

In the Supreme Court of the United States

PHILIP MORRIS USA INC., PETITIONER

v.

ARMAND FONTAINE, individually and as personal
representative of the Estate of Barbara
Ellen Fontaine

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS SUPREME JUDICIAL COURT*

**BRIEF OF MANHATTAN INSTITUTE AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

ILYA SHAPIRO
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.
institute

MARK A. PERRY
Counsel of Record
WEIL, GOTSHAL & MANGES LLP
2001 M Street NW
Washington, DC 20036
(202) 682-7000
mark.perry@weil.com

ROBERT B. NILES-WEED
CATHERINE E. CAZES
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153

TABLE OF CONTENTS

Interest of <i>amicus curiae</i>	1
Introduction and Summary of Argument	2
Argument	3
I. This Court has rightly held that express pre-emption provisions should be interpreted fairly, not narrowly	3
A. The presumption was a short-lived misadventure	4
B. The Court was right to abandon the presumption	7
II. This Court should grant certiorari to overrule <i>Altria</i> and inter the presumption	10
A. Courts continue to rely on <i>Altria</i> to invoke the presumption.....	11
B. Only this Court can end the confusion—and it should do so in this case.....	15
Conclusion	17

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Agostini v. Felton</i> , 521 U.S. 203 (1997).....	12
<i>Altria Grp., Inc. v. Good</i> , 555 U.S. 70 (2008).....	3, 5, 6, 10-16
<i>Bates v. Dow Agrosciences LLC</i> , 544 U.S. 431 (2005).....	5, 6
<i>Biden v. Nebraska</i> , 600 U.S. 477 (2023).....	9
<i>BP p.l.c. v. Mayor & City Council of Balt.</i> , 593 U.S. 230 (2021).....	8
<i>Calabria Ristorante, Inc. v. Ruggiero Seafood, Inc.</i> , 706 F. Supp. 3d 489 (D.N.J. 2023)	13
<i>Cal. Rest. Ass’n v. City of Berkeley</i> , 89 F.4th 1094 (9th Cir. 2024)	14, 16
<i>Chamber of Com. v. Whiting</i> , 563 U.S. 582 (2011).....	2, 6, 7, 12
<i>Cipollone v. Liggett Grp., Inc.</i> , 505 U.S. 504 (1992).....	2-6, 9-10, 15, 16
<i>Consumer Data Indus. Ass’n v. Platkin</i> , 2024 WL 1299256 (D.N.J. Mar. 27, 2024).....	13
<i>CSX Transp., Inc. v. Easterwood</i> , 507 U.S. 658 (1993).....	6, 7
<i>Cuomo v. Clearing House Ass’n</i> , 557 U.S. 519 (2009).....	6
<i>De Buono v. NYSA-ILA Med. & Clinical Servs. Fund</i> , 520 U.S. 806 (1997).....	5
<i>Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan</i> , 938 F.3d 246 (5th Cir. 2019).....	14

<i>Encino Motorcars, LLC v. Navarro</i> , 584 U.S. 79 (2018)	8
<i>Food Mktg. Inst. v. Argus Leader Media</i> , 588 U.S. 427 (2019)	8
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	9
<i>Happel v. Guilford Cnty. Bd. of Educ.</i> , 913 S.E.2d 174 (N.C. 2025)	13
<i>Iowans for Alternatives to Smoking & Tobacco</i> , <i>Inc. v. Mosiman</i> , 183 F.4th 1040 (8th Cir. 2026)	13
<i>Loper Bright Enters. v. Raimondo</i> , 603 U.S. 369 (2024)	8, 15
<i>Lupian v. Joseph Cory Holdings LLC</i> , 905 F.3d 127 (3d Cir. 2018)	12
<i>Medtronic, Inc. v. Lohr</i> , 518 U.S. 470 (1996)	5, 11, 12, 13
<i>Monsanto Co. v. Durnell</i> , 146 S. Ct. 2001 (2026)	7
<i>N.Y. State Conf. of Blue Cross & Blue Shield</i> <i>Plans v. Travelers Ins. Co.</i> , 514 U.S. 645 (1995)	5
<i>Octane Fitness, LLC v. ICON Health & Fitness</i> , <i>Inc.</i> , 572 U.S. 545 (2014)	3
<i>Puerto Rico v. Franklin Cal. Tax-Free Tr.</i> , 579 U.S. 115 (2016)	2, 3, 7, 11-15
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947)	4
<i>Riegel v. Medtronic, Inc.</i> , 552 U.S. 312 (2008)	6
<i>R.J. Reynolds Tobacco Co. v. City of Edina</i> , 60 F.4th 1170 (8th Cir. 2023)	12

<i>Rodriguez de Quijas v. Shearson/Am. Express, Inc.,</i> 490 U.S. 477 (1989)	11
<i>Shuker v. Smith & Nephew, PLC,</i> 885 F.3d 760 (3d Cir. 2018)	11, 12
Constitutional Provisions & Statutes	
U.S. Const. art. VI, cl. 2	8
15 U.S.C. 1334(b)	5
Other Authorities	
Amy Coney Barrett, <i>Substantive Canons and Faithful Agency</i> , 90 B.U. L. Rev. 109 (2010)	9
Thomas W. Merrill, <i>Preemption and Institutional Choice</i> , 102 Nw. U. L. Rev. 727 (2008)	9
Caleb Nelson, <i>Preemption</i> , 86 Va. L. Rev. 225 (2000)	8, 10
Catherine M. Sharkey, <i>Products Liability Preemption: An Institutional Approach</i> , 76 Geo. Wash. L. Rev. 449 (2008)	9

In the Supreme Court of the United States

No. 26-235

PHILIP MORRIS USA INC., PETITIONER

v.

ARMAND FONTAINE, individually and as personal
representative of the Estate of Barbara
Ellen Fontaine

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS SUPREME JUDICIAL COURT*

**BRIEF OF MANHATTAN INSTITUTE AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

INTEREST OF *AMICUS CURIAE*¹

The Manhattan Institute for Policy Research (“MI”) is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. Through its constitutional studies program, MI works to advance the Constitution’s original public meaning and to promote transparent, politically accountable government. To that end, MI regularly files

¹ Pursuant to S. Ct. Rule 37.6, no counsel for any party authored this brief in whole or in part and no person or entity other than *amicus curiae* and its counsel made a monetary contribution to its preparation or submission. Pursuant to S. Ct. Rule 37.2, *amicus curiae* gave timely notice to all parties of its intent to file this brief.

amicus briefs on questions of statutory interpretation in this Court and other courts. How courts construe express pre-emption provisions bears directly on the faithful interpretation of statutory text, the uniformity of national markets, and the public's ability to identify which sovereign is accountable for the law that governs it.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Cipollone v. Liggett Group, Inc.*, Justice Scalia, joined by Justice Thomas, criticized the Court for “announc[ing] what, on its face, is an extraordinary and unprecedented principle of federal statutory construction: that express pre-emption provisions must be construed narrowly.” 505 U.S. 504, 544 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). “Under the Supremacy Clause,” Justice Scalia instructed, this Court’s “job is to interpret Congress’s decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning.” *Ibid.*

Justice Scalia proved prophetic. In the years that followed, the Court applied this extraordinary and unprecedented presumption inconsistently, over the dissent of a growing number of Justices. The Court finally dispensed with the presumption in 2016: Where a “statute ‘contains an express pre-emption clause,’ we do not invoke any presumption against pre-emption but instead ‘focus on the plain wording of the clause.’” *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016) (quoting *Chamber of Com. v. Whiting*, 563 U.S. 582, 594 (2011)). The life of the presumption against express pre-emption was nasty, brutish, and short.

But a zombie presumption lives on. The Court’s application of the presumption to narrowly construe an

express pre-emption provision in *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008), remains on the books. Courts continue to rely on *Altria* to adopt second-best readings of statutes across the U.S. Code in the name of a presumption that never should have existed and which this Court has long abandoned. That is exactly what happened in the decision below, where the court relied on the presumption to further narrow the pre-emptive scope of the very same statute under which the presumption was born and raised in *Cipollone* and *Altria*.

This Court should grant certiorari, overrule *Altria*, and end the presumption where it began—interring it for good.

ARGUMENT

I. This Court Has Rightly Held That Express Pre-emption Provisions Should Be Interpreted Fairly, Not Narrowly

This Court’s usual method of statutory interpretation “begins and ends with the text.” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014). Express pre-emption provisions—statutory text like any other—should be no exception.

Yet for nearly a quarter century, from *Cipollone* to *Franklin*, this Court invoked a “presumption against pre-emption” to construe Congress’s words narrowly rather than fairly. Whatever force such a presumption may have in cases involving *implied* pre-emption where Congress has not directly addressed the issue—a question not raised by this petition—a presumption is inappropriate in cases involving *express* pre-emption, where Congress has spoken to pre-emption and it is a court’s job to interpret Congress’s enacted text. It is for this reason that the presumption against express pre-emption

was criticized from its inception, applied half-heartedly even in its heyday, and ultimately abandoned—at least by this Court.

A. The Presumption Was a Short-Lived Misadventure

The presumption favoring narrow interpretations of express pre-emption provisions was invented in 1992. A similar presumption had applied in *implied* pre-emption cases, based on an “assumption that the historic police powers of the States were not to be superseded by [a] Federal Act *unless* that was the clear and manifest purpose of Congress.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). On this reasoning, no such presumption was needed where Congress spoke clearly and manifestly to pre-emption with an express pre-emption provision. But the Court in *Cipollone* drew exactly the opposite conclusion: Interpreting the express pre-emption provision in section 5(b) of the Federal Cigarette Labeling and Advertising Act (the Labeling Act), the Court recited *Rice*’s assumption as the starting point for addressing any and all “issues arising under the Supremacy Clause.” *Cipollone*, 505 U.S. at 516. From there, the Court fashioned its new rule of statutory interpretation: “the precise language of” an express pre-emption provision must be “fairly but—in light of the strong presumption against pre-emption—narrowly construe[d].” *Id.* at 523.

The presumption infected this Court’s interpretation of statute after statute over the next two decades. The Court narrowly interpreted the Employee Retirement Income Security Act’s express pre-emption provision in light of the “considerable burden of overcoming ‘the starting presumption that Congress does not intend to

supplant state law.” *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995)). It invoked the presumption “to support a narrow interpretation of [the] express command” in the Medical Device Amendments. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). And the Court adopted “the reading that disfavors pre-emption” when confronted with two “plausible” readings of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)—rather than determining which interpretation was the better of the two. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

Most relevant here, the presumption dictated this Court’s interpretation of the Labeling Act in *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008). The case involved the same express pre-emption provision at issue in *Cipollone*, which bars any state-law “requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or promotion of any cigarettes.” 15 U.S.C. 1334(b). The majority began with the presumption: “[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily ‘accept the reading that disfavors pre-emption.’” *Altria*, 555 U.S. at 77 (quoting *Bates*, 544 U.S. at 449). From there, the majority concluded that imposing liability under the Maine Unfair Trade Practices Act for cigarette manufacturers’ use of “light” and “lowered tar and nicotine” labels did not amount to a “requirement or prohibition based on smoking and health,” and was not pre-empted. *Id.* at 74, 80-83. The majority “acknowledge[d] that [its] analysis of these claims may lack ‘theoretical elegance,’” defending the result as “a fair understanding of congressional

purpose.” *Id.* at 84 (quoting *Cipollone*, 505 U.S. at 529-30 n.27).

But the presumption was never a consistent or universally accepted canon for interpreting express pre-emption provisions. Justice Scalia, joined by Justice Thomas, objected to this “extraordinary and unprecedented” presumption at its birth. *Cipollone*, 505 U.S. at 544 (Scalia, J., concurring in the judgment in part and dissenting in part). They objected again in *Bates*: “Th[e] presumption does not apply, however, when Congress has included within a statute an express pre-emption provision.” 544 U.S. at 457 (Thomas, J., concurring in the judgment in part and dissenting in part). And again in *Altria*—now joined by the Chief Justice and Justice Alito: “Since *Cipollone*, the Court’s reliance on the presumption . . . has waned[.] . . . [T]here is no authority for invoking the presumption against pre-emption in express pre-emption cases”; rather, “[t]he text of the statute must control.” *Altria*, 555 U.S. at 99, 102-03 (Thomas, J., dissenting).

In time, these dissents came to command a majority. First, the Court began interpreting express pre-emption provisions based only “on the plain wording of the clause” without relying on the presumption. *Whiting*, 563 U.S. at 594 (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)); see also, *e.g.*, *Cuomo v. Clearing House Ass’n*, 557 U.S. 519, 534 (2009) (“We have not invoked the presumption against pre-emption, and think it unnecessary to do so in giving force to the plain terms of the National Bank Act.”). The Court did so even in the face of dissenting opinions calling for the presumption’s application. See, *e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 334 (2008) (Ginsburg, J., dissenting) (“Federal laws containing a preemption clause do not

automatically escape the presumption against preemption.”).

Then, in *Franklin* in 2016, the Court held expressly what these decisions had implied: Where a statute “contains an express pre-emption clause,” courts “do not invoke any presumption against pre-emption” but “focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ pre-emptive intent.” *Franklin*, 579 U.S. at 125 (quoting *Whiting*, 563 U.S. at 594). The Court has not invoked the presumption since. Just last Term, this Court enforced FIFRA’s express pre-emption provision to pre-empt a state-law failure-to-warn claim—and the presumption was nowhere to be found. See *Monsanto Co. v. Durnell*, 146 S. Ct. 2001, 2017 (2026).

B. The Court Was Right to Abandon the Presumption

A presumption that favors narrow interpretations of express pre-emption provisions over correct interpretations violates core tenets of statutory interpretation, is at odds with the Supremacy Clause, and is unworkable. The Court was right to reject the presumption, and it should ensure that lower courts do the same.

First, the presumption is inconsistent with this Court’s approach to statutory interpretation. An express pre-emption provision is statutory text like any other. The ordinary tools of statutory interpretation suffice to determine its best meaning. See *CSX Transp.*, 507 U.S. at 664 (“Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue.”). Faced with a choice between two plausible interpretations, courts must “use every tool at their disposal to determine the best reading of the statute and resolve

the ambiguity.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024). “In the business of statutory interpretation, if it is not the best, it is not permissible.” *Ibid.* That command was *Chevron*’s death knell, and it confirms this Court was right to consign the presumption compelling second-best readings of express pre-emption provisions to the same fate.

To that end, this Court has abandoned other similar presumptions that skew statutes toward narrow or broad readings and away from their best readings: the rule that FLSA exemptions are “construed narrowly,” *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 88-89 (2018); the doctrine that “FOIA exemptions should be narrowly construed,” *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 439 (2019); and the maxim calling for strict construction of all “exceptions to statutory rules” regarding removal, *BP p.l.c. v. Mayor & City Council of Balt.*, 593 U.S. 230, 239 (2021). Absent a “textual indication” from Congress, “there is no reason to give [statutory text] anything other than a fair (rather than a ‘narrow’) interpretation.” *Encino Motorcars*, 584 U.S. at 88 (quoting Scalia & Garner, *Reading Law* 363 (2012)).

Second, the presumption is in tension with the Supremacy Clause. An express pre-emption provision is not mere circumstantial evidence of Congress’s preemptive intent; it is “the supreme Law of the Land.” U.S. Const. art. VI, cl. 2. Courts must follow Congress’s command to the letter, not as narrowly as any plausible reading permits. Requiring narrow interpretations of express pre-emption provisions turns the Supremacy Clause on its head by “strain[ing] the meaning of a federal law to avoid a contradiction with state law.” Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 256 (2000). The

Constitution makes federal law supreme; the presumption tells courts the opposite.

Nor can the presumption be defended as a legitimate substantive canon necessary to protect conflicting constitutional values. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 169-70 (2010); see also *Biden v. Nebraska*, 600 U.S. 477, 508-09 (2023) (Barrett, J., concurring); see, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460-64 (1991) (grounding a clear-statement rule in the constitutionally protected authority of the States to structure their own governments). Any need to protect “the historic police powers of the States” “dissolves once there is conclusive evidence of intent to pre-empt in the express words of the statute itself, and the only remaining question is what the scope of that pre-emption is meant to be.” *Cipollone*, 505 U.S. at 545 (Scalia, J.). If anything, the presumption undermines State interests by denying States clarity about the boundaries of their authority, reducing the predictability of statutory interpretation on which States and their citizens rely, and allowing a judicial thumb on the scale, rather than the Constitution and the political process, to set the federal-state balance. Cf. Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727, 748 (2008) (“Stability in this structure is desirable because it allows affected persons to know which level of government is primarily responsible for which problems.”).

Third, even were it justified in theory, the presumption proved unworkable in practice. In the presumption’s heyday, a “veritable chorus of scholars point[ed] out the Court’s haphazard application of the presumption.” Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 Geo. Wash. L. Rev.

449, 458 (2008); see Nelson, *supra*, at 298 (“The Court itself has applied the presumption only half-heartedly.”). It was unclear when the presumption applied, or what degree of ambiguity it required, and it sometimes was ignored entirely. As the *Altria* dissenters argued, “[t]he Court should not retain an interpretative test that has proved incapable of implementation.” *Altria*, 555 U.S. at 97 (Thomas, J., dissenting).

In time, the Court did just as they advised and wisely abandoned the presumption. That should have been the end of the story.

II. This Court Should Grant Certiorari to Overrule *Altria* and Inter the Presumption

Although this Court has held that express pre-emption provisions should be interpreted correctly, not narrowly, lower courts have not gotten the message. The decision below is a prime example: The Supreme Judicial Court of Massachusetts relied on *Cipollone* and *Altria* to hold that the express pre-emption provision in the Labeling Act “is to be read narrowly ‘in light of the presumption against the pre-emption of state police power regulations.’” Pet. App. 36 (quoting *Cipollone*, 505 U.S. at 517-18). Certiorari should be granted and the decision reversed because applying the now-dead presumption “conflicts with relevant decisions of this Court,” S. Ct. Rule 10, and the decision below is incorrect on the merits for all of the reasons petitioner offers.

Certiorari is particularly warranted because the implications of leaving *Altria* on the books reach far beyond the Labeling Act and smoking-related litigation. Lower courts, federal and state, have pointed to *Altria* in continuing to apply the presumption against express pre-emption that this Court rejected in *Franklin*—

narrowing disparate federal statutes in a host of unrelated contexts, even after *Altria*'s foundation has crumbled. Only this Court can finish the job it started.

A. Courts Continue to Rely on *Altria* to Invoke the Presumption

The presumption persists in the lower courts for the simple reason that this Court has not formally overruled *Altria*. A court confronting an express pre-emption provision today faces conflicting authorities: *Franklin*, which instructs courts not to “invoke any presumption against pre-emption” where Congress has enacted an express pre-emption provision, 579 U.S. at 125, and *Altria*, which applied exactly that presumption, 555 U.S. at 77. The problem, then, is not disobedience. It is obedience to a decision this Court has abandoned but never overruled and to the command that this Court and only this Court has “the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

This conflict is well recognized, deeply entrenched, and entirely of this Court's own making. The Third Circuit, for example, has recognized this tension and chosen to follow *Altria* and the presumption rather than *Franklin* and the ordinary rules of statutory interpretation. In *Shuker v. Smith & Nephew, PLC*, the court confronted the express pre-emption provision in the Medical Device Amendments and began its analysis by declaring that “the historic primacy of state regulation of matters of health and safety’ *requires*” courts to apply “the ‘presumption against the pre-emption of state police power regulations.’” 885 F.3d 760, 770-71 (3d Cir. 2018) (emphasis added) (quoting *Lohr*, 518 U.S. at 485). The manufacturer had argued that, after *Franklin*,

“[a]ny presumption against express preemption no longer exists.” *Id.* at 771 n.9. But the court of appeals rejected that argument: Because *Franklin* construed the Bankruptcy Code and “did not address preemption of claims involving ‘historic . . . state regulation of matters of health and safety,’” *Franklin* does not “directly control.” *Ibid.* (quoting *Lohr*, 518 U.S. at 485). And the courts of appeals must “leave to the Supreme Court the prerogative of overruling its own decisions.” *Ibid.* (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).² The Third Circuit therefore “continue[s] to apply the presumption against preemption” to express pre-emption provisions limiting the historic police powers of the States. See *ibid.*; see, e.g., *Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 131 & n.5 (3d Cir. 2018) (applying the presumption to the Federal Aviation Administration Authorization Act’s express pre-emption provision).

The Eighth Circuit has likewise rejected *Franklin* and embraced *Altria* and the presumption. In *R.J. Reynolds Tobacco Co. v. City of Edina*, the court construed the Tobacco Control Act’s express pre-emption provision and found that it faced “two plausible readings” of the statute that “compel[led] two different outcomes.” 60 F.4th 1170, 1176 (8th Cir. 2023). Relying on *Altria*, the court did not ask which reading was best; it simply adopted “the reading . . . that disfavors preemption.” *Id.*

² In a footnote, the Third Circuit recited this Court’s modern rule that an express clause’s “plain wording . . . ‘necessarily contains the best evidence of Congress’ pre-emptive intent.” *Shuker*, 885 F.3d at 770 n.8 (quoting *Whiting*, 563 U.S. at 594). But, in the very next footnote, it considered that same “best evidence” with a thumb on the scale against pre-emption. See *id.* at 771 n.9.

at 1177. Earlier this year, the court again held that, because Iowa’s restrictions on unauthorized e-cigarette products were “a manifestation of Iowa’s traditional police power to regulate the health and safety of its citizens,” the presumption “applies here,” and the court would “only find the law preempted if Congress provided a ‘clear and manifest purpose’” to displace state law. *Iowans for Alternatives to Smoking & Tobacco, Inc. v. Mosiman*, 183 F.4th 1040, 1051-52 (8th Cir. 2026) (quoting *Lohr*, 518 U.S. at 485).

The disarray runs down to the trial courts. Some decisions apply the presumption as though *Franklin* had never been decided. See, e.g., *Calabria Ristorante, Inc. v. Ruggiero Seafood, Inc.*, 706 F. Supp. 3d 489, 501 (D.N.J. 2023) (analyzing the Food, Drug, and Cosmetic Act and the Fair Packaging and Labeling Act: “In an express preemption analysis, like in any preemption analysis, the Court begins by applying a presumption against preemption.”). Others recite *Franklin*’s rule, then apply the presumption anyway. See, e.g., *Consumer Data Indus. Ass’n v. Platkin*, 2024 WL 1299256, at *16, *18 (D.N.J. Mar. 27, 2024) (acknowledging that courts “do not invoke any presumption against pre-emption” where a statute contains an express pre-emption provision, yet interpreting the clause “fairly but narrowly”).

The presumption lives on in state courts as well. The decision below is the presumption’s latest casualty—as the Supreme Judicial Court of Massachusetts applied *Altria* and the presumption to further narrow the exact same express pre-emption provision at issue in *Altria*. See Pet. App. 36. And Massachusetts is not alone. See, e.g., *Happel v. Guilford Cnty. Bd. of Educ.*, 913 S.E.2d 174, 189 & n.8 (N.C. 2025) (applying the presumption to

narrowly interpret the Public Readiness and Emergency Preparedness Act’s express pre-emption provision while acknowledging that “the scope of [*Franklin*] is an open question”).

This tension has not escaped judicial notice. The Fifth Circuit recognized that the Third Circuit “declin[ed] to apply *Franklin*’s holding” to claims “historically regulated by the states,” while other circuits had followed the correct path and refused to apply the presumption. *Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 258-59 (5th Cir. 2019).³ Judge O’Scannlain has explained that *Franklin* “did not acknowledge—and, most importantly, did not expressly overturn—the decades of decisions applying the presumption against preemption to express-preemption provisions,” creating “great difficulty in deciding how to read th[is] ... Court’s instructions.” *Cal. Rest. Ass’n v. City of Berkeley*, 89 F.4th 1094, 1107-10 (9th Cir. 2024) (O’Scannlain, J., concurring).

The disconnect is jarring. This Court declared the presumption dead a decade ago, yet lower courts continue to apply it. Courts continue to adopt new, unduly narrow interpretations of diverse statutes—the Food, Drug, and Cosmetic Act; the Public Readiness and Emergency Preparedness Act; the Federal Aviation Administration Authorization Act, to name a few—without stopping to ask whether those interpretations are the *best* interpretations or merely plausible ones. While

³ The Fifth Circuit counted the Eighth Circuit as getting it right as of 2019, but the more recent decisions discussed above show that court is willing to resurrect the presumption from time to time. See *Dialysis Newco*, 938 F.3d at 258.

Altria may provide a citation to support these interpretations, it does not make them right.

**B. Only This Court Can End the Confusion—
and It Should Do So in This Case**

For all of these reasons, the appropriate path forward is for this Court to grant certiorari and reverse.

The issue is intractable and important. Percolation cannot resolve a conflict that lower courts believe only this Court can address. And the presumption’s distortions reverberate across the country and the U.S. Code, as courts continue to misread express pre-emption provisions in the name of a presumption that never should have existed and no longer does.

This Court already did the doctrinal work in *Franklin*, and stare decisis considerations pose no obstacle to reaffirming what this Court has already held. A judicially created interpretive rule of thumb that had no solid doctrinal foundation, was contested from the day it was announced, was applied inconsistently and without any workable standard, and was decisively abandoned is not a rule anybody can rely on—Congress least of all. See *Loper Bright*, 603 U.S. at 407-12. Even were *Altria* entitled to some measure of stare decisis protection, see *id.* at 412, it cannot stand once its premise falls: The *Altria* majority acknowledged its analysis “may lack ‘theoretical elegance.’” *Altria*, 555 U.S. at 84 (quoting *Cipollone*, 505 U.S. at 529-30 n.27). Without the presumption, it has no theoretical underpinnings at all, and offers only the promise of continued underenforcement of Congress’s pre-emptive mandates. Overruling *Altria* is good housekeeping. It would not be a change in the law as to the presumption against pre-emption but an announcement that the law has already changed. And

it would provide courts with the guidance they have asked for. *E.g.*, *Cal. Rest. Ass’n*, 89 F.4th at 1110 (O’Scannlain, J., concurring) (“I would welcome guidance”).

The disposition would be narrow and straightforward. The Court need not, and should not, address any question relating to the distinct area of implied pre-emption, where Congress has not spoken directly to a statute’s pre-emptive scope. The Court need hold only that when Congress has spoken expressly, courts must listen. Express pre-emption clauses should receive a fair reading under ordinary interpretive principles with no thumb on the scale. This Court has already held exactly that. Yet the decision below tripled down on the presumption invented in *Cipollone* and relied on in *Altria* by further narrowing the very same express pre-emption provision. This Court should put an end to the judicial rewriting of that express pre-emption provision and many others by granting certiorari and interring the presumption for good.

CONCLUSION

The petition should be granted.

Respectfully submitted.

ILYA SHAPIRO
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.
institute

MARK A. PERRY
Counsel of Record
WEIL, GOTSHAL & MANGES LLP
2001 M Street NW
Washington, DC 20036
(202) 682-7000
mark.perry@weil.com

ROBERT B. NILES-WEED
CATHERINE E. CAZES
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153

SEPTEMBER 2026