No. 23-207

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This case warrants review for three reasons. *First*, the Ninth Circuit's holding conflicts with this Court's precedents and the reasoning of other circuits. Indeed, this Court has "twice reversed" the Ninth Circuit for doing exactly what it did here: "interpreting an express preemption clause to allow states and municipalities to defeat its entire purpose with a sales ban." *R.J. Reynolds Tobacco Co. v. County of Los Angeles*, 29 F.4th 542, 561–62 (9th Cir. 2022) ("*Los Angeles*") (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)), *cert. denied* 143 S. Ct. 979 (2023); *see* Pet.App.1a (following *Los Angeles*). Nothing California says resolves the conflict between the decision below and *Engine Manufacturers, National Meat*, and *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929 (2022). To the contrary, the Ninth Circuit makes precisely the same textual errors as in those cases, interpreting the term "standard" in a way that nullifies both the preemption clause and the statutory distinction between laws "prohibiting" and "relating to" sales.

California likewise fails to reconcile the Ninth Circuit's reasoning with that of the First and Second Circuits. *See NATO v. City of Providence*, 731 F.3d 71 (1st Cir. 2013); *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428 (2d Cir. 2013). Indeed, the conflict with the Second Circuit's decision is stark. The Second Circuit held that state laws that dictate tobacco manufacturing processes *would be* preempted. But that is precisely what California's law does.

Second, this issue is exceptionally important. Interpreting the TCA's preemption provisions has wide-ranging consequences because of the tobacco industry's size (something California cannot minimize), and because states and localities continue to impose conflicting standards on tobacco products. Even on its own, California's ban cuts off one of the Nation's largest markets for flavored tobacco products. And tobacco aside, the Ninth Circuit's decision jeopardizes numerous other industries that also rely on uniform, national standards. Although California argues the TCA is unique, the core issue is whether a state can end-run federal preemption simply by styling its preferred standard as a sales ban. If so, that holding applies in numerous other tobacco and non-tobacco contexts as well.

Third, this case is an ideal vehicle, something California does not dispute.

ARGUMENT

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

The decision below, which was controlled by *Los Angeles*, conflicts with *Engine Manufacturers*, *National Meat*, and *Ysleta*. Instead of addressing that head-on, California leads with a plea to uncritically treat this petition the same as the one in *Los Angeles*. BIO 10–12. But circumstances have changed—with California's much broader ban taking effect and a fourth court of appeals weighing in on the question presented.

More importantly, however, the decision below contravenes this Court's caselaw and conflicts with

the reasoning of other circuits. California's efforts to reconcile these conflicts fail.

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

1. This Court's precedents (and the TCA's text) refute California's argument that "tobacco product standards" are limited to how a product is manufactured and that states can therefore enforce their own standards at the point of sale. *E.g.*, BIO 15.

a. California contends that *Engine Manufacturers* does not control because it construed "markedly different" language. BIO 14. But the relevant language here is *not* different. Both the Clean Air Act (*Engine Manufacturers*) and the TCA preempt "standards." *Compare* 21 U.S.C. § 387p(a)(2)(A), *with* 541 U.S. at 252. Neither statute defines "standard," so both require looking to the word's plain meaning. 541 U.S. at 253. *Engine Manufacturers*' key holding therefore applies: "a standard is a standard even when not enforced through manufacturer-directed regulation." *Id.* at 254. It is thus no answer to say that manufacturers are "free to produce flavored tobacco products," but "may not sell" them in California. BIO 15. *Engine Manufacturers* rejected an identical argument: "The manufacturer's right to [make federally authorized products] is meaningless in the absence of a purchaser's right to buy them." 541 U.S. at 252, 255.

California nevertheless asserts that the Clean Air Act's preemption clause was absolute, whereas the TCA's preserves some state and local authority. BIO 13–14. This supposed distinction is illusory. The

Clean Air Act preempted *standards*: "It is . . . impossible to find . . . an exception for standards imposed through purchase restrictions rather than directly upon manufacturers." 541 U.S. at 256. And so does the TCA. Nothing in the TCA's preemption clause exempts standards enforced at the point of sale.

Nor does the TCA's "preservation sandwich" change what "standard" means. *Los Angeles*, 29 F.4th at 555; *see* BIO 13. The preemption clause is an express "[e]xcept[ion]" to the preservation clause, 21 U.S.C. § 387p(a)(1), meaning the preemption clause takes precedence. And the savings clause saves a portion of what already is preempted, meaning it cannot change what the preemption clause covers in the first place. Thus, these surrounding clauses neither change what a "standard" is nor distinguish this case from *Engine Manufacturers*.

b. The Ninth Circuit's decision also flouts the statutory text. Both sides agree that preemption analysis "must be grounded 'in the text and structure of the statute.'" BIO 13. California's problem is that nothing in the TCA's text limits "tobacco product standards" to those enforced directly against manufacturers. In fact, Congress crafted one of the TCA's two "[t]obacco product standards" (its ban on certain characterizing flavors in cigarettes) to be enforced at the point of sale. *See* 21 U.S.C. § 387g(a)(1)–(3). Congress thus plainly understood that a ban enforced at the point of sale, much like California's here, is a "tobacco product standard."

California nonetheless parrots the Ninth Circuit's view that other categories in the preemption clause

(*e.g.*, modified risk tobacco product and labeling requirements) implicitly cabin the meaning of "tobacco product standards" because *those other categories* target manufacturing. BIO 5. But Congress specifically described a ban on characterizing flavors as "a tobacco product standard," so those other categories are irrelevant. Regardless, they are not limited to manufacturing. For example, a product is a "modified risk tobacco product" if it "is *sold or distributed* for use to reduce harm." 21 U.S.C. § 387k(b)(1) (emphasis added). And courts have held that a product's website—which has nothing to do with manufacturing—can amount to labeling. *See United States v. Innovative Biodefense, Inc.*, No. 18-996, 2019 WL 2428670, at *4 (C.D. Cal. Feb. 22, 2019).

California also suggests (at 2–3, 5) that limiting tobacco product standards to manufacturing is consistent with one purpose of the TCA: setting national manufacturing standards. But purpose cannot override text. Moreover, California's position torpedoes another congressional purpose: "to continue to permit the sale of tobacco products to adults." TCA § 3(7), Pub. L. No. 111-31, 123 Stat. 1776, 1782 (2009).

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

2. The Ninth Circuit's decision is irreconcilable with this Court's precedents, moreover, even if the TCA were read to preempt only manufacturing standards. That's because *National Meat* held that even where a preemption clause is limited to manufacturing standards, a state cannot prohibit *the sale* of products that depart from the state's standard. 565 U.S. at 464.

Permitting a state to impose "a ban on the sale of [a product] produced in whatever way the State disapproved," this Court explained, "would make a mockery of the [federal statute's] preemption provision." *Id.*

California claims (at 15) its sales ban differs from the one in *National Meat*. But *National Meat*'s core insight is that a state law banning the sale of a product unless it is made a certain way "functions as a command to [manufacturers] to structure their operations" accordingly. 565 U.S. at 464. That's just what California's ban does.

The State also argues (at 15) that *National Meat* is irrelevant because the statute there did not contain a savings clause. Wrong again. The TCA's savings clause cannot alter the preemption clause's meaning. The savings clause instead exempts from preemption certain state laws that would otherwise fall within the preemption clause's scope. Thus, *National Meat* applies: "[I]f [California's] sales ban were to avoid the [act's] preemption clause, then any State could impose any regulation on [tobacco products] just by framing it as a ban on the sale of [products] produced in whatever way the State disapproved. That would make a mockery of the [act's] preemption provision." 565 U.S. at 464. The TCA likewise must preempt sales bans to avoid rendering its preemption clause "a mockery."

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

Los Angeles's alternative holding—that the savings clause saves a ban like California's—also conflicts with this Court's decisions and the TCA.

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

California brushes *Ysleta* aside because it "did not even address a preemption question." BIO 15. That is immaterial. Both the TCA and the *Ysleta* statute recognize a "dichotomy between prohibition and regulation." *Ysleta*, 142 S. Ct. at 1938. And the only way to give that dichotomy meaning in the TCA is to recognize that the savings clause does not save sales prohibitions like California's. Otherwise, the statutory distinction between requirements "relating to" and "prohibiting" sales is meaningless.

California leans heavily (at 15–16) on *Ysleta*'s allowance that its analysis might not apply "in another context." *Ysleta*, 142 S. Ct. at 1938. But California does not identify any contextual difference that could justify ignoring Congress's distinction between prohibition and regulation in neighboring sections of the TCA. *See Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021) (presuming that Congress "acts intentionally" when it "includes particular language

in one section of a statute but omits it in another"). That dichotomy is "the most striking feature" of the text here, just as it was in *Ysleta*. 142 S. Ct. at 1938.

California refuses to defend the Ninth Circuit's assertion that upholding Congress's distinction between "requirements relating to" sales and "prohibitions" of sales would be "inadministrable." *Los Angeles*, 29 F.4th at 559. For good reason. Such policy appeals are better directed to Congress. As *Ysleta* explained, when Congress adopts a distinction between regulations and prohibitions, courts must give it effect, regardless of whether it is difficult (in some cases) to do so. *See Ysleta*, 142 S. Ct. at 1943–44; *Los Angeles*, 29 F.4th at 566 (Nelson, J., dissenting) ("That the line might be hard to draw in some hypothetical future case is no reason to throw the baby out with the bathwater."). In any event, upholding the TCA's distinction presents no difficulty here because there is no question that California's ban is a prohibition—it contains no exceptions.

At bottom, California makes no attempt to assign independent meaning to both phrases; it must assume that "relate to" and "prohibit" have the same meaning. In *Ysleta*, Texas similarly "observe[d] that in everyday speech someone could describe its laws as 'prohibiting' bingo unless the State's time, place, and manner regulations are followed." 142 S. Ct. at 1938. But this Court found that "hard to see," given that Congress used both "regulate" and "prohibit." *Id.* at 1938–39. So too here. "[D]ifferences in language," after all, "convey differences in meaning." *Id.* at 1939.

2. Finally, California doesn't dispute that its interpretation renders "individuals of any age" in the

savings clause superfluous. *See Los Angeles*, 29 F.4th at 565 (Nelson, J., dissenting). That weighs further against California's interpretation. *See Corley v. United States*, 556 U.S. 303, 314 (2009).

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

The Ninth Circuit's decision conflicts with the reasoning of the First, Second, and Eighth Circuits.

Despite California's suggestion otherwise (at 16–17), the narrow scope of the laws in *NATO* and *U.S. Smokeless* (both of which limited sales of certain flavored tobacco products to tobacco bars) is highly significant. "[T]he Second Circuit upheld a more limited regulation that still allowed sales of flavored tobacco, and just required that they take place in tobacco bars." *Los Angeles*, 29 F.4th at 564 (Nelson, J., dissenting). The First Circuit in *NATO* also upheld a local sales restriction by distinguishing between "blanket prohibition[s]" (like California's law here) and "regulation[s] 'relating to' sales," explaining "[t]his difference easily distinguishes *National Meat*." 731 F.3d at 82.

The conflict with the Second Circuit is particularly acute. That court explicitly reasoned "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 [state] 'fram[ed] it as a ban on the sale of [tobacco] produced in whatever way [it] disapproved." *U.S. Smokeless*, 708 F.3d at 434 (emphasis added) (quoting *Nat'l Meat*, 565 U.S. at 464). That, however, is precisely what California's law does here. *See* Pet.

at 18 & n.4. California prohibits manufacturers from "add[ing]" flavors "to a tobacco product during the processing, manufacture, or packing of the tobacco product" by banning the sale of such products. Cal. Health & Safety Code § 104559.5(a)(2), (b)(1). Thus, under the Second Circuit's reasoning, California's law does, in fact, "command" tobacco manufacturers to structure their manufacturing operations "in accordance with locally prescribed standards." That is a flat-out conflict.

The Eighth Circuit's recent decision adds to the discord. It found two interpretations of the savings clause in equipoise and upheld a local flavor ban by relying on a "presumption against preemption"—a presumption that the Ninth Circuit rejected. *Compare R.J. Reynolds Tobacco Co. v. City of Edina*, 60 F.4th 1170, 1176–77 (8th Cir. 2023) (per curiam) (applying presumption), *with Los Angeles*, 29 F.4th at 553 n.6 (rejecting presumption). The Eighth Circuit thus departed from the Ninth Circuit's "focus . . . on the meaning of the TCA's text," *Los Angeles*, 29 F.4th at 553 n.6, because it found the TCA "ambiguous," *City of Edina*, 60 F.4th at 1177.

This Court should resolve the entrenched conflict among the four circuits to have addressed the question presented.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

Nothing California offers undermines the importance of the question presented. *See* Pet. 31–35.

California argues (at 10) that the Court should decline review because it previously declined review in *Los Angeles* and at a preliminary stage in this case.

See R.J. Reynolds Tobacco Co. v. Los Angeles, 143 S. Ct. 979 (2023) (denying certiorari); *R.J. Reynolds Tobacco Co. v. Bonta*, 143 S. Ct. 541 (2022). But the ban in *Los Angeles* applied in the unincorporated areas of a single county. And the statewide case was presented to this Court in an emergency, preliminary posture. Today's case, by contrast, concerns a challenge to a ban in the Nation's largest state, and it arises after a final judgment. Additionally, since this Court last confronted the question, the Eighth Circuit weighed in, further tipping the scales in favor of review.

California also argues (at 17–18) that the Ninth Circuit's holding will not reverberate through other statutes that preempt state "standards" because they do not mirror the TCA. In particular, California highlights that other statutes do not contain preservation or savings clauses. But as explained, the preservation and savings clauses do not change the meaning of "tobacco product standard" in the preemption clause. And as this Court has held, a standard is a standard no matter how it is enforced. *Engine Mfrs.*, 541 U.S. at 254. If California can evade the TCA's preemption clause by simply enforcing its standard at the point of sale, then every state and locality can similarly "make a mockery" of federal preemption in other industries. *National Meat*, 565 U.S. at 464.

Relatedly, "tobacco product standards" extend beyond flavors—they can cover any product "property." And localities are running roughshod over uniform federal standards, imposing immense regulatory costs and confusion where Congress has preempted their involvement. Pet. 33–34. California

nowhere disclaims the ability to regulate *all* properties of tobacco products. That power would upend Congress's design, and foreclosing it requires this Court's intervention sooner than later.

Finally, California unpersuasively disputes the practical stakes. Fundamentally, the different "practical implications" of banning sales in a single county versus banning sales in the Nation's most populous State are plain. BIO 11. And there is no merit to California's suggestion (at 11–12) that FDA's proposal to ban menthol as a characterizing flavor in cigarettes lessens the need for review. That "prospect" is far from certain, BIO 12; *see Tobacco Product Standard for Menthol in Cigarettes*, RIN 0910-AI60 (noting newly delayed target date for rule), https://tinyurl.com/mr49vfbe; indeed, California warns against relying on "speculation about potential future regulatory actions" just a few pages later (at 18). And even if FDA's regulation materializes, it likely would not take effect anytime soon, if at all. *See* RAI Services Co., *Comment from RAI Services Company* (Aug. 3, 2022) (documenting the proposed rule's many serious legal flaws), https://tinyurl.com/mrzkne43. Moreover, California bans the sale of *all* flavored tobacco products, not just menthol cigarettes, including even those flavored products with FDA authorization. *E.g.*, Pet. 9 & n.2.

III. THIS CASE PRESENTS AN IDEAL VEHICLE

California does not meaningfully dispute that this petition presents an ideal vehicle. This important case cleanly presents the core legal question, comes to this Court from final judgment, and four circuit courts have aired the question presented, rendering further percolation unnecessary.

CONCLUSION

This Court should grant the petition.

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Respectfully submitted,

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