No. 23-____

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY; R.J. REYNOLDS VAPOR COMPANY; AMERICAN SNUFF COMPANY, LLC; SANTA FE NATURAL TOBACCO COMPANY, INC.; MODORAL BRANDS INC.; NEIGHBORHOOD MARKET ASSOCIATION, INC.; AND MORIJA, LLC DBA VAPIN' THE 619,

Petitioners,

v.

ROBERT BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; AND SUMMER STEPHAN, IN HER OFFICIAL CAPACITY AS DISTRICT ATTORNEY FOR THE COUNTY OF SAN DIEGO,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Twice in the last two decades, this Court has reversed the Ninth Circuit for allowing states to use sales bans to evade express federal preemption of state standards. In *Engine Manufacturers*, this Court rejected the Ninth Circuit's conclusion that California could escape preemption of state vehicle emissions "standards" by banning the purchase (but not the manufacture) of cars that did not meet state standards. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 254 (2004). The Court held that "a standard is a standard even when not enforced through manufacturer-directed regulation." *Id.* And in *National Meat*, this Court rejected the Ninth Circuit's conclusion that California could avoid preemption of state manufacturing standards by framing its law as a sales ban. *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 464 (2012). To hold otherwise "would make a mockery of the [Act's] preemption provision." *Id.* Nonetheless, in *R.J. Reynolds Tobacco Co. v. County of Los Angeles*, 29 F.4th 542 (9th Cir. 2022) ("*Los Angeles*"), the Ninth Circuit held that states can evade the federal Tobacco Control Act's express preemption of state product standards by banning the sale of products that do not meet state standards. As Judge Nelson explained in dissent there, the Ninth Circuit repeated the same errors it made in *Engine Manufacturers* and *National Meat* and "allow[ed] states … to defeat [the] entire purpose" of the Act's preemption provisions. *Id.* at 561 (Nelson, J. dissenting). *Los Angeles* bound the Ninth Circuit in this case, which presents the same question:

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

CORPORATE DISCLOSURE STATEMENT

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

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

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

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

Petitioner Modoral Brands Inc. is a subsidiary of RAI Innovations Company; RAI Innovations Company is a subsidiary of Reynolds American Inc.; and Reynolds American Inc. is an indirect, wholly owned subsidiary of British American Tobacco, p.l.c., a publicly traded company.

Petitioner Neighborhood Market Association, Inc. has no parent corporation and no publicly held corporation owning 10% or more of its stock exists.

Petitioner Morija, LLC dba Vapin' the 619 has no parent corporation and no publicly held corporation owning 10% or more of its stock exists.

PARTIES TO THE PROCEEDING

Petitioners, who were the Plaintiffs-Appellants in the Ninth Circuit, are R.J. Reynolds Tobacco Company, R.J. Reynolds Vapor Company, American Snuff Company, LLC, Santa Fe Natural Tobacco Company, Inc., Modoral Brands Inc., Neighborhood Market Association, Inc., and Morija, LLC dba Vapin' the 619.

Respondents, who were the Defendants-Appellees in the Ninth Circuit, are Robert Bonta, in his official capacity as Attorney General of California, and Summer Stephan, in her official capacity as District Attorney for the County of San Diego.

RELATED PROCEEDINGS

R.J. Reynolds Tobacco Co., et al. v. Bonta, et al., No. 3:22-cv-01755, U.S. District Court for the Southern District of California. Order denying preliminary injunction and denying injunction pending appeal entered Nov. 15, 2022. Judgment dismissing complaint with prejudice entered March 15, 2023.

R.J. Reynolds Tobacco Co., et al. v. Bonta, et al., No. 22-56052, U.S. Court of Appeals for the Ninth Circuit. Order denying injunction pending appeal entered November 28, 2022. Order affirming district court's denial of preliminary injunction motion entered January 27, 2023.

R.J. Reynolds Tobacco Co., et al. v. Bonta, et al., No. 22A474, Supreme Court of the United States. Order denying application for a writ of injunction pending appeal entered December 12, 2023.

R.J. Reynolds Tobacco Co., et al. v. Bonta, et al., No. 23-55349, U.S. Court of Appeals for the Ninth Circuit. Order summarily affirming judgment dismissing complaint entered June 28, 2023.

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INTRODUCTION

The federal Tobacco Control Act ("TCA") expressly preempts "any" state law that is "different from, or in addition to" federal "tobacco product standards" (including standards on permissible flavors). And, after expressly distinguishing between state laws "prohibiting" the sale of tobacco products and state laws "relating to" such sales, the TCA in its savings clause exempts from preemption only the latter category. The result is a coherent and sensible preemption regime, in which states retain broad authority to regulate the sale of tobacco products—by, for example, raising the minimum purchase age, restricting sales to particular times and locations, and enforcing licensing regimes—but lack the ability to completely prohibit the sale of tobacco products for failing to meet state "tobacco product standards."

Nonetheless, the court below upheld California's ban on the retail sale of "flavored tobacco products" on the ground (set forth in binding circuit precedent) that the TCA does not preempt state laws prohibiting the *sale* of products that fail to comply with a state-imposed product standard. Pet.App.1a (citing *R.J. Reynolds Tobacco Co. v. County of Los Angeles*, 29 F.4th 542 (9th Cir. 2022) ("*Los Angeles*"), *cert. denied* 143 S. Ct. 979 (2023)). But *Los Angeles* is manifestly wrong and directly conflicts with two of this Court's seminal preemption decisions. As Judge Nelson's *Los Angeles* dissent explained, this Court has "twice reversed" the Ninth Circuit for committing the very same error—allowing states to use sales bans to evade express federal preemption of state standards. *Id.* at 562 (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's interpretation of the TCA also conflicts with other decisions from this Court, is inconsistent with the reasoning of other circuits, and implicates important issues. And this case presents an ideal vehicle.

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

The TCA's preemption clause preempts "*any*" state requirements that impose additional or different "tobacco product standards." 21 U.S.C. § 387p(a)(2)(A) (emphasis added). The Ninth Circuit, however, has held that "tobacco product standards" are limited to requirements dictating "how [a] product must be produced." *Los Angeles*, 29 F.4th at 556. The court thus concluded that any local law that is "merely" a "sale[s]" ban escapes preemption. *Id.*

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

As in *Engine Manufacturers* and *National Mea*t, the statutory text forecloses this nonsensical result. The TCA makes clear that a flavor ban (such as California's) is a paradigmatic "tobacco product

standard." Indeed, a flavor ban is one of the only tobacco product standards that Congress itself adopted in the TCA. *See* 21 U.S.C. § 387g(a)(1)(A). And because California's standard is broader than the federal one, it is within the Act's preemption clause. *Id.* § 387p(a)(2)(A).

The Ninth Circuit's alternative holding, that the TCA's savings clause allows states to prohibit the sale of products that do not conform to their product standard, likewise conflicts with *Engine Manufacturers* and *National Meat* by entirely nullifying the preemption clause. That holding also conflicts with *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929 (2022), in which this Court held that courts must give effect to Congress's decision to expressly distinguish between "regulations" (which permit an activity within certain bounds) and "prohibitions" (which totally forbid the activity). Like the statute in *Ysleta*, the TCA's three preemption-related provisions—the preservation clause, preemption clause, and savings clause—carefully distinguish between (i) requirements "relating to" the sale of tobacco products and (ii) requirements "prohibiting" their sale. *See* 21 U.S.C. § 387p(a)(1) (preservation clause). The savings clause explicitly includes the former (requirements "relating to" the sale) and omits the latter (requirements "prohibiting" the sale). The savings clause therefore does not save a blanket prohibition. *Id.* § 387p(a)(2)(B). And again, the Ninth Circuit's interpretation allows states to circumvent the preemption clause by simply framing their laws as prohibitions of the sale of products that don't meet their preferred requirements.

For these reasons, the First and Second Circuits carefully distinguished total bans like those adopted by California. Those courts both upheld restrictions on the sale of flavored tobacco products but did so because, unlike SB793, they did *not* impose total (or "blanket") bans; instead, they only regulated where those products could be sold. *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013) ("*NATO*"); *U.S. Smokeless Tobacco Mfg. v. City of New York*, 708 F.3d 428 (2d Cir. 2013). The Ninth Circuit's decision upholding an absolute prohibition conflicts with this reasoning. It is also in tension with the Eighth Circuit, which upheld a flavor ban after applying the so-called "presumption against preemption," which the Ninth Circuit expressly disavowed. *See R.J. Reynolds Tobacco Co. v. City of Edina*, 60 F.4th 1170, 1176–77 (8th Cir. 2023) (per curiam); *Los Angeles*, 29 F.4th at 553 n.6.

Second, this issue is exceptionally important. California's ban cuts off one of the Nation's largest markets for flavored tobacco products. For example, the law prohibits the sale of menthol cigarettes, which constitute approximately one-third of the State's cigarette market.

Moreover, the question continues to recur. Four federal courts of appeals have encountered the issue, and hundreds of states and localities have enacted similar provisions.

The issue presented is also far broader than whether states and localities can prohibit the sale of flavored tobacco products. "Tobacco product standards" can cover any "propert[y]" of a tobacco product. 21 U.S.C. § 387g(a)(4)(B)(i). Thus, under the

Ninth Circuit's rule, states can regulate the amount of nicotine in tobacco products, the type of filters in cigarettes, the packaging of e-cigarettes, and countless other "properties" of tobacco products. And states are doing just that, usurping the exclusive authority Congress gave to FDA.

Further, throughout the U.S. Code, Congress has reserved to the federal government the exclusive power to set uniform product standards for many industries. But the opinion below is a roadmap for circumventing preemption provisions relating to such product standards. That would undermine Congress's efforts to establish uniform standards for national industries and would significantly increase the costs of doing business.

This case is also an ideal vehicle to resolve the question presented. Opinions from four courts of appeals have aired the issues presented by this case and revealed a disagreement only this Court can answer. *See Edina*, 60 F.4th 1170; *Los Angeles*, 29 F.4th 547; *NATO*, 731 F.3d 71; *U.S. Smokeless*, 708 F.3d 428; *see also Los Angeles*, 29 F.4th at 561 (Nelson, J. dissenting). This case also cleanly presents the core legal question, with no line-drawing problems. And the case comes to this Court on final judgment.

Finally, certiorari is warranted notwithstanding this Court's previous denials of review of the question presented. *See Los Angeles*, 143 S. Ct. 979 (denying certiorari); *R.J. Reynolds Tobacco Co. v. Bonta*, 143 S. Ct. 541 (2022) (denying application for injunction and, in the alternative, certiorari). This case comes to this Court, not in an emergency posture as it did late last year, *Bonta*, 143 S. Ct. 541, but rather after final

judgment. Additionally, the Eighth Circuit has since addressed the question, adding to the circuits opining on the issue. Moreover, California's statewide ban has far greater impact on manufacturers and consumers than the local ban in *Los Angeles*, which applied only in the unincorporated parts of a single county.

OPINIONS BELOW

The Ninth Circuit's judgment is not reported but is reproduced at Pet.App.1a. The district court's order is not reported but is available at 2023 WL 2534620 and reproduced at Pet.App.2a–15a. The Ninth Circuit's prior binding opinion, *Los Angeles*, on which the judgment below relied, is reported at 29 F.4th 542.

JURISDICTION

The Ninth Circuit entered judgment on June 28, 2023. Pet.App.1a. No petition for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions (including 21 U.S.C. §§ 387g & 387p) are at Pet.App.25a–85a.

STATEMENT OF THE CASE

A. Legal Background

Long before California considered prohibiting flavored tobacco products, Congress enacted a comprehensive regime distributing authority over tobacco product regulation between FDA and state and local governments. *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (TCA). The Act granted FDA primary authority to regulate tobacco products. *See* 21 U.S.C. §§ 387–387s.

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

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

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

clause applies "[e]xcept as provided in [the preemption clause]").

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

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

B. California Bans the Sale of Flavored Tobacco Products

There has been a surge in states and localities restricting or completely banning the sale of flavored tobacco products. *See Los Angeles*, 29 F.4th at 551. The County of Los Angeles joined that trend in 2019. And California followed suit in 2020. California's law, SB793, provides that tobacco retailers "shall not sell … a flavored tobacco product" in the state. Cal. Health & Safety Code § 104559.5(b)(1).

A "[f]lavored tobacco product" includes "any tobacco product that contains a constituent that imparts a characterizing flavor." *Id.* § 104559.5(a)(4). A "[c]onstituent," in turn, is defined as "any ingredient, substance, chemical, or compound … *that is added by the manufacturer* … during the processing, *manufacture*, or packing of the tobacco product." *Id.* § 104559.5(a)(2) (emphasis added). And a "[t]obacco product" is "[a] product containing, made, or derived from tobacco or nicotine that is intended for human consumption," including "cigarettes," "chewing tobacco," "snuff," and electronic nicotine systems. *Id.* § 104495(a)(8)(A)(i)–(ii).

California thus bans retailers from selling "[f]lavored tobacco product[s]," including menthol cigarettes. In fact, SB793 bans products even if FDA has found them to be "appropriate for the protection of the public health,"[1] and even if FDA has authorized them to be marketed as presenting lower health risks than cigarettes.[2]

C. Procedural History

Petitioners R.J. Reynolds Tobacco Company, R.J. Reynolds Vapor Company, American Snuff Company, LLC, Santa Fe Natural Tobacco Company, Inc., and Modoral Brands Inc. manufacture and distribute various tobacco products for sale in California, including menthol-flavored cigarettes. Petitioner

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[1] *E.g.*, FDA Decision Summary PM0000011 (Nov. 10, 2015) (authorizing a mint snus product), https://tinyurl.com/mw56k4ps.

[2] *E.g.*, FDA News Release, *FDA Grants First-Ever Modified Risk Orders to Eight Smokeless Tobacco Products* (Oct. 22, 2019) (authorizing marketing of flavored snus products), https://tinyurl.com/y6ruvbdz.

Neighborhood Market Association, Inc. is a California-based non-profit trade association, with members who sell flavored tobacco products. *Id.* Petitioner Morija, LLC is a San Diego-based tobacco retailer that sells electronic smoking devices and e-liquid tobacco products. *Id.* Because all are subject to California's ban, they collectively filed suit, challenging SB793. And they sought a preliminary injunction and injunction pending appeal because the ban was set to go into effect within weeks. *Id.* Nevertheless, Plaintiffs recognized that their express-preemption claim, which was the basis for the relief sought, was foreclosed in the district court (and the Ninth Circuit) by *Los Angeles*. *Id.*

a. Like California's SB793, Los Angeles's Ordinance banned the sale of flavored tobacco products. Relevant to this case, Reynolds and certain affiliates (collectively, "Reynolds") sued the County, arguing that the TCA preempted the Ordinance.

A divided panel of the Ninth Circuit upheld the Ordinance. *See Los Angeles*, 29 F.4th 542. The majority concluded that "tobacco product standards" are limited to regulations of how a "product must be produced"—a limitation found nowhere in the statutory text. *Id.* at 556. And because the Ordinance "merely" bans the *sale* of flavored tobacco products, the majority concluded that it is not a preempted tobacco product standard. *Id.* The court also reasoned that not limiting "tobacco product standards" to production regulations "would render much of the preceding preservation clause a nullity." *Id.* at 554.

The majority alternatively held that the TCA's savings clause saved the Ordinance. *Id.* at 558. "A ban

on the sale of flavored tobacco products is, simply put, a requirement that tobacco retailers or licensees throughout the County not sell flavored tobacco products. It therefore fits within the savings clause as a 'requirement[] relating to the sale ... of[] tobacco products [to] individuals of any age.'" *Id.* (quoting 21 U.S.C. § 387p(a)(2)(B)). The majority refused to give effect to the statutory distinction between requirements "relating to … sales" and those "prohibiting sales." Instead, it held that the savings clause's reference to the former included the latter, notwithstanding the statute's clear distinction between the two.

Judge Nelson dissented. He began with this Court's decisions in *Engine Manufacturers* and *National Meat*, which "[both] … reversed [the Ninth Circuit] for interpreting an express preemption clause to allow states and municipalities to defeat its entire purpose with a sales ban." *Id.* at 561 (Nelson, J., dissenting). Judge Nelson explained that those cases establish that "states can't get around" preemption "by disguising [their] regulation as a sales ban." *Id.* at 563. Those cases thus require "hold[ing] that Los Angeles's ban is covered by the preemption clause." *Id.* Judge Nelson also noted that the majority's reasoning was inconsistent with the Second Circuit's reasoning in *U.S. Smokeless*, because that court "upheld a more limited regulation" and "was careful to avoid implying that a complete sales ban would be permissible." *Id.* at 564.

Judge Nelson further explained that the "preservation clause does not apply to the preemption clause at all" because it is qualified by the words "'[e]xcept as provided in' … the preemption clause." *Id.*

Instead, the preservation clause clarifies that no other TCA section has express preemptive effect and that federal agencies and Indian tribes are unaffected by the preemption clause. *Id.* at 565. Finally, Judge Nelson concluded that the savings clause does not save the County's ban because it saves only age-based requirements. *Id.*

The plaintiffs filed a petition for writ of certiorari. No. 22-338 (U.S.). After calling for a response, this Court denied the petition. 143 S. Ct. 979.

b. Petitioners challenged SB793 in court, arguing that SB793 is preempted. Petitioners moved for a preliminary injunction and an injunction pending appeal, but conceded that the Ninth Circuit's opinion in *Los Angeles* required denial of injunctive relief, while noting that they preserved their arguments for appeal. Pet.App.22a23a. The district court denied Petitioners' motion for preliminary injunction. Pet.App.18a–20a. The Ninth Circuit denied a motion for an injunction pending appeal and later (on Petitioners' motion to further facilitate this Court's review) summarily affirmed the district court. Pet.App.16a. Petitioners filed an emergency application for relief from this Court, which was denied. 143 S. Ct. 541 (2022).

Respondents then filed a motion to dismiss. Petitioners again acknowledged that their express preemption claim was foreclosed by controlling Ninth Circuit precedent while preserving their arguments for appeal. The court dismissed the complaint. Pet.App.2a, 13a. Petitioners appealed and (to facilitate this Court's review) moved for summary affirmance of the district court's dismissal, while

preserving their express preemption claim for this Court's review.[3]

The Ninth Circuit summarily affirmed the district court's dismissal on June 28, 2023. Pet.App.1a. This petition follows.

REASONS FOR GRANTING THE WRIT

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

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

That holding directly conflicts with this Court's precedents. Indeed, as Judge Nelson's dissent in *Los Angeles* noted, "[i]n the last two decades, the Supreme Court has twice reversed [the Ninth Circuit] for failing"—based on the same rationale—"to find California regulations expressly preempted." 29 F.4th

[3] Petitioners also brought a dormant Commerce Clause claim. Petitioners withdrew the claim on appeal.

at 562 (Nelson, J., dissenting) (citing *Engine Mfrs.*, 541 U.S. 246; and *Nat'l Meat*, 565 U.S. 452). The Ninth Circuit's precedent is also inconsistent with the reasoning of other courts of appeals. This Court should therefore grant certiorari.

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

1. The TCA's preemption clause preempts "*any*" state "requirement which is different from, or in addition to," federal "tobacco product standards." 21 U.S.C. § 387p(a)(2)(A) (emphasis added). Nonetheless, Ninth Circuit precedent holds that as long as a state law enforcing such a requirement is framed as a sales ban, the state law is not preempted. The court explained that Los Angeles's Ordinance was "merely banning the *sale* of a certain type of tobacco product, not dictating how that product must be *produced*." *Los Angeles*, 29 F.4th at 556 (emphasis added). That, in the Ninth Circuit's view, was dispositive, because "tobacco product standards" do not include sales prohibitions. The same reasoning applies here: Because California "merely" bans the sale of flavored tobacco products, it is not preempted.

The Ninth Circuit's precedent conflicts with this Court's repeated admonition that states cannot evade preemption by simply enforcing their standards at the point of sale. *Engine Manufacturers* rejected the Ninth Circuit's decision to impose such an atextual limitation on a preemption clause. There, California prohibited the purchase of cars that did not meet local emission standards. 541 U.S. at 248–49. The Clean

Air Act, however, expressly preempted states from adopting "*standard[s]* relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a) (emphasis added).

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

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

The Ninth Circuit's conclusion that tobacco product standards in the TCA are limited to production regulations is thus irreconcilable with *Engine Manufacturers*.

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

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

The statute also expressly describes "tobacco product standard[s]" as encompassing "provisions respecting the construction, components, *ingredients, additives, constituents, … and properties* of the tobacco product," *id.* § 387g(a)(4)(B)(i) (emphasis added)—which plainly covers regulating flavors. *See, e.g.*, *R.J. Reynolds Tobacco Co. v. City of Edina*, 482

F. Supp. 3d 875, 879 (D. Minn. 2020) ("[T]here can be no dispute that a provision respecting the flavor of a tobacco product is a provision respecting a 'propert[y]' of that product."), *aff'd*, 60 F.4th 1170 (8th Cir. 2023); 21 U.S.C. § 387(1) (defining "additive[s]" to include "substances intended for use as a flavoring").

And lest there be any doubt, FDA too has repeatedly concluded that restrictions on flavors—including sales bans—are tobacco product standards. *See, e.g.*, 21 C.F.R. § 1162.1(b) (proposed 2022) (proposing to ban the sale of menthol cigarettes using a "[p]roduct [s]tandard"); FDA, *Illicit Trade in Tobacco Products after Implementation of an FDA Product Standard* 4 (Mar. 15, 2018) (explaining FDA was "considering establishing a *product standard* prohibiting the manufacture, *sale, and distribution* of tobacco products with certain characterizing flavors" (emphasis added)).

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

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

provision was textually limited to production mandates. And like here, California argued that its rule was not preempted because it regulated sales, not manufacturing. *Id.* at 463.

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

So too here. "[E]ven if it were necessary to show a direct ban on [production], [SB793] is in effect such a ban. There is little difference between the government telling a manufacturer that it may not add an ingredient that imparts a flavor to a tobacco product and the government telling a manufacturer that it may not sell a tobacco product if it has added an ingredient that imparts a flavor." *Edina*, 482 F. Supp. 3d at 879 (citing *Nat'l Meat*, 565 U.S. 452), *aff'd* 60 F.4th 1170 (8th Cir. 2023). In that way, California's ban does regulate how tobacco products must be produced. *See id.*[4]

3. The Ninth Circuit's attempt to distinguish the TCA from the statutes in *Engine Manufacturers* and *National Meat* is unavailing. According to its

[4] Moreover, SB793 *is* directed "at the manufacturing stage." 29 F.4th at 555. SB793 bans the sale of "any tobacco product that *contains* a constituent that imparts a characterizing flavor." SB793, § 104559.5(a)(4) (emphasis added). And SB793 defines a "[c]onstituent" as "any ingredient … that is *added by the manufacturer* … *during* the processing, *manufacture*, or packing of the tobacco product." *Id.* § 104559.5(a)(2) (emphasis added).

reasoning, the TCA's "preservation clause" makes all the difference. *Los Angeles*, 29 F.4th at 556. Because that clause preserves local authority to enact laws "'relating to or prohibiting the sale'" of tobacco products, the court concluded that the preemption clause must be limited to regulations "dictating how th[e] product must be produced." *Id.* (quoting 21 U.S.C. § 387p(a)(1)). Otherwise, the preservation clause would be a "nullity." *Id.* at 554.

That gets things exactly backwards. "By its terms, the preservation clause does not apply to the preemption clause at all." *Id.* at 564 (Nelson, J., dissenting). Rather, the preservation clause is explicitly subject to the preemption clause. It says: "[E]xcept as provided in [the preemption clause] …." "Thousands of statutory provisions use the phrase 'except as provided in …' followed by a cross-reference in order to indicate that one rule should prevail over another in any circumstance in which the two conflict." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1070 (2018). That is precisely what Congress did here. And that dispenses with the Ninth Circuit's suggestion that "[i]t is unlikely that Congress would purport to preserve something for state and local authority, only to preempt it in the very next provision." *Los Angeles*, 29 F.4th at 556. The preservation clause thus in no way distinguishes the TCA from the statutes in *Engine Manufacturers* and *National Meat*.

Nor does Petitioners' interpretation nullify the preservation clause, contrary to the Ninth Circuit's suggestion. That clause serves other critical functions, which do not "affect the preemption clause." *Id.* at 564 (Nelson, J., dissenting).

First, the preservation clause also applies to federal agencies, the military, and Indian Tribes. Those entities are not subject to the preemption clause at all; the preservation clause clarifies that they are free to set their own tobacco product standards. *See id.* at 565.

Second, the preservation clause clarifies that other TCA sections do not have express preemptive effect. *Id.* at 564. Specifically, the preservation clause says that only those categories listed in the preemption clause have express preemptive effect. The preservation clause also rebuts any suggestion that Congress through the TCA occupied the field of tobacco regulation. Thus, under the preservation clause, states retain broad authority over how tobacco products are sold, so long as their laws do not amount to product standards (or other preempted categories of regulation). Laws raising the minimum purchase age, restricting sales to particular times and locations, and enforcing licensing regimes are all preserved.

* * *

In sum, the decision below directly conflicts with *Engine Manufacturer*'s admonition that a "standard" applies to the final product and that states therefore cannot circumvent preemption by targeting sales. *See* 541 U.S. at 254. And it conflicts with *National Meat*'s reaffirmation that allowing a state to avoid preemption simply by framing its product standard as a "ban on the sale" of nonconforming products would "make a mockery of the … preemption provision." *See* 565 U.S. at 464.

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

The Ninth Circuit alternatively held that the savings clause saves state and local sales prohibitions. But the savings clause saves "requirements relating to … sale[s]," not "requirements prohibiting sales." *See* 21 U.S.C. § 387p(a)(2)(A). The Ninth Circuit's interpretation of the savings clause nullifies that distinction and, in so doing, renders the preemption clause a dead letter, once again contravening *Engine Manufacturers* and *National Meat*. And given Congress's careful distinction between requirements "relating to the sale" and requirements "prohibiting the sale"—language that this Court has said must be given effect—the Ninth Circuit's interpretation also conflicts with this Court's recent decision in *Ysleta*, 142 S. Ct. at 1938.

1. The decision below, which was bound by *Los Angeles*, held that even if a sales prohibition fell within the TCA's preemption clause, it would nonetheless be saved by the savings clause, which saves requirements "relating to the sale" of tobacco products. Pet.App.74a; *see also Los Angeles*, 29 F.4th at 552. That interpretation of the savings clause, however, "make[s] a mockery of the [TCA's] preemption provision" because there is nothing for the preemption clause to do. *See Nat'l Meat*, 565 U.S. at 464. Under that precedent, a state is free to set its own tobacco product standard, as long as it frames its law as a ban on the *sale* of products that do not meet that standard. As this Court explained in *Engine Manufacturers*, "if one State or political subdivision

may enact such rules, then so may any other; and the end result would undo Congress's carefully calibrated regulatory scheme." 541 U.S. at 255.

It gets worse. Throughout the TCA, Congress intended to preempt not just state tobacco product standards but also state requirements for labeling and good manufacturing standards (among others). 21 U.S.C. § 387p(a)(2)(A). Thus, the Ninth Circuit's opinion means that a state can easily circumvent the preemption clause and establish its own good manufacturing standards, such as a requirement that manufacturers use certain equipment. Similarly, the decision means that a state can establish its own labeling standards, such as requiring cigars and e-cigarettes to carry the state's mandated warning label, even if FDA has mandated a different one.[5] All the state has to do is ban the *sale* of products that do not meet a state's good manufacturing or labeling requirements. The Ninth Circuit's interpretation of the savings clause thus conflicts with *Engine Manufacturers* and *National Meat*, both of which held that states cannot use sales bans to circumvent a preemption clause.

2. The Ninth Circuit's conclusion also directly conflicts with this Court's recent decision in *Ysleta*, 142 S. Ct. 1938. As this Court has long and repeatedly instructed, statutory provisions must fit "into an harmonious whole." *E.g.*, *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012); *Mkt. Co. v. Hoffman*, 101 U.S. (11 Otto) 112, 116 (1879). And one clause cannot

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

be construed as being "inconsistent with the [other] provisions of the act." *AT&T Co. v. Cent. Off. Tel., Inc.*, 524 U.S. 214, 227–28 (1998).

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

"Perhaps the most striking feature about [the Act's] language," the Court reasoned, "is its dichotomy between prohibition and regulation." *Id.* at 1938. "[T]o *prohibit* something means to 'forbid,' 'prevent,' or 'effectively stop' it …." *Id.* (quoting *Webster's Third New Int'l Dictionary* 1813 (1986)). By contrast, "to *regulate* something is usually understood to mean to 'fix the time, amount, degree, or rate' of an activity 'according to rule[s].'" *Id.* (quoting *Webster's Third*, *supra*, at 1913). "Frequently, then, the two words are 'not synonymous.'" *Id.* (quoting *Black's Law Dictionary* 1212 (6th ed. 1990)). This Court further highlighted its "usual presumption that 'differences in language like this convey differences in meaning.'" *Id.* at 1939 (quoting *Henson v. Santander Consumer USA*

Inc., 582 U.S. 79, 86 (2017)). And *Ysleta* emphasized that a construction that renders "regulations simultaneously both (permissible) prohibitions and (impermissible) regulations" had to be rejected. *Id.* Accordingly, laws that "merely regulate[]" gaming do not apply to the Tribe. *Id.* at 1937.

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

The Court also rejected a supposed line-drawing problem when it came to regulations and prohibitions. Texas argued that distinguishing between the two would be "unworkable." *Id.* at 1943. According to Texas, courts "might be called on to decide whether 'electronic bingo' qualifies as 'bingo' and thus a gaming activity merely regulated by Texas, or whether it constitutes an entirely different sort of gaming activity absolutely banned by Texas and thus forbidden as a matter of federal law." *Id.* That could lead to more litigation. The Court "appreciate[d] these concerns" but they did "not persuade." *Id.* "Most fundamentally, they are irrelevant. It is not our place to question whether Congress adopted the wisest or most workable policy, only to discern and apply the policy it did adopt. If Texas thinks good governance requires a different set of rules, its appeals are better

directed to those who make the laws than those charged with following them." *Id.* at 1943–44.

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

The TCA's preservation clause provides, "Except as provided in [the preemption clause], nothing [in the TCA] shall be construed to limit the authority of" state and local governments, federal agencies, the military, and Indian tribes, "to enact … any law … with respect to tobacco products that is in addition to, or more stringent than, requirements established under [the TCA], including a law … *relating to* <u>*or*</u> *prohibiting* the sale, distribution, [or] possession" of "tobacco products by individuals of any age." *Id.* § 387p(a)(1) (emphasis added). It thus gives state and local governments, federal agencies, the military, and Indian tribes broad authority, including the authority to adopt requirements "relating to *or* prohibiting" the sale of tobacco products. But as its text also makes clear, it is subject to the preemption clause's exception.

The preemption clause, then, takes away from state and local governments (but not others) part of the broad power the preservation clause confers. Under the preemption clause, state and local governments cannot enact "*any requirement* which is different from,

or in addition to," federal tobacco product standards. *Id.* § 387p(a)(2)(A) (emphasis added). The capacious phrase "any requirement" sweeps in both requirements "relating to" and "prohibiting" the sale of tobacco products—both are preempted if they are "different from, or in addition to," federal standards.

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

Congress's decision to use "relating to or prohibiting" sales in the preservation clause, but to omit "or prohibiting" from the nearly identical phrase in the savings clause, shows that Congress deliberately excluded sales prohibitions from the class of non-preempted laws in the savings clause. Congress generally "acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another." *Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021); *see Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018).

The only way to reconcile the TCA's preemption-related clauses is to recognize that while state governments have broad authority to regulate the sales process, one thing they may not do is absolutely prohibit the sale of products that fail to meet their preferred product standards. The Ninth Circuit's contrary reading renders the TCA "a jumble." *Ysleta*, 142 S. Ct. at 1939. And it leaves the preemption clause

with "no work to perform, its terms dead letters all." *Id.*; *see also supra* Part I. (explaining that this interpretation also conflicts with *Engine Manufacturers* and *National Meat*).

The Ninth Circuit's contention that the distinction between regulation and prohibition would "create a hopelessly inadministrable standard," *Los Angeles*, 29 F.4th at 559, also conflicts with *Ysleta*, which rejected that kind of "appeal to public policy." 142 S. Ct. at 1943–44. As Judge Nelson explained in dissent, "[t]hat the line might be hard to draw in some hypothetical future case is no reason to throw the baby out with the bathwater. We must avoid reading statutes in absurd ways, … but no canon of statutory interpretation requires us to avoid any reading … under which one can craft an absurd argument." *Los Angeles*, 29 F.4th at 566 (Nelson, J., dissenting). And in all events, *this* case presents no line-drawing issue at all, because SB793 *bans* the sale of flavored tobacco products. *See infra* Part III.

3. As Judge Nelson concluded, the savings clause also does not apply for a second reason. "The savings clause only saves for states the authority to enact age requirements." *Los Angeles*, 29 F.4th at 565 (Nelson, J., dissenting). This is clear from the clause's limitation to "requirements relating to the sale … of[] tobacco products [to] *individuals of any age*." 21 U.S.C. § 387p(a)(2)(B) (emphasis added). "Any age" must mean "individuals of a particular age"; that is, only state requirements that are age-based are saved. The Ninth Circuit, however, interpreted "any age" to mean "all ages," thus rendering the phrase "by individuals of any age" wholly superfluous. *Los Angeles*, 29 F.4th at 565 (Nelson, J., dissenting). That

conflicts with numerous cases instructing that statutory provisions should not be rendered meaningless. *E.g.*, *Corley v. United States*, 556 U.S. 303, 314 (2009).

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For these reasons, certiorari is warranted. The Ninth's Circuit's approval of California's SB793 is contrary to this Court's decisions in *Engine Manufacturers*, *National Meat*, and *Ysleta*.

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

The decision below, which relies on *Los Angeles*, conflicts with the reasoning of decisions of the First, Second, and Eighth Circuits. *See NATO*, 731 F.3d 71; *U.S. Smokeless*, 708 F.3d 428; *Edina*, 60 F.4th 1170; *see also Los Angeles*, 29 F.4th at 564 (Nelson, J. dissenting) (noting that *Los Angeles* conflicts with *U.S. Smokeless*'s reasoning). In contrast to the Ninth Circuit, the First and Second Circuits upheld local restrictions on flavored tobacco products based on reasoning that would not permit a blanket prohibition. And the Eighth Circuit concluded the savings clause saved a local flavor ban only because the "presumption against preemption" applied to the TCA, something the Ninth Circuit disavowed.

1. In *U.S. Smokeless*, the Second Circuit considered New York City's ordinance that limited the sale of flavored tobacco products to tobacco bars. 708 F.3d at 431. Tobacco manufacturers sued the city, arguing that the TCA expressly preempted the ordinance. The Second Circuit, however, held that the TCA did not preempt the ordinance because it was "[a] local sales

regulation that does not clearly infringe on the FDA's authority to determine what chemicals and processes may be used in making tobacco products." *Id.* at 434 (emphasis added). The court emphasized that this was so because the ordinance still "allows [flavored tobacco products] to be sold within New York City, although to a limited extent." *Id.* at 436. By contrast, the court explained, "any purported sales ban that in fact 'functions as a command' to tobacco manufacturers 'to structure their operations' in accordance with locally prescribed standards would not escape preemption simply because the City 'fram[ed] it as a ban on the sale of [tobacco] produced in whatever way [it] disapproved.'" *Id.* at 434 (quoting *Nat'l Meat*, 565 U.S. at 464). In other words, as Judge Nelson opined, the Second Circuit "did adopt a version of the [Ninth Circuit's] sales vs. manufacturing distinction," but "it was careful to avoid implying that a complete sales ban would be permissible." *Los Angeles*, 29 F.4th at 564 (Nelson, J., dissenting).

Likewise, the law at issue in the First Circuit *regulated* the sale of flavored tobacco products—it did not *prohibit* sales completely. *NATO*, 731 F.3d at 74. There, a local ordinance made it "unlawful for any person to sell or offer for sale any flavored tobacco product to a consumer, except in a smoking bar." *Id.* The First Circuit held that the ordinance was not preempted for the same reason the Second Circuit upheld New York City's ordinance: it "is not a *blanket prohibition* because it allows the sale of flavored tobacco products in smoking bars. Rather, it is a regulation 'relating to' sales…." *Id.* at 82 (emphasis added). The First Circuit concluded that this

"distinguishe[d]" Providence's law from the law at issue in *National Meat*. *Id.*

By contrast, the binding precedent below upholds a blanket prohibition. Like Los Angeles's Ordinance, SB793 is different in kind from those upheld in *U.S. Smokeless* and *NATO*. Under SB793, consumers cannot purchase flavored tobacco products *anywhere* in California. There is no exception for tobacco bars (as in *U.S. Smokeless*), smoking bars (as in *NATO*), or any other location. Thus, the Ninth Circuit's decision upholding a blanket ban conflicts with the rationale of these First and Second Circuit decisions, under which such a prohibition would be preempted.

2. The decision below also conflicts with the Eighth Circuit's reasoning. The Eighth Circuit concluded that the TCA's savings clause saved a local flavor ban because the "presumption against preemption" applies to the TCA. Specifically, that court found "two plausible readings of the Savings Clause that compel two different outcomes." *Edina*, 60 F.4th at 1176. The savings clause says the preemption clause "does not apply to requirements relating to the sale" of tobacco. 21 U.S.C. § 387p(a)(2)(B). The court reasoned that one reading of "does not apply" is that "if something falls under the Savings Clause, it cannot also fall under the Preemption Clause." *Edina*, 60 F.4th at 1175. So the question under that reading is whether the local law is more like a requirement relating to tobacco product standards (preemption clause) or a requirement relating to sales (savings clause). The second reading "is that 'does not apply' means the Savings Clause voids the effect of the Preemption Clause. That is, if a rule falls into the Preemption Clause 'bucket' but also relates to sales, it is essentially scooped out of the

Preemption Clause bucket and placed into the Savings Clause bucket." *Id.*

The court then claimed the only way to choose between these readings was to apply a presumption against preemption. "When addressing express or implied preemption we begin with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 1176. And since "[t]he TCA is ambiguous and implicates traditional state police powers, we must accept the reading of the Savings Clause that disfavors preemption." *Id.* at 1177.

But this is in direct contrast to *Los Angeles*, which, after discussing Supreme Court precedent on the presumption issue, held that "our focus is on the meaning of the TCA's text without any presumptive thumb on the scale." 29 F.4th at 553 n.6. Thus, the controlling decision below contrasts with the reasoning of the Eighth Circuit as well.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

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

First, California has shut the doors to one of the Nation's largest markets for flavored tobacco products and thereby banned a product (menthol cigarettes) that has been lawfully sold for nearly a century. Not only that, as *amici curiae* explained to this Court in *Los Angeles*, the economic impact of flavor bans, especially at the statewide level, are catastrophic to small retailers and will also harm manufacturers. *See,*

e.g., Brief for E-Cigarette Businesses and Trade Associations as Amici Curiae Supporting Petitioners, *Los Angeles*, 143 S. Ct. 979 (2023) (No. 22-338). Just looking at the vapor industry, California's ban could result in $1.4 billion in lost economic output and cost thousands of jobs. *Id.* at 13.

It is no surprise then that Congress has said, "The sale … of tobacco products … ha[s] a substantial effect on the Nation's economy." TCA § 2(10), 123 Stat. at 1777, *codified at* 21 U.S.C. § 387 note; *see* 7 U.S.C. § 1311 ("The marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect … commerce at every point, and stable conditions therein are necessary …."), *repealed by* Pub. L. No. 108-357 (Oct. 22, 2004). And that is precisely why Congress enacted the TCA, which includes a comprehensive scheme to regulate tobacco products nationwide. *See* 21 U.S.C. § 387 note. In taking that comprehensive approach to tobacco regulation, Congress granted FDA broad authority to regulate tobacco products. *See id.* ("It is in the public interest for Congress to enact legislation that provides [FDA] with the authority to regulate tobacco products and the advertising and promotion of such products. The benefits to the American people from enacting such legislation would be significant in human and economic terms.").

The fact that this case involves one of the Nation's largest markets distinguishes it from *Los Angeles*, where this Court denied certiorari. *See* 143 S. Ct. 979. That ban's economic effect—limited to the unincorporated parts of Los Angeles County—paled in comparison to California's. This is all the more reason

that this Court needs to settle the meaning of the TCA's preemption provisions now.[6]

Second, tobacco product standards are not limited to flavors but cover any "propert[y]" of a tobacco product. 21 U.S.C. § 387g(a)(4)(B)(i). That includes the amount of nicotine in tobacco products, the length of cigars, the properties of batteries in e-cigarettes, the types of filters in cigarettes, and countless other aspects of tobacco products. And under the Ninth Circuit's rule, states and localities can target all of those "properties." Again, all the state or locality has to do is ban the *sale* of products that do not conform to their preferred product standards.

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

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[6] Moreover, hundreds of jurisdictions have enacted restrictions on flavored tobacco products. *Los Angeles*, 29 F.4th at 551.

The Ninth Circuit is not the first appeals court to decide this issue. The issue has reached four federal courts of appeals, *see Edina*, 60 F.4th 1170; *Los Angeles*, 29 F.4th 542; *NATO*, 731 F.3d 71; *U.S. Smokeless*, 708 F.3d 428. And it is sure to continue, as the Ninth Circuit recognized. *Los Angeles*, 29 F.4th at 551.

Thus, not only are states and localities enacting a slew of inconsistent bans on flavored tobacco products, but they are also now moving even further, usurping the authority Congress vested in FDA to set other tobacco product standards. The Court should step in to uphold Congress's decision to preempt such regulatory chaos.

Third, the problem is not limited to tobacco products. Throughout the U.S. Code, Congress has reserved to the federal government the exclusive power to set uniform product standards for a variety of industries. For example, Congress passed the Poultry Products Inspection Act ("PPIA") to "assur[e] that poultry products ... are wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. § 451. To that end, the PPIA includes an express-preemption clause, which provides that any "[m]arking, labeling, packaging, or ingredient requirements ... in addition to, or different than, those made under [the PPIA] may not be imposed by any State." *Id.* § 467e. That ensures that labeling is consistent throughout the country. Numerous other industries also rely on uniform, national product standards. *E.g.*, *id.* § 678 (poultry products); *id.* § 379r (nonprescription drugs); *id.* § 360k (medical devices); 42 U.S.C. § 7543(a) (vehicle

emissions); 46 U.S.C. § 4306 (recreational vessels); 49 U.S.C. § 30103(b)(1) (motor vehicles).

But under the Ninth Circuit's rule, businesses cannot rely on Congress's words. All a state needs to do to circumvent these preemption clauses is to frame its law as a ban on the sale of products that do not conform to its preferred requirements. So a state could skirt the PPIA's express-preemption clause by simply banning the sale of poultry products that do not use its preferred packaging, negating the preemption clause altogether. And that reasoning will carry over to numerous other preemption clauses throughout the Code.

The question presented is thus important not only for one of the Nation's largest industries, but for numerous others too.

III. THIS CASE PRESENTS AN IDEAL VEHICLE

This is an ideal vehicle for numerous reasons. *First*, further percolation is unnecessary. There have now been four published circuit court opinions (and a dissent) on the issue, including one issued after this Court's denial of certiorari in *Los Angeles*. Those decisions have aired the issues, and the disagreement over how to interpret the TCA's preemption clauses is entrenched. It is now time for this Court to take up the issue. And even if there were no circuit disagreement, this Court routinely grants review in splitless preemption cases given preemption issues' "importance." *Wyeth v. Levine*, 555 U.S. 555, 563 (2009) (noting that certiorari was granted despite no split); *see, e.g.*, *Merck Sharp & Dohme Corp v. Albrecht*, 138 S. Ct. 2705 (2018) (granting certiorari in same situation).

Second, this issue was squarely passed upon below. And this Court's resolution of how to interpret the TCA's three preemption-related provisions would dispose of this case one way or another.

Third, this case cleanly presents the core legal question: whether the TCA preempts a total prohibition on the sale of flavored tobacco products. There are no line-drawing problems regarding whether SB793 is a "prohibition." Some restrictions might present difficult questions regarding whether they are requirements "relating to" the sale of tobacco products or "prohibiting" their sale. But SB793 does not: it is a blanket ban on the covered products—a paradigmatic prohibition. So the Ninth Circuit's supposed administrability problem is not presented here. *Los Angeles*, 29 F.4th at 559; *see also Ysleta*, 142 S. Ct. at 1943–44 (rejecting administrability problems as a reason to adopt an atextual interpretation).

CONCLUSION

This Court should grant the petition.

September 1, 2023

Respectfully submitted,

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