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 FOR AMICI CURIAE PUBLIC CITIZEN, AARP, CENTER FOR RESPONSIBLE LENDING, CONSUMER FEDERATION OF AMERICA, NATIONAL CONSUMER LAW CENTER, AND PUBLIC HEALTH LAW CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are consumer advocacy groups and a legal technical assistance organization interested in the protection of public health and welfare through both state and federal law. Amici are concerned about the increasing invocation of federal preemption by a variety of industries to avoid state health and safety regulation and to cut off consumers' access to the civil justice system. Therefore, amici have a strong interest in the proper application of the interpretive principles that govern cases involving claims of preemption. This case implicates one of those principles—the presumption against preemption. Although the presumption does not often determine the answer to the question whether state law is preempted, it can be an important tool for preserving public protections and respecting the appropriate role of state law in our federalist system.

Public Citizen is a nonprofit organization devoted to research, advocacy, and education on a wide range of public-health and consumer-safety issues, with more than 250,000 members and supporters nationwide. Founded in 1971, Public Citizen has a longstanding interest in fighting exaggerated claims of federal preemption of state health and safety laws, and its lawyers have represented parties in many significant federal preemption cases, including *Williamson v. Mazda*, 131 S. Ct. 1131 (2011), *Warner-*

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[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amici curiae made any monetary contribution to this brief's preparation or submission. The parties' letters of consent to the filing of this amicus brief have been filed with the clerk.

Lambert v. Kent, 552 U.S. 440 (2008) (mem.), *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), and *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

AARP is a nonpartisan, nonprofit organization dedicated to representing the needs and interest of people age 50 or older. As the largest organization in the United States dedicated to addressing the needs and interests of older Americans, AARP is concerned about ensuring strong protections against unfair and deceptive practices in the marketplace that target vulnerable populations, such as older individuals who are disproportionately victimized by many of these practices. AARP believes that state consumer-protection laws play a critical role in protecting consumers and the proper application of the long-standing presumption against preemption is necessary to protect consumers' interests.

Center for Responsible Lending (CRL) is a nonprofit policy, advocacy, and research organization dedicated to exposing and eliminating abusive practices in the market for consumer financial services and to ensuring that consumers may benefit from the full range of consumer-protection laws designed to inhibit unfair and deceptive practices by banks and other financial services providers. CRL has been extensively involved in the debate over preemption of state consumer-protection laws by national banks. CRL regularly testifies before Congress on preemption and consumer-credit issues, and was the principal author of amicus briefs in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007), and *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710 (2009).

Consumer Federation of America (CFA) is a nonprofit association of nearly 300 nonprofit organizations, including consumer, senior citizen, low-income, labor, farm, public power, and cooperative organizations. Founded in 1968 to

advance the consumers' interest through advocacy and education, CFA represents consumer interests before federal and state regulatory and legislative agencies, participates in court proceedings as amicus curiae, and conducts research and public education. CFA, in its work on numerous consumer issues ranging from financial and tobacco regulation, to auto, food and product safety, has urged that federal laws provide a floor and not a ceiling to consumer protections.

The National Consumer Law Center (NCLC) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit corporation in 1969 at Boston College School of Law, NCLC has been a resource center addressing issues such as illicit contract terms and charges, home improvement frauds, debt collection abuses, and fuel assistance benefit programs. NCLC publishes an 18-volume Consumer Credit and Sales Legal Practice Series, served on the Federal Reserve System Consumer-Industry Advisory Committee and committees of the National Conference of Commissioners on Uniform State Laws, and acted as the Federal Trade Commission's designated consumer representative in promulgating important consumer-protection regulations.

The Public Health Law Center is a nonprofit public interest legal center located at the William Mitchell College of Law in Saint Paul, Minnesota. The Center is dedicated to helping local, state, and national leaders improve public health by strengthening law. The Center serves as the National Coordinating Center for the Network for Public Health Law, which offers legal technical assistance to health departments nationwide. The Center also houses the Preemption and Movement Building in

Public Health Project. The Center frequently supports state and local governments in responding to legal challenges based on preemption, and provides education and resources about preemption and the role of local authority in promoting public health policy development.

SUMMARY OF ARGUMENT

This Court's decisions have repeatedly emphasized that "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This "presumption against preemption" has informed many of the Court's decisions concerning both express and implied preemption. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1195 n.3 (2009) (citing cases).

The use of presumptions as tools to resolve ambiguity in statutory language is well established in the Court's jurisprudence. Where the scope of express preemption is unclear, such a tool is necessary, has a constitutional basis, and is consistent with the Court's approach to resolving ambiguities in other contexts.

In considering whether the Federal Meat Inspection Act (FMIA) expressly preempts California Penal Code § 599f, the court below properly acknowledged the presumption against federal preemption of state law. Pet. App. 8a, 9a. The opinion does not state that the presumption affected the court's conclusion that federal law does not expressly preempt § 599f. Even so, if this Court finds the scope of the FMIA's preemption provision ambiguous

in this case, it should apply the presumption against preemption and affirm the decision below.

ARGUMENT

THE PRESUMPTION AGAINST PREEMPTION IS A NECESSARY AND APPROPRIATE TOOL FOR RESOLVING AMBIGUITIES IN EXPRESS PREEMPTION PROVISIONS.

This Court's cases stating a presumption against preemption go back more than a century. *See, e.g., Reid v. Colorado*, 187 U.S. 137, 148 (1902) (Harlan, J.) ("It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested.") (citing *Sinnot v. Davenport*, 63 U.S. 227, 243 (1859)); *Napier v. Atl. Coast Line R. Co.*, 272 U.S. 605, 611 (1926) ("The intention of Congress to exclude states from exerting their police power must be clearly manifested."); *Allen-Bradley Local No. 1111, United Elec., Radio & Mach. Workers of Am. v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942) (citing cases); *Rice*, 331 U.S. at 230 ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."); *see also Cohens v. Virginia*, 19 U.S. 264, 443 (1821) ("To interfere with the penal laws of a State . . . is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately, and

the intention would be clearly and unequivocally expressed.").

The Court has repeatedly held that the presumption applies to cases construing the scope of express preemption provisions. *See, e.g.*, *Altria Group v. Good*, 555 U.S. 70, 77 (2009); *Bates v. Dow AgroSciences, LLC*, 544 U.S. 431, 449 (2005); *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 432-33 (2002); *Medtronic*, 518 U.S. at 485; *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-55 (1995); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992); *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 678-79 (1993) (Thomas, J., concurring in part and dissenting in part) (criticizing majority's partial preemption holding for broad reading of term "subject matter" in express preemption provision because "'historic police powers of the States' to regulate train safety must not 'be superseded . . . unless that [is] the clear and manifest purpose of Congress.'").

In each of these cases, the question was not *whether* the plain language of a federal statute preempted state law to some extent. Rather, the parties agreed that the language of the statute manifested Congress's intent to override state law, and the dispute was over the scope of the preemption. In such circumstances, the presumption against preemption serves as an important tool of statutory construction, providing a principled way for the courts to resolve questions about ambiguous statutory language.

A. The federal courts' basic approach to statutory construction is well established: Courts resolve questions of statutory interpretation, first, by looking "to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."

Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997). The courts have developed various tools to aid in this task, such as ejusdem generis, expressio unius est exclusio alterius, and noscitur a sociis, which aim to assist in ascribing a definite meaning to the words used by Congress to express its intent. "If a court, employing [these] traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, USA v. Natural Res. Defense Council*, 467 U.S. 837, 843 n.9 (1984); *see, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

It is hardly controversial to say, however, that the traditional tools for analyzing text are often inadequate to ascertain the meaning of statutory language. In recognition of this fact, the Court has developed additional tools to be employed when the meaning of a statutory provision is ambiguous. The tools employed depend on the context in which the question arises.

For example, when faced with an ambiguity in a criminal statute, the courts apply a "rule of lenity," under which ambiguous criminal laws are "interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008). In the usual case (as in the Court's express preemption cases), it is undisputed that Congress addressed the particular topic at issue in some fashion, but the intended scope of the law is not clear. For example, in *Santos*, there was no dispute that the statute criminalized activities involving "proceeds" of unlawful activity. *Id.* at 510-11. The question was the meaning of "proceeds"—specifically, whether "proceeds" included receipts or only profits. Applying the presumption embodied in the rule of lenity, the Court plurality chose the narrower reading of the statutory term. *Id.* at 514

("Because the 'profits' definition of 'proceeds' is always more defendant-friendly than the 'receipts' definition, the rule of lenity dictates that it should be adopted.").

Several presumptions used to construe ambiguous statutory language derive from the Court's concern with trenching too broadly on the exercise of state powers, even where the federal government's power to do so is unquestioned. For example, the Court has held that the Eleventh Amendment immunizes the states from suit in federal court. *Edelman v. Jordan*, 415 U.S. 651 (1974). Although Congress may override that judgment pursuant to its legislative powers under the Fourteenth Amendment, *see Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court has insisted that Congress do so in unmistakably clear terms. *See, e.g., Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-46 (1985). Accordingly, where the question arises whether a statute abrogates the states' immunity, the Court's "plain-statement rule" holds that any ambiguity is resolved in favor of the states.

Even where Eleventh Amendment sovereign immunity is not at issue, the Court has held that principles of federalism give rise to a similar rule of statutory construction when the question is whether Congress intended to exercise its Fourteenth Amendment powers to impose enforceable obligations on the states. "Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority," the Court has held that it "should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981). "The rule of statutory construction invoked in *Pennhurst* was, like all rules of statutory construction, a

tool with which to divine the meaning of otherwise ambiguous statutory intent." *EEOC v. Wyoming*, 460 U.S. 226, 244 n.18 (1983).

Again, in construing the applicability to the states of statutes enacted pursuant to Congress's authority under the Commerce Clause, the Court has adopted a plain-statement rule. *See Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). As the Court explained, "[i]n the face of [an] ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions." *Id.* Notably, in *Gregory*, there was no question that Congress intended to extend the coverage of the statute involved (the Age Discrimination in Employment Act (ADEA)) to the states—the ADEA plainly applies to some state employees. *Id.* at 467. Rather, as in many such cases, the question was the scope of the statute's application to the states, and specifically in *Gregory*, whether state judges were among the state employees covered by the ADEA. *Id.* at 464-65.

Similarly, the Court has held that, when legislating pursuant to its spending power, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S. at 17 ("By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."); *see Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *see also Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 781 (2000) (presumption that "person" does not include the states).

In addition, the Court has developed tools to resolve ambiguities in statutory language in a variety of other circumstances. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (stating "longstanding rule requiring a clear state-

ment of congressional intent to repeal habeas jurisdiction"); *United States v. Mead Corp.*, 533 U.S. 218, 227, 229 (2001) (deference to agency's reasonable interpretation of ambiguous statutory provision it is charged with implementing); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995) ("strong presumption" in favor of judicial review of final agency action); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *cf. Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (noting common-law rule that ambiguous contract language should be construed against drafting party).

B. Like these other established doctrines, the presumption against preemption provides a principled way to resolve ambiguities in statutory language. And like the plain-statement rule recognized in the Eleventh Amendment, Fourteenth Amendment, and Commerce Clause contexts, the presumption derives from the federalist system at the heart of our constitutional structure. *See Gregory*, 501 U.S. at 461. As the Court stated in *Medtronic*, "because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." 518 U.S. at 485; *see Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (finding no preemption of state law and observing that "the structure and limitations of federalism . . . allow the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons'") (quoting *Medtronic*, 518 U.S. at 475) (some internal quotation marks omitted). The

presumption against preemption "provides assurance that the 'federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

Like the plain-statement rule, the presumption against preemption helps to ensure that, "although the courts will still have to struggle with statutory language, they will be working with an anchor holding them to Congress' preemptive intent." Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 Hastings Const. L.Q. 69, 113 (1988) (footnote omitted). That is, the "presumption, if consistently applied, . . . shift[s] authority for making preemption decisions from the courts to Congress." Thomas Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727, 728 (2008); *see* Bradford Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1425 (2001) (presumption against preemption "safeguard[s] federalism by ensuring compliance with federal lawmaking procedures" and "ensure[s] that courts do not displace state law in the name of a command Congress did not actually enact into law").

Also like the plain-statement rule, the presumption facilitates the proper division of functions between the legislative branch and the judicial branch by requiring Congress to define precisely the areas of law in which it intends to oust state authority. "[R]equiring that Congress speak clearly will help ensure that its decision to preempt is the product of a deliberate policy choice[.]" Betsy Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. Rev. 559, 627 (1997); *see* Wolfson, 16 Hastings Const. L.Q. at 113 (presumption "requir[es] Congress to deal honestly in settling the expectations of those who are subject to regulation").

In fact, in *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), the Court explicitly invoked *Gregory*'s plain-statement requirement in support of its holding that a provision of the Federal Communications Act did not expressly preempt a Missouri statute:

> Hence the need to invoke our working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires.

Id. at 140; *see id.* at 141 (Scalia, J., joined by Thomas, J., concurring in the judgment) (also invoking *Gregory*'s "clear statement" requirement). Other opinions also correlate the presumption against preemption with a plain-statement rule. *See Gonzales v. Oregon*, 546 U.S. at 291 (Scalia, J., joined by Roberts, C.J., and Thomas, J., dissenting) (referring to "clear-statement rule based on the presumption against pre-emption"); *Cipollone*, 505 U.S. at 533 & n.1 (Blackmun, J., joined by Kennedy, J., and Souter, J.) (concurring in part, concurring in the judgment in part, and dissenting in part) (comparing rule that "[w]e do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language" to Eleventh Amendment plain-statement rule).

Moreover, Congress has known for more than a century that a presumption against preemption will be applied where the scope of statutory preemption is ambiguous, if the topic at issue is one within the states' traditional areas of concern. Thus, applying the presumption is consistent with the background understanding of Congress as it has legislated over many years. *See Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 206 (1991) ("When the

issue to be resolved is one of statutory construction, of congressional intent to impose monetary liability on the States, the requirement of a clear statement by Congress to impose such liability creates a rule that ought to be of assistance to the Congress and the courts in drafting and interpreting legislation."); *cf. AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 397 (1999) (affording *Chevron* deference to agency interpretation and noting that "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency").

C. Petitioner NMA does not take issue with the presumption against preemption as a general matter, but questions its applicability here. In contrast, its amicus Chamber of Commerce broadly argues that the Court should disavow the long-stated presumption. Primarily, the Chamber asserts that a presumption makes no sense in the context of express preemption because, there, Congress has explicitly stated an intent to preempt. This argument misses the point.

Here, as on most disputes about express preemption, the parties agree that a federal statute preempts state law to some extent. The question is not *whether* it preempts, but *what* it preempts. *See* Pet. App. 8a-9a. In such cases, the presumption comes into play in determining the effect of the express preemption provision on the state law at issue—for example, whether a state law "relates to" a covered employee benefit plan within the scope of ERISA's express preemption provision, 29 U.S.C. § 1144(a), or, in this case, whether activity addressed in a particular state law falls within the scope of the term "operations" in the FMIA's preemption provision, 21 U.S.C. § 678. The Chamber (at 12-13) argues that a presumption is not needed to discern the scope of express preemption provisions, but it fails to identify another tool of statutory

construction to replace it when plain meaning does not suffice to resolve a case.

The Chamber is correct that the presumption is not always needed, but only in the sense that the Court in many cases sees no ambiguity in the application of a preemption provision to the case before it. *See*, *e.g.*, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1978-79 (2011) (finding scope of provision clear); *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710, 2720 (2009) (presumption against preemption not invoked where "unnecessary to do so in giving force to the plain terms of the [statute]").

On the other hand, like any statutory provision, an express preemption provision may be ambiguous in its scope or meaning. *See*, *e.g.*, *Cal. Div. of Labor Standards Enforcement v. Dillingham Const.*, 519 U.S. 316, 325 (1997); *N.Y. State Conference of Blue Cross & Blue Shield Plans*, 514 U.S. at 655; *Cipollone*, 505 U.S. at 518. When faced with such a provision, it is no answer to say that the preemption question is, "by constitutional design, to be *answered by Congress*." Chamber Br. 19 (emphasis in original, citation omitted). Congress has already spoken, and the question facing the court is what Congress's words mean or how they apply to the circumstances before the court. In such a case, as the Court has recognized, "extrinsic aids to construction" may be used "to solve . . . an ambiguity." *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83 (1932), *cited in Chamber of Commerce v. Whiting*, 131 S. Ct. at 1980.

To be sure, if this Court construes an express preemption provision differently than Congress intended, Congress can then amend the provision to speak more clearly. *See* Grey, 77 B.U.L. Rev. at 627. But that is as true when the Court gives a narrow construction as when it gives a broad one. Faced with an ambiguity, the courts must make

a choice, and the presumption against preemption is a tool to ensure that the choice is made on a basis that is consistent with the principles underlying our federalist system and with other judicial tools of statutory construction. These concerns dictate that the courts should err on the side of requiring Congress to make the choice to preempt, rather than requiring Congress to correct an overbroad preemption ruling by the courts.

While generally arguing that the Court needs no tool to resolve ambiguity, the Chamber (at 20) eventually suggests that the Supremacy Clause weighs *in favor* of preemption. This suggestion runs directly counter to this Court's jurisprudence. As the Court has noted, the power granted by the Supremacy Clause to preempt state law is "an extraordinary power in a federalist system," and one that the Court "must assume that Congress does not exercise lightly." *Gregory*, 501 U.S. at 460. Although the Supremacy Clause allows federal law to override state law, the Chamber is wrong to say that the Supremacy Clause exhibits a preference for preemption. The Clause provides that state law must yield to federal law when the two conflict or when federal law expressly preempts state law, but it nowhere expresses a preference for federal laws that conflict with and preempt state law. And it cannot credibly be read to support the Chamber's suggestion that express preemption provisions should be broadly construed.

The discussion in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2579-80 (2011), of the Supremacy Clause as a "non obstante" provision is not to the contrary. In *PLIVA*, four Justices took the view that the Supremacy Clause "suggests that federal law should be understood to impliedly repeal conflicting state law." *Id.* at 2580. Thus, they stated, the Clause indicates that courts "need look no further than the 'ordinary meaning' of federal law, and

should not 'distort the new law to accommodate the old.'" *Id.* (brackets omitted). Whether or not this view of the Supremacy Clause is correct, it does not require the conclusion that a presumption against preemption should not apply in situations where the "ordinary meaning" of statutory language is ambiguous. In such a case, as here, the issue is not whether to "distort" the federal statute to accommodate state law. Rather, the issue is whether to adopt one of two possible readings of statutory language.

Furthermore, even accepting the "non obstante" view of the Supremacy Clause, the presumption against preemption has a strong foundation in the constitutional design.

> The Supremacy Clause is an indispensable feature of our federal system, but so is the concept of enumerated, limited sources of federal power with residual power lying in the states. . . . A presumption against a broad reading of federal law that purports to preempt state law expressly . . . serves a different function. Like other "clear statement" rules it operates to ensure that the federal political process has focused upon the displacement of state authority before it acts to do so. Without such a rule there is no assurance that in fact Congress has attended to the consequences of displacing state authority.

Calvin Massey, *Federalism and the Rehnquist Court*, 53 Hastings L.J. 431, 511-12 (2002) (responding to Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 293-98 (2000)). Indeed, if the Supremacy Clause provided the only constitutional principle relevant to construing the scope of federal laws that displace state authority, the clear-statement principle of *Gregory* would be baseless.

D. In this case, the question presented turns on the meaning of the term "operations" in the FMIA. The court below held that California Penal Code § 599f does not address the operations of slaughterhouses; it addresses the types of meat that may be sold for human consumption. The court noted the presumption against presumption, but its analysis started and ended with "the language of the statute," which it found unambiguous. Pet. App. 9a ("Starting, as we should, with the language of the statute, we find no express preemption."). Thus, the presumption may not be needed to resolve this case. Nonetheless, to the extent that the Court finds ambiguity in the scope of the FMIA's express preemption provision, the presumption supports a narrow reading and affirmance of the conclusion that the FMIA does not expressly preempt § 599f.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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