No. 22-338

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, ET AL.,

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE**

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as an *amicus curiae* in important federal preemption cases, urging the Court to ensure that federal law operates efficiently and uniformly—as Congress intended. *See, e.g.*, *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015).

Federal law prohibits States and localities from banning the sale of a tobacco product for failing to meet state or local product standards that differ from the federal standard. Yet a sharply divided panel of the Ninth Circuit allowed Los Angeles County to do just that. WLF fears that the decision below, if allowed to stand, will undercut Congress's ability to maintain uniform, nationwide product standards in important regulated industries.

STATEMENT

Tobacco is among the most federally regulated products in America. For decades, Congress has carefully controlled the interstate marketing and use of tobacco products—from eliminating smoking on

* No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, contributed money for preparing or submitting this brief. After timely notice, all counsel of record consented in writing to WLF's filing this brief.

public transportation and setting a minimum age for tobacco sales to banning tobacco ads on television and radio.

In 2009, Congress gave the Food and Drug Administration broad authority to regulate tobacco products in the Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No 111-31, 123 Stat. 1776 (TCA). Among other things, the TCA prohibits cigarette flavors other than tobacco and menthol, 21 U.S.C. § 387g(a)(1)(A); bans the sale of "adulterated" tobacco products that don't conform to this federal standard, *id.* §§ 331(a), (c), 387b(5); and authorizes the FDA to decide whether to extend the federal ban to other tobacco products or flavors, *id.* § 387g(a).

The TCA also authorizes the FDA to set nationwide, uniform standards for tobacco products. Under the TCA, the FDA must understand, assess, and account for the relative health effects of tobacco products by setting "tobacco product standards," *id.* § 387g; consider the illicit market for tobacco products in adopting such standards, *id.* §§ 387g(b)(2), (e)(1); gather and study data to take further "action" on "menthol or any artificial or natural flavor," *id.* § 387g(a)(1)(A); and adopt other tobacco product standards if the agency determines, after weighing "the risks and benefits to the population as a whole," that a revised standard "is appropriate for the protection of the public health," *id.* § 387g(a)(3)(A), (B).

The TCA carefully clarifies the role that States and localities may play in regulating tobacco. *First*, the TCA preempts "any" state or local requirement that imposes additional or different "to-

bacco product standards." *Id.* § 387p(a)(2)(A). *Second*, "except" for state and local laws expressly preempted by the preemption clause (e.g., laws imposing different tobacco product standards from the federal standard), the TCA otherwise preserves the authority of States, localities, federal agencies, the Armed Forces, and Indian tribes to enact "more stringent" measures "relating to or prohibiting the sale * * * of tobacco products by individuals of any age." *Id.* § 387p(a)(1). Because it is subject to the preemption clause, the preservation clause does not preserve state and local regulation of flavors in tobacco. *Third*, the TCA saves from preemption state and local requirements "relating to the sale" of tobacco products to "individuals of any age" and "relating to fire safety standards." *Id.* § 387p(a)(2)(B).

In 2019, Los Angeles County enacted an ordinance banning all retail sales of flavored tobacco products, including menthol flavored cigarettes. Pet. App. 126a–36a. Petitioners sued the County, contending that the TCA preempts the County's flavor ban because it imposes a "tobacco product standard" "different from" and "in addition to" the federal tobacco standard. Pet. App. 15a.

The Central District of California upheld the County's flavor ban. Pet. App. 49a–54a. A divided panel of the Ninth Circuit affirmed. The majority decided that the TCA's tobacco product standards govern only how a "product must be produced." Pet. App. 25a. Because the County's flavor ban controls *sales* rather than *production*, the majority reasoned, it escapes the TCA's preemption clause. *Id.*

Alternatively, the majority held that the TCA's savings clause saves the County's flavor ban from preemption. In the majority's view, the County's flavor ban is no more than 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 court saw no statutory significance in the TCA's distinction between requirements "relating to" sales in the savings clause and those "prohibiting" sales in the preservation clause.

Judge Nelson dissented. Relying on this Court's decisions in *National Meat Ass'n v. Harris*, 565 U.S. 452 (2012), and *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246 (2004), he explained that States and localities can't escape preemption "by disguising [their] regulation as a sales ban." Pet. App. 38a. Because the County's ban falls within the TCA's preemption clause and is neither preserved nor saved, it is expressly preempted. Pet. App. 39a.

Although the Ninth Circuit denied rehearing en banc, Judge Nelson voted to grant rehearing. Pet. App. 73a–74a.

SUMMARY OF ARGUMENT

When the FDA approves a prescription drug as safe and effective for its intended use, nobody asks the Los Angeles Board of Supervisors to check the science. Congress would never let five local politicians convene a meeting, watch tutorials on pharmacology and biochemistry, attempt their own clinical trials, second-guess the FDA's weighing of the drug's therapeutic costs and benefits, "improve" the

drug with a redesign, and then ban the sale of the FDA-approved design.

Just as it would not let local officials tinker with the design of a federally approved prescription drug, Congress would not let them overhaul the product standards for one of the most highly regulated FDA-authorized products in America. But that did not stop the Ninth Circuit from doing just that. If Los Angeles County can ban FDA-authorized tobacco products by imposing local standards that differ from the TCA's, then other States and localities can do the same. That would contravene Congress's express intent in the TCA, which prohibits state and local governments from banning the sale of tobacco products for failing to conform to state or local standards. By blessing the County's flavor ban, the decision below discards Congress's plainly stated purpose and invites an avalanche of contradictory state and local standards.

A divided panel of the Ninth Circuit saw it differently. It held that the County could ban FDA-authorized tobacco products by enacting local product standards that differ from the federal standard. The majority concluded that the ban does not regulate product standards because it does not regulate the manufacturing or production process. Insisting that the County's ban concerns only the sale of the product, not how that product "must be produced," the court declared the ban free from TCA preemption. At every step, the panel majority erred.

The County cannot escape preemption simply by recasting its flavor ban as a regulation of tobacco sales rather than tobacco production. The Suprema-

cy Clause does not turn on such word play. This Court has twice reversed the Ninth Circuit for interpreting an express preemption clause in a way that allows States and localities to defeat federal product standards with a sales ban. "[I]t 'would make no sense,'" this Court has explained, "to allow state regulations to escape preemption because they addressed the purchase, rather than manufacture, of a federally regulated product." *Nat'l Meat*, 565 U.S. at 464. Standards always target the product itself, so a regulation of tobacco standards is preempted no matter if it is aimed at "production" or "sales." *Engine Mfrs.*, 541 U.S. at 254. This case is no different.

Nor may the County rely on a sweeping construction of the TCA's savings clause to escape preemption. This Court has rejected—repeatedly—such expansive readings. Many federal laws contain a broad savings clause that protects state and local regulatory power or preserves state and local remedies. Several times, a State or locality has argued that a savings clause permits it to act in a way that undermines the very law that contains the savings clause. And time and again, the Court has rejected those arguments and held that a savings clause is not some kind of statutory self-destruct mechanism. Because the Ninth Circuit's reading of the TCA's savings clause conflicts with this Court's commonsense construction of federal savings clauses, the Court should intervene.

In carefully crafted, plain language, Congress told Los Angeles County not to do this. The County did it anyway. Such willful subversion of the Supremacy Clause should not be allowed to stand.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW FLOUTS THIS COURT'S FEDERAL PREEMPTION PRECEDENTS.

The TCA tasks the FDA with maintaining uniform tobacco product standards—including flavors in tobacco products—based on a careful weighing of a variety of factors including public health. States and localities may not countermand that regulatory scheme. Yet the County's flavor ban elevates a local tobacco flavor standard over the federal standard. The Supremacy Clause won't allow that.

According to the Ninth Circuit, however, because the County's flavor ban does not dictate "how [a] product must be produced," it is not a tobacco product "standard" but merely a "sales" ban. Pet. App. 25a. Contrary to the view of the panel majority, Congress's ability to safeguard the federal interests at stake in the TCA does not turn on such semantics.

Put differently, a standard is a standard for preemption purposes no matter how it is enforced or described. This Court's holding in *Engine Manufacturers* proves the point. There, California prohibited anyone from purchasing or leasing vehicles that flunked California's stringent emissions requirements. 541 U.S. at 248. But the Clean Air Act forbade States from setting emissions standards different from the federal standards. *Id.* at 252. Just as the County contends here, California insisted that the challenged ban regulated only the "purchase" of vehicles, rather than their sale or manufacture. *Id.* at 248.

The Court roundly rejected that argument, which "confuses standards with the means of enforcing standards." *Id.* at 253. California could not, the Court explained, "engraft onto th[e] meaning of 'standard' a limiting component" by insisting that a "standard" means "only [a] production mandat[e] that require[s] manufacturers to ensure that the vehicles they produce have particular emissions characteristics." *Id.* Treating such restrictions "differently for preemption purposes would make no sense," the Court concluded, because a "manufacturer's right to sell federally approved vehicles is meaningless" without a "purchaser's right to buy them." *Id.* at 255. Simply put, "a standard is a standard even when not enforced through manufacturer-directed regulation." *Id.* at 254. So too here.

National Meat reaffirms this sensible view of federal preemption. There, a California law banned the sale of meat from non-ambulatory animals. 565 U.S. at 463–64. Manufacturers argued that the Federal Meat Inspection Act (FMIA) preempted state "requirements * * * which are in addition to, or different than those made under [the FMIA]." *Id.* at 458. But because the FMIA preempted only production mandates, California argued that its sales ban escaped preemption. *Id.* at 463.

The Court unanimously disagreed. Although the FMIA's preemption clause does "not usually foreclose state regulation of the commercial sales activities of slaughterhouses," this Court declared California's sales ban preempted. *Id.* "[I]t 'would make no sense,'" the Court explained, "to allow state regulations to escape preemption because they addressed

the purchase, rather than manufacture, of a federally regulated product." *Id.* at 464.

A contrary holding, the Court explained, would have allowed California to "impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved." *Id.* at 464. To allow States to circumvent federal law so easily "would make a mockery of the FMIA's preemption provision." *Id.*

As these cases confirm, federal preemption does not turn on categorical framing or clever phrasing by a State or locality. It makes no difference how a State or locality enforces its contrary standard. Whether it compels manufacturers to comply or prohibits retailers from selling nonconforming goods, any state or local product standard that seeks to override the federal standard is preempted.

The Ninth Circuit's holding upends this commonsense view of federal preemption. And it does so by reading a preemption clause that preempts "*any*" requirement that differs from the federal standard as one preempting only requirements about "how [a tobacco] product must be produced." Pet. App. 25a. That reading not only defeats the TCA but also "make[s] a mockery" of federal preemption. *Nat'l Meat*, 565 U.S. at 464. This Court should grant review to vindicate Congress's important federal interest in uniformity.

II. THE NINTH CIRCUIT'S FLAWED CONSTRUCTION OF THE TCA CONTRAVENES THIS COURT'S SAVINGS-CLAUSE JURISPRUDENCE.

Reasonably construed, the TCA does not preempt the County's imposing age-based or fire-safety regulations on tobacco products. But it prohibits the County from defeating federal tobacco product standards under the guise of regulating "sales." The TCA's preemption and savings clauses are clear about that. Put differently, a state or local law may complement the TCA; it may never impede it. Holding otherwise, the panel majority botched the TCA's statutory scheme by ignoring vital canons of statutory construction and this Court's savings-clause cases.

"[W]ith respect to a tobacco product," the TCA preempts "any requirement which is different from, or in addition to," federal tobacco product standards. 21 U.S.C. § 387p(a)(2)(A). The TCA's savings clause restores only a narrow sliver of what the preemption clause takes away. State and local governments may enact "requirements relating to the sale" of tobacco products to "individuals of any age" or "relating to fire safety standards." *Id.* § 387p(a)(2)(B). The Ninth Circuit transformed this narrow sliver into a plank. In reading the TCA's savings clause expansively, the decision below ignored two fundamental rules of statutory construction.

First, it failed to read the TCA's preemption, savings, and preservation clauses in context with the TCA itself. "A statute's meaning does not always turn solely on the broadest imaginable definition of its component words." *Epic Sys. v. Lewis*, 138 S. Ct.

1612, 1631 (2018). A court, after all, construes statutes, not isolated provisions "in a vacuum." *Home Depot USA, Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) (cleaned up). It is important, then, that a court "read [a statute's] words in their context and with a view to their place in the overall statutory scheme." *Id.* Reading a clause out of context can wreak havoc on the operation of the rest of the statute. This case shows how.

Unlike the preservation clause, which preserves non-preempted requirements "relating to or prohibiting the sale" of tobacco products, 21 U.S.C. § 387p(a)(1), the TCA's savings clause says only that the preemption clause "does not apply to requirements relating to the sale" of tobacco products. *Id.* § 387p(a)(2)(B). Because "Congress acts intentionally" whenever it "includes particular language in one section of a statute but omits it in another section," *Russello v. United States*, 464 U.S. 16, 23 (1983), Congress's choice to omit the words "or prohibiting" from a nearly identical phrase in the savings clause must be given effect. Here that means giving effect to Congress's choice that state and local governments *cannot* ban the sale of tobacco products based on differing local product standards.

Second, the Ninth Circuit ignored "the commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). "The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission." *Id.* That is the situation here, where a broad reading of a savings clause goes against spe-

cific provisions ensuring that the FDA sets "national standards controlling the manufacture of tobacco products and the * * * ingredients used in such products." 21 U.S.C. § 387 note.

This Court has interpreted many savings clauses in other federal laws. Time and again, it has refused to allow a savings clause to upset Congress's carefully chosen regulatory scheme. Instead, each time it has read the savings clause in a way that is incompatible with the Ninth Circuit's reading here.

1. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). The Airline Deregulation Act contains a savings clause held over from the Federal Aviation Act. Nothing in the FAA, the clause says, "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." *Id.* at 378.

The ADA bars the States from regulating airline prices, routes, or services. *Id.* at 378–79. The *Morales* plaintiffs argued that the FAA's savings clause saved that bar from preempting their state-law deceptive advertising claim. Rejecting this argument, *Morales* observes that "the specific governs the general." *Id.* at 385. Congress, *Morales* concludes, does not "undermine [a] carefully drawn statute through a general savings clause." *Id.* A savings clause cannot overcome a specific provision—such as the "prices, routes, or services" bar—that divides authority between state and federal governments.

2. *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214 (1998). "Nothing in this [law]," the Communications Act of 1934 says, "shall in any way abridge or alter the remedies now existing at common law or by statute." 47 U.S.C. § 414.

A set of rules in the Communications Act required AT&T to sell its services only at rates it filed with the government. A telephone-service broker brought state-law claims that, if successful, would have required AT&T to provide service at a rate lower than AT&T's filed rates. *Id.* at 222–23. *AT&T* holds that the federal rate-filing rules preempt the broker's state-law claims.

The Communications Act's general savings clause, the Court said, changes nothing: "The savings clause cannot in reason be construed as continuing in customers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act." *Id.* at 227–28 (quoting *Tex. & Pac. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)). In other words, the Court explained, "the act cannot be held to destroy itself." *Id.* at 228.

3. *Geier v. American Honda Motor Co.,* 529 U.S. 861 (2000). The National Traffic and Motor Vehicle Safety Act contains a savings clause that says "'compliance with' a federal safety standard 'does not exempt any person from any liability under common law.'" 529 U.S. at 868.

Sued for omitting airbags from the 1987 Honda Accord, Honda invoked a regulation under the Act that made airbags merely an optional safety feature.

The plaintiff answered with the Act's savings clause. The Court rejected that argument.

Geier reiterated that this Court "has repeatedly declined to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law." *Id.* at 870. Put another way, a savings clause "does *not* bar the ordinary working" of "pre-emption principles." *Id.* at 869. And because the Act's regulation made airbags optional, the plaintiff's state-law claims, which could succeed only if federal law required airbags, were preempted—the savings clause notwithstanding. *Id.* at 874–86.

Here, if Congress had meant for the TCA to categorically exempt from preemption *every* state and local ban on tobacco sales, it would have made no sense for Congress to single out "requirement[s] * * * relating to tobacco product standards" as an excepted subcategory of preempted requirements. Nor would the savings clause need to qualify "sales" with "individuals of any age" and "relating to fire safety standards."

And while the Ninth Circuit relied on the TCA's savings clause to discard specific provisions of the TCA, *Morales*, *AT&T*, and *Geier* all use a specific statutory provision to limit the scope of a savings clause. The Ninth Circuit's reading thus conflicts with this Court's understanding, grounded in sound principles of statutory interpretation, that a federal savings clause is not an invitation for States and localities to undermine federal law. If that understanding is to continue to hold sway, the petition must be granted.

III. THIS IS AN IMPORTANT CASE THAT WARRANTS REVIEW.

This case matters. The decision below is not a subtle encroachment on federal power. Rather, it is an aggressive nullification of federal law. Left in place, the Ninth Circuit's holding could allow States and localities to evade other federal product standards by merely framing a contrary standard as a ban on sales. It also threatens to lay waste to years of FDA work while exposing petitioners—and other tobacco manufacturers—to massive liability for selling FDA-authorized products.

This is not wild speculation. As the petition highlights, hundreds of jurisdictions have enacted similar laws, spurring litigation in four courts of appeals. Pet. 30. And only last Tuesday, Californians adopted Proposition 31, which bans the sale of flavored tobacco products in one of the nation's largest markets. Julie Watson, *Voters Approve California Law Banning Flavored Tobacco*, The Associated Press (Nov. 9, 2022) <https://bit.ly/3hs3Tzf>. There is thus no reason to await further percolation, as this case squarely presents the Court with an early opportunity to quell a litigation explosion affecting a highly regulated national industry.

The stakes are high. National uniformity in product standards protects manufacturers and consumers alike. It allows for businesses to operate under one set of rules—federal rules—instead of dozens or even hundreds of sets of potentially conflicting rules. Without uniformity, manufacturers are forced to either comply with a multitude of conflicting, overlapping, and burdensome state and local stand-

ards or risk liability from state and local regulatory sanctions. Regardless of the choice made, these increased risks raise the cost of doing business nationwide. All too often, those costs inevitably are passed on to consumers.

The Ninth Circuit's misreading of the TCA's preemption clause also invites second guessing of the FDA's studied conclusions on how best to balance the TCA's multifaceted policy objectives. The panel majority's holding, if allowed to stand, will prevent Congress from accomplishing those objectives by subjecting tobacco manufacturers to a jumble of disparate product standards, eradicating the federal uniformity that Congress decided is an essential element of federal tobacco regulation.

What's more, the FDA has expertise the County lacks. The FDA's work "requires deep knowledge of the human body and the biological effects of the substances we ingest." J. Harvie Wilkinson III, *Assessing the Administrative State*, 32 J.L. & Pol. 239, 246 (2017). And the TCA requires more still. Indeed, the current federal tobacco product standards reflect the FDA's studied determination, after weighing "the risks and benefits to the population as a whole," that a revised standard is not "appropriate for the protection of the public health." 21 U.S.C. §§ 387g(a)(3)(A), (B).

These complex issues are best handled by the FDA, with its teams of doctors, scientists, statisticians, and economists, and not by the Los Angeles Board of Supervisors, however wise and well-intentioned its members may be. Even leaving aside the TCA's plainly written express preemption clause,

this Court has repeatedly recognized that when an agency's regulatory judgment reflects a careful balancing of competing considerations under a comprehensive federal scheme, any state or local law that could disrupt the balance struck by the agency is preempted. *See, e.g., Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 349–51 (2001); *Geier*, 529 U.S. at 874–86. That is this case.

Los Angeles County is perfectly free to uphold local interests; it should continue its traditional role of regulating when, where, how, and to whom tobacco products are sold—including age-based and fire-safety regulations. But this Court must intervene and respond whenever any State or locality brazenly subverts federal law. This is just such a case.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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