No. 23-207

In the Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO., *et al.*,
Petitioners,

v.

ROB BONTA, ATTORNEY GENERAL OF CALIFORNIA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In October 2022, R.J. Reynolds Tobacco Co. filed a petition for a writ of certiorari in a separate case involving a Los Angeles County ban on the sale of certain flavored tobacco products. Pet., *R.J. Reynolds Tobacco Co. v. County of Los Angeles*, 143 S. Ct. 979 (No. 22-338) (Oct. 7, 2022). That petition presented the question "[w]hether the Tobacco Control Act expressly preempts state and local laws that prohibit the sale of flavored tobacco products." *Id.* at i. The Ninth Circuit had ruled that it did not, *see R.J. Reynolds Tobacco Co. v. County of Los Angeles*, 29 F.4th 542 (9th Cir. 2022), joining an unbroken line of federal cases rejecting preemption challenges to state and local prohibitions on the sale of flavored tobacco products. This Court denied the petition in February 2023.

In this case, R.J. Reynolds and other petitioners challenge Senate Bill 793, a California law prohibiting the sale of certain flavored tobacco products. In both the district court and the court of appeals, petitioners acknowledged that their preemption claim was foreclosed by the court of appeals' decision in *County of Los Angeles*. They acquiesced to the dismissal of their preemption claim in the district court, then appealed and successfully asked the court of appeals to summarily affirm. Petitioners now ask this Court to grant plenary review of the same question presented in the *County of Los Angeles* petition:

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

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STATEMENT

A. Legal Background

1. "Until just over a decade ago, tobacco products were regulated almost exclusively by the states and local governments, with little federal involvement." *R.J. Reynolds Tobacco Co. v. County of Los Angeles*, 29 F.4th 542, 547 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 979 (No. 22-338) (Feb. 27, 2023). Early regulations of tobacco "includ[ed] the passage of laws in several states that prohibited tobacco use by both adults and minors." Inst. of Med., Nat'l Acads. of Sci., *Ending the Tobacco Problem* 107 (2007).[1] This Court long ago recognized the broad authority of the States to regulate in that way. In upholding a Tennessee law that categorically banned the sale of cigarettes, the Court concluded that it is "within the province of the legislature to say how far [cigarettes] may be sold, or to prohibit their sale entirely." *Austin v. Tennessee*, 179 U.S. 343, 348-349 (1900).

State and local regulation of tobacco products continued throughout the twentieth century, becoming even more prevalent as scientific evidence confirmed that the use of cigarettes and other tobacco products caused disease and death. *See Ending the Tobacco Problem*, *supra*, at 109-121. In the early 1990s, Congress considered but ultimately failed to enact legislation giving the Food and Drug Administration explicit authority to regulate tobacco. When the FDA nonetheless promulgated regulations in 1996 to assert jurisdiction over tobacco products, this Court struck them down as exceeding the agency's authority. *See*

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[1] https://tinyurl.com/msn6sbuy.

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 128, 161 (2000). Meanwhile, States and local governments continued to enact laws restricting the sale and use of cigarettes and other tobacco products.[2]

2. Congress enacted the Family Smoking Prevention and Tobacco Control Act (TCA) in 2009. Pub. L. No. 111-31, 123 Stat. 1776 (2009), *codified* at 21 U.S.C. §§ 387, *et seq*. The text and structure of the TCA reflect Congress's dual objectives of granting the FDA certain authority "to regulate tobacco products," while at the same "expressly preserving and saving from preemption" much of the pre-existing "state and local regulatory authority over tobacco." *County of Los Angeles*, 29 F.4th at 547-548; *see, e.g.*, 21 U.S.C. § 387a; *id.* § 387p.

The question presented in this case turns on 21 U.S.C. § 387p, the section of the TCA titled "Preservation of State and local authority." That section contains "a unique three-layered preservation provision," *County of Los Angeles*, 29 F.4th at 550, reflecting "Congress's explicit decision to preserve for the states a robust role in regulating, and even banning, sales of tobacco products," *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428, 436 (2d Cir. 2013).

The first of the three layers is a clause titled "Preservation," 21 U.S.C. § 387p(a)(1), which states that,

> [e]xcept as provided in paragraph (2)(A), nothing in [the TCA], or rules promulgated under

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[2] *See, e.g.*, Vt. Stat. Ann. tit. 7, § 1003(d) (2000) (prohibiting sale of "bidi" cigarettes); N.M. Stat. § 57-2-14 (2000) (prohibiting sale of clove cigarettes); N.J. Stat. Ann. § 2A:170-51.6 (2008) (prohibiting sale of certain flavored cigarettes).

> [the TCA], shall be construed to limit the authority of a Federal agency (including the Armed Forces), a State or political subdivision of a State, or the government of an Indian tribe to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under [the TCA], including a law . . . relating to or prohibiting the sale . . . of tobacco products by individuals of any age.

Id. § 387p(a)(1). The preservation clause ensures "that state authority is preserved, with no federal preemption, with regard to enacting . . . any law . . . in critical areas with respect to tobacco products that is in addition to or more stringent than required under [the TCA]." H.R. Rep. No. 111-58 pt. 1, at 45 (2009), 2009 U.S.C.C.A.N. 468 (H.R. Rep.). That preserved authority expressly "includ[es] measures relating to or prohibiting the sale" of tobacco products. *Id.*

The second layer, the preemption clause in Section 387p(a)(2)(A), directs that

> [n]o State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of [the TCA] relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.

21 U.S.C. § 387p(a)(2)(A). That text restricts the scope of preemption to state laws that conflict with or exceed

certain FDA requirements "relating to specified and limited areas." H.R. Rep., *supra*, at 45.

The third and final layer, Section 387p(a)(2)(B), is styled as an "Exception" to the preemption clause, and is commonly referred to as the savings clause. The savings clause directs that the preemption clause "*does not apply to requirements relating to the sale,* distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use *of, tobacco products by individuals of any age*." *Id.* § 387p(a)(2)(B) (emphasis added). In enacting the unique, three-part "Preservation" provision contained in Section 387p, Congress thus "sandwiched the[] preemption clause between preservation and savings clauses that explicitly and repeatedly reiterated local authority over product sales." *County of Los Angeles*, 29 F.4th at 558.

3. Shortly after Congress enacted the TCA, tobacco companies began to challenge local restrictions on the sale of flavored tobacco products on express preemption grounds. In the 14 years since the TCA was enacted, however, no court has agreed with the tobacco industry position that the Act preempts restrictions or prohibitions on the sale of flavored tobacco products.[3]

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[3] *See, e.g.*, *R.J. Reynolds Tobacco Co. v. City of Edina*, 60 F.4th 1170, 1177 (8th Cir. 2023) (per curiam); *County of Los Angeles*, 29 F.4th at 561; *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428, 436 (2d Cir. 2013); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence,* 731 F.3d 71, 82 (1st Cir. 2013); *R.J. Reynolds Tobacco Co. v. Cnty. of San Diego*, 529 F. Supp. 3d 1147, 1159 (S.D. Cal. 2021); *Indeps. Gas & Serv. Stations Ass'ns v. City of Chicago*, 112 F. Supp. 3d 749, 754 (N.D. Ill. 2015).

Of particular relevance here, petitioner R.J. Reynolds Tobacco Company and other plaintiffs sued to enjoin a Los Angeles County ordinance that banned the sale of any flavored tobacco product. *See County of Los Angeles*, 29 F.4th at 551 (describing Los Angeles County, Cal., Code § 11.35.070(E) (2019)). The plaintiffs argued (*id.* at 552, 556) that the county ordinance imposed a "requirement which is different from, or in addition to" the TCA's requirements "relating to tobacco product standards," in violation of the preemption clause. 21 U.S.C. § 387p(a)(2)(A).

After the district court dismissed the complaint, the court of appeals affirmed. *County of Los Angeles*, 29 F.4th at 561. In an opinion authored by Judge VanDyke, the court of appeals examined the "unique tripartite preemption structure" of the TCA, and held that "text, structure, and historical context precludes express preemption" for two reasons. *Id.* at 548, 552.

First, "the phrase 'tobacco product standards' in the TCA's preemption clause does not encompass the County's sales ban." *County of Los Angeles*, 29 F.4th at 553. Considering the phrase in light of the "surrounding categories" and the "historical 'backdrop against which Congress' acted," the court instead concluded that "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." *Id.* at 554, 555. Understood in that way, the preemption clause was consistent with the "careful balance of power between federal authority and state, local, and tribal authority" struck in the TCA, "whereby Congress has allowed the federal government to set the standards regarding how a product would be manufactured and marketed, but has left

states, localities, and tribal entities the ability to restrict or opt out of that market altogether." *Id.* at 555.

"Alternatively," even if a sales ban on flavored tobacco products could be said to relate to a "tobacco product standard" under the TCA's preemption clause, the court of appeals held that it would nonetheless "be 'except[ed]' from preemption by the TCA's savings clause." *County of Los Angeles*, 29 F.4th 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." *Id.* "It therefore fits within the savings clause as a 'requirement[] relating to the sale . . . of[] tobacco products [to] individuals of any age.'" *Id.* (alterations in original) (quoting 21 U.S.C. § 387p(a)(2)(B)). Judge Nelson dissented, *id.* at 567, but the court of appeals later denied rehearing en banc without any judge requesting a vote. *See County of Los Angeles*, C.A. No. 20-55930, Dkt. 59.

The plaintiffs in *County of Los Angeles* then filed a petition for a writ of certiorari in this Court, seeking plenary review of a question identical to the question presented in this case: "[w]hether the Tobacco Control Act expressly preempts state and local laws that prohibit the sale of flavored tobacco products." Pet. i, *R.J. Reynolds Tobacco Co v. County of Los Angeles*, 143 S. Ct. 979 (No. 22-338) (Oct. 7, 2022). They argued that the *County of Los Angeles* decision "directly conflicts" with this Court's preemption precedents, *id.* at 11, 18; "conflicts with the reasoning of decisions from other courts of appeals," *id.* at 26; and presents an issue that is "exceptionally important," *id.* at 29. This Court denied the petition.

B. S.B. 793

The California Legislature enacted S.B. 793 in 2020. *See* S.B. 793, Act of Aug. 28, 2020, ch. 34, 2020 Cal. Stat. 1743 (codified at Cal. Health & Safety Code § 104559.5). S.B. 793 provides that tobacco retailers in California may not sell a "flavored tobacco product" or a "tobacco product flavor enhancer." Cal. Health & Safety Code § 104559.5(b)(1). It defines a "flavored tobacco product" as a tobacco product "that contains a constituent that imparts a characterizing flavor." *Id.* § 104559.5(a)(4). A "characterizing flavor" is a "distinguishable taste or aroma, or both, other than the taste or aroma of tobacco, imparted by a tobacco product or any byproduct produced by the tobacco product." *Id.* § 104559.5(a)(1). The statute directs that a "tobacco product shall not be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information." *Id.* "Rather, it is the presence of a distinguishable taste or aroma, or both, as described in the first sentence of [subsection (a)(1)], that constitutes a characterizing flavor." *Id.*

Shortly after the Legislature enacted S.B. 793, a coalition of manufacturers and sellers of tobacco products—including R.J. Reynolds—succeeded in putting S.B. 793 to a referendum vote. *See* Order, *Agenbroad v. Padilla*, Case No. 34-2020-80003542 (Sacramento Super. Ct. Dec. 10, 2020). That had the effect of suspending the effective date of S.B. 793 until the referendum was approved by a majority of voters. *See* Cal. Const. art. II, § 9(a). More than 63.4 percent of California voters then approved S.B. 793 at the November

2022 general election.[4] By operation of state law, S.B. 793 took effect in December 2022. *See* Cal. Const. art. II, § 10(a); Cal. Elec. Code § 15501(b).

C. Proceedings Below

The petitioners here are R.J. Reynolds Tobacco Company and other members of the tobacco industry. The day after the voters approved S.B. 793, petitioners filed a complaint alleging that the TCA expressly preempts S.B. 793's ban on the sale of flavored tobacco products. Pet. App. 3a.[5] They also filed a motion for a preliminary injunction and an injunction pending appeal. *Id.* at 21a-24a. But they acknowledged that the district court was bound to deny that motion "by Ninth Circuit precedent"—the *County of Los Angeles* decision. D. Ct. Dkt. 13-1 at 1. On that basis, they "acquiesce[d] in the denial" of the preliminary injunction and the injunction pending appeal. *Id.* at 2. The district court then entered an order denying the motion, reasoning that the "Ninth Circuit's decision in *County of Los Angeles* currently forecloses Plaintiffs' express preemption claim." Pet. App. 19a.

Petitioners appealed and moved for an injunction pending appeal in the court of appeals, but again "acquiesc[ed] in the denial of [that motion] because binding Ninth Circuit precedent currently forecloses the express preemption claim." C.A. Dkt. 14 (9th Cir. Nov. 18, 2022). The court of appeals denied the motion. Pet. App. 17a, , *id.* at 16a.

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[4] *See* Cal. Sec'y of State, Unofficial Election Results, Proposition 31 (Dec. 2, 2022), https://tinyurl.com/ycy5xz3e.

[5] Petitioners also alleged a violation of the dormant Commerce Clause, but later withdrew that claim. Pet. 13, n.3.

Petitioners next filed an emergency application for a writ of injunction in this Court, asking the Court to prohibit enforcement of S.B. 793 on the ground that the TCA "expressly preempts state and local laws that prohibit the sale of flavored tobacco products." Appl. i, No. 22A474 (Nov. 29, 2022). They argued that the *County of Los Angeles* decision is "manifestly wrong," *id*. at 2; "directly conflicts" with this Court's preemption precedents, *id*. at 22, 29; "conflicts with the reasoning of decisions from other courts of appeals," *id*. at 30; and "presents issues of imperative public importance," *id*. at 32. In the alternative, they asked the Court to treat the application as a petition for a writ of certiorari before judgment and grant review. *Id.* at 40. This Court denied the application on December 12, 2022, and S.B. 793 took effect nine days later.

In January 2023, the court of appeals granted petitioners' motion to summarily affirm the district court's denial of a preliminary injunction. Pet. App. 16a. Petitioners obtained an extension of time from Justice Kagan to file a petition for a writ of certiorari seeking review of that judgment, but did not ultimately file such a petition. *See* No. 22A910.

In March 2023, the district court dismissed petitioners' complaint, reasoning that the *County of Los Angeles* decision "bars the [p]reemption claim." Pet. App. 4a, 13a. Petitioners had acknowledged that the claim was "foreclosed by Ninth Circuit precedent" and that the district court was "bound to dismiss that claim." D. Ct. Dkt. 34 at 1. Petitioners again appealed, and again moved for the court of appeals to summarily affirm because *County of Los Angeles* "forecloses" their preemption claim. C.A. No. 23-55349, Dkt. 6 at 2. The court of appeals granted the motion

in a one-page summary order, citing *County of Los Angeles*. Pet. App. 1a.

ARGUMENT

Petitioners seek review of the exact same question that came to this Court earlier this year in the *County of Los Angeles* petition. The Court denied review of that petition and there is no reason for a different outcome here.

1. This petition is nearly identical to the petition in *County of Los Angeles* that this Court recently denied. *See R.J. Reynolds Tobacco Co. v. County of Los Angeles*, 143 S. Ct. 979 (No. 22-338) (Feb. 27, 2023). And the core arguments advanced by petitioners here are also the same as those considered by the Court late last year, when it denied petitioners' application for a writ of injunction—and rejected their alternative request for certiorari before judgment. *See R.J. Reynolds Tobacco Co. v. Bonta*, No. 22A474 (Dec. 12, 2022). Petitioners now argue that "certiorari is warranted notwithstanding this Court's previous denials of review on the question presented." Pet. 5. That argument is not persuasive.

Petitioners note that this case does not come to the Court in an "emergency posture as it did late last year," "but rather after final judgment." Pet. 5-6. But the *County of Los Angeles* case likewise arrived at the Court after final judgment, and not in an emergency posture. *R.J. Reynolds v. County of Los Angeles*, 29 F.4th 542, 552 (9th Cir. 2022). This Court nonetheless denied review in *County of Los Angeles* in that final-judgment posture. In this case, the decision that petitioners ask the Court to review is a one-sentence summary affirmance based exclusively on the *County of Los Angeles* decision. Pet. App. 1a.

Petitioners next contend that review is warranted because the "Eighth Circuit has since addressed the question, adding to the circuits opining on the issue." Pet. 6; *see also* Pet. 30-31. But the Eighth Circuit *rejected* R.J. Reynolds' preemption theory. *See R.J. Reynolds Tobacco Co. v. City of Edina*, 60 F.4th 1170 (8th Cir. 2023) (per curiam). The fact that an additional circuit has now joined the First, Second, and Ninth Circuits in holding that the TCA does not preempt sales restrictions on flavored tobacco products makes this petition an even worse candidate for plenary review, not a better one. *See supra* n.3.

Petitioners also argue that "[t]he fact that this case involves one the Nation's largest markets distinguishes it from *[County of] Los Angeles*, where this Court denied certiorari." Pet. 32. But the practical implications of both petitions are comparable. The decision in *County of Los Angeles* recognized that its ruling would have implications far beyond that one county when it emphasized that "at least three states and over 300 local jurisdictions across the country" had "enact[ed] a prohibition on the sale of flavored tobacco products." 29 F.4th at 551. R.J. Reynolds' petition in that case argued that review was warranted because "hundreds of jurisdictions have enacted" similar laws—including, in particular, "S.B. 793," which "cut off one of the nation's largest markets from flavored tobacco products." Pet. 31, *County of Los Angeles*, No. 22-338. This Court nonetheless denied review.

As petitioners acknowledge, moreover, the FDA recently proposed to regulate certain flavored tobacco products, including by banning the manufacture of menthol-flavored cigarettes. Pet. 15; *see also* Appl. 1, No. 22A474 (petitioners' acknowledgment that menthol cigarettes "make up approximately one-third of

the cigarette market").[6] And since this Court's denial of the *County of Los Angeles* petition, the FDA has submitted the proposed regulation to the Office of Information and Regulatory Affairs for review, the last step before the agency may issue the regulation. *See* Weixel, *Biden Administration Looks to Ban Menthol Cigarettes*, The Hill, Oct. 24, 2023, https://tinyurl.com/4u2nxyhu.[7] The increasing prospect of that regulatory change further diminishes the practical significance of this case, because if that regulation is issued it would substantially reduce the number of flavored tobacco products that are restricted only as a result of S.B. 793.

2. Petitioners' remaining arguments (Pet. 13-36) are the same ones they advanced when they unsuccessfully sought certiorari in *County of Los Angeles* (and certiorari before judgment in this case). They are no more persuasive the third time around.

a. Petitioners reiterate (Pet. 13, 15-17, 19-22, 25-26) their preferred interpretation of 21 U.S.C. § 387p, which no court has adopted. In *County of Los Angeles*, the court of appeals explained why the "text, structure, and historical context" of the TCA's "unique three-layered preservation provision" precludes that interpretation. 29 F.4th at 550, 552; *see id.* at 552-561. The brief in opposition to certiorari in that case, and the State's opposition to petitioners' emergency application in this one, both comprehensively respond

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[6] *See* Dep't of Health and Human Serv., FDA, Tobacco Product Standard for Menthol in Cigarettes, 87 Fed. Reg. 26454 (May 4, 2022), https://tinyurl.com/j3d4xvam.

[7] *See also* Off. of Info. and Reg. Aff., Off. of Mgmt. and Budget, Tobacco Product Standard for Menthol in Cigarettes (Oct. 13, 2023), https://tinyurl.com/2zhscz6s.

to petitioners' merits theories. *See* Br. in Opp'n 10-21, *R.J. Reynolds Tobacco Co v. County of Los Angeles*, No. 22-338 (Jan. 20, 2023)); Opp'n to Emergency Appl. 17-32, No. 22A474 (Dec. 6, 2022).

b. As in those prior proceedings, petitioners argue that certiorari is warranted because the decision in *County of Los Angeles* "directly conflicts with this Court's precedents." Pet.13; *see id.* at 14-28. They read those precedents to establish a general rule that States "cannot evade preemption by simply enforcing their standards at the point of sale." *Id.* at 14. But "all preemption arguments[] must be grounded 'in the text and structure of the statute at issue.'" *Kansas v. Garcia*, 140 S. Ct. 791, 804 (2020). None of the precedents cited by petitioners addressed the unique, three-layered "Preservation of State and local authority" provision in 21 U.S.C. § 387p—or "anything like" that provision. *County of Los Angeles*, 29 F.4th at 557. And none of them establishes any categorical rule barring state sales restrictions, as petitioners suggest. To the contrary, the Court's preemption precedents eschew categorical rules and emphasize that the analysis in each case must focus on the specific "language employed by Congress" in a particular statute. *E.g.*, *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252-253 (2004).

Each of the cases discussed by petitioners turned on statutory schemes materially different from the one at issue here. In *Engine Manufacturers*, the Court considered a Clean Air Act provision prohibiting States from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." 541 U.S. at 252 (quoting 42 U.S.C. § 7543(a)). A local air quality district argued that its

rules prohibiting certain fleet operators from purchasing vehicles that did not comply with stringent emissions requirements were not preempted, reasoning that the preemption provision only covered state "production mandate[s] that require[d] *manufacturers*" to comply with emissions standards. *Id.* at 253 (alterations omitted; emphasis added). This Court rejected that theory, explaining that it "confuse[d] standards with the means of enforcing standards"—a "distinction" that was evident in multiple provisions of the Clean Air Act that immediately followed the preemption provision. *Id.* at 253-254 (discussing 42 U.S.C. §§ 7522(a), 7523-7524, 7525).[8] But that scheme is markedly different from what Congress enacted in the TCA—which expressly *preserves* the authority of state and local governments to impose requirements relating to the sale of tobacco products. *See* 21 U.S.C. § 387p.

In *National Meat Ass'n v. Harris*, 565 U.S. 452 (2012), the Court again addressed "a fundamentally different preemption provision," *County of Los Angeles*, 29 F.4th at 557-558. That provision, 21 U.S.C. § 678, preempted state requirements that differed from any Federal Meat Inspection Act (FMIA) requirements "with respect to premises, facilities and operations of any establishment at which inspection is provided under . . . this Act." *Nat'l Meat*, 565 U.S. at 458. This Court held that Section 678 preempted a

[8] In particular, the text and structure of the Clean Air Act established that Congress "[c]learly" contemplated "enforcement of emission standards through purchase requirements," *Engine Mfrs.*, 541 U.S. at 254, thus bringing the district's purchase requirements within the bar on state "attempt[s] to enforce any standard relating to the control of emissions," 42 U.S.C. § 7543(a).

state sales ban that "function[ed] as a command to slaughterhouses to structure their operations in the exact way the [state law] mandates." *Id.* at 464. The sales ban was "a criminal proscription calculated to help implement and enforce . . . other regulations" that set state requirements for the "receipt and purchase" of animals by slaughterhouses, barred the "butchering and processing" of nonambulatory animals, and "mandat[ed] . . . immediate euthanasia" for such animals. *Id.* at 463-464. Those requirements were different from the requirements in the FMIA. *See, e.g.*, *id.* at 462 (the state law and the FMIA "require[d] different things of a slaughterhouse confronted with a delivery truck containing nonambulatory swine").

Unlike the TCA, however, the FMIA preemption provision "did not contain a savings clause that expressly exempted regulations 'relating to the sale' of" products. *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence,* 731 F.3d 71, 82 (1st Cir. 2013). And even setting that difference aside, the state law at issue here is not comparable to the statute held preempted in *National Meat*: It does not "function[] as a command" to manufacturers "to structure their operations in" any particular way, and it does not implement or enforce any substantive requirements about manufacturing. *Nat'l Meat*, 565 U.S. at 464. It leaves manufacturers free to produce flavored tobacco products however they see fit. It just provides that tobacco retailers in California may not sell those products.

Finally, the Court's decision in *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929 (2022), did not even address a preemption question. It construed a provision in the Ysleta del Sur and Alabama and Coushatta Indian Tribes of Texas Restoration Act recognizing a

"dichotomy between prohibition and regulation" of gaming activities on tribal lands. *Id.* at 1938.[9] The Court concluded that Congress meant to incorporate a distinction—recognized in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)—which allowed "'prohibitory' state gaming laws [to] be applied on the Indian lands" but "not state 'regulatory' gaming laws." *Ysleta*, 142 S. Ct. at 1940. But the Court emphasized that the same analysis would not necessarily apply "in another context." *Id.* at 1938. It certainly does not control the interpretation of the "Preservation of State and local authority" provision in the TCA.

c. Petitioners also contend that the court of appeals' decision in *County of Los Angeles* "conflicts with the reasoning of decisions of the First, Second and Eighth Circuits." Pet. 28. As petitioners acknowledge, however, each of those decisions "*upheld* local restrictions" on the sale of "flavored tobacco products." *Id.* (emphasis added). And petitioners are not correct when they assert that "the First and Second Circuits upheld local restrictions . . . based on reasoning that would not permit a blanket prohibition" on sales of tobacco products. *Id.* In fact, the Second Circuit expressly *reserved* the question whether the savings clause could be read to cover "an outright ban on the sale of flavored tobacco," noting that it was unnecessary to reach that issue to resolve the case before it.

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[9] The first subsection of the provision "says that gaming activities *prohibited* by state law are also prohibited as a matter of federal law" on tribal lands; the second subsection "insists that the statute does not grant Texas civil or criminal *regulatory* jurisdiction with respect to" matters related to gaming. *Ysleta*, 142 S. Ct. at 1938.

U.S. Smokeless Tobacco Mfg. Co. v. City of New York, 708 F.3d 428, 435 (2d Cir. 2013).[10] The First Circuit similarly had no occasion to address whether a sales ban would fall within the scope of the savings clause: the ordinance challenged in that case did not impose a "blanket prohibition because it allow[ed] the sale of flavored tobacco products in smoking bars." *Nat'l Ass'n of Tobacco Outlets, Inc.,* 731 F.3d at 82.

Nor does petitioners' criticism (Pet. 30-31) of the reasoning in *R.J. Reynolds Tobacco Co. v. City of Edina*, 60 F.4th 1170 (8th Cir. 2023) (per curiam), provide any basis for granting review in this case. Petitioners fault the Eighth Circuit for applying a "presumption against preemption" in holding that a local ban on flavored tobacco products was not preempted in light of the TCA's savings clause. As petitioners acknowledge (at 31), however, the court of appeals in *County of Los Angeles* held that flavored tobacco bans are not preempted by the TCA even without putting "any presumptive thumb on the scale." 29 F.4th at 553 n.6. So petitioner's critique of the Eighth Circuit's decision would not have made any difference to the outcome of the Ninth Circuit's analysis. If petitioners believed the Eighth Circuit's application of a presumption against preemption warranted plenary review by this Court, they should have filed a petition for a writ of certiorari in that case. They did not.

d. None of petitioners' remaining arguments (Pet. 31-36) justify review. For example, petitioners argue that this case is exceptionally important because

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[10] The reasoning of the Second Circuit on the issues it did decide aligns with the approach of the court of appeals below. *See County of Los Angeles*, 29 F.4th at 555 (citing *U.S. Smokeless* as evidence that "[w]e are not alone in reaching this interpretation of the TCA's unique preemption structure").

"[t]hroughout the U.S. Code, Congress has reserved to the federal government the exclusive power to set uniform product standards for a variety of industries." Pet. 34. But this case concerns "a unique three-layered preservation provision." *County of Los Angeles*, 29 F.4th at 550. Neither the text of the TCA nor that three-layered structure is repeated in any of the other statutes that petitioners invoke. There is thus no basis for fearing that the reasoning in *County of Los Angeles* "will carry over to numerous other preemption clauses." Pet. 35.

Petitioners also contend that review is warranted because States and localities may attempt to use sales restrictions as a way to regulate other tobacco products, such as by banning e-cigarettes "that contain certain ingredients." Pet. 33. But speculation about potential future regulatory actions is no basis for reviewing a decision that addresses only a ban on the sale of certain flavored tobacco products—especially not when that decision is a one-sentence summary disposition that rests entirely on a separate judgment that this Court declined to review just nine months ago.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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