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No. 10-224

In the Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,

Petitioner,

v.

KAMALA D. HARRIS *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
KATE COMERFORD TODD
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

KENNETH S. GELLER
Counsel of Record
BRIAN J. WONG
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
kgeller@mayerbrown.com

Counsel for Amicus Curiae

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

This is one such case. The Chamber—which has filed amicus briefs in prior preemption cases, including *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011), *Williamson* v. *Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011), *Bruesewitz* v. *Wyeth LLC*, 131 S. Ct. 1068 (2011), *Wyeth* v. *Levine*, 555 U.S. 555 (2009), *Altria Group, Inc.* v. *Good*, 555 U.S. 70 (2008), *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312 (2008), *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861 (2000),

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no party, counsel for a party, or any person other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of the brief. Letters reflecting the parties' consent to the filing of the brief have been filed with the Clerk.

and *United States* v. *Locke*, 529 U.S. 89 (2000)—is well-situated to address the issue of preemption raised here. Its members—which include meat processors and packers that depend on preemption under the Federal Meat Inspection Act (FMIA or Act), 21 U.S.C. § 678—are engaged in commerce in each of the 50 states. The Chamber's membership includes businesses that are subject in varying degrees to a wide range of federal regulatory schemes that expressly preempt state and local laws. As a result, the Chamber is uniquely suited to offer a broader perspective on preemption and keenly interested in ensuring that the regulatory environment in which its members operate is a consistent one.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FMIA's express preemption provision straightforwardly provides that no State may impose "[r]equirements within the scope of [the Act] with respect to premises, facilities and operations of any [federally inspected] establishment * * * , which are in addition to, or different than those" established by the federal government. 21 U.S.C. § 678.

Petitioner challenges a California statute that makes it illegal for a federally inspected slaughterhouse to, *inter alia*, "receive," "hold," "butcher," or otherwise "process" non-ambulatory swine. Cal. Penal Code § 599f. In effect, State law requires the immediate euthanasia and disposal of non-ambulatory swine as soon as they are discovered. Yet federal law imposes no such requirement. Rather, it contemplates the ante-mortem observation and inspection of non-ambulatory swine, which allows inspectors under the auspices of USDA's Food Safety and Inspection Service (FSIS) to determine if the affected ani-

mal has a communicable disease that might affect a larger population.

The court of appeals, conceiving itself bound by the "presumption against preemption" to give the FMIA's preemption provision "a narrow interpretation," concluded that the California statute was not preempted. Pet. App. 7a-8a. Petitioner's brief explains in detail why the decision below is incorrect. Rather than reprising at length the features of the statutory text and regulatory scheme that support petitioner's reading of the FMIA's preemptive scope, we focus on a problematic and more generally applicable aspect of the decision below, the court's use of a presumption against preemption. Although there is no basis for applying a presumption against preemption in any context, doing so is especially unwarranted when (as here) Congress has expressly stated its intent to preempt state law.

Particularly in the context of express preemption, the presumption against preemption is fundamentally at odds with central principles of preemption law and statutory interpretation. It cannot be reconciled with the settled understanding that preemption turns on congressional intent. A presumption that must yield to any indicia of Congress's preemptive purpose—as ascertained through the usual methods of statutory construction—has very limited application. Thus, one unsurprisingly finds that the Court often ignores the presumption or applies it to no discernable effect, suggesting that the presumption is of limited utility as a practical matter. Other courts struggling to apply this Court's jurisprudence have similarly encountered difficulties trying to make sense of the presumption and deciding how much weight to afford it. Because the pre-

sumption is logically ungrounded and has been applied in a haphazard fashion, this case presents an excellent opportunity to reexamine the applicability of the presumption and clarify that express preemption provisions should simply be given a fair reading, with a thumb neither on the side favoring preemption nor that disfavoring it.

The State respondents have asserted that the presumption against preemption is justified in order to protect the traditional prerogatives of the States. The threat to federalism they invoke is exaggerated, while the remedy they propose—the presumption against preemption—endangers other constitutional values. When Congress includes an express preemption clause in a statute (as it did in the FMIA), Congress's intent to displace state law is obvious and the only remaining issue is the *extent* of preemption intended. This is a straightforward issue of statutory interpretation, and does not implicate our system of federalism or the "respect for the States as independent sovereigns." Cf. State BIO 17 (internal quotation marks omitted).

In other words, whatever the force of the view that matters of federal law should *ordinarily* be approached with due regard for the States' traditional spheres of responsibility (*e.g.*, in matters of health or safety), once Congress has already *explicitly* stated its intent to preempt state law, the balance that Congress has articulated should not lightly be second-guessed by courts or disrupted by interpretive "presumptions." It is, after all, in the political branches that the Constitution has vested the prerogative of refining the balance between the respective roles of the States and of the Federal government. That is the unmistakable import of the Su-

premacy Clause, which declares Federal law the "supreme Law of the Land * * * any Thing in the * * * Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

Thus, application of a presumption against preemption has no legitimate purpose (if ever it does) once Congress has validly enacted a preemption provision pursuant to one of its enumerated powers—and nobody disputes that the FMIA's application to slaughterhouses that receive animals transported in interstate commerce and process them for interstate consumption falls squarely within the heartland of Congress's Commerce Clause power. When courts adopt "narrow" readings of statutory language in order to avoid finding preemption, they frustrate Congress's purpose in establishing a uniform federal regime to govern conduct—a congressional function that takes on additional importance when the alternative is a patchwork of inconsistent state regulation and, worse yet, frustration of important federal regulatory objectives.

This very case aptly illustrates the dangers of the systematic application of a presumption against preemption in express preemption cases. As the United States has persuasively explained, the California statute and the decision below are "misconceived" and "threaten[] to disrupt the * * * inspection activities" carried out by FSIS. U.S. Br. 20; see also Pet. Br. 30-33. Federal law provides for the systematic ante-mortem and post-mortem inspection of livestock. The federal scheme is designed not only to screen out individual animals that are unsuitable for human consumption but also to "implement a *national policy* of humane handling" and to ensure the rapid detection of communicable diseases that could

spread and "destabilize the *Nation's* meat supply." U.S. Br. 10 (emphasis added). Because California law requires the immediate euthanasia of non-ambulatory swine—*i.e.*, before the animal can be separated from the herd, held for disposition, and ultimately observed and inspected ante-mortem by federal inspectors—it disrupts the federal inspection regime and increases the risk that serious diseases could go undetected. The imposition of an alternative regime for processing non-ambulatory swine on the basis of one State's perception that the federal "USDA inspection system" is inadequate is precisely the sort of venturesomeness that the FMIA's express preemption provision was designed to curb. See CA9 App. 195.

Finally, the non-State respondents suggest that the presumption against preemption is justified as a sort of tiebreaker when the ordinary tools of statutory construction are in equipoise and the reading disfavoring preemption is truly "just as plausible" as the one favoring preemption. See *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); HSUS BIO 29-30. There is no principled basis for such a "tiebreaker," since there is nothing intrinsically suspect about preemption. In any event, that principle could have no application in *this* case. As petitioner explains, Congress's intent to preempt state-law requirements pertaining to the operation of federally inspected slaughterhouses—including any attempt to regulate the processing of animals once they have arrived within the premises—is plain on the face of the FMIA's express preemption provision, and is further confirmed by the FMIA's legislative history and the structure of the federal meat inspection regime. There is no countervailing reason to believe that Congress would have wanted to allow States to "fru-

strate FSIS's inspection activity * * * by requiring immediate euthanasia" before federally conducted "ante-mortem inspections" can be completed. U.S. Br. 21. This is an easy case—especially once the presumption against preemption has been laid to rest in the express preemption context.

ARGUMENT

Although the conclusion that California Penal Code § 599f is preempted follows whether or not the presumption against preemption is applied, the Court should take this opportunity to clarify that the presumption should have played no role in the analysis of the FMIA's express preemption provision.

In refusing to find that Section 599f of the California Penal Code is expressly preempted by the FMIA, the court of appeals manifestly erred. After all, as petitioner explains, California law plainly imposes "requirements" with respect to the "premises, facilities and operations" of federally inspected slaughterhouses that are "in addition to[] or different" from those provided for by federal law. Cf. 21 U.S.C. § 678. State law bans receiving, holding, butchering, or processing non-ambulatory swine and requires instead "immediate action to humanely euthanize the animal." Cal. Penal Code § 599f(c). Federal law imposes no such requirement. The FMIA's "explicit pre-emption provision" thus "dictates the result" in this case: preemption of the California statute. See *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 531 (1977).

Although the decision below is incorrect under any standard, we submit that the court of appeals may not have wandered so far astray had it not begun its analysis by declaring that courts must re-

solve cases like this one "consistent[ly] with the presumption against preemption," which it understood to require that any express preemption provision be given a "narrow interpretation." Pet. App. 7a-8a. The court of appeals fundamentally misread the FMIA, and the fact that it ill-advisedly invoked a presumption against preemption did not help matters.

I. A Presumption Against Preemption Is Not Appropriately Applied In Express Preemption Cases.

The application of the presumption against preemption has not been without controversy. A number of current members of the Court have explicitly rejected the presumption's applicability. Earlier this year, a plurality of the Court would have discarded the presumption against preemption altogether. See *PLIVA, Inc.* v. *Mensing*, 131 S. Ct. 2567, 2579-2580 (2011) (plurality op.).[2] The *Mensing* plurality explained that the "Supremacy Clause indicates that a court need look no further than the ordinary meanin[g] of federal law, and should not distort federal law to accommodate conflicting state law." *Id.* at 2580 (internal quotation marks omitted); see also, *e.g.*, *Altria Group*, 555 U.S. at 102 (Thomas, J., dissenting); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S.

[2] It is especially telling that the Court disclaimed a presumption against preemption in *Mensing*, which involved implied preemption, a context in which the argument for a presumption is arguably stronger. Four members of the Court expressly criticized the presumption, stating that "courts should not strain to find ways to reconcile federal law with seemingly conflicting state law." *Id.* at 2580. Thus, even in the context of implied preemption, it now appears the presumption may no longer command a majority of the Court. That is *a fortiori* true here, when the statute includes an express preemption provision.

504, 544 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); see also *Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 256 (2004) (noting that "not all Members of this Court agree" on the "application" of the "presumption against pre-emption") (internal quotation marks omitted).

In some cases, the Court has applied the doctrine when interpreting express preemption provisions. See, *e.g.*, *Altria Group*, 555 U.S. at 77; *Bates*, 544 U.S. at 449; *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996); *Cipollone*, 505 U.S. at 518. But not a single one of the Court's express preemption decisions since 2008 has applied the presumption.[3]

It went unmentioned in any of the opinions in *Chamber of Commerce* v. *Whiting*, 131 S. Ct. 1968 (2011), which interpreted the Immigration Reform and Control Act's express preemption provision. Similarly, earlier this year in *Bruesewitz*, the Court considered the preemptive effect of the Vaccine Act's express preemption provision. Neither the majority opinion nor Justice Breyer's concurring opinion—both of which concluded that the Vaccine Act preempted all design-defect claims against manufacturers of covered vaccines—referenced the presumption against preemption, even though the dissent specifically invoked it to support its argument. Cf. 131 S. Ct. at 1096 n.15 (Sotomayor, J., dissenting).

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[3] Even before, the Court has often decided express preemption cases without applying the presumption. *E.g.*, *Riegel*, 552 U.S. at 330 (holding that the Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act preempted the plaintiff's state-law claims without even mentioning the presumption against preemption); see also pages 13-14 & notes 6-9*, infra*.

Rather, the majority gave a disputed term in the preemption provision "its most plausible meaning using the traditional tools of statutory interpretation." *Id.* at 1082.

And in *Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710 (2009), the Court, although reading the statute at issue as not preempting certain state activities, notably did not rely on any presumption against preemption. The majority did "not invoke[] the presumption against pre-emption," and thought it "unnecessary to do so in giving force to the plain terms" of the provision. 129 S. Ct. at 2720. Similarly, Justice Thomas's partial concurrence and partial dissent explained that there should never be a presumption against preemption in express preemption cases, where there "is conclusive evidence of intent to pre-empt in the express words of the statute itself." *Id.* at 2732 (internal quotation marks omitted).

This case presents an excellent opportunity for the Court to clarify its jurisprudence and resolve the confusion in the lower courts by concluding that the presumption against preemption has no application in the express preemption context.

A. The preemption conflicts with the tools of statutory construction ordinarily used to ascertain Congressional intent.

Applying the presumption in the presence of an express preemption provision conflicts with the central, universally acknowledged rule governing preemption cases: "[p]re-emption fundamentally is a question of congressional intent." *English* v. *Gen.*

Elec. Co., 496 U.S. 72, 78-79 (1990).[4] The "task of statutory construction must in the first instance focus on the plain wording of the [express preemption] clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 62-63 (2002) (internal quotation marks omitted); see also *Whiting*, 131 S. Ct. at 1977 ("When a federal law contains an express preemption clause, we focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.") (internal quotation marks omitted).

Thus, even decisions that have forcefully stated the presumption against preemption have gone on to recognize that the Court's "analysis of the scope of [a] statute's pre-emption is guided by [the] oft-repeated comment * * * that '[t]he purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Lohr*, 518 U.S. at 485 (quoting *Cipollone*, 505 U.S. at 516). "As a result, any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of congressional purpose.'" *Ibid.* (emphasis omitted); see also *New York State Conference of Blue Cross & Blue Shield*, *Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

When Congress has made its preemptive intent known through "explicit statutory language," the Court's task is "an easy one." *English*, 496 U.S. at 79.

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[4] See, *e.g.*, *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992) (plurality opinion); *Cipollone*, 505 U.S. at 545 (Scalia, J., concurring in the judgment in part and dissenting in part); *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 208 (1985); *Hillsborough Cnty.* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 714 (1985).

The Court's "ultimate task * * * is to determine whether state regulation is consistent with * * * the statute as a whole (*Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)), and Congress's "preemptive intent" may be expressed through the "statute's express language or through its structure and purpose" (*Altria Group*, 555 U.S. at 76). It is settled that "[i]f the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." *FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990) (internal quotation marks omitted). Thus, any presumption against preemption "dissolves once there is conclusive evidence of intent to pre-empt in the express words of the statute itself." *Cipollone*, 505 U.S. at 545 (Scalia, J., concurring in the judgment in part and dissenting in part). "Under the Supremacy Clause, * * * [the Court's] job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning." *Id.* at 544. The judicial task is to "determine which state-law claims [the statute] pre-empts, *without slanting the inquiry* in favor of either the Federal Government or the States." *Bates*, 544 U.S. at 457 (Thomas, J., concurring in the judgment in part and dissenting in part) (emphasis added).

Because it is fundamental that preemption turns on congressional intent—and because the Court conducts an inquiry into preemption by "begin[ning] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose" (*FMC Corp.*, 498 U.S. at 57 (internal quotation marks omitted))—any presumption regarding preemption must yield to the ordinary tools of statutory construction when Congress has enacted an ex-

press preemption provision. This analysis starts with the text of the statute, read (only if necessary) in light of the statute's structure, purpose, regulatory context, and legislative history, and leaves no place for the "unreasonabl[e] interpret[ation of] expressly pre-emptive federal laws in the name of" a supposed presumption against preemption. *Altria Group*, 555 U.S. at 102 (Thomas, J., dissenting).

B. The Court has inconsistently applied the presumption and, in more recent cases, has effectively abandoned it.

In light of the primacy of congressional intent, it is hard to discern what work the presumption actually does in practice. To be sure, there are a fair number of cases in which the Court has recited the familiar phrases acknowledging the presumption.[5] But there are numerous express preemption decisions—most recently *Whiting*, *Bruesewitz*, *Cuomo*, and *Riegel*—in which the Court has "said not a word about 'a presumption against . . . preemption, * * * that was to be applied to construction of the text [of such a provision]." *Cipollone*, 505 U.S. at 546 (Scalia, J., concurring in the judgment in part and dissenting in part).[6] In fact, the Court regularly has "refrained from invoking the presumption in the context of express pre-emption." *Altria Group*, 555 U.S. at 99

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[5] *E.g.*, *Altria Group*, 555 U.S. at 77; *Lohr*, 518 U.S. at 485; *New York State Conference of Blue Cross & Blue Shield Plans*, 514 U.S. at 655; *Cipollone*, 505 U.S. at 518; *English*, 496 U.S. at 79; *Hillsborough Cnty.*, 471 U.S. at 715.

[6] Justice Scalia cited *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) and *Norfolk & W. Ry.* v. *Am. Train Dispatchers Ass'n*, 499 U.S. 117 (1991).

(Thomas, J., dissenting).[7] This is true both in cases holding state laws not to be preempted,[8] and in those finding them to be preempted.[9] And even when the Court has acknowledged the presumption against preemption, it has applied the presumption inconsistently. Although the Court has held that the presumption is inapplicable "when the State regulates in an area where there has been a history of significant federal presence" (*Locke*, 529 U.S. at 108), at other times it has said that the presumption governs all federal legislation (*Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981)) or legislation that touches fields where there has been a "historic presence of state law" (*Levine*, 555 U.S. at 1195 n.3).

Because the Court's decisions have done little to clarify the question of what it means to interpret an express preemption provision narrowly, and when this must be done, it is unsurprising that confusion and inconsistency dominate other courts' attempts to apply the presumption against preemption. See *De-*

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[7] Justice Thomas cited *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008); *Engine Mfrs. Ass'n*, 541 U.S. 246; *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Locke*, 529 U.S. 89; and *Geier*, 529 U.S. 861. There are many others. *E.g.*, *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995); *Am. Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995); *FMC Corp.*, 498 U.S. 52; *La. Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355 (1986); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982); *Malone* v. *White Motor Corp.*, 435 U.S. 497 (1978).

[8] See, *e.g.*, *Whiting*, *supra*; *Freightliner Corp.*, *supra*; *La. Public Serv. Comm'n*, *supra*; *Malone*, *supra*.

[9] See, *e.g.*, *Bruesewitz*, *supra*; *Cuomo*, *supra*; *Riegel*, *supra*; *Rowe*, *supra*; *Engine Mfrs. Ass'n*, *supra*; *Buckman*, *supra*; *Locke*, *supra*; *Geier*, *supra*; *Am. Airlines*, *supra*; *FMC Corp.*, *supra*; *Capital Cities Cable*, *supra*; *Fid. Fed. Sav.*, *supra*.

mahy v. *Actavis, Inc.*, 593 F.3d 428, 434 (5th Cir. 2010) (noting "ongoing disagreement * * * as to if, when, and how this presumption applies), *rev'd sub nom*, 131 S. Ct. 2567 (2011); *Farina* v. *Nokia*, 578 F. Supp. 2d 740, 754-55 (E.D. Pa. 2008) (noting that "Supreme Court precedents have not been consistent" and that "[h]ow this presumption against preemption is to be applied" has varied widely depending on context), *aff'd*, 625 F.3d 97 (2010), *cert. pending*, 79 U.S.L.W. 3514 (Feb. 22, 2011).

The Court's 5-4 decision in *Altria Group* has not dispelled this confusion. Although the majority opinion stated in passing that the presumption against preemption applies to express as well as implied preemption analyses (555 U.S. at 77), the Court did not explain how that result could be reconciled with *Riegel*—which was also decided in 2008, but which interpreted the express preemption provision without reference to any presumption against preemption—or the widely accepted tenet that congressional intent is the ultimate touchstone of the preemption inquiry. Nor can *Altria Group* be reconciled with the Court's subsequent express preemption decisions that have not invoked a presumption against preemption. See *Whiting*, 131 S. Ct. at 1977 ("[W]e 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'"); *Bruesewitz*, 131 S. Ct. at 1082 ("We must make do with giving the term its most plausible meaning using the traditional tools of statutory interpretation."); *Cuomo*, 129 S. Ct. at 2720; *id.* at 2732 (Thomas, J., concurring in part and dissenting in part).

This complexity is needless and unwarranted. In the end, we are not aware of any decision in which

the Court found evidence of congressional intent that would have been held sufficient in other contexts, but was rejected because it did not overcome the presumption against preemption. For all of the controversy, the presumption seems to make little difference to how *this* Court decides express preemption cases. But *other* courts have to struggle with faithfully applying this Court's precedent. It is time to abandon the presumption against preemption—at the very least in the express preemption context—and to bring to an end the mischief it has occasioned. Express preemption provisions should be analyzed according to the normal tools of statutory interpretation.

II. The Federalism Concerns That Respondents Have Asserted In Passing Cannot Justify A Presumption Against Preemption.

The presumption against preemption often is said to rest on "principles of federalism and respect for state sovereignty." *Cipollone*, 505 U.S. at 533 (Blackmun, J., concurring in part and dissenting in part). The State respondents insist that the presumption against preemption has particular force when the "state law concerns traditional areas that come within the police power, such as health and safety laws." State BIO 17. This traditionally advanced rationale for the presumption—*i.e.*, that it is necessary to respect the States as "independent sovereigns in our federal system"—does not, however, withstand scrutiny. *Ibid.* And it certainly does not constitute a legitimate reason for imposing a "clear statement" limitation on the scope of express preemption provisions.

A. The Supremacy Clause is a complete response to respondents' asserted federalism concerns.

No federalism concerns inhere in the operation of express preemption provisions because preemption of state law is a necessary consequence of the constitutional plan—in particular, the interplay between Congress's legislative powers and the Supremacy Clause. See *New York* v. *United States*, 505 U.S. 144, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States."). Regardless of how "compelling" an interest a State has in preservation of its law, "under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law"—even one "clearly within a State's acknowledged power, which interferes with or is contrary to federal law"—"must yield." *Gade*, 505 U.S. at 108 (internal quotation marks omitted).

Valid federal legislation has the power to trump state law. U.S. CONST. art. VI, cl. 2. The Supremacy Clause's purpose was "to remedy one of the chief defects in the Articles of Confederation by instructing courts to resolve state-federal conflicts in favor of federal law." David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 402 (2004). There is no historical "support * * * for the conclusion that the [F]ramers intended any * * * presumption to be read into [the Supremacy Clause]." Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 U.C. DAVIS L. REV. 1, 30 (2001).[10] To the

[10] The Court's earliest Supremacy Clause cases give no indication that any sort of presumption against preemption should

contrary, there is every reason to believe the Framers would have regarded the Supremacy Clause as rejecting "a general presumption that federal law does not contradict state law." Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 293 (2000). On its face, the phrase "any [state] law to the contrary notwithstanding" in the Supremacy Clause is a "classic *non obstante* provision," which instructs courts *not* to apply the presumption against implied repeals. *Id.* at 238-240 & nn.43-45 (internal quotation marks omitted).

In other words, the Supremacy Clause was "designed precisely to eliminate any residual presumption" against implied repeals of state law in the face of conflicting federal law. Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 184. Thus, as the plurality explained in *Mensing*:

> The *non obstante* provision in the Supremacy Clause therefore suggests that federal law should be understood to impliedly repeal conflicting state law. [¶] Further, the provision suggests that courts should not strain to find ways to reconcile federal law with seemingly conflicting state law.

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govern analysis of the validity of state laws. See, *e.g.*, *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 343-344 (1816); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796) (applying no presumption in case where state criminal law was superseded by treaty). Nor did the Court in these early cases suggest that special treatment was appropriate for state laws involving exercise of the State's traditional police powers. Chief Justice Marshall took pains to explain for the Court that, if a State's laws "come into collision" with federal law by "being contrary to" acts of Congress, it would be immaterial that the laws were passed "in virtue of a power to regulate [the State's] domestic trade and police." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824).

131 S. Ct. at 2580. In sum, then, "the *non obstante* provision of the Supremacy Clause indicates that a court need look no further than 'the ordinary meaning[]' of federal law, and should not distort federal law to accommodate conflicting state law." *Id.* at 2580 (quoting *Levine*, 555 U.S. at 588 (Thomas, J., concurring in judgment)).

When all is said and done, the issue of constitutional magnitude implicated by the presumption against preemption is not the *vertical* structure of federal-state relations upon which petitioners and their *amici* dwell. After all, "'[t]he relative importance to the State of its own law is not material when there is a conflict with valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)). And "to the extent that other federalism questions remain—the wisdom of national regulation, the balance between regulatory uniformity and policy innovations, etc.—those questions are, by constitutional design, to be *answered by Congress*." Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2092 (2000) (emphasis added).

Rather, the presumption against preemption aggrandizes the judicial branch over the political branches—a classic *horizontal* clash of authority. Courts depart from the proper judicial role when they apply the presumption against preemption at the expense of concrete indicia of congressional intent. The "systematic[] favor[ing]" of "one result over another" in analyzing preemption questions "risk[s] an illegitimate expansion of the judicial function" by "disrupt[ing] the constitutional division of power be-

tween federal and state governments" and by "re-writ[ing] the laws enacted by Congress." Dinh, 88 GEO. L.J. at 2092. Respect for the political branches counsels in favor of not placing a judicial thumb on the scales when interpreting the reach of an express preemption provision.

B. The presumption cannot be justified as a "tiebreaker" or as a clear statement rule.

Respondents reluctantly acknowledge that the "text of a statute obviously controls any express preemption inquiry," but insist that the presumption against preemption still has some role to play when the provision is "inconclusive" or open to other "plausible" meanings that do not result in a finding of preemption. HSUS BIO 29-30; see also State BIO 18 (presumption does not apply when preemption is "clear[]" or there is "no question * * * that preemption exist[s]"). Because, however, the Supremacy Clause of the Constitution points in *favor* of, not *against*, preemption, repackaging the presumption against preemption as a clear statement rule cannot be justified. Respondents therefore are mistaken when they suggest that courts should not give full effect to an express preemption provision absent "clear" or "conclusive" evidence of preemptive purpose or preemptive scope. Such a rule would mesh at best uneasily with the clear statement rules that the Court has applied in other contexts.

As Justice Scalia has explained, clear statement rules are designed principally "to ensure that, absent unambiguous evidence of Congress's intent, extraordinary constitutional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied. *Cipollone*,

505 U.S. at 546 (Scalia, J., concurring in the judgment in part and dissenting in part). Such clear statement rules ordinarily are applied to guarantee that Congress actually has focused on achieving a particular result that gives rise to constitutional concern.[11] But there is nothing extraordinary or concerning about express preemption, which is a routine consequence of the constitutional design.[12]

The presumption against preemption forces Congress to be *doubly* explicit about drafting legislation that potentially encroaches on traditional areas of state authority. According to the presumption's proponents, it is not enough that Congress be explicit about its *intent* to preempt—by assumption, the fact that Congress has enacted an express preemption provision does not suffice. Congress would be required to go still further, and anticipate every area of potential overlap between the federal and state regu-

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[11] *E.g.*, *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) (Congress's intent to abrogate Eleventh Amendment sovereign immunity must be "unmistakably clear in the language of the statute") (internal quotation marks omitted).

[12] A presumption against preemption in the express preemption context would be conceptually incoherent in yet another respect: namely, it would have to coexist alongside the notion of *implied* preemption, under which federal laws can have preemptive effect even "[w]here Congress likely did not focus specifically on the matter." *Lohr*, 518 U.S. at 504 (Breyer, J., concurring). When implied preemption is at issue, Congress *by definition* has not clearly spoken to its intent to preempt, yet the Court remains willing to find preemption. Indeed, four members of the Court were willing to discard the preemption against preemption in the implied preemption context, which makes it especially odd to impose a clear statement rule when dealing with an express preemption provision. See *Mensing*, 131 S. Ct. at 2577-2578.

latory regimes. As Justice Scalia explained in a related context, "the result is extraordinary: The statute that says *anything* about pre-emption must say *everything*; and it must do so with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power." *Cipollone*, 505 U.S. at 548 (Scalia, J., concurring in the judgment in part and dissenting in part).

Thus, a Congress intent on displacing state law would be left with one of two unpalatable options. Congress might try to enumerate and specifically target every conceivable state-law regime subject to preemption. But this would at most be a partial solution, since States would be emboldened to strategically re-characterize their law—*e.g.*, by calling a prohibition against the processing of non-ambulatory swine a regulation of the "kind of animal that may be slaughtered," cf. Pet. App. 9a—in order to wedge open a supposed gap in preemptive coverage, notwithstanding Congress's plainly expressed intent to preempt. See Nelson, 86 VA. L. REV. at 290-291. Or Congress might enact a deliberately over-inclusive preemption provision that sweeps so broadly as to deprive courts of the interpretative latitude to find any possible "ambiguity" or alternative "reading that disfavors pre-emption." Cf. *Bates*, 544 U.S. at 449. Neither outcome serves federalism.

The Constitution entrusts to the political branches the task of allocating regulatory authority between the States and the federal government. Especially in the express preemption context, constitutional principle and pragmatism align and call for the same result: forswearing further reliance on a presumption against preemption that can serve only to unnecessarily distort congressional intent.

III. The FMIA Preempts Section 599f Of The California Penal Code.

The court of appeals believed itself bound to apply the presumption against preemption, which likely contributed to its manifestly erroneous interpretation of the FMIA. Whether or not a presumption against preemption applies, it is plain that, in enacting the FMIA, Congress intended to preempt statutes like the one at issue here, which impose state-law requirements with respect to the operations of federally inspected slaughterhouses that are "in addition to, or different than" those established by federal law. We submit that this result can (and should) be reached more straightforwardly without the analytical underbrush of the presumption and, accordingly, that the Court should take this opportunity to clarify that the presumption has no application.

The appropriate function of the courts in this, as in any other, issue of statutory interpretation is to identify the "most plausible meaning" of a statute "using the traditional tools of statutory interpretation." *Bruesewitz*, 131 S. Ct. at 1082. When employed in the service of gaining a "fair understanding of congressional purpose" (*Lohr*, 518 U.S. at 485-86 (emphasis omitted)), those tools for divining congressional purpose point in a single direction: that the immediate euthanasia and disposal of non-ambulatory swine compelled under Section 599f is not required by federal law and thus is expressly preempted by the FMIA.

A. The plain meaning of the FMIA compels preemption of Section 599f.

The FMIA's express preemption provision provides that no State may impose "[1] [r]equirements

[2] within the scope of [the Act] with respect to premises, facilities and operations of any [federally inspected] establishment * * * , which are [3] in addition to, or different than those" established by the federal government. 21 U.S.C. § 678.

1. There can be no question that Section 599f imposes "requirements." An individual or company who engages in any of the conduct that it prohibits—*e.g.*¸ buying, selling or receiving a non-ambulatory animal; processing, butchering, or selling the meat of a non-ambulatory animal for human consumption; or holding a non-ambulatory animal without taking immediate action to humanely euthanize the animal—faces up to a year in prison and a $20,000 fine. Cal. Penal Code § 599f(a)-(c), (h). As this Court has recognized, the term "requirements" in the context of a preemption statute has a broad meaning. It includes any feature of state-law that has the effect of imposing a "legal duty" or "obligation" to take some action or refrain from others. See *Riegel*, 552 U.S. at 324; *Cipollone*, 505 U.S. at 522-523 (plurality opinion), 548-549 (Scalia, J., concurring in part and dissenting in part). It is difficult to imagine how a State could more effectively "govern[] conduct" (*Cipollone*, 505 U.S. at 521) than to criminalize it, as California has done here.

2. The next condition for preemption is that the requirements imposed by state law fall "within the scope of [the FMIA] with respect to * * * operations of any [federally inspected] establishment." 21 U.S.C. § 678. This condition is also plainly satisfied. The federal government has established a detailed and comprehensive regulatory scheme governing slaughterhouse "operations," including with respect to the humane handling of livestock, 21 U.S.C. § 603(b); 9

C.F.R. §§ 313.1-313.2; ante-mortem and post-mortem inspections, 21 U.S.C. §§ 603(a), 604; 9 C.F.R. pts. 309, 311; and the slaughtering, processing, and butchering of carcasses passed for human consumption, 9 C.F.R. pts. 313, 318.

As soon as a delivery "vehicle carrying livestock enters an official slaughter establishment's premises, the vehicle is considered to be a part of that establishment's premises." FSIS Directive 6900.2, pt. I, § I.V.B (rev. 1, Nov. 25, 2003); see also FSIS Directive 6900.2, ch. II § I (rev. 2, Aug. 15, 2011).[13] It therefore comes within the physical scope of the FMIA and its implementing regulations. See 21 U.S.C. § 606(a) (extending authority of inspectors to "every part of * * * establishment"). Inspectors are authorized to enter delivery vehicles to, *inter alia*, "verify that the establishment is meeting humane handling requirements"—which extend to "[a]ll animals that are on the premises of the establishment," including "on vehicles that are on the premises"—and conduct ante-mortem inspections. FSIS Directive 6100.1 § VIII.A.1 (rev. 1, Apr. 16, 2009); FSIS Directive 6900.1, pt. 1, §§ III, VI.B (rev. 1, Nov. 2, 1998).

Importantly, federal law does *not* require the immediate euthanasia of non-ambulatory swine.[14] An intricate regulatory regime governs the handling and disposition of swine that are discovered to be (or

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[13] Revision 2 of FSIS Directive 6900.2 becomes effective September 15, 2011.

[14] Other non-ambulatory animals are subject to different requirements. For example, non-ambulatory cattle are categorically removed from the human food supply because of the risk of bovine spongiform encephalopathy (*i.e.*, "mad cow disease"). 9 C.F.R. § 309.3(e).

later become) non-ambulatory while on slaughterhouse premises. A non-ambulatory animal is one that "cannot rise from a recumbent position or that cannot walk" for any reason. 9 C.F.R. § 309.2(b). It is immediately identified as a "U.S. Suspect." *Id.* § 301.2. At all times, non-ambulatory swine (like all livestock) are subject to humane handling requirements. FSIS Directive 6900.2 (rev. 1), pt. I, § I.V.B; *id.* pt. III § A; see also FSIS Directive 6900.2 (rev. 2), ch. I, § VI; *id.* Attachment 2 § B.

Such animals are "subject to further examination by an inspector to determine" their ultimate disposition. 9 C.F.R. § 301.2. In the meantime, the non-ambulatory animals must be "separated from normal ambulatory animals" (*id.* § 313.2(d)(1)) and placed in a "covered pen sufficient, in the opinion of the inspector, to protect them from the adverse climatic conditions of the locale while awaiting disposition by the inspector" (*id.* § 313.1(c)). The federal inspector may clear the non-ambulatory swine for slaughter, post-mortem inspection, and further processing if ante-mortem inspection does not reveal that it is unsuitable for human consumption.[15] *Id.* §§ 309.2(b),

[15] Once an animal has been identified as a U.S. Suspect, the slaughterhouse cannot unilaterally release or dispose of the animal. 9 C.F.R. § 309.2(p) ("When any animal identified as a U.S. Suspect is released for any purpose or reason, * * * * the operator of the official establishment or the owner of the animal shall first obtain permission for the removal of such animal from the local, State or Federal livestock sanitary official having jurisdiction."). The court of appeals downplayed this provision, hypothesizing that "there's no reason to suppose that federal officials wouldn't willingly give permission to euthanize downer animals." Pet. App. 12a n.5. *Mensing* makes clear the court of appeals' error: "The question * * * is whether the private party

311.1(a); see generally 21 U.S.C. §§ 604, 606(a); FSIS Directive 6100.1. But the ante-mortem inspection may also result in the non-ambulatory animal being classified as "U.S. Condemned," in which case it is euthanized and its carcass is removed from the premises. See 9 C.F.R. §§ 309.2-309.3, 309.13; *id.* pt. 314.

The ante-mortem observation and inspection of non-ambulatory animals (and other U.S. Suspects) play an important role in keeping the nation's food supply safe. Many signs of disease exhibit themselves only in live animals. *E.g.*, 9 C.F.R. § 309.3(c) (body temperatures). As the United States explains, a regime of systematic ante-mortem inspection "allow[s] inspectors to determine if the affected animals have a communicable disease that signals a threat to the larger swine population." U.S. Br. 5. Early detection of a communicable disease can enable segregation or quarantine of affected animals in time for such steps to be effective, as well as rapid notification of other potentially affected stakeholders. See 9 C.F.R. § 309.5, 309.15; FSIS Directive 6000.1 pts. VI-VII (rev. 1, Aug. 3, 2006).

Because Section 599f purports to dictate how federally inspected slaughterhouses must handle and dispose of non-ambulatory swine—matters that federal law addresses in considerable detail as explained *supra* (at 24-26) and in petitioner's brief at 30-33, 45-50—the requirements that it imposes fall "within the scope" of the FMIA and are "with respect to" slaughterhouse "operations."

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could *independently* do under federal law what state law requires of it." 131 S. Ct. at 2579 (emphasis added).

3. The final condition for preemption is satisfied because Section 599f imposes requirements that are "in addition to, or different than," those established by federal law. California law requires the immediate euthanasia of non-ambulatory swine and prohibits their further processing in the human food supply chain. Federal law does neither. It sets forth detailed procedures for receiving, handling, holding, observing, and inspecting non-ambulatory swine. And it contemplates that at least some non-ambulatory swine will, if cleared by federal inspector, eventually be passed for human consumption. Requiring immediate euthanasia and disposal of non-ambulatory swine (as California law does) is plainly "in addition to" and "different than" (21 U.S.C. § 678) establishing a system for the humane handling and inspection of non-ambulatory swine (as federal law does). It follows that Section 599f is preempted by the FMIA.

B. Even if the FMIA technically *permitted* what Section 599f now *requires*, Section 599f still would impose additional requirements, and so is preempted.

Respondents attempt to escape this conclusion in a variety of ways. But what practically all of them have in common is the unarticulated premise that the California statute is not preempted by the FMIA because state law ostensibly neither requires anything that federal law prohibits nor prohibits anything that federal law requires. For example, respondents assert that "federal regulations require inspection *if* downer animals are to be slaughtered, but the regulations do not require the slaughter of downer animals." State BIO 11; see also HSUS BIO 22. Along similar lines, respondents contend that there

are no "specific" or "affirmative" federal requirements specifying that slaughterhouses *must* receive non-ambulatory swine or that non-ambulatory swine *must* be presented for inspection. HSUS BIO 19, 22-23. Respondents thus submit that slaughterhouses could comply with state law by foreswearing any attempt to slaughter and process non-ambulatory swine for human food consumption.

As an initial matter, respondents' characterization of the federal regulatory scheme is incorrect. As the United States puts it, a slaughterhouse cannot "avoid all FSIS oversight by euthanizing a non-ambulatory animal and spiriting it away from federal inspector." U.S. Br. 23 n.7; see also Pet. Br. 47-48.

But even if respondents' characterization were accurate, it would not avail them in the slightest. Their arguments, at most, show that Section 599f is not subject to *conflict* or *impossibility* preemption (but cf. note 15 and *Mensing*, 131 S. Ct. at 2578-2579) and have no bearing on the applicability of the FMIA's *express* preemption provision. As this Court has explained, a state-law requirement survives the "different from" or "in addition to" standard only if it is "genuinely equivalent" to a pre-existing federal requirement. *Bates*, 544 U.S. at 447, 454; see also *Lohr*, 518 U.S. at 495 (state-law requirement must be "identical"). Even if the existing federal regulatory scheme simply *allowed* the course of conduct that is *required* under state law, the state-law requirements would be "in addition to the federal requirement and thus * * * preempted." *Bryant* v. *Medtronic, Inc.*, 623 F.3d 1200, 1205 (8th Cir. 2010) (internal quotation marks omitted); see also *Cupek* v. *Medtronic, Inc.*, 405 F.3d 421, 424-425 (6th Cir. 2005) (similar).

Thus, even assuming *arguendo* that federal law allowed slaughterhouses to independently or voluntarily "spirit[] * * * away" non-ambulatory swine from the federal inspection regime and thus avoid violating Section 599f's immediate-euthanasia-and-disposal requirement (cf. U.S. Br. 23 n.7), that still would not save the California statute from express preemption. Indulging that assumption, at most it could be said that federal law "permits, but does not require," a slaughterhouse to comply with state law. *McMullen* v. *Medtronic, Inc.*, 421 F.3d 482, 489 (7th Cir. 2005). But that would not change the fact that Section 599f imposes requirements that are not "genuinely equivalent" to those set forth by federal law. *Ibid.* There could hardly be a plainer example of a state-law attempt to impose requirements that are "in addition" to existing federal requirements.

Because the only interpretation of the FMIA's express preemption provision that is "supported by the text and structure of" the statute and regulatory scheme is one that embraces Section 599f of the California Penal Code, there is no need to resort to other "tools of statutory interpretation." *Bruesewitz*, 131 S. Ct. at 1082. Section 599f is expressly preempted by federal law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBIN S. CONRAD
KATE COMERFORD TODD
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

KENNETH S. GELLER
Counsel of Record
BRIAN J. WONG
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
kgeller@mayerbrown.com

Counsel for Amicus Curiae

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