



U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave. NW
Washington, DC 20530

Tel: (202) 598-6735

September 1, 2026

VIA CM/ECF

Clifton Cislak, Clerk of Court
U.S. Court of Appeals for the District of Columbia Circuit
333 Constitution Ave. NW
Washington, D.C. 20001

RE: *D and Business Investments LLC d/b/a THC Smokes v. U.S. Food & Drug Administration*, No. 25-1074 (argument held December 8, 2025)

Dear Mr. Cislak:

On August 25, 2026, and consistent with 28 U.S.C. § 530D, the Department of Justice sent the attached letter to Congress explaining that the Department would not file a petition for a writ of certiorari in *Texas Tobacco Barn, LLC v. HHS*, No. 25-60200 (5th Cir.). The Department determined not to seek further review of the Fifth Circuit's decision, explaining that the involvement of interstate commerce alone does not demonstrate that an adjudication concerns matters of public rights, and that matters addressing public health can also "effectively redress private injuries and traditionally could be resolved only by courts and juries." Letter at 1-2. The Department explained, however, that not all FDA penalty adjudications violate the Seventh Amendment and that the constitutionality of many such adjudications can be defended on grounds apart from those discussed above. *Id.* at 2.

Consistent with the 530D letter, to the extent the government's brief in this case suggested that the money penalties for violations of the Tobacco Control Act involved public rights simply because the statute concerns

“public health” or “regulate[s] ... ‘interstate commerce,’” *cf.* Resp. Br. 28-31, the government disavows such arguments.

The 530D letter does not, however, cover the argument raised in the government’s brief in this case that FDA is not “stepping into the shoes of any disappointed customer,” or seeking to “‘regulate transactions between private individuals’” in a manner that resembles a court adjudicating a suit at common law, Resp. Br. 28 (quoting *SEC v. Jarkesy*, 603 U.S. 109, 135 (2024), but rather is enforcing “duties owed ‘to the whole community, considered as a community, in its social aggregate capacity,’” *id.* at 27 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 345 (2016) (Thomas, J., concurring) (quoting 4 William Blackstone, Commentaries on the Laws 28 of England *5 (1769))); *see id.* at 22-28.

Sincerely,

s/ David L. Peters

David L. Peters

U.S. Department of Justice

Appellate Staff, Civil Division

cc (via CM/ECF):Counsel of Record



Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

August 25, 2026

The Honorable Mike Johnson
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: *Texas Tobacco Barn, L.L.C. v. HHS*, No. 25-60200 (5th Cir.)

Dear Mr. Speaker:

Consistent with 28 U.S.C. 530D, I am writing to advise you that the Department of Justice has decided not to file a petition for a writ of certiorari in the above-captioned case.

Federal law prohibits marketing certain tobacco products without authorization from the Food and Drug Administration (FDA). See 21 U.S.C. 387j. Companies that sell unauthorized products are subject to civil penalties, which Congress has empowered FDA to collect in administrative proceedings. See 21 U.S.C. 333(f). Here, FDA initiated an administrative proceeding against Texas Tobacco Barn, determined that it had sold unauthorized e-cigarette products, and imposed a civil penalty of \$19,192. The Fifth Circuit granted Texas Tobacco Barn's petition for review and vacated FDA's order, which the court held violated the Seventh Amendment, as interpreted by the Supreme Court in *SEC v. Jarkesy*, 603 U.S. 109 (2023).

The Department of Justice has determined that further review of the Fifth Circuit's judgment is not warranted and that the Fifth Circuit correctly rejected certain arguments emphasized by the government in this case. In *Jarkesy*, the Supreme Court explained that the Seventh Amendment generally guarantees a right to trial by jury before the imposition of civil penalties, except in cases involving public rights. See 603 U.S. at 125, 127. The Court further explained that courts should ascertain whether a penalty adjudication involves public rights primarily by examining whether the case falls within "historic categories of adjudications" that could be conducted by the Executive Branch or instead "is made of the stuff of the traditional actions" tried exclusively by courts. *Id.* 128, 130.

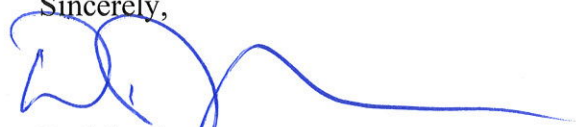
In the Fifth Circuit, the government argued, among other things, that this case involves public rights because it involves "interstate commerce" and "public health." Gov't C.A. Br. 33-34. *Jarkesy*, however, expressly distinguished between foreign and interstate commerce and rejected the notion that Congress's authority over interstate commerce can alone justify applying the public-rights doctrine. Similarly, the Supreme Court's cases and historical practice do not establish that an adjudication fits within the public-rights doctrine simply because it concerns

public health. As the Fifth Circuit observed, at least some adjudications that protect public health—such as common-law tort suits brought against sellers of “bad provisions”—effectively redress private injuries and traditionally could be resolved only by courts and juries. C.A. Op. 9.

To be clear, the Department of Justice does not suggest that all FDA penalty adjudications violate the Seventh Amendment. The constitutionality of many FDA penalty adjudications can be defended on grounds apart from those discussed above. For example, FDA may continue to assess civil penalties against foreign companies that sell unauthorized products in the United States, given that such adjudications implicate the public right to control foreign commerce and to enforce the conditions on which foreign entities may import goods into the United States. See *Jarkesy*, 603 U.S. at 129 n.1. Moreover, the Department of Justice is exploring alternative mechanisms for FDA to pursue civil penalties while respecting the jury-trial right secured by *Jarkesy*.

The Department of Justice has accordingly determined that a petition for a writ of certiorari is not warranted in this case. The Department also plans to dismiss pending appeals in other cases controlled by the Fifth Circuit’s decision here. See *Wulferic, LLC v. FDA*, No. 25-1112 (5th Cir.); *Vaping Dragon, LLC v. FDA*, No. 26-10292 (5th Cir.). Please let me know if I can be of any further assistance in this matter.

Sincerely,



D. John Sauer
Solicitor General