No. 22-338

In The

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY, ET AL.,
Petitioners,

v.

COUNTY OF LOS ANGELES, CALIFORNIA, ET AL.,
Respondents.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Family Smoking Prevention and Tobacco Control Act (TCA or Act) provides a tripartite scheme to delineate state and federal authority to regulate tobacco. 21 U.S.C. § 387p. This scheme preserves longstanding state and local regulatory authority over tobacco, while describing specific areas of federal preemption. First, the "preservation clause" provides that state and local governments, consistent with their traditional authority, may adopt and enforce any "measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under" the Act, "including a … measure relating to or prohibiting the sale … of tobacco products," subject to the preemption clause. *Id.* § 387p(a)(1). Second, the "preemption clause" instructs that state and local governments may not impose "any requirement which is different from, or in addition to, any requirement under the [Act] relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products." *Id.* § 387p(a)(2)(A). Finally, the "savings clause" directs that the Act does not preempt, among other things, any "requirements relating to the sale … of[] tobacco products by individuals of any age." *Id.* § 387p(a)(2)(B).

The question presented is:

Whether the Act preempts a local ordinance prohibiting the sale of flavored tobacco products.

PARTIES TO THE PROCEEDINGS

Respondents here are the County of Los Angeles, its Board of Supervisors, and all Board members in their official capacities (County). All other parties to the proceedings are correctly described in the petition filed by R.J. Reynolds Tobacco Company, *et al.* (R.J. Reynolds), No. 22-338 (at iii).

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INTRODUCTION

The Tobacco Control Act is a unique law. Congress adopted a distinctive structure for tobacco regulation, deliberately preserving traditional state regulatory authority over tobacco sales, while providing a limited scope of federal preemption for specific other matters. Exercising its reserved authority, the County of Los Angeles responded to a public-health crisis involving youth addiction to tobacco products, through the gateway of flavored products, by banning the sale of such products. Construing the Act's specific and reticulated framework, the Ninth Circuit correctly held that the County of Los Angeles validly exercised its authority over tobacco sales. That holding reflects the precise text and structure of the Act: Congress preserved state authority to enforce any "measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under" the Act, "including a … measure relating to or prohibiting the sale … of tobacco products." 21 U.S.C. § 387p(a)(1), and further directed that the Act does not preempt, among other things, any "requirements … relating to the sale … of[] tobacco products by individuals of any age." *Id.* § 387p(a)(2)(B).

Petitioners—which manufacture and sell flavored tobacco products (although they can no longer do so in California)—challenge that determination with a series of flawed arguments. Petitioners claim that the Ninth Circuit's holding conflicts with this Court's decisions holding that, in particular statutory contexts, federal preemption of *direct* state regulation of product standards also covered certain state *sales* or *purchase* restrictions. But preemption analysis is statute-specific, and the cases petitioners cite arose in

readily distinguishable statutory contexts: none involved the unique sales-authorizing text of the Act or the background of traditional state authority over tobacco sales. And petitioners' effort to claim a circuit conflict based on decisions *upholding* specific local limitations on tobacco sales is entirely unfounded. Absent a conflict, there is no reason for this Court to intervene. And multiple considerations—including California's parallel ban on the sale of flavored tobacco products that this Court recently declined to enjoin—strongly counsel that this Court's intervention is not warranted.

The County's effort to protect the health of its citizens—and particularly its youth *before* they become addicted to products with grievous health effects—falls well within its traditional regulatory power. The petition for certiorari should be denied.

STATEMENT

A. States' Historical And Predominant Role In Tobacco Regulation

In 1900, this Court recognized the right of the States, consistent with their traditional police powers, to prohibit cigarette sales within their borders to protect public-health. *Austin v. Tennessee*, 179 U.S. 343, 348-49 (1900). It is "within the province of the [state] legislature to say how far [cigarettes] may be sold, or to prohibit their sale entirely, after they have been taken from the original packages or have left the hands of the importer." *Id.* Up until the passage of the TCA more than a century later, state and local governments were the primary regulators of tobacco

products, and the only regulators of tobacco's sale and usage.[1]

Leading up to the TCA's enactment in 2009, state and local governments actively regulated tobacco sales as the public-health dangers of tobacco became better understood. More than 40 States reached a 1998 "landmark agreement" with large tobacco companies, including R.J. Reynolds, that provided for significant monetary payments and permanent injunctive relief, including restrictions on cigarette advertising. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001).[2] As of 1998, for example, 41 States restricted tobacco vending machines, and 19 States banned tobacco vending machines at locations accessible to youth. *State Laws on Tobacco Control — United States, 1998*, *supra*, n.1. States also restricted sales of flavored tobacco or other classes of tobacco products. In 2007, Maine passed a law banning the sale of certain flavored cigarettes and cigars, later amended to apply to only certain flavored cigars. 22 M.R.S. § 1560-D(2) (2007); *id.* § 1560-D(2) (2010). And in 2008, New Jersey banned the sale of flavored cigarettes. N.J. Stat. § 2A:170-51.5. In addition, when the TCA was enacted, Illinois, New York, North Dakota, Vermont, and West Virginia prohibited the sale of a class of thin cigarettes known as bidis. *See* 720 Ill. Comp. Stat. 685/4 (a-5) & 685/5 (2001); N.Y.

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[1] *See, e.g.*, Ctrs. for Disease Control, *State Laws on Tobacco Control — United States, 1998* (June 25, 1999), https://www.cdc.gov/mmwr/preview/mmwrhtml/ss4803a2.htm.

[2] *See also* Nat'l Ass'n of Att'ys Gen., *The Master Settlement Agreement*, https://www.naag.org/our-work/naag-center-for-tobacco-and-public-health/the-master-settlement-agreement/.

[Pub. Health] Law § 1399-ll (2019); N.D. Cent. Code § 12.1-31-10 (2003); Vt. Stat. Ann. tit. 7, § 1003(e) (2000); W. Va. Code § 16-9A-9 (2001). States and local governments also pervasively prohibited or regulated smoking in public places, including the workplace, restaurants, and daycare centers. *State Laws on Tobacco Control — United States, 1998*, *supra*, n.1.

By contrast, federal agencies lacked regulatory power because "Congress ha[d] clearly precluded the FDA from asserting jurisdiction to regulate tobacco products." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000). Limited federal efforts "in response to growing awareness of the harmful effects of cigarettes … focus[ed] on consumer education through advertising and labeling requirements." Pet.App. 8a-9a; *see Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1187 (11th Cir. 2017).

B. The TCA's Unique Tripartite Structure Begins With A Clause That Preserves State And Local Authority

The TCA expanded federal authority over tobacco regulation by "authoriz[ing] the [FDA] to set national standards controlling" certain specific aspects of tobacco products: their "manufacture" and "the identity, public disclosure, and amount of ingredients used in such products." Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1782 (2009). The TCA preserved, however, state and local governments' traditional regulatory authority over the sale of tobacco products (as well as their use, possession, advertising, and distribution).

To that end, the TCA section titled "Preservation of State and local authority" has a tripartite structure: it first *preserves* state and local authority to enact laws respecting tobacco products; then *preempts* a narrow subset of requirements that conflict with the newly authorized federal requirements; and finally *saves* some of that narrow subset of otherwise-preempted state regulations from preemption. 21 U.S.C. § 387p.

The "preservation clause" specifies that "[e]xcept as provided in [the preemption clause]," the Act preserves state and local authority to "enact, adopt, promulgate, and enforce any … measure with respect to tobacco products, … that is in addition to, or more stringent than, requirements established under" the Act, "including a law … relating to or prohibiting the sale … of tobacco products by individuals of any age." 21 U.S.C. § 387p(a)(1).

The "preemption clause," in turn, preempts "any requirement which is different from, or in addition to, any [TCA] requirement … relating to" one of eight specific federal regulatory topics: "tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products." *Id.* § 387p(a)(2)(A).

Finally, the third section—the "savings clause"—limits the reach of the preemption clause. The savings clause specifies that the preemption clause "does not apply to," among other things, "requirements relating to the sale … of[] tobacco products by individuals of any age." *Id.* § 387p(a)(2)(B).

The TCA does not define "tobacco product standards." To date, only a single federal tobacco

product standard exists; it provides that "a cigarette or any of its component parts … shall not contain, as a constituent (including a smoke constituent) or additive, an artificial or natural flavor (other than tobacco or menthol)." *Id.* § 387g(a)(1)(A). That requirement is enforced through a statutory sales restriction on adulterated tobacco products, which are defined to include products that do not comply with federal tobacco product standards—and thus to include flavored cigarettes (other than menthol). *Id.* § 331(a) (prohibiting "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded"); *id.* § 387b(5) (defining an adulterated tobacco product to include "a tobacco product which is subject to a tobacco product standard established under section 387g of this title unless such tobacco product is in all respects in conformity with such standard").

C. The County's Ordinance

On September 24, 2019, the County enacted an ordinance as part of amendments to Title 7 (Business Licenses) and Title 11 (Health and Safety) of the Los Angeles County Code. The ordinance became law on November 1, 2019, with an effective date of May 1, 2020. As petitioners themselves pleaded in the district court, the County enacted its ordinance to combat a public-health epidemic, including increased youth tobacco use, which the County found was the result of the proliferation of flavored tobacco products. C.A.E.R. 37 ¶¶ 21-22.[3]

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[3] C.A.E.R. are citations to the Ninth Circuit excerpts of record.

The ordinance provides that no retailer or licensee may "sell or offer for sale … any flavored tobacco product." Pet.App. 135a (L.A. Cnty. Code § 11.35.070(E)). The ordinance in turn defines a "flavored tobacco product" as "any tobacco product … which imparts a characterizing flavor," Pet.App. 131a (L.A. Cnty. Code § 11.35.020(J))—*i.e.*, "a taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product," Pet.App. 129a (L.A. Cnty. Code § 11.35.020(C)).

Petitioners filed a complaint in the District Court for the Central District of California on June 1, 2020, one month after the County's ordinance became effective, contending that the TCA preempted the ordinance. The district court rejected petitioners' claim and granted judgment in the County's favor. Pet.App. 14a-15a.

D. The Ninth Circuit's Decision

The Ninth Circuit affirmed. The panel majority, in an opinion by Judge VanDyke, analyzed the statutory text, including § 387p's tripartite structure, against the backdrop of the Act's historical context and concluded that the Act does not preempt the ordinance. The court held that the ordinance is not a tobacco product standard within the preemption clause's reach, but rather a preserved sales restriction. The court noted that the TCA's preservation clause specifically permits local governments to "go beyond" any restrictions imposed by the federal government and explicitly allows them to "*prohibit[] the sale* … of tobacco products [to] individuals of any age." Pet.App. 19a.

Addressing the TCA's preemption of "requirements … relating to tobacco product standards," 21 U.S.C. § 387p(2)(A), the court concluded that this provision addresses only pre-retail, manufacturing requirements. "While the TCA does not explicitly define 'tobacco product standards'" as used in the preemption clause, "it describes that phrase in terms of the manufacturing and marketing stages." Pet.App. 20a (citing 21 U.S.C. § 387g(a)(4)(B)(i)).

Next, the court held that even if the preemption clause encompassed sales prohibitions, the savings clause would nonetheless authorize the County's ordinance as a "requirement[] relating to the sale" of tobacco products. Pet.App. 30a. The court reasoned that the savings clause "reinforces what [the TCA] first established in the preservation clause: that the regulation and prohibition of tobacco product sales falls squarely within" local authority, such that communities can opt out of the retail tobacco market altogether. *Id.* 21a. The court rejected petitioners' argument that the ordinance must fail because the savings clause uses the phrase "requirement relating to" sales, rather than "prohibiting" sales. Noting that both the preemption and savings clauses use the phrase "requirement relating to," the court reasoned that if petitioners were correct that phrase did not cover a prohibition, then the preemption clause would not reach the ordinance in the first place. *Id.* 30a.

The court also rejected petitioners' claimed conflict with this Court's decisions in *Engine Manufacturers Association v. South Coast Air Quality Management District*, 541 U.S. 246 (2004), and *National Meat Association v. Harris*, 565 U.S. 452 (2012). The court explained that those cases involved entirely different

statutes and that neither "considered anything like the preservation sandwich included in the TCA." Pet.App. 26a-29a.

The dissent disagreed. It interpreted *Engine Manufacturers* and *National Meat* to mean that the preemption clause's coverage of tobacco product standards extended to the County's sales prohibition, Pet.App. 40a, and it found neither the preservation clause nor the savings clause sufficient to withstand preemption. The preservation clause, in the dissent's view, did "not apply to the preemption clause at all," *id.* at 42a, and the savings clause saved only age-based sales restrictions, *id.* at 44a.

REASONS FOR DENYING THE PETITION

Petitioners contend that this Court's review is warranted for three reasons: they assert that the decision below is incorrect; they claim a conflict with *Engine Manufacturers* and *National Meat*; and they maintain that two circuit decisions—holding that certain tobacco sales restrictions were not preempted—conflict with the Ninth Circuit's similar decision here. Those claims lack merit. The unique provisions of the Act explicitly preserve the County's authority to ban the sale of flavored tobacco products. This Court's decisions holding that certain sales restrictions were preempted by laws preempting state product standards involved distinct statutory schemes that bear no resemblance to the provisions of the Act here. And the claimed circuit split is illusory. Further review of the County's effort to protect its citizens from the public-health crises that flavored tobacco products exacerbate—particularly for youths—is unwarranted.

I. THE NINTH CIRCUIT'S DECISION IS CORRECT

The principles that guide the interpretation of the Act are well settled. "[A]ll preemption arguments[] must be grounded in the text and structure of the statute at issue." *Kansas v. Garcia*, 140 S. Ct. 791, 804 (2020) (internal quotation marks omitted). The Court must read 21 U.S.C. § 387p in "context and with a view to [its] place in the overall statutory scheme." *Brown & Williamson*, 529 U.S. at 133 (internal quotation marks omitted). And it is a "longstanding canon[] of statutory construction" 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." *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1939 (2022) (internal quotation marks omitted).

The Ninth Circuit applied those principles to the specific statutory context at issue here. Based on a detailed analysis of the text, structure, and context of the TCA, the Ninth Circuit correctly held that the ordinance falls within the County's authority to enact measures "with respect to tobacco products" under 21 U.S.C. § 387p(a)(1). The ordinance does not fall within the Act's preemption clause because that clause addresses federal pre-marketing and manufacturing regulations, not tobacco sales restrictions. And even if it were assumed that the preemption clause could apply to restrictions on sales based on an expansive reading of "tobacco product standards" in the preemption clause, *id.* § 387p(a)(2)(A), the Act's savings clause would rescue the ordinance from preemption by explicitly permitting state laws "relating to the sale … of[] tobacco products." *Id.* § 387p(a)(2)(B).

A. The Ordinance Comes Within The Express Language Of The Preservation Clause, And The Preemption Clause Does Not Apply

1.a. The County's ordinance prohibits the sale of tobacco products imparting a flavor of anything other than tobacco. L.A. Cnty. Code § 11.35.070(E). This ban falls squarely within the preservation clause as a "measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under" the TCA—specifically, a "measure relating to or prohibiting the sale … of tobacco products." 21 U.S.C. § 387p(a)(1).

Petitioners do not dispute that the preservation clause covers a sales ban like the ordinance. Rather, petitioners argue that because the preservation clause is subject to an exception—the preemption clause—express coverage in the preservation clause is irrelevant and, indeed, should not even inform how the preemption clause is interpreted. *See* Pet. 17-18. But the Ninth Circuit correctly concluded that "the text of all three adjacent clauses" must be "considered together"—starting from "the initial preservation clause," which "broadly preserves state, local, and tribal authority to enact a variety of regulations," before turning to the narrower and "subsequent preemption clause," which "carves out eight limited exceptions to the preservation clause." Pet.App. 19a. That accords with the statutory-construction principle petitioners elsewhere endorse: "statutory provisions must fit 'into an harmonious whole.'" Pet. 21 (quoting *Roberts v. Sea-Land Serv., Inc.*, 566 U.S. 93, 116 (2012)). And that principle defeats petitioners' claim that the preemption clause overshadows everything else in the Act.

b. Construed in context, the preemption clause does not divest the County of its power to regulate or prohibit tobacco sales. The TCA preempts "any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter relating to tobacco product standards … ." 21 U.S.C. § 387p(a)(2)(A). Although the Act "does not define 'tobacco product standards,'" reading the Act as a whole, "it makes sense to view 'tobacco product standards' in the TCA's preemption clause as most naturally referring to standards pertaining to the production or marketing stages up until the actual point of sale." Pet.App. 20a. This interprets the list of preempted topics (*e.g.*, "premarket review"; "registration"; and "good manufacturing standards") as a coherent whole. Under the properly cabined understanding, the County's ordinance is not a "requirement … relating to tobacco product standards"; it does not tell petitioners *how* to make their flavored tobacco products. Instead, the ordinance prohibits the sale of a specific class of products—flavored tobacco products. Petitioners can keep making flavored tobacco products. They simply cannot sell them in Los Angeles County.

The overall structure of § 387p confirms that Congress did not intend to preempt sales prohibitions like the County's ordinance. The preservation clause and the savings clause—which bookend the preemption clause—both protect the same broad regulatory authority: "sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age, information reporting to the State, or measures relating to fire safety standards for tobacco products."

21 U.S.C. § 387p(a)(1) (preservation clause); *see also id.* § 387p(a)(2)(B) (savings clause). These items describe what happens to tobacco products at and after retail.

By contrast, the preemption clause, including both product standards and labeling, refers generally to what happens to tobacco products *before* they are sold at retail: "tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products." *Id.* § 387p(a)(2)(A). While the TCA precludes state and local governments from telling tobacco manufacturers how to make their products, the TCA does not require state and local governments to allow any and all federal-regulation-compliant tobacco products to be sold on their shelves.

This is consistent with the purpose of the TCA: to "authorize the [FDA] to set national standards controlling the *manufacture* of tobacco products and the identity, public disclosure, and amount of *ingredients used* in such products." Pub. L. No. 111-31, 123 Stat. 1778, 1782 (2009) (emphasis added); *see, e.g.*, *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020) (interpreting statute in light of "Congress' purpose as reflected in the language of the … Act"). This also is consistent with the "primary role in regulating the sale of tobacco products" that "states and localities have historically played." Pet.App. 23a; *see Austin*, 179 U.S. at 348-49 (upholding state constitutional authority to ban cigarette sales); *see also, e.g.*, *Bond v. United States*, 572 U.S. 844, 863 (2014) ("[T]he background principle that Congress does not normally intrude upon the police power of the States is critically important.").

If Congress intended to preempt sales prohibitions like the ordinance, it would have said so—rather than saying the opposite. In fact, the TCA's drafting history shows that Congress *did* consider preempting sales prohibitions—and chose not to. "Earlier versions of § [387g] would have expressly reserved to the federal government authority to ban the sale of entire categories of tobacco products." *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428, 433 n.1 (2d Cir. 2013). But the statute Congress enacted prevents only the Secretary of Health and Human Services from banning entire categories of tobacco products, 21 U.S.C. § 387g(d)(3), and places no similar restrictions on state or local governments. It instead preserves state and local government authority.

This textual evolution of § 387g is significant. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (internal quotation marks omitted).

2. Petitioners' arguments to the contrary cannot rewrite the preemption clause to cover more than the explicit categories Congress included.

a. Petitioners rely (Pet. 13-16) on 21 U.S.C. § 387g(a) to support the idea that sales regulations or prohibitions are "product standards." In § 387g(a), Congress created a product standard for cigarettes that prohibited cigarettes from containing flavors

(other than menthol) as a constituent or additive.[4] In that provision, Congress placed restrictions on the recipes that tobacco companies may use to make their products. While this restriction is enforced at the point of sale through the Food Drug, and Cosmetic Act's prohibition of "[t]he introduction … into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded," 21 U.S.C. § 331(a)—which would include flavored tobacco products produced in violation of section 387g—the point-of-sale restrictions themselves are not *part* of that product standard. The federal government's separate power to *enforce* tobacco product standards through sales bans does not mean that state and local governments *create* product standards when they prohibit the sale of existing federally allowed tobacco products.

Petitioners note that FDA-promulgated "tobacco product standards can govern a tobacco product's 'properties,' 'constituents,' and 'additives,'" 21 U.S.C. § 387g(a)(4)(B)(i), and leap from that observation to the conclusion that any regulation that refers to some descriptive characteristic of the "final product" is a preempted "product standard," whether or not it governs the "production of the product." Pet. 14. That jump misreads the provision governing the content of tobacco product standards that the FDA may promulgate. That provision describes a product

[4] Specifically, Congress provided: "a cigarette or any of its component parts (including the tobacco, filter, or paper) shall not contain, as a constituent (including a smoke constituent) or additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice, … that is a characterizing flavor of the tobacco product or tobacco smoke." 21 U.S.C. § 387g(a)(1)(A).

standard to include "provisions respecting" the "construction, components, ingredients, additives, constituents, including smoke constituents, and properties of the tobacco product." 21 U.S.C. § 387g(a)(4)(B)(i). "Additives," "constituents," and "properties" must be read consistently with the list in which they appear. *See Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 8 (1985) (noting the "familiar principle of statutory construction that words grouped in a list should be given related meaning" (internal quotation marks omitted)); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012) ("[W]ords grouped in a list should be given related meanings." (internal quotation marks omitted)). In context, "construction, components, [and] ingredients" of a product naturally refer to the pre-retail, manufacturing stage.

Petitioners also note (Pet. 15) that a *proposed* FDA regulation would include a sales ban under the authority to promulgate tobacco product standards. But the FDA has not yet issued this rule, and for that reason alone it can shed no light on the construction of the statute. This Court's "task is to rule on what the law is, not what it might eventually be." *Garcia v. Texas*, 564 U.S. 940, 941 (2011) (per curiam). If the FDA ultimately finalizes a regulation that includes sales bans in a tobacco product standard, there will be time enough to address whether that regulation bears on the issues disputed here—which would not be the case if the FDA is drawing on a separate strand of regulatory authority that specifically addresses "restrictions on the sale and distribution of a tobacco product," *see* 21 U.S.C. § 387f(d)—or even whether the regulation is valid.

b. Petitioners' expansive reading of the preemption clause is further flawed because it would render Congress's preservation of sales prohibitions superfluous. *See* Pet.App. 21a. If any sales restriction that is triggered by some characteristic of a tobacco product were a "tobacco product standard," then every sales *prohibition* would be a preempted "product standard" (other than, perhaps, a total ban on all tobacco products). Congress would not have preserved for state and local governments the power to enact laws "prohibiting the sale … of tobacco products" only to preempt each such prohibition in the preemption clause; that would render the preservation clause's statement protection of a regulation "prohibiting the sale … of tobacco products" meaningless.

Petitioners try to give the preservation clause some work to do by referring to its inclusion of tribal and federal agencies, Pet. 18, but that still would render the inclusion of state and local governments a nullity. *See*, *e.g.*, *Ysleta*, 142 S. Ct. at 1939 ("[W]e 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." (internal quotation marks omitted)). Had Congress intended the preservation clause to address only federal and tribal actors, it would not have named state and local governments. And Congress not only named them but also made them the primary focus of the section. 21 U.S.C. § 387p ("Preservation of State and local authority").

B. The Savings Clause Covers The Ordinance Regardless

Even if a sales restriction could qualify as a preempted "product standard," Congress used a belt-and-suspenders framework to safeguard state and local authority over sales by including the savings clause. That clause exempts from preemption any "requirements relating to the sale … of[] tobacco products by individuals of any age." 21 U.S.C. § 387p(a)(2)(B). The County's prohibition on the sale of flavored tobacco products falls squarely within that exemption.

Petitioners contend that to apply the savings clause here would leave the preemption clause without anything to do: a locality could, the argument goes, escape the preemption clause "as long as it frames its law" as a sales prohibition. Pet. 19-20. But the assumption that *any* sales restriction would escape preemption is not necessarily true: an express attempt to create a manufacturing standard through a sales ban, "such as a requirement that manufacturers use certain equipment," Pet. 20, may not survive judicial review. But the County's sales restriction does not amount to a pretextual effort to regulate manufacturing, branding, labeling, or the like—and petitioners do not identify any other state or locality's sales restriction that does. Rather, the County's ordinance is exactly what the savings clause permits: a pure sales ban. And regardless of that point, the preemption clause will, on any reading, prevent state and local governments from making their own product standards, or other rules directly regulating premarket review, adulteration, misbranding, labeling, registration, good

manufacturing standards, or modified risk tobacco products.

Petitioners likewise err in contending that the savings clause cannot save the County's ban because Congress intended to save only rules "relating to," not rules "prohibiting", the sale of tobacco products. Pet. 23-26. Petitioners build that argument on a comparison between the preservation clause—which protects measures "relating to or prohibiting the sale" of tobacco products—and the savings clause—which protects laws "relating to the sale" of tobacco products. That is a false comparison. The preservation clause uses the phrase "relating to or prohibiting" in the course of offering particularly salient *examples* of what the clause preserves: state and local authority to enact and enforce "*any* measure *with respect to* tobacco products that is in addition to, or more stringent than," federal requirements (other than matters preempted under the preemption clause). 21 U.S.C. § 387p(a)(1) (emphasis added). The reference to "relating to or prohibiting the sale" appears in a clause beginning with "including." *Id.* The words are therefore not words of limitation; they are not even the source of state and local authority to enact sales restrictions. Rather, they provide non-exclusive illustrations of the operative rule: that *any* non-preempted measure "*with respect to* tobacco products"—*including* sales restrictions—is permissible so long as the state measure is not less stringent than the federal floor. The savings clause—which saves requirements "relating to the sale" of tobacco products—and the preservation clause—which preserves measures "with respect to" tobacco products—therefore have comparable textual scope.

Petitioners' argument also is self-defeating. The preemption clause itself bars only certain laws "relating to" various subjects; the word "prohibiting" does not appear. *Compare* 21 U.S.C. § 387p(a)(2)(A) (preempting "any requirement … relating to …"), *with id.* § 387p(a)(2)(B) (saving "requirements relating to …"). If "relating to" excluded prohibitions, that would mean that the preemption clause would reach only laws "relating to" the subjects described—not "prohibitions." That would preclude preemption of the County's sales prohibition—and thus destroy the basis of petitioners' case. *See* Pet.App. 30a.

Petitioners' only response is that the "capacious phrase 'any requirement'" in the preemption clause is broad enough to "sweep[] in both requirements 'relating to' and 'prohibiting' the sale of tobacco products." Pet. 24. But that point runs afoul of the "usual rule against ascribing to one word a meaning so broad that it assumes the same meaning as another statutory term." *Ysleta*, 142 S. Ct. at 1939. Beyond that, the savings clause itself withdraws from the preemption clause "*requirements* relating to" tobacco sales. If the preemption clause's reference to "any requirement … relating to tobacco product standards" reached prohibitions on sales, then the savings clause's reference to "requirements relating to the sale … of tobacco products" would save them. What is sauce for the goose is sauce for the gander—even if petitioners would prefer a different flavoring.

Petitioners' final argument—that the savings clause applies to only age-based restrictions—has no textual mooring. The "of any age" language in the savings clause does not operate to narrow the clause's scope. Just the opposite: that language makes clear

that state and local governments' authority to regulate tobacco sales extends to adults and is not limited to minors.

* * *

The TCA represents Congress's careful balancing of the historical power of state and local governments, on the one hand, and the power newly granted to the federal FDA, on the other. The Ninth Circuit, consistent with every court to have considered similar regulations, *see infra* at 10-21, correctly held that the TCA does not compel the County to permit the sale of flavored tobacco within its territorial jurisdiction. This Court's review is not warranted first and foremost because the decision below is sound.

II. NO CONFLICT EXISTS WITH THIS COURT'S OR OTHER CIRCUITS' DECISIONS

Petitioners contend that the Ninth Circuit's decision conflicts with this Court's precedents and the decisions of other courts upholding similar bans on the sale of flavored tobacco products. That claim of a conflict is spurious: this Court's decisions addressed fundamentally different statutory schemes, and the other courts of appeals' decisions upholding tobacco sales restrictions do not conflict with the Ninth Circuit's decision upholding the County's law.

A. The Decision Below Does Not Conflict With This Court's Precedents

Petitioners contend that the decision below conflicts with this Court's decisions in *Engine Manufacturers*, *National Meat*, and *Ysleta*. Those claims lack merit because they ignore the unique and distinguishable text and structure of the TCA.

1. In *Engine Manufacturers* and *National Meat*, this Court considered materially different preemption clauses in holding that the sales restrictions at issue in those cases were in fact preempted product standards. The statutes at issue in those cases, unlike the TCA, have single-tier preemption clauses that sweep broadly, with additional reinforcing provisions showing Congress's intent to curb, rather than preserve, state and local authority. Neither statute features anything like the TCA's "unique 'preservation sandwich' enveloping [its] preemption clause" between a preservation clause and a savings clause. Pet.App. 22a. Thus, the general rule that "[l]anguage in one statute usually sheds little light upon the meaning of different language in another statute," *Russello v. United States*, 464 U.S. 16, 25 (1983), applies with full force here; this Court's interpretations of starkly different statutes in *Engine Manufacturers* and *National Meat* do not inform, much less control, interpretation of the distinct tripartite scheme set forth in the TCA.[5]

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[5] The cases upon which *amicus* Washington Legal Foundation relies, *see* Amicus Br. 12-14, are irrelevant for the same reason—they do not address statutory schemes featuring anything like the TCA's "unique 'preservation sandwich,'" Pet.App. 22a. *See*

a. *Engine Manufacturers* concerned a preemption clause with "categorical" sweep. 541 U.S. at 256. The Clean Air Act preempts "any standard relating to the control of emissions from new motor vehicles" and specifically bars states from enforcing any emissions-control requirement "as condition precedent to the initial retail sale" of a vehicle. *Id.* at 252 (quoting 42 U.S.C. § 7543(a)). Faced with this express prohibition on sales restrictions—and in the absence of any preservation or savings clause reserving state authority—this Court held the Act preempted a California regulation restricting the *purchase* of vehicles that did "not comply with stringent emissions requirements." *Id.* at 249. The Court "decline[d] to read into the" Clean Air Act's preemption provision "a purchase/sale distinction that is not to be found in the text of [that provision] or the structure of the [Act]." *Id.* at 255.

The preemptive sweep of the TCA, by contrast, is far from categorical, and the TCA expressly preserves and saves the County's power regarding tobacco sales. The statutory text here also distinguishes between point-of-sale restrictions and restrictions on manufacturing and other pre-market activities. *Contra* Pet. 13. Enforcing that distinction fulfills, not frustrates, Congress's intent.

Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384-85 (1992) (addressing a "general 'remedies' saving clause" unlike the TCA's detailed savings clause, in a statute with no preservation clause); *Am. Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998) (similar); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868-74 (2000) (addressing a general savings clause broadly maintaining "liability under common law," also in a statute with no preservation clause).

b. *National Meat* likewise involved a statute unlike the TCA, as well as a law markedly different from the County's ordinance. The Federal Meat Inspection Act (FMIA) instructs: "Requirements within the scope of this [Act] with respect to premises, facilities, and operations of any establishment at which inspection is provided under … this [Act], which are in addition to, or different than those made under this [Act] may not be imposed by any State." 565 U.S. at 458 (alterations in original) (quoting 21 U.S.C. § 678). This Court, emphasizing that this "preemption clause sweeps widely" to reach any "additional or different—even if non-conflicting—requirements," held that the Act preempted a California law banning the sale of meat from nonambulatory animals. *Id.* at 459. The Court stressed that the California sales ban was "calculated to help implement and enforce each of the [California law] section's other regulations—its prohibition of receipt and purchase, its bar on butchering and processing, and its mandate of immediate euthanasia"—that governed slaughterhouse operations in ways different from federal law. *Id.* at 463-64. And the Court reasoned that the FMIA's narrow savings clause, which "provides that States may regulate slaughterhouses as to 'other matters,' not addressed in the express preemption clause, as long as those laws are 'consistent with' the [Act]," did not reach the California law. *Id.* at 467 n.10 (quoting 21 U.S.C. § 678).

The TCA's preemption clause is narrower than the FMIA's, and its savings clause is broader—and unlike the TCA, the FMIA does not preserve certain powers expressly for the States, including the power to prohibit sales. And while the sales ban in *National*

Meat "function[ed] as a command to slaughterhouses to structure their operations in the exact way the remainder of [the statute] mandate[d]," *id.* at 464, the County's sales ban here is not an adjunct to any attempt to regulate how tobacco producers structure their operations.

2. Petitioners fare no better in asserting (Pet. 21) a conflict with *Ysleta*. That case addressed whether federal law allowed Texas to apply its state bingo laws on tribal lands. Section 107 of the federal Restoration Act provides in subsection (a) that "gaming activities which are *prohibited* by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe," but cautions in subsection (b) that nothing in the Act "shall be construed as a grant of civil or criminal *regulatory* jurisdiction to the State of Texas." 142 S. Ct. at 1938 (quoting Pub. L. No. 100-89, 101 Stat. 668-669 (1987)) (emphases added). Observing the "striking … dichotomy between prohibition and regulation" in a single statutory section, this Court found it "almost impossible to ignore" the "implication that Congress drew from" precedent interpreting another statute to permit states to enforce gaming *prohibitions* but not *regulations* on tribal lands and intended "to apply [the] same prohibitory/regulatory framework here." *Id.* The Court thus rejected Texas's effort to construe its regulations as a prohibition that the Restoration Act would permit it to apply on tribal land—but stressed that the same logic might not apply "in another context." *Id.*

The TCA presents "another context," and petitioners cannot transpose *Ysleta*'s ruling about the Restoration Act into this completely different

statutory context. Petitioners argue that *Ysleta* precludes reading the TCA's saving clause to insulate sales *prohibitions* from preemption by making an analogy between (a) the prohibition/regulation dichotomy in the Restoration Act and (b) the asserted dichotomy between "measure[s] relating to or prohibiting the sale" of tobacco products in the preservation clause, 21 U.S.C. § 387p(a)(1), and "requirements relating to the sale" of tobacco products in the savings clause, *id.* § 387p(a)(2)(B). *See* Pet. 23-25. As discussed above, see *supra* at 19-21, that argument fails.

Petitioners seize on the wrong phrase in the preservation clause to make their argument. Again, the preservation clause preserves state and local authority to enact any "measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under the [TCA] … *including* … measure[s] relating to or prohibiting the sale" of tobacco products. 21 U.S.C. § 387p(a)(1) (emphasis added). The preservation clause thus first defines what state and local authority is preserved—the authority to enact "measure[s] with respect to tobacco products" that are at least as stringent as federal measures—and then lists *examples* of what kinds of state and local measures are "includ[ed]" within that authority. Because of this structure, the operative phrase in the preservation clause is "measure[s] with respect to tobacco products"—and that phrase mirrors the phrase "requirements relating to the sale" of tobacco products in the savings clause.

This Court in *Ysleta* analyzed very different statutory text. There, Congress drew a direct contrast

between state gaming *prohibitions* enforceable on tribal lands and state *regulatory* measures that were not. Unlike "prohibit" and "regulate" in *Ysleta*, the words at issue here are not mutually exclusive—a "prohibition" can clearly "relate to" its subject, *i.e.*, "have relationship or connection" with its subject.[6] *Cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992) (describing the capacious breadth of the phrase "relating to"). The TCA, unlike the Restoration Act, authorizes "regulations" in the form of both prohibitions and other requirements "relating to" a permissible subject—here, sales of tobacco products. *See* 21 U.S.C. § 387p(a)(1) (preserving state authority to adopt "regulation[s] … relating to or prohibiting … sale[s]"). And while Congress enacted the Restoration Act against the backdrop of recent and relevant Supreme Court precedent distinguishing gaming prohibitions from regulations, *see* 142 S. Ct. at 1940 (discussing the Restoration Act's linguistic and historical parallel with *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), and stating that this "clinches the case"), Congress enacted the TCA against a long history of exclusive state regulation of tobacco sales, including total bans. *See supra* at 2-4.

B. No Court Has Invalidated A Flavored Tobacco Sales Restriction Under The TCA

Petitioners wrongly contend that a circuit conflict exists. Every court that has considered a preemption challenge to a law restricting the sale of flavored tobacco has agreed that the TCA preserves state and

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[6] *Relate*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/relate.

local governments' traditional authority to regulate tobacco sales.

1. In *National Association of Tobacco Outlets, Inc. v. City of Providence (NATO)*, 731 F.3d 71 (1st Cir. 2013), the First Circuit rejected a preemption challenge to an ordinance prohibiting most retailers from selling flavored tobacco products. There, as here, the challenger argued that the local sales restriction effectively regulated manufacturer operations, as in *National Meat*. The First Circuit observed that the ordinance, which "allow[ed] the sale of flavored tobacco products in smoking bars," was "not a blanket prohibition," and for that reason found it unnecessary to decide whether the TCA would preempt a blanket prohibition. *Id.* at 82. Petitioners claim that the First Circuit distinguished the case from *National Meat* on that ground, Pet. 28, but that is not so. Rather, the First Circuit distinguished *National Meat* because in that case, "the state preemption statute—in contrast to the [TCA]—did not contain a savings clause that expressly exempted regulations 'relating to the sale' of the product from preemption." *NATO*, 731 F.3d at 82. The First Circuit did not suggest that the TCA would prohibit a complete prohibition, as petitioners contend, because the court did not find it necessary to reach that question at all.

2. In *U.S. Smokeless Tobacco Manufacturing Co. v. City of New York*, 708 F.3d 428 (2d Cir. 2013), the Second Circuit rejected a preemption challenge to a similar ordinance prohibiting the sale of "any flavored tobacco product except in a tobacco bar." *Id.* at 431. That court first held that the challenged ordinance did not fall within the preemption clause's ambit at all, because the ordinance did "not care what goes into the

tobacco or how the flavor is produced, but only whether final tobacco products are ultimately characterized by—or marketed as having—a flavor." *Id.* at 435. The court also held that, whatever the preemption clause's reach, the savings clause would protect that flavored tobacco ban because it did "not constitute a complete ban" as the challengers had argued. *Id.*

The Ninth Circuit expressly followed the Second Circuit's reasoning—including, significantly, "that the TCA's preemption provision 'distinguishes between manufacturing and the retail sale of finished products,'" "'reserv[ing] regulation at the manufacturing stage exclusively to the federal government, but allow[ing] states and localities to continue to regulate sales and other consumer-related aspects of the industry in the absence of conflicting federal regulation.'" Pet.App. 23a (quoting *U.S. Smokeless*, 708 F.3d at 434); *see also* Pet.App. 10a-11a. Petitioners gamely suggest that a conflict exists because the Second Circuit did not address a *total* sales ban. Pet. 3, 27. That, however, only proves the absence of conflict, because the Second Circuit cannot have taken a conflicting position on a question it expressly declined to address. *U.S. Smokeless*, 708 F.3d at 436 (declining "to address the permissibility of outright prohibitions under the saving clause.").

3. Finally, in *R.J. Reynolds Tobacco Co. v. City of Edina*, 482 F. Supp. 3d 875 (D. Minn. 2020), *appeal pending*, No. 20-2852 (8th Cir. argued May 12, 2021), the district court rejected petitioners' preemption challenge to an ordinance providing that "[n]o person shall sell or offer for sale any flavored tobacco

products" by relying on the TCA's savings clause.[7] Petitioners' appeal remains pending before the Eighth Circuit, but the district court in that case joined the Ninth Circuit in upholding a complete sales ban, albeit under the savings clause rather than the preemption clause. 482 F. Supp. 3d at 880-82. District court decisions cannot create a conflict in authority warranting this Court's review, even setting aside the reality that the case is on appeal.

III. CERTIORARI IS NOT OTHERWISE WARRANTED

None of petitioners' other arguments justify review of this issue. Indeed, given this Court's denial of an injunction to prevent California's statewide ban on flavored tobacco products from going into effect, it is not clear *what* practical importance the County's parallel sales ban has for petitioners' operations. Certainly, no compelling circumstances would justify the extraordinary step of reviewing an issue that has generated no disagreement in the lower courts and accords with this Court's precedent.

1. Petitioners suggest that review is warranted to shed light on preemption doctrine generally or for its implications for other industries in which "Congress has reserved to the federal government the exclusive power to set uniform product standards." Pet. 32. That suggestion is misguided: none of the statutes petitioners invoke remotely resembles the TCA in structure or language.

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[7] *See also Independents Gas & Serv. Stations Ass'ns, Inc. v. City of Chicago*, 112 F. Supp. 3d 749 (N.D. Ill. 2015) (upholding under savings clause ordinance preventing the sale of flavored tobacco products within 500 feet of a school).

Petitioners first invoke (Pet. 33) the Poultry Products Inspection Act, which bears no relevant resemblance to § 387p. Rather, that statute contains a preemption provision similar to that in the Federal Meat Inspection Act, with no text elsewhere preserving state and local authority over sales: "Marking, labeling, packaging, or ingredient requirements (or storage or handling requirements found by the Secretary to unduly interfere with the free flow of poultry products in commerce) in addition to, or different than, those made under this chapter may not be imposed by any State … ." 21 U.S.C. § 467e. This focused preemption provision bears no comparison to "the TCA's preservation sandwich." Pet.App. 23a.

The other statutes that petitioners identify in a string cite are no different. Pet. 33. None has anything remotely akin to either the preservation clause or the savings clause in the TCA, much less both. *See*, *e.g.*, 21 U.S.C. § 360k (preemption provision for medical devices without a sales exception); *id.* § 379r (preemption provision for non-prescription drugs without a sales exception); *id.* § 678 (at issue in *National Meat*, and discussed *supra* at 24); 42 U.S.C. § 7543 (at issue in *Engine Manufacturers*, and discussed in *supra* at 23); 46 U.S.C. § 4306 (preemption clause of recreational vessel performance and safety standards without a sales exception); 49 U.S.C. § 30103(b)(1) (preemption of motor vehicle safety standards without a sales exception). A decision interpreting the TCA's unique package of text, which narrowly preempts product standards while buttressing traditional state and local authority with preservation and savings clauses, would say

nothing about how to interpret those very different statutes—never mind unnamed federal standard-setting statutes in unidentified other industries.

2. The practical stakes for petitioners are also unclear and certainly do not warrant this Court's intervention at this time. At the outset, possible FDA regulatory action may eclipse state and local efforts to combat the monumental health hazards—especially to youth—posed by flavored tobacco products. *See Amici Curiae* Brief of Public Health, Medical, and Community Groups in Opposition to Emergency Injunction, *R.J. Reynolds Tobacco Co., et al. v. Bonta*, No. 22A474 (filed Dec. 6, 2022) (recounting enormous public-health dangers posed by flavored tobacco products, especially to youth), *injunction denied*, 2022 WL 17576427 (Dec. 12, 2022). As petitioners themselves note, the FDA has issued proposals to regulate various facets of flavored tobacco products. *See* Pet. 15; *see also Tobacco Product Standard for Menthol in Cigarettes,* 87 Fed.Reg. 26454 (2022). If the FDA, for example, prohibits menthol-flavored cigarettes, it will significantly narrow the universe of products for which any divergence between federal and local approaches would exist. Menthol cigarettes account for 37% of the total cigarette market.[8] And any regulatory approach that the FDA issues may ultimately prove germane to the Court's analysis of petitioners' claims. See *supra* at 16-17.

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[8] Fed. Trade Comm'n, *Cigarette Report for 2020* at 10 (2021), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-cigarette-report-2020-smokeless-tobacco-report-2020/p114508fy20cigarettereport.pdf.

Besides the proposed federal regulation, a California state law, Cal. Health & Safety Code § 104559.5, just went into effect—after this Court declined to enjoin it—that bans sales of flavored tobacco products statewide. *R.J. Reynolds Tobacco Co. v. Bonta*, No. 22A474. The upshot is that petitioners could obtain little practical benefit from review of the County's ordinance because they are *already* compelled to comply with statewide parallel regulation. Any urgency that petitioners assert that might overcome the lack of any conflict (and the weaknesses of their claims on the merits) dissolves in the face of these practical realities.

Review would be especially premature while the Eighth Circuit is considering on appeal the very issues petitioners ask this Court to address. If the Eighth Circuit agrees with petitioners, the conflict may warrant intervention; if it rejects petitioners' claims, that only reinforces that the conflict claims petitioners assert are insubstantial.

3. In addition to inaccurately claiming that this case will have practical consequences beyond the tobacco industry, petitioners also suggest that the impact on the case of the tobacco industry alone warrants this Court's review, *see* Pet. 29-30, but that is not so. Annual cigarette sales have declined by nearly one hundred billion cigarettes as compared to when the TCA was passed.[9] Petitioners quote one of

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[9] *Compare Cigarette Report for 2020*, *supra*, n.8, *with* Fed. Trade Comm'n, *Cigarette Report for 2009 and 2010* (2012), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-cigarette-report-2009-and-2010/120921cigarettereport.pdf.

the TCA's findings about the economic impact of tobacco sales, Pet. 29 (quoting 21 U.S.C. § 387, Note, Finding (10)), but fails to grapple with the contemporary reality of a substantial contraction in the tobacco markets. What's more, any economic costs of reducing an already-shrinking market need to be balanced against the public-health benefits. Congress referenced the impact of tobacco on the nation's economy not as something positive, but rather as part of an ongoing public-health crisis that led to the passage of the TCA (and the County's ordinance) in the first instance. *See*, *e.g.*, 21 U.S.C. § 387, Note, Findings 14 ("[A] reduction in youth smoking would … result in approximately $ 75,000,000,000 in savings attributable to reduced health care costs.").

4. Petitioners' final claim—that hundreds of jurisdictions have enacted legislation touching upon the sale of flavored tobacco products, Pet. 30-31—does not make this case exceptional. Of the hundreds of sales restrictions, petitioners point to only five, including the County's ordinance, that have led to litigation, and each of those five cases upheld the law in question. *See supra* at 27-30. The paucity of litigation, and the judicial consensus that claims like petitioners' claims lack merit, argues against granting certiorari, not for it.

Petitioners contend that if this Court does not act now, states and localities will enact a barrage of restrictions on tobacco products, regulating "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." Pet. 31-32. But speculation of this character provides scant reason to

jump the queue and grant review now. Petitioners' imaginary parade of horribles (if regulations seeking to suppress a dangerous product for public-health reasons can be so characterized) cannot obscure what is at stake here: sales restrictions like the County's fall within the heartland of state and local governments' traditional police powers over tobacco sales, and every court to address the issue has sustained that authority. No further review of that consensus is warranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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