No. 20-55930

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

R.J. REYNOLDS TOBACCO COMPANY, et al.,

Plaintiffs/Appellants,

v.

COUNTY OF LOS ANGELES, et al.,

Defendants/Appellees.

On Appeal from the United States District Court
for the Central District of California
(No. 2:20-cv-4880-DSF-KS)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

Cory L. Andrews
John M. Masslon II
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

Counsel for Amicus Curiae
Washington Legal Foundation

March 8, 2021

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as an *amicus curiae* in important federal preemption cases. *See, e.g.*, *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015); *Dolin v. GlaxoSmithKline LLC*, 901 F.3d 803 (7th Cir. 2018).

INTRODUCTION & SUMMARY OF ARGUMENT

If Los Angeles County can impose a ban on FDA-authorized tobacco products based on local standards that differ from the FDA's, then other localities can do the same. Such action would directly contravene the express, and plainly stated, intent of Congress in the Tobacco Control Act, which prohibits state and local governments from banning the sale of tobacco products for failure to conform to state or local standards. Leaving the County's flavor ban in place would defeat

[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

the TCA's stated purpose that the FDA sets standards for tobacco products.

What's more, the FDA has expertise the County lacks. The FDA's work "requires deep knowledge of the human body and the biological effects of the substances we ingest." J. Harvie Wilkinson III, *Assessing the Administrative State*, 32 J.L. & Pol. 239, 246 (2017). And the TCA requires more still. The FDA must (1) understand, assess, and account for the relative health effects of tobacco products by setting "tobacco product standards," 21 U.S.C. § 387g; (2) consider the illicit market for tobacco products in adopting a such standards, *id.* § 387g(b)(2), (e)(1); (3) gather and study data to take further "action . . . applicable to menthol or any artificial or natural flavor," *id.* § 387g(a)(1)(A); and (4) adopt other tobacco product standards if the agency determines, after weighing "the risks and benefits to the population as a whole," that a revised standard "is appropriate for the protection of the public health," *id.* § 387g(a)(3)(A)-(B). These complex issues are best handled by the FDA, with its teams of doctors, scientists, statisticians, and economists, and not by the Los Angeles Board of Supervisors, however wise and well-intentioned its members may be.

The district court saw it differently. It held that the County could ban FDA-authorized tobacco products based on County standards that differ from the FDA's. While conceding that the County's flavor ban "is more restrictive than [other] ordinances previously held not to be preempted" (ER 21), the court found that the ban does not regulate product standards because it does not regulate the manufacturing process. (ER 23) Insisting that the County's ban concerns only the sale of the end product, not how that product is "made," the district court declared the ban free from TCA preemption. (ER 26) At every step, the district court erred.

But the County cannot escape preemption simply by recasting its flavor ban as a regulation of tobacco "sales" rather than tobacco "manufacturing." Standards always target the product itself, so a regulation of tobacco standards is preempted no matter if it is directed to "manufacturing" or to "sales." "[I]t 'would make no sense,'" the Supreme Court has explained, "to allow state regulations to escape preemption because they addressed the purchase, rather than manufacture, of a federally regulated product." *Nat'l Meat Assoc. v. Harris*, 565 U.S. 452, 464 (2012). So too here.

Nor may the County rely on a sweeping construction of the TCA's saving clause to escape preemption. The Supreme Court has rejected—repeatedly—such expansive readings. Many federal laws contain a broad saving clause that protects state and local regulatory power or preserves state and local remedies. Several times, a State or locality has argued that a saving clause permits it to act in a way that undermines the very law in which the saving clause appears. And several times, the Court has rejected that argument and held that a saving clause is not some kind of statutory self-destruct mechanism. The County's reading conflicts with the Supreme Court's commonsense construction of federal saving clauses.

True, the Supreme Court once employed a presumption against express preemption. But it abandoned that presumption in 2016, deciding instead that a court should simply "focus on [a federal law's] plain wording," which "necessarily contains the best evidence of Congress's pre-emptive intent." *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016). Even so, the trial court treated the dead presumption as a reason to interpret the TCA's preemption clause narrowly. That was a mistake. In any event, even a narrow reading of

the TCA's preemption clause must leave each word in the statute some work to do. The trial court's fundamental error was to empty the preemption clause of nearly all meaning.

ARGUMENT

I. THE DISTRICT COURT RELIED ON THE NOW-DEFUNCT PRESUMPTION AGAINST PREEMPTION.

The district judge reasoned that because the TCA's preemption clause is "susceptible to more than one plausible reading," the "general presumption" against preemption compels "the narrow[er] interpretation." (ER26) The judge drew this conclusion from *CTS Corp. v. Waldburger*, 573 U.S. 1, 19 (2014) and *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), both which applied a presumption against express preemption. When a state law regulates an area traditionally subject to a State's police powers, those cases said, it can be preempted only by a federal law with a "clear and manifest" preemptive effect. *CTS Corp.* 573 U.S. at 1; *Medtronic*, 518 at 485.

But *CTS Corp.*'s and *Medtronic*'s anti-preemption presumption is no longer good law. The Supreme Court has "changed its position on the presumption against [express] preemption," *Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 258 (5th Cir. 2019).

A more recent authority, *Puerto Rico v. Franklin California Tax-Free Trust*, says that a court considering "an express pre-emption clause" should "not invoke any presumption against pre-emption." 136 S. Ct. at 1946. It should "instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress's pre-emptive intent." *Id*.

Relying on *Franklin*, this Court now holds that "[w]here the intent of a statutory provision that speaks expressly to the question of preemption is at issue," it does "'not invoke any presumption against pre-emption.'" *Atay v. Cnty. of Maui*, 842 F.3d 688, 699 (9th Cir. 2016) (quoting *Franklin*, 136 S. Ct. at 1946); *see Int'l Bhd. of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin.*, 986 F.3d 841, 853 (9th Cir. 2021) (same).

And this Court's sister circuits likewise view *Franklin* as having replaced *CTS Corp.* and *Medtronic* on that point. *See Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 761-62 & n.1 (4th Cir. 2018) (applying *Franklin*); *Dialysis Newco*, 938 F.3d at 258 (same); *Watson v. Air Methods Corp.*, 870 F.3d 812, 817 (8th Cir. 2017) (same); *EagleMed LLC v. Cox*, 868 F.3d 893, 903 (10th Cir. 2017) (same). Although the switch

has not been universal, see *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 771 n.9 (3d Cir. 2018) (applying *Medtronic*), the "best course is simply to follow as faithfully as [possible] the wording of the express preemption provision, without applying a presumption one way or the other," *Air Evac EMS*, 910 F.3d at 762 n.1.

Even if one were inclined (quixotically) to reject this Court's own authority holding that no presumption against express preemption applies, the presumption would have nothing to contribute here. The TCA's preemption clause is not ambiguous. It preempts any state and local requirement that is "different from, or in addition to," federal tobacco product standards. And no one seriously disputes that the County's flavor ban imposes a requirement that is "different" from the federal requirements.

In any event, a presumption that compels a court to construe a statutory term "narrowly" does not empower a court to strike that term from the statute altogether. As the plaintiffs have shown, even a "narrow" construction of "product standards" cannot give "product standards" and "sales" the same meaning. And if "product standards" must mean something, apart from "sales," it is exceedingly hard to see

how the "characterizing flavor" of tobacco could fall outside that semantic space. *Id.* § 387g(a)(1).

In short, the Supremacy Clause speaks for itself. The Court "should not distort federal law to accommodate conflicting state law." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 622 (2011) (plurality op.). The plaintiffs deserve to have their preemption claim evaluated on the best available evidence of Congress's intent, rather than on a presumption that bears no apparent relation to that question. And that analysis, in turn, should hinge on the plain meaning of the words in the TCA's express preemption provision, read in harmony with the statute as a whole—*not* on the expedient of some *a priori* rule of decision.

The district court erred by reflexively reaching for a non-existent presumption against preemption. That fundamental error at the outset, which infected the rest of the court's preemption analysis, is an independent ground for reversal.

II. THE DISTRICT COURT CONFLATED THE TCA'S PRODUCT STANDARD WITH A MERE MANUFACTURING STANDARD.

According to the district court, because the County's flavor ban "does not direct manufacturers as to which ingredients they may or may not include," it "is not a preempted tobacco product standard." (ER 23)

And if the flavor ban is not a "product standard," the court reasoned, "it does not matter if it is 'different from' or 'in addition to'" the TCA's tobacco product standard. (*Id.*) Contrary to the view of the district court, Congress's ability to safeguard the federal interests at stake in the TCA does not turn on such wordplay.

Put differently, a standard is a standard for preemption purposes no matter how it is enforced or described. *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246 (2004), proves the point. There, California had prohibited anyone from purchasing or leasing any vehicle that flunked California's stringent emissions requirements. *Id.* at 248. But the Clean Air Act forbade States from setting their own emissions standards. *Id.* at 252. Just as the County contends here, California insisted that the challenged ban regulated the "purchase" of vehicles, rather than their "manufacture." *Id.* at 248.

The Supreme Court roundly rejected that argument, which "confuses standards with the means of enforcing standards." *Id*. at 253. California could not, the Court explained, "engraft onto th[e] meaning of 'standard' a limiting component" by insisting that a "standard" means

"only [a] production mandat[e] that require[s] manufacturers to ensure that the vehicles they produce have particular emissions characteristics." *Id.* Treating such restrictions "differently for preemption purposes would make no sense," the Court said, because a "manufacturer's right to sell federally approved vehicles is meaningless" without a "purchaser's right to buy them." *Id.* at 255. Simply put, "a standard is a standard even when not enforced through manufacturer-directed regulation." *Id.* at 254; *see Nat'l Meat*, 565 U.S. at 464 ("[I]t 'would make no sense' to allow state regulations to escape preemption because they addressed the purchase, rather than manufacture, of a federally regulated product.").

This Court has consistently embraced that very approach to federal preemption of local "standards." In *In re Volkswagen "Clean Diesel" Marketing*, 959 F.3d 1201 (9th Cir. 2020), for example, the Court considered whether the Clean Air Act expressly preempts state and local regulators from imposing anti-tampering rules on pre-sale vehicles. The Act precludes local governments from enforcing "any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a). County regulators maintained that their rules

aimed not at enforcing an emissions standard but at prohibiting tampering with emissions-control standards. 959 F.3d at 1218.

The Court disagreed. Invoking *Engine Manufacturers*' rule that "even a requirement 'that certain purchasers may buy only vehicles with particular emission characteristics' constitutes an 'attempt to enforce' a 'standard,'" the Court held that the Act precludes "any restriction that has the purpose of enforcing emission characteristics" for pre-sale vehicles. *Id.* at 1216 (quoting *Engine Mfrs.*, 541 U.S. at 255). "Standards," the Court explained, include not only "numerical emissions levels" with which vehicles must comply, but also "emissions control technology" with which they must be equipped. *Id.* at 1218 (cleaned up).

Likewise, in *Pacific Merchant Shipping Ass'n v. Goldstene*, 517 F.3d 1108 (9th Cir. 2008), owners and operators of ocean-going vessels sought to enjoin California regulations limiting emissions from the diesel engines of such vessels. The plaintiffs argued that the rules were emissions standards preempted by the Clean Air Act. When California answered that the rules were not "emissions standards" because vessel operators could fully comply by merely switching to non-diesel fuels, the

Court was unpersuaded. *Id.* at 1115. California had "set a standard for engine emissions; the means of compliance are irrelevant." *Id.* "It is no answer," the Court declared, that "vessel operators may comply with the [rules] by fuel switching"; the "standards themselves are separate from . . . enforcement techniques." *Id.* at 1115-16 (quoting *Engine Mfrs.*, 541 U.S. at 253).

As these cases show, federal preemption does not turn on categorical framing or clever phrasing. It makes no difference how a state or local regulator enforces its contrary standard. Whether it compels manufacturers to comply, bans the sale of nonconforming goods, or prohibits their purchase altogether, any state or local product standard that differs from the federal standard is preempted.

III. THE COUNTY MISCONSTRUES THE TCA'S SAVING CLAUSE.

"[W]ith respect to a tobacco product," the TCA preempts "any requirement which is different from, or in addition to," federal tobacco product standards. 21 U.S.C. § 387p(a)(2)(A). The TCA's saving clause restores only a small sliver of what the preemption clause takes away. State and local governments may enact "requirements relating to the

sale" of tobacco products (1) to "individuals of any age" or (2) "relating to fire safety standards." *Id.* § 387p(a)(2)(B).

The County advances a sweeping construction of this provision. In reading the TCA's saving clause expansively, the County ignores two fundamental rules of statutory construction. First, it fails to read the TCA's saving clause in context with the TCA itself. "A statute's meaning does not always turn solely on the broadest imaginable definition of its component words." *Epic Sys. v. Lewis*, 138 S. Ct. 1612, 1631 (2018). A court, after all, "construe[s] statutes, not isolated provisions." *King v. Burwell*, 576 U.S. 473, 486 (2015). It is important, then, that a court "read [a statute's] words in their context and with a view to their place in the overall statutory scheme." *Id.* Reading a saving clause out of context can wreak havoc on the operation of the rest of the statute.

Take the TCA's preservation clause. It says that *except* as provided in the preemption clause, the TCA authorizes state and local governments, federal agencies, and the military to adopt requirements "relating to *or prohibiting the sale*" of tobacco products. 21 U.S.C. § 387p(a)(1) (emphasis added). The TCA's saving clause, in contrast,

says only that the preemption clause "does not apply to requirements *relating to the sale*" of tobacco products. *Id.* § 387p(a)(2)(B) (emphasis added). Because "Congress acts intentionally" whenever it "includes particular language in one section of a statute but omits it in another section," *Medina Tovar v. Zuchowski*, 982 F.3d 631, 635 (9th Cir. 2020), Congress's choice to omit the words "or prohibiting" from a nearly identical phrase in the saving clause must be given effect. Here that means giving effect to Congress's intent that state and local governments *not* prohibit the sale of tobacco products based on local product standards.

Second, the County ignores "the commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). "The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission." *Id.* That is the situation here, where a broad reading of a general saving clause goes against specific provisions ensuring that the FDA sets "national standards controlling the

manufacture of tobacco products and the . . . ingredients used in such products." 21 U.S.C. § 387 note.

The Supreme Court has interpreted myriad saving clauses in other federal laws. The Court "has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 870 (2000). Each time, it has read the saving clause before it in a fashion incompatible with the County's reading here.

1. *Nat'l Meat Assoc. v. Harris*, 565 U.S. 452 (2012). The Federal Meat Inspection Act preempts state regulation of slaughterhouses' procedures for inspecting, handling, and slaughtering livestock. A California law prohibited only *the sale* of meat from livestock that had not been inspected, handled, and slaughtered according to the State's regulations. *Id.* at 455, 463-64.

Although the FMIA's preemption clause does "not usually foreclose state regulation of the commercial sales activities of slaughterhouses," the Court unanimously held that California's sales ban was preempted. *Id.* at 463. A contrary holding would have allowed

California to "impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved." *Id.* at 464. Blessing so transparent an attempt to circumvent federal law, the Court insisted, "would make a mockery of the FMIA's preemption provision." *Id.*

2. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). The Airline Deregulation Act contains a saving clause held over from the Federal Aviation Act. Nothing in the FAA, the clause says, "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." *Id.* at 378.

The ADA bars the States from regulating airline prices, routes, or services. *Id.* at 378-79. The *Morales* plaintiffs argued that the FAA's saving clause saved that bar from preempting their state-law deceptive advertising claim. Rejecting this argument, *Morales* observes that "the specific governs the general." *Id.* at 385. Congress, *Morales* concludes, does not "undermine [a] carefully drawn statute through a general saving clause." *Id.* A saving clause cannot overcome a specific

provision—such as the "prices, routes, or services" bar—that divides authority between state and federal law.

3. *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214 (1998). "Nothing in this [law]," the Communications Act of 1934 says, "shall in any way abridge or alter the remedies now existing at common law or by statute." 47 U.S.C. § 414.

A set of rules in the Communications Act required AT&T to sell its services only at rates it filed with the government. A telephone-service broker brought state-law claims that, if successful, would have required AT&T to provide service at a rate lower than AT&T's filed rates. *Id.* at 222-23. *AT&T* holds that the federal rate-filing rules preempt the broker's state-law claims.

The Communications Act's general saving clause, the Court said, changes nothing: "The saving clause cannot in reason be construed as continuing in customers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act." *Id.* at 227-28 (quoting *Tex. & Pac. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)). In other words, the Court explained, "the act cannot be held to destroy itself." *Id.* at 228.

* * *

If Congress had meant for the TCA to categorically exempt from preemption *any* state and local prohibition on tobacco sales, it would have made no sense for Congress to single out "requirement[s] . . . relating to tobacco product standards" as an excepted subcategory of preempted requirements. Nor would the saving clause need to qualify "sales" with "individuals of any age" or "relating to fire safety standards."

Whereas the County relies on the TCA's saving clause to discard specific provisions of the TCA, *National Meat*, *Morales*, and *AT&T* all use a specific statutory provision to limit the scope of a saving clause. The County's reading thus conflicts with the Supreme Court's understanding, grounded in sound principles of statutory interpretation, that a federal saving clause is not an invitation for States and localities to bypass federal law.

A state or local law may complement the TCA; it may not impede it. Reasonably construed, the TCA's saving clause provides only that the TCA does not preempt the County from imposing age-based or fire-

safety regulations. It does not allow for the local regulation of "sales" to defeat federal tobacco product standards.

CONCLUSION

The district court's dismissal order should be reversed.

March 8, 2021

Respectfully submitted,

/s/ Cory L. Andrews

Cory L. Andrews
John M. Masslon II
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

Counsel for Amicus Curiae Washington Legal Foundation

CERTIFICATE OF COMPLIANCE

I certify:

(i) That this brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 3,447 words, excluding the parts exempted by Fed. R. App. P. 32(f).

(ii) That this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared using Microsoft Office Word 16 and is set in 14-point Century Schoolbook font.

March 8, 2021

/s/ Cory L. Andrews

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2021, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

/s/ Cory L. Andrews