No. 22-____

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY;
AMERICAN SNUFF COMPANY; AND
SANTA FE NATURAL TOBACCO COMPANY,
Petitioners,

v.

COUNTY OF LOS ANGELES; COUNTY OF LOS ANGELES
BOARD OF SUPERVISORS; AND HILDA L. SOLIS,
HOLLY MITCHELL, SHEILA KUEHL,
JANICE HAHN, AND KATHRYN BARGER,
EACH IN HER OFFICIAL CAPACITY AS A MEMBER
OF THE BOARD OF SUPERVISORS,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Twice in the last two decades, this Court has reversed the Ninth Circuit for allowing states and localities to use sales bans to evade express federal preemption of state and local standards. In *Engine Manufacturers*, this Court rejected the Ninth Circuit's conclusion that California could escape preemption of state vehicle emissions "standards" by banning the purchase (but not the manufacture) of cars that did not meet the state standards. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 254 (2004). The Court held that "a standard is a standard even when not enforced through manufacturer-directed regulation." *Id.* Similarly, in *National Meat*, this Court rejected the Ninth Circuit's conclusion that California could avoid express preemption of state manufacturing standards by framing the state law as a sales ban. *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 464 (2012). To hold otherwise "would make a mockery of the [Act's] preemption provision." *Id.* As Judge Nelson explained in dissenting from the decision below, the Ninth Circuit has now committed the same error for a third time, by "allow[ing] states and municipalities to defeat [the] entire purpose" of the federal Tobacco Control Act's express preemption of state and local product standards "with a sales ban." Pet.App.36a (Nelson, J. dissenting).

The question presented is:

Whether the Tobacco Control Act expressly preempts state and local laws that prohibit the sale of flavored tobacco products.

CORPORATE DISCLOSURE STATEMENT

Petitioner R.J. Reynolds Tobacco Company is a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc.; R.J. Reynolds Tobacco Holdings, Inc. is a direct, wholly owned subsidiary of Reynolds American Inc.; and Reynolds American Inc. is an indirect, wholly owned subsidiary of British American Tobacco, p.l.c., a publicly traded company.

Petitioner American Snuff Company is a direct, wholly owned subsidiary of Conwood Holdings Inc.; Conwood Holdings Inc. is a wholly owned subsidiary of Reynolds American Inc.; and Reynolds American Inc. is an indirect, wholly owned subsidiary of British American Tobacco, p.l.c., a publicly traded company.

Petitioner Santa Fe Natural Tobacco Company is a direct, wholly owned subsidiary of Reynolds American Inc.; and Reynolds American Inc. is an indirect, wholly owned subsidiary of British American Tobacco, p.l.c., a publicly traded company.

PARTIES TO THE PROCEEDING

Petitioners, who were the Plaintiffs-Appellants in the Ninth Circuit, are R.J. Reynolds Tobacco Company, American Snuff Company, and Santa Fe Natural Tobacco Company.

Respondents, who were the Defendants-Appellees in the Ninth Circuit, are County of Los Angeles, County of Los Angeles Board of Supervisors, and Hilda L. Solis, Holly Mitchell, Sheila Kuehl, Janice Hahn, and Kathryn Barger, each in her official capacity as a member of the Board of Supervisors.*

* Holly Mitchell replaced Mark Ridley-Thomas as a member of the Board of Supervisors while the case was pending on appeal. Petitioner has notified the Court pursuant to Rule 35.3 that Holly Mitchell has been automatically substituted as a Respondent in this case.

RELATED PROCEEDINGS

R.J. Reynolds Tobacco Co., et al. v. County of Los Angeles, et al., No. 2:20-cv-04880, U.S. District Court for the Central District of California. Judgment entered Aug. 7, 2020.

R.J. Reynolds Tobacco Co., et al. v. County of Los Angeles, et al., No. 20-55930, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Mar. 18, 2022.

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INTRODUCTION

Under the federal Tobacco Control Act (TCA), states and localities have broad authority to regulate the sale of tobacco products. They can raise the minimum purchase age, restrict sales to particular times and locations, and enforce licensing regimes. But one thing they cannot do is completely prohibit the sale of those products for failing to meet state or local "tobacco product standards." Nonetheless, a sharply divided Ninth Circuit upheld Los Angeles County's ban on the sale of flavored tobacco products. As Judge Nelson explained in dissent, that conclusion conflicts with this Court's precedent. Indeed, this Court has "twice reversed" the Ninth Circuit for committing the same error as below: "interpreting an express preemption clause to allow states and municipalities to defeat its entire purpose with a sales ban." Pet.App.36a–37a (Nelson, J., dissenting) (citing first *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004); and then *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452 (2012)). Here, the third time is not the charm. This Court should grant the petition for certiorari.

First, the decision below conflicts with this Court's precedents and the reasoning of decisions from other circuits.

The TCA's preemption clause preempts "*any*" local requirements that impose additional or different "tobacco product standards." 21 U.S.C. § 387p(a)(2)(A) (emphasis added). The court below, however, held that "tobacco product standards" are limited to requirements dictating "how [a] product must be produced." Pet.App.25a. The court thus concluded

that any local law that is "merely" a "sale[s]" ban escapes preemption. *Id.*

That atextual limitation directly conflicts with this Court's admonition that a product "standard" applies to the final product and that localities therefore cannot circumvent preemption by calling their laws "sales bans." *See Engine Mfrs.*, 541 U.S. at 254. Indeed, the Ninth Circuit's interpretation "make[s] a mockery of the ... preemption provision," since a locality could always defeat it by simply framing its law as a ban on the "sale" of a product that does not meet the locality's preferred standard. *Nat'l Meat*, 565 U.S. at 464.

As in *Engine Manufacturers* and *National Meat*, the text of the statute forecloses this nonsensical result. The TCA makes clear that a flavor ban (such as Los Angeles's) is a paradigmatic "tobacco product standard." Indeed, a flavor ban is one of the only tobacco product standards that Congress itself adopted in the TCA. *See* 21 U.S.C. § 387g(a)(1)(A). And because the County's standard is broader than the federal one, it is squarely within the Act's preemption clause, which prohibits "*any* [local] requirement" that is "different from, or in addition to," federal tobacco product standards. *Id.* § 387p(a)(2)(A).

The Ninth Circuit's alternative holding, that the TCA's savings clause allows Los Angeles to prohibit the sale of products that do not conform to the County's product standard, likewise conflicts with *Engine Manufacturers* and *National Meat* by entirely nullifying the preemption clause. That holding also conflicts with *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929 (2022), in which this Court held that courts

must give effect to Congress's decision to expressly distinguish between "regulations" (which permit an activity within certain bounds) and "prohibitions" (which totally forbid the activity). Like the statute in *Ysleta*, the TCA's three preemption-related provisions—the preservation clause, preemption clause, and savings clause—carefully distinguish between (i) requirements "relating to" the sale of tobacco products and (ii) requirements "prohibiting" their sale. *See* 21 U.S.C. § 387p(a)(1) (preservation clause). The savings clause explicitly includes the former (requirements "relating to" the sale) and omits the latter (requirements "prohibiting" the sale). The savings clause therefore does not save a blanket prohibition. *Id.* § 387p(a)(2)(B). And again, the Ninth Circuit's interpretation allows localities to circumvent the preemption clause by simply framing their laws as prohibitions of the *sale* of products that don't meet their preferred requirements.

These reasons are why the First and Second Circuits carefully distinguished total bans like those adopted by the County. Those courts both upheld restrictions on the sale of flavored tobacco products but did so because, unlike the County's Ordinance, they did *not* impose total (or "blanket") bans; instead, they only regulated where those products could be sold. *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013) ("*NATO*"); *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428 (2d Cir. 2013). The Ninth Circuit's decision upholding an absolute prohibition on sales conflicts with this reasoning.

Second, this issue is exceptionally important. The proper test for TCA preemption has wide-ranging

consequences because it affects Congress's careful delineation of regulatory authority over a significant and important industry.

Moreover, the question continues to recur. Four federal courts of appeals have encountered the issue, and hundreds of states and localities have enacted similar provisions. In addition, a California referendum this November could enact a statewide ban on flavored tobacco products in one of the nation's largest markets. *See* S.B. 793, 2019–2020 Reg. Sess. (Cal. 2020) (suspended by referendum set for November 8, 2022).

The issue presented is also far broader than whether states and localities can prohibit the sale of flavored tobacco products. "Tobacco product standards" can cover any "propert[y]" of a tobacco product. 21 U.S.C. § 387g(a)(4)(B)(i). Thus, under the holding below, states can regulate the amount of nicotine in tobacco products, the type of filters in cigarettes, the packaging of e-cigarettes, and countless other "properties" of tobacco products. And states are doing just that, usurping the exclusive authority Congress gave to FDA.

Further, throughout the U.S. Code, Congress has reserved to the federal government the exclusive power to set uniform product standards for a variety of industries. But the opinion below is a roadmap for circumventing those preemption provisions. All a state or locality has to do is frame its law as a ban on the *sale* of products that do not conform to the state or local product standard. That, in turn, would dramatically undermine Congress's efforts to establish uniform standards for national industries

and significantly drive up the costs of doing business, contrary to congressional intent.

Finally, this case is an ideal vehicle to resolve the question presented. Opinions from three courts of appeals have aired the issues presented by this case and revealed a disagreement only this Court can answer. A case presenting the same issue is also pending before another court of appeals. *R.J. Reynolds Tobacco Co. v. City of Edina*, No. 20-2852 (8th Cir. argued May 12, 2021). This case also cleanly presents the core legal question, with no line-drawing problems when it comes to what constitutes a "prohibition," because there is no dispute that there are no exceptions to the County's ban.

For these reasons, and those discussed below, this Court should grant certiorari.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 29 F.4th 542 and reproduced at Pet.App.1a–48a. The district court's opinion is not reported, but is available at 2020 WL 5405668. It is reproduced at Pet.App.49a–54a.

JURISDICTION

The Ninth Circuit issued its opinion and entered judgment on March 18, 2022. Pet.App.1a. On May 11, 2022, the Ninth Circuit denied Petitioners' petition for rehearing en banc. Pet.App.73a–74a. On July 15, 2022, Justice Kagan extended the time to file this petition until October 7, 2022. No. 22A33 (U.S.). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions (including 21 U.S.C. §§ 387g & 387p) are at Pet.App.75a–136a.

STATEMENT OF THE CASE

A. Legal Background

Long before Los Angeles County considered prohibiting flavored tobacco products, Congress enacted a comprehensive regime distributing authority over tobacco product regulation between FDA and state and local governments. *See* Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776 (TCA). Among other things, the Act amended the federal Food, Drug, and Cosmetic Act to grant FDA primary authority to regulate tobacco products. *See* 21 U.S.C. §§ 387–387s.

The TCA addresses flavors in tobacco products in a section entitled "Tobacco product standards." *Id.* § 387g. In that section, Congress created a "[t]obacco product standard[]" prohibiting characterizing flavors in cigarettes other than tobacco or menthol. *Id.* § 387g(a)(1)(A) (establishing this tobacco product standard); *id.* § 387g(a)(2) (calling it a "tobacco product standard[]"); *id.* § 387g(a)(3)(A) (same). Congress, moreover, enforced that standard through a sales ban, providing that any cigarettes containing impermissible characterizing flavors are "adulterated" and cannot be sold. *Id.* §§ 387b(5), 331(a), (c). Congress left it to FDA to decide, subject to various requirements, whether to extend that prohibition to other tobacco products or flavors. *E.g.*, *id.* § 387g(a).

Given the primary role Congress assigned to FDA, Congress also addressed the relationship between federal authority and state and local authority to regulate tobacco products. Congress did so in three interrelated provisions:

The preservation clause generally preserves "the authority of" states, localities, the Armed Forces, federal agencies, and Indian tribes to promulgate measures that are "in addition to, or more stringent than, requirements" under the TCA, including "measure[s] *relating to or prohibiting the sale* … of tobacco products by individuals of any age." *Id.* § 387p(a)(1) (emphasis added). While the preservation of those entities' authority is broad, when it comes to state and local governments, it has an express exception: If a state or local law falls within the TCA's preemption clause, that law is not protected by the preservation clause. *Id.* (stating that the preservation clause applies "[e]xcept as provided in [the preemption clause]").

The preemption clause then prohibits states and localities from "establish[ing] … *any requirement*" that "is different from, or in addition to," federal requirements "relating to *tobacco product standards*, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products." *Id.* § 387p(a)(2)(A) (emphases added).

The savings clause then provides an exception to preemption. It saves state and local "requirements *relating to the sale* … of, tobacco products by individuals of any age." *Id.* § 387p(a)(2)(B) (emphasis added). But unlike the preservation clause, the savings clause does not reference—and so does not save—local power to enact "requirements *prohibiting the sale*" of those products. *Compare id.* (savings clause), *with id.* § 387p(a)(1) (preservation clause).

B. Los Angeles Bans the Sale of Flavored Tobacco Products

There has been a surge in states and localities restricting, and sometimes completely banning, the sale of flavored tobacco products. *See* Pet.App.14a–15a (identifying more than 300 restrictions). Los Angeles County joined that trend in 2019. That year, the County's Board of Supervisors approved an Ordinance imposing a total ban on retail sales of flavored tobacco products. *Id.*

The Ordinance makes it illegal to "sell or offer for sale, … any flavored tobacco product." L.A. Cnty. Code § 11.35.070(E). A "[t]obacco product" includes "[a]ny product containing, made, or derived from tobacco or nicotine." *Id.* § 7.83.020(G). A "Flavored Tobacco Product" is "any tobacco product" that "imparts a characterizing flavor" other than tobacco. *Id.* § 11.35.020(J).

Los Angeles thus bans retailers from selling any type of flavored tobacco product, including menthol cigarettes. In fact, the Ordinance bans products even if FDA has found them to be "appropriate for the protection of the public health,"[1] and even if FDA has authorized manufacturers to market them as presenting lower health risks than cigarettes.[2]

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[1] *E.g.*, FDA Decision Summary PM000011 (Nov. 10, 2015) (authorizing a mint snus product), https://tinyurl.com/mw56k4ps.

[2] *E.g.*, FDA News Release, *FDA Grants First-Ever Modified Risk Orders to Eight Smokeless Tobacco Products* (Oct. 22, 2019), https://tinyurl.com/y6ruvbdz (authorizing marketing of flavored snus products as having "a lower risk [than cigarettes] of" certain diseases); *see also* FDA, *Modified Risk Granted Orders* (Mar. 11, 2022), https://tinyurl.com/y2bvbzxv.

C. Procedural History

R.J. Reynolds Tobacco Company and its affiliates manufacture various tobacco products for sale in the United States, including menthol-flavored cigarettes. They sued the County, arguing that the TCA preempted the Ordinance. As Reynolds argued, a ban on flavored tobacco products is a paradigmatic "tobacco product standard." And because the County's ban is broader than the federal one, it is "different from" and "in addition to" the federal standard under the TCA's preemption clause.

A divided panel of the Ninth Circuit upheld the Ordinance. The majority concluded that "tobacco product standards" are limited to regulations of how a "product must be produced"—a limitation found nowhere in the statutory text. Pet.App.25a. And because the Ordinance "merely" bans the *sale* of flavored tobacco products, the majority insisted that it is not a preempted tobacco product standard. *Id.* The court also reasoned that not limiting "tobacco product standards" to production regulations "would render much of the preceding preservation clause a nullity." Pet.App.21a.

The majority alternatively held that the TCA's savings clause saved the Ordinance. Pet.App.29a. The court held, "A ban on the sale of flavored tobacco products is, simply put, a requirement that tobacco retailers or licensees throughout the County not sell flavored tobacco products. It therefore fits within the savings clause as a 'requirement[] relating to the sale ... of[] tobacco products [to] individuals of any age.'" Pet.App.29a (quoting 21 U.S.C. § 387p(a)(2)(B)). The majority refused to give effect to the statutory

distinction between requirements "relating to" sales, on the one hand, and those "prohibiting sales," on the other. Instead, it held that the savings clause's reference to the former included the latter, notwithstanding the statute's clear distinction between the two.

Judge Nelson dissented. He explained that Los Angeles's ban falls within the preemption clause and is neither preserved nor saved. He began with this Court's decisions in *Engine Manufacturers*, 541 U.S. 246, and *National Meat*, 565 U.S. 452, which "[t]wice … reversed [the Ninth Circuit] for interpreting an express preemption clause to allow states and municipalities to defeat its entire purpose with a sales ban." Pet.App.36a (Nelson, J., dissenting). Judge Nelson explained that those cases establish that "states can't get around" preemption "by disguising [their] regulation as a sales ban." Pet.App.38a. Those cases thus require "hold[ing] that Los Angeles's ban is covered by the preemption clause." Pet.App.39a. Judge Nelson also noted that the majority's reasoning was inconsistent with the Second Circuit's reasoning in *U.S. Smokeless*, because that court "upheld a more limited regulation" and "was careful to avoid implying that a complete sales ban would be permissible." Pet.App.41a.

Judge Nelson further explained that the "preservation clause does not apply to the preemption clause at all" because it is qualified by the words "'[e]xcept as provided in' … the preemption clause." Pet.App.42a. Instead, the preservation clause clarifies that no other section of the Act has express preemptive effect and that federal agencies and Indian tribes are unaffected by the preemption clause.

Pet.App.42a–43a. Finally, Judge Nelson concluded that the savings clause does not save the County's ban because the clause saves only age-based requirements. Pet.App.43a–46a. "Any other reading makes the clause '[to] individuals of any age' superfluous." Pet.App.44a.

Petitioners sought rehearing en banc. Although the court denied the en banc petition, Judge Nelson voted to grant it. Pet.App.73a–74a.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH THIS COURT'S PRECEDENTS AND THE REASONING OF DECISIONS FROM OTHER COURTS OF APPEALS

Under the Tobacco Control Act, states and localities have broad authority to regulate how products are sold. They can raise the minimum purchase age, restrict sales to particular times and locations, and enforce licensing regimes. But one thing they cannot do is completely prohibit the sale of certain tobacco products for failing to meet the state's or locality's preferred tobacco product standards. That is because the TCA's preemption clause specifically denies states and localities the power to enact "*any* requirement which is different from, or in addition to," federal "tobacco product standards." 21 U.S.C. § 387p(a)(2)(A) (emphasis added). Despite that clause, however, the Ninth Circuit held that a state or locality can evade preemption by simply framing its law as a ban on the sale of products that do not meet the state or local standard.

That decision directly conflicts with this Court's precedents. Indeed, as Judge Nelson's dissent in this case noted, "[i]n the last two decades, the Supreme

Court has twice reversed [the Ninth Circuit] for failing"—based on the same rationale—"to find California regulations expressly preempted." Pet.App.37a (Nelson, J., dissenting) (citing first *Engine Mfrs.*, 541 U.S. 246; and then *Nat'l Meat*, 565 U.S. 452). The Ninth Circuit's opinion is also inconsistent with the reasoning of two other courts of appeals. This Court should therefore grant certiorari.

A. The Ninth Circuit's conclusion that the TCA's preemption clause does not preempt local sales prohibitions contravenes this Court's precedents

1. The TCA's preemption clause preempts "*any*" local "requirement which is different from, or in addition to," federal "tobacco product standards." 21 U.S.C. § 387p(a)(2)(A) (emphasis added). Nonetheless, the Ninth Circuit held that as long as a local law enforcing such a requirement is framed as a sales ban, the local law is not preempted. The court explained that Los Angeles's Ordinance was "merely banning the *sale* of a certain type of tobacco product, not dictating how that product must be *produced*." Pet.App.25a (emphasis added). That, in the Ninth Circuit's view, was dispositive, because "tobacco product standards" do not include sales regulations or prohibitions.

The Ninth Circuit's holding conflicts with this Court's repeated admonition that states and localities cannot evade preemption by simply enforcing their standards at the point of sale. In *Engine Manufacturers*, this Court rejected the Ninth Circuit's decision to impose such an atextual limitation on a preemption clause. There, California prohibited the

purchase of cars that did not meet local emission standards. 541 U.S. at 248–49. The Clean Air Act, however, expressly preempted states from adopting "*standard[s]* relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a) (emphasis added).

Like here, California argued that a "standard" was only "a 'production mandate'" applicable to manufacturers; thus, the *purchase* requirement was not preempted. *Engine Mfrs.*, 541 U.S. at 254–55. But this Court specifically rejected that attempt to "engraft onto th[e] meaning of 'standard' a limiting component" found nowhere in the statutory text. *Id.* at 253. Instead, looking to the dictionary definition of "standard," the Court concluded that a "standard" applies to the final product, not simply how it is made. *Id.* Standards "target" the product itself, which means preempted "standard-enforcement efforts … can be directed to manufacturers or purchasers." *Id.* In other words, "a standard is a standard even when not enforced through manufacturer-directed regulation." *Id.* at 254.

The same is true here. A tobacco product *standard* applies to the final product, not simply to how the product is made. *See* 21 U.S.C. § 387g(a)(4)(B)(i). A sales ban and a manufacturing ban are just different ways of enforcing a standard. In either case, what is being enforced is a *standard* (no flavors in tobacco products). Indeed, like the Ordinance here, *federal* tobacco product standards are *also* enforced at the point of sale. *Id.* §§ 331(a), (c), 387b(5); *see also* 21 C.F.R. § 1162.1(b) (proposed 2022) (proposing, as part of a "[p]roduct [s]tandard for [m]enthol in [c]igarettes," to ban the sale of menthol cigarettes).

Such enforcement mechanisms, however, do not change the fact that the sales prohibitions are enforcing product *standards*. The Ninth Circuit's conclusion that tobacco product standards in the TCA are limited to production regulations is thus irreconcilable with *Engine Manufacturers*.

It is also irreconcilable with the TCA's plain text. The TCA specifically says that tobacco product standards can govern a tobacco product's "properties," "constituents," and "additives," 21 U.S.C. § 387g(a)(4)(B)(i). Those words likewise refer to the final product—*not* merely the production of the product. In other words, a tobacco product standard governs *what* may be produced, not just *how* it may be produced.

Indeed, the TCA makes it patently clear that the type of law at issue here—a ban on flavored tobacco products—is a paradigmatic "tobacco product standard." The section titled "Tobacco product standards" contains two tobacco product standards, the very first of which is a ban on flavored cigarettes (other than tobacco and menthol). *Id.* § 387g. It bans cigarettes that "contain, as a constituent … or additive, an artificial or natural flavor (other than tobacco or menthol) … that is a *characterizing flavor* of the tobacco product or tobacco smoke." *Id.* § 387g(a)(1) (emphasis added). The next two provisions also call that prohibition a "tobacco product standard[]." *Id.* § 387g(a)(2); *id.* § 387g(a)(3)(A).

The statute also expressly describes "tobacco product standards" as encompassing "provisions respecting the construction, components, *ingredients, additives, constituents, … and properties* of the

tobacco product," *id.* § 387g(a)(4)(B)(i) (emphasis added)—which plainly covers the regulation of flavors. *See, e.g.*, *R.J. Reynolds Tobacco Co. v. City of Edina*, 482 F. Supp. 3d 875, 879 (D. Minn. 2020) ("[T]here can be no dispute that a provision respecting the flavor of a tobacco product is a provision respecting a 'propert[y]' of that product."), *appeal pending*, No. 20-2852 (8th Cir. argued May 12, 2021); 21 U.S.C. § 387(1) (defining "additive[s]" to include "substances intended for use as a flavoring"); *Webster's Third New Int'l Dictionary* 486 (1986) (defining "constituent" as "an essential part" of the product).

And lest there be any doubt, FDA too has repeatedly concluded that restrictions on flavors—including sales bans—are tobacco product standards. *See* 87 Fed. Reg. 26,454, 26,456 (May 4, 2022) (invoking its "authorities to revise or issue tobacco product standards" to propose a rule, titled "Tobacco Product Standard for Menthol in Cigarettes," which would prohibit menthol-flavored cigarettes); FDA, *Illicit Trade in Tobacco Products after Implementation of an FDA Product Standard* 4 (Mar. 15, 2018) (explaining FDA was "considering establishing a *product standard* prohibiting the manufacture, *sale, and distribution* of tobacco products with certain characterizing flavors" (emphasis added)).[3]

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[3] Further examples abound. *See* FDA, *Menthol in Cigarettes, Tobacco Products; Request for Comments*, 78 Fed. Reg. 44,484, 44,485 (July 24, 2013); FDA, *Regulation of Flavors in Tobacco Products*, 83 Fed. Reg. 12,294, 12,299 (Mar. 21, 2018); FDA Statement, *Statement from FDA Commissioner Scott Gottlieb, M.D., on Proposed New Steps to Protect Youth by Preventing Access to Flavored Tobacco Products and Banning Menthol in Cigarettes* (Nov. 15, 2018), https://tinyurl.com/27z227hb.

Thus, the Ninth Circuit's artificial limitation of "tobacco product standards" not only conflicts with *Engine Manufacturers* but with the text of the TCA itself.

2. Even if tobacco product standards were somehow limited to production mandates (they are not), the decision below conflicts with *National Meat*, 565 U.S. 452. There, California banned slaughterhouses from selling meat from animals that could not walk. Manufacturers argued that the Federal Meat Inspection Act (FMIA) preempted California's law. That Act prohibited states from adopting "[r]equirements … with respect to premises, facilities and operations of any establishment … which are in addition to, or different than those made under [the FMIA]." *Id.* at 458. Unlike here, this preemption provision was textually limited to production mandates. And like the decision below, California argued that its rule was not preempted because it regulated sales, not manufacturing. *Id.* at 463.

This Court, however, unanimously rejected the argument. "[I]f the sales ban were to avoid the FMIA's preemption clause, then any State could impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved. That would make a mockery of the FMIA's preemption provision." *Id.* at 464.

So too here. "[E]ven if it were necessary to show a direct ban on [production], [Los Angeles's] Ordinance is in effect such a ban. There is little difference between the government telling a manufacturer that it may not add an ingredient that imparts a flavor to a tobacco product and the government telling a

manufacturer that it may not sell a tobacco product if it has added an ingredient that imparts a flavor." *Edina*, 482 F. Supp. 3d at 879 (citing *Nat'l Meat*, 565 U.S. 452). In that way, the County's ban does regulate how tobacco products must be produced. *Id.*

3. The Ninth Circuit's attempt to distinguish the TCA from the statutes in *Engine Manufacturers* and *National Meat* is unavailing. According to the decision below, the TCA's "preservation clause" makes all the difference. Pet.App.21a. Because that clause preserves local authority to enact laws "relating to or prohibiting the sale" of tobacco products, 21 U.S.C. § 387p(a)(1), the court concluded that the preemption clause must be limited to regulations "dictating how th[e] product must be produced." Pet.App.25a. Otherwise, the preservation clause would be a "nullity." Pet.App.21a.

That gets things exactly backwards. "By its terms, the preservation clause does not apply to the preemption clause at all." Pet.App.42a (Nelson, J., dissenting). Rather, the preservation clause is explicitly subject to the preemption clause. It says: "Except as provided in [the preemption clause] …." "Thousands of statutory provisions use the phrase 'except as provided in …' followed by a cross-reference in order to indicate that one rule should prevail over another in any circumstance in which the two conflict." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1070 (2018). That is precisely what Congress did here. And that dispenses with the Ninth Circuit's suggestion that "[i]t is unlikely that Congress would purport to preserve something for state and local authority, only to preempt it in the very next provision." Pet.App.24a. The preservation

clause thus in no way distinguishes the TCA from the statutes in *Engine Manufacturers* or *National Meat*.

Moreover, Petitioners' interpretation does not nullify the preservation clause, contrary to the Ninth Circuit's suggestion. That clause serves other critical functions, which do not "affect the preemption clause." Pet.App.42a (Nelson, J., dissenting).

First, the preservation clause also applies to federal agencies, the military, and Indian Tribes. Those entities are not subject to the preemption clause at all, 21 U.S.C. § 387p(a)(1); the preservation clause clarifies that they are free to set their own tobacco product standards. *See* Pet.App.42a (Nelson, J., dissenting).

Second, the preservation clause clarifies "that other sections of the TCA do not have any preemptive effect." Pet.App.42a. The preservation clause says that only those categories listed in the preemption clause have express preemptive effect. The preservation clause also rebuts any suggestion that Congress through the TCA occupied the field of tobacco regulation. Thus, under the preservation clause, states and localities retain broad authority over how tobacco products are sold, so long as their laws do not amount to product standards (or other preempted categories of regulation). Laws raising the minimum purchase age, restricting sales to particular times and locations, and enforcing licensing regimes are all preserved.

* * *

In sum, the opinion below directly conflicts with *Engine Manufacturer*'s admonition that a "standard" applies to the final product and that localities

therefore cannot circumvent preemption by calling their laws "sales bans." *See* 541 U.S. at 254. And it conflicts with *National Meat*'s reaffirmation that allowing localities to avoid preemption simply by framing their product standards as "banning the sale of nonconforming products" would "make a mockery of the … preemption provision." *See* 565 U.S. at 464.

B. The Ninth Circuit's conclusion that the TCA's savings clause saves local sales prohibitions contravenes this Court's precedents

The Ninth Circuit alternatively held that the TCA's savings clause saves state and local sales prohibitions. But the savings clause saves "requirements relating to sales," not "requirements prohibiting sales." *See* 21 U.S.C. § 387p(a)(2)(A). This interpretation of the savings clause renders the preemption clause a complete nullity, once again conflicting with *Engine Manufacturers* and *National Meat*. And given Congress's careful distinction between requirements "relating to the sale" and requirements "prohibiting the sale," language that this Court has said must be given effect, the Ninth Circuit's interpretation also conflicts with *Ysleta*.

1. The Ninth Circuit held that even if a sales prohibition fell within the TCA's preemption clause, it would nonetheless be saved by the TCA's savings clause, which saves requirements "relating to the sale" of tobacco products. Pet.App.29a. That interpretation of the savings clause, however, "make[s] a mockery of the [TCA's] preemption provision" because there is nothing for the preemption clause to do. *See Nat'l Meat*, 565 U.S. at 464. Under

the decision below, a locality is free to set its own tobacco product standard, as long as it frames its law as a ban on the *sale* of products that do not meet that standard. As this Court explained in *Engine Manufacturers*, "if one State or political subdivision may enact such rules, then so may any other; and the end result would undo Congress's carefully calibrated regulatory scheme." 541 U.S. at 255.

It gets worse. Through the TCA, Congress intended to preempt not just local tobacco product standards but also local requirements for labeling and good manufacturing standards (among others). 21 U.S.C. § 387p(a)(2)(A). Thus, the Ninth Circuit's opinion means that a locality can easily circumvent the preemption clause and establish its own good manufacturing standards, such as a requirement that manufacturers use certain equipment. Similarly, the decision means that a locality can establish its own labeling standards, such as requiring cigars and e-cigarettes to carry the locality's mandated warning label, even if FDA has mandated a different one.[4] All the locality has to do is ban the *sale* of products that do not meet a locality's good manufacturing or labeling requirements. The Ninth Circuit's interpretation of the savings clause thus conflicts with *Engine Manufacturers* and *National Meat*, both of which held that states and localities cannot use sales bans to circumvent a preemption clause.

[4] While other laws would preempt state labeling of cigarettes and smokeless tobacco, 15 U.S.C. §§ 1334 & 4406(b), only the TCA expressly preempts labeling of other tobacco products.

2. The Ninth Circuit's decision also directly conflicts with this Court's recent decision in *Ysleta*, 142 S. Ct. at 1938.

a. As this Court has long and repeatedly instructed, statutory provisions must fit "into an harmonious whole." *E.g.*, *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012); *Mkt. Co. v. Hoffman*, 101 U.S. (11 Otto) 112, 116 (1879) ("every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each"). And one clause cannot be construed as being "inconsistent with the [other] provisions of the act." *AT&T Co. v. Cent. Off. Tel., Inc.*, 524 U.S. 214, 227–28 (1998).

In *Ysleta*, this Court specifically applied those interpretive rules to conclude that the words "regulation[s]" and "prohibition[s]" must be given independent meaning, especially when used in the same statute. *Ysleta*, 142 S. Ct. at 1938. *Ysleta* interpreted the Restoration Act's bar on Indian Tribes' offering "gaming activities which are prohibited by the laws of … Texas." *Id.* at 1935 (quoting Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, § 107(a), 101 Stat. 666, 668 (1987)). Texas argued that this provision subjected Tribes to all Texas gaming *regulations* (not just to outright prohibitions). This Court rejected that reading, relying on a separate provision of the Act that says the Act is not a "grant of civil or criminal regulatory jurisdiction to … Texas." *Id.* at 1935–36 (quoting Pub. L. No. 100-89, § 107(b), 101 Stat. at 669).

"Perhaps the most striking feature about [the Act's] language," the Court reasoned, "is its dichotomy between prohibition and regulation." *Id.* at 1938. "[T]o prohibit something means to 'forbid,' 'prevent,' or 'effectively stop' it …." *Id.* (quoting *Webster's Third*, *supra*, at 1813). By contrast, "to regulate something is usually understood to mean to 'fix the time, amount, degree, or rate' of an activity 'according to rule[s].'" *Id.* (quoting *Webster's Third*, *supra*, at 1913). "Frequently, then, the two words are 'not synonymous.'" *Id.* (quoting *Black's Law Dictionary* 1212 (6th ed. 1990)). This Court further highlighted its "usual presumption that 'differences in language like this convey differences in meaning.'" *Id.* at 1939 (quoting *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017)). And *Ysleta* emphasized that a construction that renders "regulations simultaneously both (permissible) prohibitions and (impermissible) regulations" had to be rejected. *Id.* Accordingly, laws that "merely regulate[]" gaming do not apply to the Tribe. *Id.* at 1937.

Moreover, the Court pointed out, if the words were not given different meanings, then the Restoration Act's provision stating that the act was not a "grant of civil or criminal regulatory jurisdiction" would "be left with no work to perform." *Id.* at 1938–39. That result would defy "yet another of our longstanding canons of statutory construction—this one, the rule that we must normally seek to construe Congress's work 'so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Id.* at 1939.

The Court also rejected a supposed line-drawing problem when it came to regulations and prohibitions.

Texas argued that distinguishing between the two would be "unworkable." *Id.* at 1943. According to Texas, courts "might be called on to decide whether 'electronic bingo' qualifies as 'bingo' and thus a gaming activity merely regulated by Texas, or whether it constitutes an entirely different sort of gaming activity absolutely banned by Texas and thus forbidden as a matter of federal law." *Id.* That could lead to further litigation. The Court "appreciate[d] these concerns" but they did "not persuade." *Id.* "Most fundamentally, they are irrelevant. It is not our place to question whether Congress adopted the wisest or most workable policy, only to discern and apply the policy it did adopt. If Texas thinks good governance requires a different set of rules, its appeals are better directed to those who make the laws than those charged with following them." *Id.* at 1943–44.

b. The Ninth Circuit's interpretation of the TCA—that it saves sales prohibitions—conflicts with *Ysleta*. Foremost, the savings clause only saves "requirements relating to the sale" of tobacco products. 21 U.S.C. § 387p(a)(2)(B). Under *Ysleta*, that cannot include prohibitions, since the TCA's text explicitly distinguishes between requirements "relating to the sale" and requirements "prohibiting the sale."

The TCA's preservation clause provides, "Except as provided in [the preemption clause], nothing [in the TCA] shall be construed to limit the authority of" state and local governments, federal agencies, the military, and Indian tribes, "to enact … any law … with respect to tobacco products that is in addition to, or more stringent than, requirements established under [the TCA], including a law … *relating to* <u>*or*</u>

prohibiting the sale, distribution, [or] possession" of "tobacco products by individuals of any age." *Id.* § 387p(a)(1) (emphasis added). It thus gives state and local governments, federal agencies, the military, and Indian tribes broad authority, including the authority to adopt requirements "relating to *or* prohibiting" the sale of tobacco products. But as its text also makes clear, it is subject to the exception set forth in the preemption clause.

The preemption clause, then, takes away from state and local governments (but not others) part of the broad power conferred by the preservation clause. Under the preemption clause, state and local governments cannot enact "*any requirement* which is different from, or in addition to," federal tobacco product standards. *Id.* § 387p(a)(2)(A) (emphasis added). The capacious phrase "any requirement" sweeps in both requirements "relating to" and "prohibiting" the sale of tobacco products—both are preempted if they are "different from, or in addition to," federal tobacco product standards.

Finally, the savings clause restores only part of what the preemption clause takes away. It says the preemption clause "does not apply to requirements *relating to* the sale" of tobacco products. *Id.* § 387p(a)(2)(B) (emphasis added). But absent is any reference to the power to impose requirements "*prohibiting* the sale" of tobacco products—meaning that state and local governments still lack that power.

Congress's decision to use "relating to or prohibiting" sales in the preservation clause, but to omit "or prohibiting" from the nearly identical phrase in the savings clause, shows that Congress

deliberately excluded sales prohibitions from the class of non-preempted laws in the savings clause. Congress generally "acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another." *Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021). And "[c]ourts are required to give effect to Congress' express inclusions and exclusions." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018).

The only way to reconcile the TCA's preemption-related clauses is to recognize that while local governments have broad authority to regulate the sales process, one thing they may not do is absolutely prohibit the sale of products that fail to meet their preferred product standards. The Ninth Circuit's contrary reading renders the TCA "a jumble." *Ysleta*, 142 S. Ct. at 1939. And it leaves the preemption clause with "no work to perform, its terms dead letters all." *Id.*; *see also supra* Part I.B.1 (explaining that this interpretation also conflicts with *Engine Manufacturers* and *National Meat*).

The Ninth Circuit's contention that the distinction between regulation and prohibition would "create a hopelessly inadministrable standard," Pet.App.31a, also conflicts with *Ysleta*, which rejected that kind of "appeal to public policy." 142 S. Ct. at 1943–44. As Judge Nelson explained in dissent, "[t]hat the line might be hard to draw in some hypothetical future case is no reason to throw the baby out with the bathwater. We must avoid reading statutes in absurd ways, … but no canon of statutory interpretation requires us to avoid any reading of a statute under which one can craft an absurd argument." Pet.App.46a (Nelson, J., dissenting). And in all

events, *this* case presents no line-drawing issue at all, because there is no dispute that there are no exceptions to the County's total ban on the sale of flavored tobacco products. *See infra* Part III.

3. Finally, as Judge Nelson concluded, the savings clause also does not apply for a second, independent reason. "The savings clause only saves for states the authority to enact age requirements." Pet.App.44a. This much is clear from the clause's limitation to "requirements relating to the sale … of[] tobacco products [to] *individuals of any age*." 21 U.S.C. § 387p(a)(2)(B) (emphasis added). "Any age" must mean "individuals of a particular age"; that is, only state and local requirements that are age-based are saved. The Ninth Circuit, however, interpreted "any age" to mean "all ages," thus rendering the phrase "by individuals of any age" wholly superfluous. Pet.App.34a. That conflicts with numerous cases instructing that statutory provisions should not be rendered meaningless. *E.g.*, *Corley v. United States*, 556 U.S. 303, 314 (2009).

C. The Ninth Circuit's decision conflicts with the reasoning of decisions from other courts of appeals

The decision below also conflicts with the reasoning of decisions of the First and Second Circuits. *See U.S. Smokeless*, 708 F.3d 428; *NATO*, 731 F.3d 71; *see also* Pet.App.45a (Nelson, J. dissenting) (noting that the decision below conflicts with the reasoning of *U.S. Smokeless*). *U.S. Smokeless* and *NATO* upheld local restrictions on flavored tobacco products, but neither court upheld a blanket prohibition like the one here.

In *U.S. Smokeless*, the Second Circuit considered a New York City ordinance that limited the sale of flavored tobacco products to tobacco bars. 708 F.3d at 431. Tobacco manufacturers sued the city, arguing that the TCA expressly preempted the ordinance. The Second Circuit, however, held that the TCA did not preempt the ordinance because it was "[a] local sales *regulation* that does not clearly infringe on the FDA's authority to determine what chemicals and processes may be used in making tobacco products." *Id.* at 434 (emphasis added). The court emphasized that this was so because the ordinance still "allows [flavored tobacco products] to be sold within New York City, although to a limited extent." *Id.* at 436. By contrast, the court explained, "any purported sales ban that in fact 'functions as a command' to tobacco manufacturers 'to structure their operations' in accordance with locally prescribed standards would not escape preemption simply because the City 'fram[ed] it as a ban on the sale of [tobacco] produced in whatever way [it] disapproved.'" *Id.* at 434 (quoting *Nat'l Meat*, 565 U.S. at 972–73). In other words, as Judge Nelson opined below, although the Second Circuit "did adopt a version of the [Ninth Circuit's] sales vs. manufacturing distinction, … it was careful to avoid implying that a complete sales ban would be permissible." Pet.App.41a (Nelson, J., dissenting).

Likewise, the law at issue in the First Circuit *regulated* the sale of flavored tobacco products—it did not *prohibit* sales completely. *NATO*, 731 F.3d at 74. In that case, a local ordinance made it "unlawful for any person to sell or offer for sale any flavored tobacco product to a consumer, except in a smoking bar." *Id.* The First Circuit held that the ordinance was not

preempted for the same reason the Second Circuit upheld New York City's ordinance: it "is not a *blanket prohibition* because it allows the sale of flavored tobacco products in smoking bars. Rather, it is a regulation 'relating to' sales…." *Id.* at 82 (emphasis added). The First Circuit concluded that this "distinguishe[d]" Providence's law from the law at issue in *National Meat*. *Id.*

By contrast, the decision below upheld a blanket prohibition. Los Angeles's Ordinance is different in kind from those upheld in *U.S. Smokeless* and *NATO*. Los Angeles's Ordinance has no exceptions. Consumers cannot purchase flavored tobacco products *anywhere* in the County—not in tobacco bars (as in *U.S. Smokeless*), not in smoking bars (as in *NATO*). Thus, the Ninth Circuit's decision upholding a total prohibition conflicts with the rationale of these decisions from the First and Second Circuits, under which such a total prohibition would be preempted.

* * *

In the end, because the preemption clause covers a total ban on flavored tobacco products and the savings clause does not save such a blanket prohibition, the Ninth's Circuit's approval of Los Angeles County's Ordinance is contrary to this Court's decisions in *Engine Manufacturers*, *National Meat*, and *Ysleta* and is inconsistent with the reasoning of decisions from the First and Second Circuits.

II. THIS QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

A. The proper test for TCA preemption is critically important for achieving Congress's objectives

The question presented is exceptionally important because it has far-reaching consequences for a significant industry in the national economy. Indeed, Congress has said, "The sale … of tobacco products … ha[s] a substantial effect on the Nation's economy." TCA § 2(10), 123 Stat. at 1777, *codified at* 21 U.S.C. § 387 note; *see also* 7 U.S.C. § 1311, *repealed by* Pub. L. No. 108-357 (Oct. 22, 2004) ("The marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare.").

In recognition of the tobacco industry's large and significant role in the national economy and in order to protect against nonuniform and confusing tobacco regulations, Congress enacted the TCA, which includes a comprehensive scheme to regulate tobacco products nationwide. *See* 21 U.S.C. § 387 note (TCA findings). In taking that comprehensive approach to tobacco regulation, Congress granted FDA broad authority to regulate tobacco products. *See id.* ("It is in the public interest for Congress to enact legislation that provides the Food and Drug Administration with the authority to regulate tobacco products and the advertising and promotion of such products. The benefits to the American people from enacting such

legislation would be significant in human and economic terms.").

But Congress also recognized that states and localities should continue to play a role in regulating some aspects of tobacco products. Thus, Congress guaranteed that states and localities could continue their traditional role of regulating how tobacco products are sold—for example, through licensing regimes, restrictions on where and when products can be sold, and setting a minimum age for purchase. And to protect the federal government's exclusive authority to regulate certain aspects of tobacco products, including standards that apply to those products, Congress denied states and localities the power to enforce their own standards through sales bans.

The Ninth Circuit's opinion upends that statutory scheme and imperils Congress's careful design. Under the Ninth Circuit's rule, every state and locality may enact its own ban on flavored tobacco products; all they have to do is ban their sale. *See Engine Mfrs.*, 541 U.S. at 255 ("if one State or political subdivision may enact such rules, then so may any other"). That is not what Congress intended. And the regulatory chaos augured by the Ninth Circuit's opinion threatens the stable conditions that are necessary for the tobacco industry.

B. This issue is important because hundreds of jurisdictions have enacted similar laws, resulting in litigation in four courts of appeals

The Ninth Circuit is not the first appeals court to decide this issue. The issue has reached four federal

courts of appeals, *City of Edina*, No. 20-2852 (8th Cir. argued May 12, 2021); Pet.App.1a; *NATO*, 731 F.3d 71; *U.S. Smokeless Tobacco Mfg. Co.*, 708 F.3d 428. And it is sure to continue, since, as the opinion below recognizes, hundreds of jurisdictions have enacted varying restrictions on flavored tobacco products. Pet.App.14a. That not only shows that this issue continues to arise throughout the country, but also that regulatory chaos already exists in direct defiance of Congress's design.

Further, next month, Californians will vote via referendum on whether to cut off one of the nation's largest markets from flavored tobacco products. *See* S.B. 793, 2019–2020 Reg. Sess. (Cal. 2020) (suspended by referendum scheduled for November 8, 2022). If Californians vote to ban flavored tobacco products, there is little doubt that the issue will be the subject of litigation—and will almost surely reach this Court given the Ninth Circuit's opinion in this case. The Court should therefore take this opportunity to address this substantial and growing problem.

C. The case is also important given the far-reaching implications of the decision below

The issue presented also goes beyond whether states and localities can ban the sale of flavored tobacco products.

First, tobacco product standards are not limited to flavors but cover any "propert[y]" of a tobacco product. 21 U.S.C. § 387g(a)(4)(B)(i). That includes the amount of nicotine in tobacco products, the length of cigars, the properties of batteries in e-cigarettes, the types of filters in cigarettes, and countless other aspects of

tobacco products. And under the Ninth Circuit's rule, states and localities can target all of those "properties." Again, all the state or locality has to do is ban the *sale* of products that do not conform to their preferred product standards.

These concerns are not just hypothetical. For example, Utah has banned the sale of e-cigarettes that contain more than a certain amount of nicotine. Utah Admin. Code r. R384-415-5. California lawmakers, in a proposed law, sought to ban cigarettes with single-use filters. Assemb. B. 1690, 2021–2022 Reg. Sess. (Cal. 2022) (as introduced Jan. 24, 2022). New York legislators are considering a similar ban on single-use filters. S.B. 1278, 2021–2022 Reg. Sess. (N.Y. 2021) (as introduced Jan. 8, 2021). Illinois bans e-cigarettes that contain certain ingredients, such as polyethylene glycol and medium chain triglycerides. 410 Ill. Comp. Stat 86/20. And numerous states regulate the type of packaging that manufacturers can use for their e-cigarettes. *E.g.*, 430 Ill. Comp. Stat. 40/10; N.Y. Gen. Bus. Law § 399-gg(1); Me. Stat. tit. 22, § 1560-B(2); Mass. Gen. Laws ch. 270, § 27(b); 940 Mass. Code Regs. 21.05; Mich. Comp. Laws § 722.642b(1).

Thus, not only are states and localities enacting a slew of inconsistent bans on flavored tobacco products, but they are also now moving even further, usurping the authority Congress vested in FDA to set and enforce other tobacco product standards.

Second, the problem is also not limited to tobacco products. Throughout the U.S. Code, Congress has reserved to the federal government the exclusive power to set uniform product standards for a variety of industries. For example, Congress passed the

Poultry Products Inspection Act (PPIA) to "assur[e] that poultry products ... are wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. § 451. To that end, the PPIA includes an express preemption clause, which provides that any "[m]arking, labeling, packaging, or ingredient requirements ... in addition to, or different than, those made under [the PPIA] may not be imposed by any State." *Id.* § 467e. That ensures that labeling is consistent throughout the country. Numerous other industries also rely on uniform, national product standards. *E.g.*, 21 U.S.C. § 678 (preempting certain state and local requirements related to slaughtering animals); *id.* § 379r (same for requirements for nonprescription drugs); *id.* § 360k (same for requirements for medical devices); 42 U.S.C. § 7543(a) (same for requirements for vehicle emissions); 46 U.S.C. § 4306 (same for safety standards of "recreational vessel[s]"); 49 U.S.C. § 30103(b)(1) (same for performance standards for motor vehicles).

But under the Ninth Circuit's opinion, businesses can no longer rely on Congress's words. All a locality needs to do to circumvent these preemption clauses is to frame its law as a ban on the sale of products that do not conform to its preferred requirements. So a state could skirt the PPIA's express preemption clause by simply banning the sale of poultry products that do not use its preferred packaging, negating the preemption clause altogether. And that reasoning will carry over to numerous other preemption clauses throughout the U.S. Code.

The question presented is thus important not only for one of the largest industries in the country, but for numerous other industries as well.

III. THIS CASE PRESENTS AN IDEAL VEHICLE

This is an ideal vehicle for numerous reasons.

First, further percolation of the question presented is not necessary. There have been three published circuit court opinions (and a dissent) on the issue.[5] Those decisions have aired the issues, and the disagreement over how to interpret the TCA's preemption clauses is entrenched. It is now time for this Court to take up the issue. And even if there were no disagreement among the circuits, this Court routinely grants review in splitless preemption cases given the "importance of the pre-emption issue." *Wyeth v. Levine*, 555 U.S. 555, 563 (2009) (noting that certiorari was granted despite no split among lower courts); *see also Merck Sharp & Dohme Corp v. Albrecht*, 138 S. Ct. 2705 (2018) (granting certiorari in same situation).

Second, this issue was squarely pressed and passed upon below. There are no extraneous issues to prevent the Court from resolving this case once and for all. This Court's resolution of how to interpret the TCA's three preemption-related provisions would dispose of this case one way or another.

Third, this case also cleanly presents the core legal question: whether the TCA preempts a total prohibition on the sale of flavored tobacco products. There are no line-drawing problems when it comes to

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[5] As noted (*supra* p. 5), the issue is also pending before the Eighth Circuit.

whether Los Angeles's Ordinance is a "prohibition." Some state and local restrictions on flavored tobacco products might present difficult questions regarding whether they are requirements "relating to" the sale of tobacco products or "prohibiting" their sale. But Los Angeles's Ordinance does not: it is a blanket ban—a paradigmatic prohibition. So the Ninth Circuit's supposed administrability problem is not presented here. Pet.App.31a; *see also Ysleta*, 142 S. Ct. at 1943–44 (rejecting administrability problems as a reason to adopt an atextual interpretation).

CONCLUSION

This Court should grant the petition.

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