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; 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

REPLY TO BRIEF IN OPPOSITION

NOEL J. FRANCISCO
Counsel of Record
CHRISTIAN G. VERGONIS
RYAN J. WATSON
ANDREW J. M. BENTZ
CHARLES E.T. ROBERTS
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
njfrancisco@jonesday.com

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

LEGISLATIVE MATERIALS

INTRODUCTION

This case warrants review for three reasons. *First*, the decision below flouts this Court's precedents and conflicts with the reasoning of other courts of appeals. This Court has "twice 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–37a (Nelson, J., dissenting) (citing *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) and *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452 (2012)). The Ninth Circuit repeated the same mistake here—this time with the Tobacco Control Act (TCA). Nothing the County says resolves the conflict between that decision and *Engine Manufacturers* and *National Meat*.

The Ninth Circuit's disregard of this Court's decisions doesn't stop there. *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929 (2022), held that courts must give effect to Congress's distinction between regulations and prohibitions. But the Ninth Circuit refused to do so in the TCA, and nothing the County argues alleviates that conflict. The County likewise fails to reconcile the reasoning below with that of the First and Second Circuits, which upheld restrictions on the sale of flavored tobacco products because they were not total prohibitions like the one here. *See NATO v. City of Providence*, 731 F.3d 71 (1st Cir. 2013); *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428 (2d Cir. 2013).

Second, this issue is exceptionally important. The interpretation of the TCA's preemption provisions has wide-ranging consequences because of the size of the

tobacco industry (something the County cannot minimize), and because states and localities continue to impose conflicting standards on tobacco products. Numerous other industries also rely on uniform, national standards. The decision below puts those in jeopardy. And though the County argues the TCA is unique, the core issue is whether a locality can end-run preemption of local standards through a sales ban. If so, that holding applies elsewhere. The fact that California has also enacted a flavor ban is immaterial, because if the County's ban is preempted, then so is California's.

Third, this case is an ideal vehicle—something the County does not dispute.

ARGUMENT

I. THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH THIS COURT'S PRECEDENTS AND THE REASONING OF OTHER CIRCUITS

The decision below conflicts with *Engine Manufacturers*, *National Meat*, and *Ysleta*. Instead of addressing that head-on, the County leads with a defense of the decision below. While that decision is demonstrably wrong, the key point here is that it contravenes this Court's caselaw. The County is hard-pressed to argue otherwise. Indeed, the County does not address the conflict until page 21. And its meager efforts to reconcile that conflict fail.

A. The Ninth Circuit's interpretation of the preemption clause contravenes this Court's precedents

1. This Court's precedents (and the TCA's text) refute the County's argument that "tobacco product standards" are limited to how a product is

manufactured and that localities can therefore enforce their own standards at the point of sale. *E.g.*, BIO 12–13.

a. The County contends that *Engine Manufacturers* does not control because "[l]anguage in one statute usually sheds little light upon the meaning of different language in another statute." BIO 22. But the relevant language here is *not* different. Both the Clean Air Act (*Engine Manufacturers*) and the TCA preempt "standards." And both statutes require looking to the plain meaning of the word "standard." 541 U.S. at 253. So *Engine Manufacturers*' key holding applies: "a standard is a standard even when not enforced through manufacturer-directed regulation." *Id.* at 254. It is thus no answer to say, "Petitioners can keep making flavored tobacco products. They simply cannot sell them in Los Angeles County." BIO 12. This Court rejected the identical argument in *Engine Manufacturers*: "The manufacturer's right to [make federally authorized tobacco products] is meaningless in the absence of a purchaser's right to buy them." 541 U.S. at 252, 255.

Wait, the County says. The Clean Air Act's preemption clause had "categorical" sweep. *Id.* at 256. But that was because the clause preempted *standards*: "It is … impossible to find … an exception for standards imposed through purchase restrictions rather than directly upon manufacturers." *Id.* Exactly so here. Nothing in the TCA's preemption clause exempts standards enforced at the point of sale.

Further, the TCA's "preservation sandwich" does not change what "standard" means. *See* BIO 22. The preemption clause is an "except[ion]" to the

preservation clause, 21 U.S.C. § 387p(a)(1), meaning that the preemption clause takes precedence. And the savings clause saves a portion of what already is preempted, meaning it cannot change what the preemption clause covers in the first place. Thus, these surrounding clauses neither change what a "standard" is nor distinguish this case from *Engine Manufacturers*.

b. The decision below also flouts the statutory text. Both sides agree that preemption analysis "must be grounded in the text and structure of the statute." BIO 10. The problem for the County is that nothing in the TCA's text limits "tobacco product standards" to manufacturing. One need look no further than the Act itself. The TCA contains two tobacco product standards—not one, as the County claims. BIO 6; *see* 21 U.S.C. § 387g(a)(1)(B). One of them bans certain characterizing flavors in cigarettes. 21 U.S.C. § 387g(a)(1), (a)(2), (a)(3)(A). Congress thus said that a flavor ban is a "tobacco product standard." True, the federal sales ban based on this standard is in a separate provision. *See* BIO 15. But that proves the point: a standard is a standard, regardless of how it is enforced. *See Engine Mfrs.*, 541 U.S. at 253–54 ("distinction between 'standards,' … and methods of standard enforcement, … is borne out" by the Clean Air Act's "separate provisions enforc[ing]" those "standards").

The County nonetheless argues that other categories in the preemption clause (*e.g.*, modified risk tobacco product and labeling requirements) implicitly cabin the meaning of "tobacco product standards" because *they* target manufacturing. BIO 12. But Congress *explicitly* said that a flavor ban is a tobacco

product standard, so those other categories are irrelevant.

In any event, those categories are not limited to manufacturing. For example, a product is a "modified risk tobacco product" if it "is *sold or distributed* for use to reduce harm or the risk of tobacco-related disease." 21 U.S.C. § 387k(b)(1) (emphasis added). So a product that has been on the market for years with no physical changes becomes a "modified risk tobacco product" if a manufacturer's labeling describes it as presenting less risk. And courts have held that a product's website—which has nothing to do with manufacturing—can amount to labeling. *See United States v. Innovative Biodefense, Inc.*, 2019 WL 2428670, at *4 (C.D. Cal. Feb. 22, 2019) .

The County invokes the same words-are-known-by-their-company argument when it comes to how the TCA describes "tobacco product standards." The TCA says those standards can regulate "ingredients," "constituents," "properties," *etc.* 21 U.S.C. § 387g(a)(4)(B). The County maintains that "'properties'" must be "read consistently" with the other words. BIO 16. But the meaning of "properties" is plain. Pet. 14–15. Indeed, the County never argues that a flavor is not a property. But the other items are not limited to manufacturing anyway. "Constituents," for example, include things already in the product, *e.g.*, nicotine, not just manufactured additives. That list, therefore, provides no basis for limiting "properties" to manufacturing.

The County's other "textual" points warrant even less discussion. For example, the County says (at 13) that limiting tobacco product standards to

manufacturing is "consistent" with one purpose of the TCA, *i.e.*, to set national manufacturing standards. But purpose cannot override text. Moreover, another purpose of the TCA is "to continue to permit the sale of tobacco products to adults." TCA § 3(7), Pub. L. No. 111-31, 123 Stat. 1776, 1782 (2009). The County's interpretation torpedoes that purpose.

The County also argues that Petitioners' reading renders the preservation clause a nullity. Not so. It has "separate functions." Pet.App.42a (Nelson, J., dissenting). For example, it preserves the authority of federal agencies, the military, and Indian Tribes, which may set their own tobacco product standards. *Id.* It also clarifies that only those categories listed in the preemption clause expressly preempt state and local laws, *id.*, and rebuts any suggestion that Congress through the TCA occupied the field of tobacco regulation. The County offers no response.

The County points next (at 14) to legislative history. True, an earlier version of the bill that became the TCA reserved to Congress the power to ban all cigarettes, while the TCA merely forbids FDA from doing so. But neither provision addresses state or local authority.

The legislative history actually supports Petitioners' reading. The TCA's House Report said FDA has exclusive "authority to establish product standards regarding … ingredients, additives, and *all other properties* of the tobacco product." H.R. Rep. No. 111-58, pt. 1, at 39–40 (2009) (emphasis added). So "property" refers to *any* property of the final product, regardless of how the property got there.

In short, the Ninth Circuit's artificial limitation of "tobacco product standards" conflicts with *Engine Manufacturers* and the TCA's text.

2. The decision below also conflicts with *National Meat*, 565 U.S. 452, which held that even where a preemption clause is limited to manufacturing and production standards, a state cannot prohibit *the sale* of products that depart from the state's own standard. The County claims the TCA differs from the statute in *National Meat*. But, again, the preservation and savings clauses cannot change the preemption clause's meaning. Thus, *National Meat* applies here: "[I]f [California's] sales ban were to avoid the [act'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 [act's] preemption provision." 565 U.S. at 464. The TCA must preempt sales bans, too, to avoid rendering the preemption clause "a mockery."

The County avers (at 24–25) that California's sales ban in *National Meat* enforced a separate provision expressly regulating manufacturing. But the Court analyzed each provision independently. *See* 565 U.S. at 971-72. In any event, the same is practically true here. The County has forbidden manufacturers from "add[ing]" flavors to tobacco products. L.A. Cnty. Code § 11.35.020(C). The County then enforces that prohibition by banning sales of products that do not conform to its standard. *Id.* § 11.35.070(E). That is precisely what this Court in *National Meat* said California may not do.

B. The Ninth Circuit's interpretation of the savings clause contravenes this Court's precedents

The Ninth Circuit's alternative holding—that the savings clause saves the County's ban—also conflicts with this Court's decisions and misreads the TCA.

1. *Ysleta* made clear that the words "regulation" and "prohibition" have independent meaning, especially when used in the same statute. 142 S. Ct. at 1938. So in the TCA, the phrases "requirements *relating to* the sale" and "requirements *prohibiting* the sale" must mean different things. And since the savings clause only saves the former, the County's ban cannot survive.

The County concedes its alternative interpretation does not give independent meaning to both phrases. The County tries to justify this because they are merely "examples" of measures that the preservation clause preserves. BIO 19, 26; *see* 21 U.S.C. § 387p(a)(1). But if "measures relating to the sale" meant the same thing as "measures prohibiting the sale," Congress would not have said both or distinguished them in the disjunctive. The "examples" clause would mean the same if Congress had omitted "prohibiting" entirely.

Moreover, Petitioners have not ascribed "to one word a meaning so broad that it assumes the same meaning as another statutory term." *See* BIO 20. The County simply concentrates on the wrong word ("requirement"). The proper focus is on the words "relating to" and "prohibiting." And that is why it is the County that has violated its interpretive rule, by defining "relating to" to include "prohibiting."

The County also tries (at 27) to distinguish the TCA because "[u]nlike 'prohibit' and 'regulate' in *Ysleta*, … a 'prohibition' can clearly 'relate to' its subject." That highlights the County's textual problem: it reads "relating to" as swallowing "prohibiting." If that is true, "prohibiting" is meaningless. Moreover, like Los Angeles, Texas "observe[d] that in everyday speech someone could describe its laws as 'prohibiting' bingo unless the State's time, place, and manner regulations are followed." 142 S. Ct. at 1938. But this Court found that "hard to see" given that Congress used both "regulate" and "prohibit." *Id.* at 1938–39. So too here.

That the preemption clause uses "requirements relating to," *see* BIO 20, actually proves that "relating to" *does not* include "prohibiting." The TCA's preemption provisions use "relating to" five times. Three (including the one the County cites) reference "standards"—"fire safety standards" and "tobacco product standards." Those uses show "relating to" does not encompass prohibitions—because governments do not prohibit standards, they set them. The fourth occurrence is in the preservation clause, where Congress distinguished between requirements "relating to" and "prohibiting" the sale of tobacco products. Governments can obviously enact requirements "relating to" sales or "prohibiting" sales. So the preservation clause confirms that Congress did not intend "relating to" to encompass "prohibiting." That leaves the savings clause's reference to requirements "relating to the sale" and *omission* of "prohibiting the sale." Thus, the only way to harmonize these provisions is to conclude that "relating to" does not include "prohibiting."

There is also no merit to the contention that history requires ignoring Congress's distinction. *See* BIO 27. True, states have long *regulated* tobacco sales. But from the early-twentieth century until the twenty-first, states did not entirely *prohibit* categories of tobacco products. *See* BIO 2–4. Rather, when Congress adopted the TCA in 2009, the key area where states had legislated on tobacco products was *regulating* sales (not *prohibiting* them).

2. Finally, the County doesn't dispute that its interpretation renders "individuals of any age" in the savings clause superfluous. BIO 20; *see also* Pet.App.44a (Nelson, J., dissenting). That conflicts with this Court's caselaw. *E.g.*, *Corley v. United States*, 556 U.S. 303, 314 (2009).

C. The decision below conflicts with the reasoning of other courts of appeals

The Ninth Circuit's decision conflicts with the reasoning of the First and Second Circuits. As Judge Nelson explained, "the Second Circuit upheld a more limited regulation that still allowed sales of flavored tobacco, and just required that they take place in tobacco bars." Pet.App.41a (Nelson, J., dissenting) (citing *U.S. Smokeless*, 708 F.3d at 431). And that court "was careful to avoid implying that a complete sales ban would be permissible." *Id. NATO* also upheld a local restriction but not a blanket prohibition like the County's here. 731 F.3d at 82. Among these laws, Los Angeles's Ordinance stands alone in its scope—and so does the decision below. This Court should resolve this conflict among the circuits.

II. THIS QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

Nothing the County offers undermines the importance of the question presented. *See* Pet. 29–34.

1. The County argues (at 30) that this case is no longer important because California has also banned flavored tobacco products. But if Los Angeles's ban falls, so too will California's. Indeed, a challenge to California's law is already on its way to this Court. *See* Order, *R.J. Reynolds Tobacco Co. v. Bonta*, No. 22-56052 (9th Cir. Jan. 27, 2023) (affirming denial of preliminary injunction).

2. The County argues (at 30–31) that the Ninth Circuit's holding will not reverberate elsewhere because other statutes that preempt local "standards" do not "resemble[]" the TCA. In particular, the County highlights that other statutes do not contain preservation or savings clauses.

But as explained, the preservation and savings clauses do not change the meaning of "tobacco product standard" in the preemption clause. And as this Court has held, a standard is a standard no matter how it is enforced. *Engine Mfrs.*, 541 U.S. at 254. If the County can evade the TCA's preemption clause by simply enforcing its standard at the point of sale, then every state and locality can do so when it comes to other industries. Thus, the interpretation of the TCA's preemption clause will reverberate through numerous other federal statutes.

3. Finally, the County unpersuasively disputes the practical stakes.

It suggests (at 32) that FDA's "possible" ban on menthol as a characterizing flavor in cigarettes might

lessen the need for review. But that "possible" action is far from certain, and even if it materializes, it likely would not take effect for a significant period of time. *See* 21 U.S.C. § 387g(d)(2) (stating such rules generally cannot take effect until at least one year after promulgation). Moreover, the County bans the sale of *all* flavored tobacco products, not just menthol cigarettes, including even those flavored products with FDA authorization. *E.g.*, Pet. 8 & n.2–3.

The County also fails to grapple with the fact that "tobacco product standards" extend beyond flavors—they can cover any product "property." And localities are running roughshod over uniform federal standards, imposing immense regulatory costs (and confusion). Pet. 32.

Finally, it is unclear why the County thinks the practical importance depends on the number of other cases that examined similar laws. BIO 34. Even one is enough when preemption is at issue, because "if [even] one State or [locality] may enact such rules, then so may any other; and the end result would undo Congress's carefully calibrated regulatory scheme." *Engine Mfrs.*, 541 U.S. at 255; *e.g.*, *Nat'l Meat*, 565 U.S. at 465 (noting only one circuit decision).

What is clear is that the County does *not* disclaim any ability to regulate *all* properties of tobacco products. That completely upends Congress's design and warrants this Court's intervention.

III. THIS CASE PRESENTS AN IDEAL VEHICLE

The County does not dispute that this case presents an ideal vehicle. The issue was pressed and passed upon below. This case cleanly presents the core legal question. And further percolation is unnecessary.

CONCLUSION

This Court should grant the petition.

February 7, 2023

Respectfully submitted,

NOEL J. FRANCISCO
Counsel of Record
CHRISTIAN G. VERGONIS
RYAN J. WATSON
ANDREW J. M. BENTZ
CHARLES E.T. ROBERTS
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
njfrancisco@jonesday.com

Counsel for Petitioners