merely alleging injury to consumers. The phrase "substantial injury," which the Attorney General casts as one of Neb. Rev. Stat. § 59-1602's disjunctive elements, makes no appearance in *Stenberg*, nor in any other Nebraska Supreme Court or Court of Appeals opinion. And in *Raad*, the District of Nebraska specifically rejects the Attorney General's position that consumer injury alone can trigger NCPA liability:

> The cases are unclear whether it would be enough to prove that the practice "causes substantial injury" without, for example, proving that the practice was also unscrupulous. Some courts (at least theoretically) see "substantial injury" as a separate basis for liability, while others see "substantial injury" as a damage issue. I do not believe that a merchant involved in a contract dispute can recover under Nebraska consumer protection law simply by proving that he or she was substantially injured without proof of culpability. In short, the statute, at least for merchants, is not a "strict liability" law.

13 F. Supp. 2d at 1014 n.7.

This point is not merely academic. As the *Raad* Court held, the NCPA is not a strict liability statute. *See id.* The Attorney General cannot meet his

pleading burden through the bare allegation, as his Complaint makes, that Chasing Clouds caused injury. (*See* Complaint, ¶ 107.) Instead, the Attorney General must plead more.

2. The NCPA Does Not Apply When Conduct Is Regulated By Other Sources of Law

These products are legal—under both federal and state law. Lacking a clear prohibition on these products, the Attorney General turns to the NCPA. But the State "cannot accomplish indirectly what it is prohibited from doing directly." *Myers v. Neb. Inv. Council*, 272 Neb. 669, 682, 724 N.W.2d 776, 792 (2006).

In enacting the NCPA, the Legislature expressly prohibited the State from using it to regulate in areas that are already subject to regulation:

> [T]he Consumer Protection Act shall not apply to actions or transactions otherwise permitted, prohibited, or regulated under laws administered by the Director of Insurance, the Public Service Commission, the Federal Energy Regulatory Commission, or any other regulatory body or officer acting under statutory authority of this state or the United States. . . .

Neb. Rev. Stat. § 59-1617(1). This NCPA carveout is "broader than federal preemption, and applies to *all* conduct regulated. . . ." *In re ConAgra Foods, Inc.*, 908 F. Supp. 2d 1090, 1104 (C.D. Cal. 2012) (applying Nebraska law). Therefore, if conduct is subject to regulation or prohibition, or is permitted by some other source of law—overseen by any regulatory body or officer—the NCPA cannot apply. *See id.*

Nebraska caselaw agrees. The Nebraska Reporter overflows with courts' refusals to apply the NCPA when other sources of law regulate the challenged conduct. *See, e.g.*, *Page v. Siedband*, No. A-19-121, 2023 Neb. App. LEXIS 284, *20-21 (Neb. Ct. App. Nov. 14, 2023) (in action challenging mortgage foreclosure, dismissing NCPA claim because practices were regulated by federal Comptroller of the Currency); *Wrede v. Exchange Bank*, 247 Neb. 907, 915-16, 531 N.W.2d 523, 529-30 (1995) (similar holding in case against bank on certificates of deposit); *Hydroflo Corp. v. First Nat'l Bank*, 217 Neb. 20, 33, 349 N.W.2d 615, 622 (1984) (in action to recover amounts deposited with bank

pursuant by allegedly improper endorsee, concluding NCPA claim was properly dismissed because state's Department of Banking and Finance had broad authority to regulate banking standards); *Little v. Gillette*, 218 Neb. 271, 277-78 (1984) (in fraud action involving loans extended by bank, finding claim brought under NCPA "was directed to the wrong branch of government" because bank was regulated by Nebraska Department of Banking and Finance); *McCaul v. Am. Sav. Co.*, 213 Neb. 841, 846-47, 331 N.W.2d 795, 799-800 (1983) (in action challenging loan servicing practices, dismissing NCPA claim because practices were specifically regulated by Nebraska's Installment Loan Act); *Kuntzelman v. Avco Fin. Serv.'s of Neb., Inc.*, 206 Neb. 130, 133, 291 N.W.2d 705, 706-07 (Neb. 1980) (same)

The same is true of authority from other jurisdictions that have taken up the NCPA. Courts do not entertain claims under the NCPA when more specific authority controls. *See*, *e.g.*, *Mirandette v. Nelnet, Inc.*, 720 F. App'x 288, 291 (6th Cir. 2018) (applying Nebraska law in action challenging student loan servicing practices, finding dismissal of NCPA claim was correct when practices were regulated by federal Department of Education); *In re Dicamba Herbicides Litig.*, 359 F. Supp. 3d 711 (E.D. Mo. 2019) (applying Nebraska law and dismissing NCPA claim regarding pesticide advertising practices because conduct was regulated by federal Environmental Protection Agency regulations); *In re ConAgra Foods, Inc.*, 908 F. Supp. 2d at 1104 (applying Nebraska law and concluding NCPA does not apply when challenged labeling practices were regulated by the federal Food, Drug, and Cosmetics Act).

a. The NCPA Labeling Claims for Edible Products Are Excluded by Other Sources of Law (Counts VI, VII, VIII, IX, XII, XIII, XIV, & XV)

Eight of the Attorney General's NCPA claims challenge Chasing Clouds' labeling practices. These are that Chasing Clouds' labels:

- Do not disclose that they contain THC. (Complaint, ¶¶ 105(f) & 114(b))
- Do not disclose that they do not contain the THC stated on their packaging, despite the packing claiming they contain THC. (*Id.* at ¶¶ 105(g) & 114(c))

- Do not disclose the correct concentration of THC contained in the product. (*Id.* at ¶¶ 105(h), 105(i), 114(d), & 114(e))

But for these claims that involve edible products, they are not brought under the proper source of law and must be dismissed.

Food labeling is a heavily regulated commercial activity. For example, the Nebraska Pure Food Act makes it "unlawful for any person to misbrand any food or distribute, offer for sale, or sell any misbranded food." Neb. Rev. Stat. § 81-2,283(1). This Act also renders it "unlawful for any person to deceptively pack or package any food or for any person to distribute, offer for sale, or sell any food that has been deceptively packed or packaged." Neb. Rev. Stat. § 81-2,284. Food is "misbranded" if it does not bear a label that clearly states what it is, the net quantity of its contents, and the name of its manufacturer, distributor, and seller, or is misleading. Neb. Rev. Stat. § 81-2,283. Food is "deceptively packed or packaged" if "[a]ny substance has been added to, mixed with, or packed with the food so as to increase its bulk or weight, reduce its quality or strength, or make it appear to be better or of greater value than it actually is" or if an "inferiority or damage to the food has been concealed in any manner." Neb. Rev. Stat. § 81-2,284(2).

Strangely, the State's Complaint concedes that the Pure Food Act regulates some of the products at issue here. The Complaint's last section asserts a Pure Food Act claim that accuses Chasing Clouds of:

- Selling food products at retail sale that contain THC at concentrations that are not disclosed on their packaging. (Complaint, ¶ 131(a))
- Selling food products at retail sale that contain THC at different concentrations than are listed on their packaging. (*Id.* at ¶ 131(b))
- Selling food products that are "otherwise false or misleading." (*Id.* at ¶ 131(c))

These claims entirely overlap with at least the eight NCPA claims listed above. But Neb. Rev. Stat. § 59-1617 is quite direct—the NCPA cannot be used as a parallel source of authority to regulate when another source of regulation exists.

That the Attorney General may prefer to proceed under the NCPA is understandable. The NCPA allows for civil penalties, attorney fees, as well as the ability for the Attorney General to file an action in the District Court without fulfilling any other prerequisite steps. *See* Neb. Rev. Stat. § 59-1609.

But the Pure Food Act offers none of these things. The Act does not allow for the recovery of attorney fees, nor civil penalties. *See*, *generally*, Neb. Rev. Stat. §§ 81-2,286 – 81-2,290. Instead, it creates a regulatory framework under which the Department of Agriculture polices the sale of food products—not prosecutors. *See id.* If the Department finds that food is being sold in a way that violates the Act's prohibitions on misbranding or deceptive packaging, it "may issue and enforce a written or printed stop-sale, stop-use, or removal order" regarding that product. Neb. Rev. Stat. § 81-2,287. From there, the accused may appeal that letter's direction pursuant to the Administrative Procedure Act. *Id.* Only after the right to appeal has expired or been exercised can the accused be directed to dispose of the product. *Id.* At the statutory scheme's very last step, only when the county attorney is "notified of such violation by the department," may the county attorney commence suit Neb. Rev. Stat. §§ 81-2,289(2); 81-2,290(2). But this suit can only take place after the completion of each preceding stage.

Nebraska's Pure Food Act is not the only source of regulatory authority that precludes the NCPA's application. In *In re ConAgra Foods, Inc.*, the United States District Court for the Central District of California presided over a consumer action against ConAgra that included claims under the NCPA. 908 F. Supp. 2d 1090, 1095-96 (C.D. Cal. 2012). The consumers' complaints centered on ConAgra's use of the phrase "100% Natural" on its cooking oil labels, which the consumers claimed was untrue because the product was, in fact, "genetically engineered in a laboratory." *Id.* at 1095.

The court found that the consumers' claims challenged labeling practices that were regulated by the federal Food and Drug Administration pursuant to powers conferred on it by Congress under the Food, Drug, and Cosmetics Act, 21 U.S.C. §§ 343, 393 (the "FDCA"). *Id.* at 1104. In particular, "[t]he FDCA expressly empowers the FDA to protect the public health by ensuring that 'foods are safe, wholesome, sanitary, and properly labeled,'" and that part of this

regulatory regime gave the FDA specific power to enforce against foods that were "misbranded" and whose labels are "false or misleading in any particular.'" *Id.* (quoting 21 U.S.C. §§ 343(a), 393(b)(2)(A)). Again, because "the exception to the [NCPA] is broader than federal preemption, and applies to all conduct regulated by federal agencies," and "it is clear that the labeling and advertising of food products . . . is extensively regulated by the FDA" it held that the NCPA was excluded from application. *Id.* at 1104.

Therefore, as shown above, the labeling of Nerdy Bears, Cook Rope, Hixtotic, and any other edible product placed at issue in the Complaint's Counts VI, VII, VIII, IX, XII, XIII, XIV, & XV are governed by specific regulation that precludes the NCPA's application. For that reason, the State cannot state a claim under the NCPA, and the Court should dismiss those eight claims.

b. The Federal Food and Drug Administration's Regulatory Authority Precludes the Flower and Vape Labeling Claims (Counts VI, VII, VIII, IX, XII, XIII, XIV, & XV)

The Attorney General's Complaint also challenges Chasing Clouds' labeling of its Exotic Diamond and Dimo Rockets and vape products. (*See* Complaint, ¶¶ 95(a) & 95(d).) But like the food labeling claims above, these claims are excluded by operation of the regulatory authority wielded by the United Stated Food and Drug Administration. Therefore, they too must be dismissed.

The Federal Food, Drug, and Cosmetic Act applies to more than the edible products discussed above. The FDCA prohibits "[t]he adulteration or misbranding of any food, **drug**, device, tobacco product, or cosmetic. . . ," as well as the receipt of any such misbranded item. 21 U.S.C. § 331(b) – (c) (emphasis added). The definition for "Drug" broadly includes "articles (other than food) intended to affect the structure or any function of the body of man or other animals." 21 U.S.C. § 331(g)(1). A drug is then "misbranded" if, among other thing, its label is false or misleading or its label does not contain an accurate statement of its contents. 21 U.S.C. § 352(a) – (b).

The Attorney General's allegations demonstrate that Chasing Clouds' flower and vape products are "intended to affect . . . any function of the body,"

and therefore fall under the FDCA's regulatory scheme. (*See*, *e.g.*, Complaint, ¶¶ 7 ("THC is the chemical responsible for the intoxicating effect—the 'high'"); 14(c) (discussing "the likelihood of inducing intoxication" and "potential psychotropic and physiological effects"); 16 (referring to product's "psychoactive, physiological, or intoxicating effect"); *see also United States v. Undetermined Quantities of Articles of Drug*, 145 F. Supp. 2d 692, 699 (D. Md. 2001) (holding "[A product] will be deemed a drug if the labeling, including separate promotional claims, attributes characteristics to the product that would bring it within the [FDCA]'s definition.").

Moreover, the FDA itself advises the public that hemp and cannabis-derived products fall under the FDCA's provisions. Its website contains a repository of Warning Letters it has sent in connection with its regulatory authority over hemp and cannabis-derived products. *See Warning Letters and Test Results for Cannabidiol-Related Products*, available at https://www.fda.gov/news-events/public-health-focus/warning-letters-and-test-results-cannabidiol-related-products. The FDA's website begins by noting:

> Over the past several years, FDA has issued several warning letters to firms that market unapproved new drugs that allegedly contain cannabidiol (CBD). As part of these actions, FDA has tested the chemical content of cannabinoid compounds in some of the products, and many were found to not contain the levels of CBD they claimed to contain. It is important to note that these products are not approved by FDA for the diagnosis, cure, mitigation, treatment, or prevention of any disease. Consumers should beware purchasing and using any such products.

Id. It then goes on to link to over 120 Warning Letters sent since 2015 to retailers of cannabis products. *See id.*

Simply stated, it is the FDA's position that it is a regulatory authority that oversees the enforcement of regulations that apply to the products and labeling complained of in the Attorney General's Complaint. Therefore, just as the FDA's regulatory authority over food labeling precludes the Attorney General's NCPA food labeling claims, the FDA's regulatory authority over drug labeling also

precludes the Attorney General's attempt to regulate through this action, and these claims must be dismissed.

c. Nebraska's Policymakers Have Considered and Set Guardrails for the State's Children (Counts I, II, & X)

Next, the Attorney General brings three counts that claim Chasing Clouds sells products "without consideration for age restriction or youth buyers," and that it "sells products that are dangerous to minors." (Complaint, ¶¶ 105(a), 105(b), 105(j)). If these claims proceed past the pleading stage—which they should not—Chasing Clouds looks forward to challenging these counts on the merits. Its customers' safety, as well as youth non-customers (because its policy is that it does not sell these products to minors) is paramount. That said, these claims are fatally flawed as pled and must be dismissed.

As a threshold matter, with respect to Counts I and II, it is unclear what conduct Chasing Clouds is even being charged with. A government entity's action must give "a person of ordinary intelligence a reasonable opportunity to know what is prohibited, and [] explicit standards for those who apply it." *Bamford v. Upper Republican Nat. Res. Dist.*, 245 Neb. 299, 307, 512 N.W.2d 642, 648 (1994) (internal quotations omitted). Counts I and II both contain some variation of a claim that Chasing Clouds sells its products "without consideration for age restriction or youth access." *Id.* (emphasis added). The plain meaning of "consideration" is "[t]he keeping of a subject before the mind; attentive thought, reflection, mediation." (Oxford English Dictionary, Online Ed. 2023.) It cannot be that the State has commenced a very public lawsuit based on the allegation that Chasing Clouds did not engage in reflection or meditation about youth access to its products, but that is what it pleads for its first two counts. Nor are there any allegations in the Complaint to support this theory. Therefore, Counts I and II should be dismissed because they fail to state claim.

In response to this, the State will likely point to the Complaint's paragraphs 97 and 98, which state:

> 97. Chasing Clouds does not require proof of identification or a minimum age to enter the store.

> 98. Chasing Clouds does not display any noted requirement near the register of the necessity of any minimum age or proof of identification for the purchase of any THC-containing products.

(Complaint, ¶¶ 97-98.) But these charges implicate no legal duty. There is no law that requires that customers present proof of age to enter the store, nor is there a signage requirement that Chasing Clouds post a minimum age or proof of identification at the register. Even less clear is what age Chasing Clouds would post, as, at least with respect to edible hemp products, Nebraska law imposes no minimum age of purchase.

Regardless, the Nebraska Legislature has spoken: "[n]otwithstanding any other provision of law, hemp shall not be considered a controlled substance under the Uniform Controlled Substances Act." *Id.* And it is legal "[t]o possess, transport, sell, and purchase lawfully produced hemp products." Neb. Rev. Stat. § 2-504(1)(b). Under § 59-1617, "the Consumer Protection Act shall not apply to actions or transactions **otherwise permitted**" by laws or regulations from any regulatory body. (emphasis added). To claim that Chasing Clouds did not "consider" the needs of consumers, including youth non-consumers, is in effect to claim that the Legislature did not consider those persons' needs. These transactions are permitted by law, and the Attorney General cannot use the NCPA to fashion his own law, regulation, or judicially-ordered requirement that supersedes the State's statutes. For that reason, Counts I, II, and X must be dismissed through operation of § 59-1617.

3. Materials Embraced by the Pleadings Demonstrate that Some of The Attorney's Labeling Claims Are Untrue (Counts VI, VII, VIII, IX, XII, XIII, XIV, & XV)

Though, as discussed above, there are straightforward legal reasons that bar the Attorney General's NCPA labeling claims, on an even more fundamental level—many of these claims are simply untrue. And because the products' labels are embraced by the pleadings, this Court can reach that finding on this Motion. Therefore, these claims must be dismissed.

This group of labeling claims place five products at issue: Exotic Diamond, Cook Rope, Hixotic, Dimo Rockets, and Nerdy Bears. For each product, the Attorney General's Complaint attaches a picture taken from its label.

(Complaint, ¶¶ 95, 105(f)-(i), 114(b)-(e).) The Attorney General's claim is that these products labels fail to disclose their respective THC contents. But these pictures only capture incomplete portions of the labels. Had the Complaint displayed these products' full packaging and labels, their disclosures would be obvious.

But by placing these products' labels at issue the labels' contents can be considered here. For instance, in *S&H Distrib., LLC v. Meyer Lab., Inc.*—an NCPA and DTPA action—the United States District Court for the District of Nebraska weighed whether it could consider the contents of a product's label on a Rule 12(b) motion to dismiss an NCPA action. 8:22-cv-183482, 2022 U.S. Dist. LEXIS 183482, *6-7 (D. Neb. Oct. 5, 2022). Though it declined to dismiss the action, the court found that because the complaint alleged the existence of and discussed the contents of a website and product labels, the court could consider pictures and the text of such materials for the purposes of the motion. *Id.* And because Nebraska's Court Rules of Pleading are modeled after the Federal Rules of Civil Procedure, so too can this Court accept Chasing Clouds' evidence of its labels' contents. *See McEwen v. Neb. Stat College Sys.*, 303 Neb. 552, 574, 931 N.W.2d 120, 135 (2019).

Each of Chasing Clouds' products, including those placed at issue in the Complaint, are labeled with a Quick-Response Code ("QR code"). Each QR code is set adjacent to text that states: "POTENCY & CONTENTS FULL LABEL RESULTS" with a prompt that directs the customer to scan the QR code. By scanning the QR code with a cellphone camera, a consumer is taken to Chasing Clouds' website, which contains information about the scanned product. *See* https://www.chasingcloudsvape.com/labs.

As shown above, and based on the pleadings alone, the Court can determine that the Attorney General's allegation that Chasing Clouds does not disclose its products' contents are incorrect. Therefore, Chasing Clouds asks the Court to dismiss the Complaint's Counts VI, VII, VIII, IX, XII, XIII, XIV, & XV.

4. The Attorney General Cannot Use the NCPA or the DPTA to Trample Chasing Clouds' First Amendment Rights (Counts III, IV, V, and XI)

The State's Complaint also claims the power to dictate what images Chasing Clouds can and cannot use to market its products. Specifically, the State claims Chasing Clouds employs images that:

- "Are likely to attract or induce youth purchasers." (Complaint, ¶ 105(c))
- "Are similar to food products that are regularly marketed toward children." (*Id.* at ¶¶ 105(d) & 114(a))
- "Are likely to attract consumption by children." (*Id.* at ¶ 105(e))

These claims place two product at issue—Nerdy Bears and Neon Buttr. As discussed below, when Chasing Clouds learned of the State's objections to Chasing Clouds's marketing of these products, Chasing Clouds changed various of these practices. But even before Chasing Clouds changed its practices, it was simply exercising its commercial speech rights guaranteed by the First Amendment.

The State's claims here strike a parallel to those heard by the United States Supreme Court in *Lorillard Tobacco Co. v. Reilly*, a case involving the Massachusetts Attorney General's attempt to use the state's consumer protection statutes to "stop Big Tobacco from recruiting new customers among the children of Massachusetts." 533 U.S. 525, 533 (2001). There, the Attorney General sought to ban cigarette advertisements across the state by promulgating regulations that prohibited outdoor advertising in specific geographic locations, as well as indoor advertising "placed lower than five feet of the floor . . . within a one thousand foot radius of any school or playground." *Id.* at 563-66 (internal quotations omitted).

The Supreme Court repeated its long-held view that "commercial speech does not fall outside the purview of the First Amendment." *Id.* at 553. Instead, regulations that affect commercial speech are subject to the four-part *Central Hudson* test. *Id.* at 554 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980)). Namely, if the proponent can demonstrate

its speech concerns lawful activity and is not misleading, it is the government's burden to demonstrate that the interest its regulation pursues is substantial, that the regulation directly advances the government's asserted interest, and that the regulation is not more extensive than it needs to be to meet that interest. *Id.* After finding that the speech to be regulated was not misleading and that the government had the requisite substantial interest, the Court turned to *Central Hudson*'s third and fourth prongs—whether the regulation advances the government's interests, and whether it is more extensive than it needs to be. *Id.* at 555-66.

Starting first with the regulation's wholesale ban on advertisements within certain geographical areas, the Court noted that the speech otherwise banned was intended to convey information not necessarily just to children, but also to adults. *Id.* at 564. The Court opined that though "[t]he State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity." *Id.* The Court noted that its precedent provides that "the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults." *Id.* (quoting *Reno v. ACLU*, 521 U.S. 844, 875 (1997). Or perhaps more colorfully, it cited caselaw that observed "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," and "[t]he incidence of this enactment is to reduce the adult population . . . to reading only what is fit for children." *Id.* (quoting *Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 74 (1983) and *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). In sum, though the state had an interest in protecting children from tobacco advertisements, "tobacco manufacturers and retailers and their adult consumer still have a protected interest in communication." *Id.* at 564. Because the regulations banned whole expressions of speech intended for both children and adults, the ban was more extensive than it needed to be—thus failing *Central Hudson*'s fourth prong. *Id.* at 565.

As for the ban on advertisements under five feet from the floor, the Court found that the regulation could not pass either of *Central Hudson*'s third or fourth prongs. As to the third, "a regulation cannot be sustained if it 'provides only ineffective or remote support for the government's purpose,' [] or if there is 'little chance' that the restriction will advance the State's goal. . . ." *Id.* at 566 (internal

quotations and citations removed). As the court easily concluded, "[n]ot all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings." *Id.* Nor did the regulation—a ban on all expression below five feet—"constitute a reasonable fit" toward satisfying the state's goal, thus also failing *Central Hudson*'s fourth prong. *Id.* at 567.

Like the regulations at issue in *Lorillard*, the Attorney General's Complaint seeks to regulate speech that involves legal commercial activity. Even beyond *Lorillard*—where the activity could be illegal or legal based on the consumer's age—here Chasing Clouds' edible products are legal, regardless of the prospective consumer's age. Therefore, as argued below, the Attorney General's actions here fail *Central Hudson*'s third and fourth prongs.

Again, it is the Attorney General's specific demand that Chasing Clouds must be barred from using "imagery or depictions of objects, persons, animals, creatures, or similar caricatures with comically exaggerated features, anthropomorphic attributes, and/or unnatural or extra-human abilities. . . ." In other words, the Attorney General does not want Chasing Clouds to use illustrations or cartoons on its products.

But just as in *Lorillard*, children are not the only consumers of "caricatures" and images with "comically exaggerated features." Adults are as well. And this perfectly captures why outright bans on what types of speech a retailer can engage in seldom achieve the "reasonable fit" demanded by *Central Hudson*. *See*, *e.g.*, *Lorillard Tobacco Co.*, 533 U.S. at 567 (regarding tobacco advertising restrictions, holding "the blanket height restriction does not constitute a reasonable fit"); *Turtle Island Foods SPC v. Soman*, 632 F. Supp. 3d 909, 937 (E.D. Ark. 2022) (in case involving food labeling restrictions, finding the state could not demonstrate a "reasonable fit, because the challenged provisions . . . are outright bans on what the Court has concluded . . . is non-misleading commercial speech"); *Safelite Grp., Inc. v. Rothman*, 229 F. Supp. 3d 859, 882 (D. Minn. 2017) (finding outright prohibition on auto-glass replacement company's use certain phrases in advertising was not narrowly drawn, thus failing *Central Hudson*).

Moreover, as noted in a prior section of this brief, a government's actions are unconstitutionally vague unless they give "a person of ordinary intelligence a reasonable opportunity to know what is prohibited, and [] explicit standards for those who apply it." *Bamford*, 245 Neb. at 307, 512 N.W.2d at 648. The Attorney General's claim is that Chasing Clouds's products depict "objects, persons, animals, creatures, or similar caricatures with comically exaggerated features, anthropomorphic attributes, and/or unnatural or extra-human abilities. . ." after which the Complaint pastes this image:

(Complaint, ¶ 94(a)). Based on the Attorney General's allegation, everything on this picture from the illustrated bear (as it is an "animal") at the bottom to the illustrated butter (because it is an "object") is impermissible. But by this same token, Chasing Clouds would be similarly prohibited from a portrayal of *any object* that is not a photograph or at least not a photorealistic depiction.

If this is not the Attorney General's intent, then his attempts to enforce his speech code through judicial action fail because his Complaint does not give notice of what he intends to prohibit. Conversely, if what his Complaint states is actually what he intends to prohibit, his proposed code fails *Central Hudson*'s fourth prong because a regulation that prohibits advertisements from using any images but photographs cannot possibly be "narrowly tailored."

Accordingly, this Court should find that Counts III, IV, V, and XI fail *Central Hudson*'s test and, if enforced, would violate Chasing Clouds' First

Amendment right to engage in commercial speech. For that reason, the Court should dismiss these claims.

C. The Deceptive Trade Practices Act Injunction the Attorney General Seeks is Moot (Count XVI, XVII, XVII, XIX & XX)

The Attorney General's powers under the Uniform Deceptive Trade Practices Act ("DTPA") are found at Neb. Rev. Stat. §§ 87-303.02–303.05. The Attorney General specifies that he brings this action under § 87-303.05(1), which provides that:

> Whenever the Attorney General has cause to believe that a person has engaged in or is engaging in any deceptive trade practice or unconscionable act listed in section 87-302 or 87-303.01, the Attorney General may apply for and obtain, in an action in any district court of this state, a temporary restraining order, or injunction, or both, pursuant to the rules of civil procedure, prohibiting such person from continuing such practices, or engaging therein, or doing any act in furtherance thereof.

The DTPA is designed to prevent future deceptive acts—not to compensate for past acts. *See*, *e.g.*, *Senior Hous. Managers, LLC v. Highway 2 Dev., LLC*, No. 4:18-cv-3167, 2019 U.S. Dist. LEXIS 164236, *22 (D. Neb. Sept. 25, 2019) (seeking explanation for how plaintiff would be "damaged in the future"); *Est. of Petersen v. Boland*, No. 8:16-cv-183, 2016 U.S. Dist. LEXIS 144809 (D. Neb. Oct. 19, 2016) (explaining that Nebraska courts routinely dismiss UDTPA claims for failing to seek injunctive relief). Therefore, for a trade practice to pose a justiciable controversy for which the Attorney General can seek redress, the Attorney General must, as the statute states, have "cause to believe" that the trade practice is ongoing.

Count XVI claims that Chasing Clouds is engaged in "distributing, promoting, displaying for sale, offering for sale, attempting to sell, and selling THC-containing products at retail sale in consumable products that are similar to food products that are regularly marketed towards children." (Complaint, ¶ 120(a)). Counts XVII, XVIII, XIX, and XX claim Chasing Clouds sells products that do not contain the type or concentration of THC that is stated on their packaging. (*Id.* at ¶¶ 121(a), 121(b), 122(a), & 121(b).) Based on the

Complaint's allegations, these products are Neon Buttr, Nerdy Bears, Cook Ropes, Hixotic, and Dimo Rockets. But Chasing Clouds no longer engages in the practices the Attorney General complains of.

The Attorney General filed his complaint on October 25, 2023, and Chasing Clouds accepted service on February 9, 2024. But already two months prior, Chasing Clouds notified the Attorney General via letter that it had already taken action to address aspects of its business practices placed at issue in the Complaint. Specifically:

- Chasing Clouds has discontinued all sales of Cook Ropes Rainbow.
- Chasing Clouds has discontinued all sales of Nerdy Bears.
- Since December 2023, Chasing Clouds began repackaging Exotic Diamond so that all new Exotic Diamond product from after that date employ this new packaging.
- Chasing Clouds has not ordered any new Hixotic product since 2022, and currently has no inventory of this item at the storefront the Complaint places at issue.
- Chasing Clouds has not ordered any new Dimo Rockets since 2022, and currently has no inventory of this item at the storefront the Complaint places at issue.

(Affidavit of Greg Staudenmaier, Ex. 1.)

"A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement." *Nesbitt v. Frakes*, 300 Neb. 1, 7, 911 N.W.2d 598, 604 (2018). Simply stated, Chasing Clouds already complied with the Attorney General's demands. Therefore, because there is no substantial controversy between the parties, the Court should dismiss the Complaint's Count XVI. *See In re Saturn L-Series Timing Chain Prods. Liab. Litig.*, MDL No. 1920, 2008 U.S. Dist. LEXIS 109978, *68 (D. Neb. Nov. 7, 2008) (granting motion to dismiss because "Defendants no longer manufacture or sell vehicles with defective timing chains and oiling nozzles. . . . There is no current, deceptive behavior this Court could possibly enjoin.").

D. This Action Seeks to Impermissibly Usurp the Procedures of the Pure Food Act (Count XXI)

Last, the Court should find that the Attorney General has ignored the procedures and rights available to Chasing Clouds under Nebraska's Pure Food Act and that this action is therefore premature. Accordingly, the Court should dismiss this claim.

As discussed in this brief's Section B(2)(a), Nebraska's Pure Food Act provides a framework through which a "regulatory authority" works with the state's county attorneys to enforce the terms of the act. *See* Neb. Rev. Stat. §§ 81-2,287, 81-2,290. "Regulatory authority," under the Act, is defined as the state's Department of Agriculture or a political subdivision or "political subdivision or state agency under contract with the department to perform regulatory functions authorized pursuant to the Nebraska Pure Food Act." Neb. Rev. Stat. §§ 81-2,252, 81-2,243.

Neb. Rev. Stat. § 81-2,287's plain terms vest the power to find whether the Nebraska Pure Food Act has been violated in the Department of Agriculture. Specifically, "**if a regulatory authority finds**" that food is being sold in a way that violates the Act's prohibitions, the authority "may issue and enforce a written or printed stop-sale, stop-use, or removal order" regarding that product. *Id.* (emphasis added). If the regulatory authority issues this letter, it "shall clearly advise the person in charge of the food that he or she may request an immediate hearing before the director or his or her designee on the matter." *Id.* Further, "[n]o such order may direct the involuntary and immediate disposal or destruction of any food until the person in charge of such food has been afforded an opportunity to be heard on the matter and an opportunity to appeal . . . in accordance with the Administrative Procedure Act." *Id.*

It is the Department of Agriculture, not the Attorney General, that is charged with making the adjudicative finding of whether one has violated Nebraska's Pure Food Act. *See* Neb. Rev. Stat. § 81-2,287 (providing enforcement powers for when "a regulatory authority finds" that food is being sold in violation of the Act). If the Department makes this finding, it commences an action grounded in the Administrative Procedure Act to resolve the violation. *See id.* From there—the county attorneys' authority only serves as a backstop to the power that flows from the Department. *See* Neb. Rev. Stat. § 81-2,289, 81-

2,290(2). A county attorney can only commence an action under Nebraska's Pure Food Act "when notified of such violation by the department." *Id.* Stated another way, county attorneys are tasked with seeking injunctions as to behavior that violates the Act at the Department's direction—not finding or deciding for themselves whether a violation exists. *See id.*

The Attorney General's Complaint flouts this process and usurps authority the Act assigns to the Department of Agriculture. Chasing Clouds received no letter from the Department or its designee pursuant to § 81-2,287. Nor has it been afforded a right to appeal any administrative determination under the Administrative Procedure Act. *See id.* Instead, the Attorney General simply filed suit and is attempting to divest Chasing Clouds of these basic protections of law. To date, the Department of Agriculture has never informed Chasing Clouds that its products violate Nebraska's Pure Food Act. And until it does and until Chasing Clouds is given its administrative hearing pursuant to § 81-2,287, the Attorney General cannot unilaterally "find" that Chasing Clouds has violated the Act. Therefore, the Court should dismiss this last claim because it is not ripe.

Conclusion

Wherefore, for the reasons stated above, the Court should grant this motion to dismiss the Attorney General's claims in their entirety.

DATED this 10th day of April, 2024.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the word count function was applied to include all text, including the caption, headings, footnotes and quotations. This document was prepared using Microsoft Word for Microsoft 365 MSO and contains 8,747 words. This brief complies with the typeface requirements of Neb. Sup. Ct. R. 6-1505 and Neb. Ct. R. App. P. §2-103.

s/ Jason W. Grams

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Certificate of Service

I hereby certify that on Thursday, April 11, 2024 I provided a true and correct copy of the Brief to the following:

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