

No. 26-235

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
RESPONDENT.

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

**BRIEF OF THE FEDERATION OF DEFENSE &
CORPORATE COUNSEL AS *AMICUS CURIAE*
SUPPORTING PETITIONER**

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INTEREST OF *AMICUS CURIAE**

The Federation of Defense & Corporate Counsel (“FDCC”) is a not-for-profit corporation composed of recognized leaders in the legal community who represent the interests of civil defendants, including publicly and privately owned businesses, public entities, and individual defendants. FDCC members work in private practice, as in-house counsel, and as insurance claims representatives. A significant number of FDCC members practice in the trial and appellate courts of the United States at both the federal and state level.

Since 1936, the FDCC has been dedicated to advancing the principles of integrity, professionalism, and fair civil justice. A touchstone of a fair judicial system is predictability for all litigants, no matter the court, the state, or the judge. This case involves a doctrine that has for too long undermined predictability in this Nation’s court systems: the presumption against preemption.

The presumption against preemption holds that “[i]n all pre-emption cases,” courts should “start with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”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) (cleaned up). Particularly as applied to statutes containing an express

* Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, *amicus* affirms that all parties received notice of *amicus*’s intent to file this brief on September 11, 2026, more than 10 days before the due date.

preemption provision, this mistaken presumption has created significant uncertainty that FDCC members must confront daily when advising clients on preemption defenses. The FDCC submits this brief to urge the Court to grant the petition, hear this case on the merits, and, in doing so, bring clarity and uniformity to the doctrine of preemption.

SUMMARY OF ARGUMENT

By invoking a “presumption against the pre-emption of state police power regulations,” Pet.App.36, to narrow an express preemption clause, the Massachusetts Supreme Judicial Court (“SJC”) perpetuated an approach to preemption that this Court rightly repudiated a decade ago in *Puerto Rico v. Franklin California Tax-Free Trust*, 579 U.S. 115 (2016). The SJC’s decision has ramifications that extend far beyond the tobacco industry. The continued existence of this unfounded and anachronistic presumption threatens the coherence of preemption law across virtually every field of federal regulation—medical devices, banking, air transportation, pesticides, meat inspection, and more.

This brief will make two points.

First, applying a presumption against preemption to express preemption clauses is doctrinally unsound. When Congress enacts a statute, the statutory text is “the best evidence of Congress’ preemptive intent.” *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 594 (2011) (citation omitted). And *Franklin* made clear that when it comes to interpreting express preemption clauses, courts should “focus on the plain wording of the clause.” *Franklin*, 579 U.S. at 125 (citations omitted), instead of invoking any presumption. *Franklin*’s instruction was unequivocal and unqualified. It was also correct. Whatever its merits in

implied preemption cases, invoking the presumption against preemption in cases involving express preemption provisions is deeply inconsistent with ordinary statutory interpretation. And neither the Supremacy Clause nor general principles of federalism support that approach.

Second, the persistence of the presumption in some jurisdictions, and its abandonment in others, has created tremendous uncertainty in courts across the country. As petitioner explains, Pet.26-28, the lower courts are fractured. Some have followed *Franklin*'s instruction and abandoned the presumption for express preemption clauses. But many others have treated the presumption as alive and well, relying on *Cipollone v. Liggett Group*, 505 U.S. 504 (1992), and *Altria Group v. Good*, 555 U.S. 70 (2008), while ignoring *Franklin*. The result is that the same statutory clause means different things depending on the forum. That inconsistency makes it enormously difficult for defense counsel, like the FDCC's members, to advise their client and litigate preemption defenses. It also hurts the businesses and individuals that FDCC members represent, who find themselves facing conflicting and unpredictable legal rules across different jurisdictions.

ARGUMENT

I. A Presumption Against Express Preemption Is Doctrinally Unsound

The Court should use this case to declare, with finality, that the presumption against preemption has no place when it comes to express preemption clauses.

A. In *Franklin*, the Court stated plainly that where a statute "contains an express pre-emption clause," courts "do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which

necessarily contains the best evidence of Congress’ preemptive intent.” 579 U.S. at 125 (quoting *Whiting*, 563 U.S. at 582 (citations omitted)). The Court’s straightforward instruction to focus on the text was not limited to the bankruptcy context in which *Franklin* arose. To the contrary, *Franklin*’s statement reflected a time-honored principle of interpretation applicable across all types of statutes: when Congress has spoken clearly, “the ordinary tools of statutory interpretation”—not normative canons or presumptions—should govern the result. *Biden v. Nebraska*, 600 U.S. 477, 507, 509 (2023) (Barrett, J., concurring); see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 293 (2012) (“[T]he preemption canon ought not to be applied to the text of an explicit preemption provision.”).¹

Those ordinary tools should not go out the window just because a statute involves preemption. Instead, as Justice Scalia explained in *Cipollone*, when “the pre-emption provision was intended to sweep broadly, [a court’s] construction must sweep broadly as well.” 505 U.S. at 548 (Scalia, J., dissenting). “And when it bespeaks a narrow scope of pre-emption, so must [the court’s] judgment.” *Id.* To the extent the presumption against preemption produces a different outcome, it is not acting as just another interpretive tool courts sometimes use to discern congressional intent. It is a way for courts to *evade* Congress’s considered decision to preempt state law and “adopt

¹ In declining to apply the presumption against preemption, *Franklin* finally made explicit what was implicit in several of the Court’s prior decisions involving express preemption provisions. See, e.g., *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (not mentioning the presumption); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011) (same); *Dan’s City Used Cars, Inc. v. Pelkey*, 569 U.S. 251 (2013) (same).

something other than the statute’s most natural meaning.” *Nebraska*, 600 U.S. at 509 (Barrett, J., concurring). Such a practice is incompatible with the judicial obligation to “independently interpret the statute and effectuate the will of Congress subject to constitutional limits.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024).

B. The Supremacy Clause does not require that federal law should be given anything less than its natural meaning when it comes into conflict with state law. Nothing in the Clause suggests the Framers wanted courts to read federal law “narrowly,” Pet.App.36, just because state police powers might be implicated by the words Congress chose. The Clause declares that federal statutes—including express preemption statutes—“shall be the supreme Law of the Land” and that state judges “shall be bound thereby.” U.S. Const. art. VI, cl. 2. The provision’s broad text was “designed precisely to eliminate any residual presumption” against implied repeals of state law in the face of federal law. Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 Sup. Ct. Rev. 175, 184.

Thus, as five Justices have explained, the Supremacy Clause language signals “that courts should not strain to find ways to reconcile federal law with seemingly conflicting state law.” *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 622 (2011) (plurality op.) (Thomas, J., joined by Roberts, C.J., Scalia & Alito, JJ.); *Kansas v. Garcia*, 589 U.S. 191, 213–14 (2020) (Thomas, J., concurring, joined by Gorsuch, J.). That kind of interpretive gymnastics would have been foreign to early American jurists, who when “confronting preemption analyzed the issue without discussing any special interpretive rule.” Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 153 n.211 (2010); see also Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 U.C. Davis L. Rev.

1, 30 (2001) (observing that there is no historical “support . . . for the conclusion that the [F]ramers intended any . . . presumption to be read into” the Supremacy Clause).

C. Nor can a presumption against express preemption be justified by “principles of federalism and respect for state sovereignty.” *Cipollone*, 505 U.S. at 533 (Blackmun, J., concurring in part and dissenting in part); see Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. Chi. L. Rev. 483, 536-40 (1997) (discussing origins of the modern presumption against preemption). The design of our federal system ensures that state sovereignty is respected by, among other things, making the States’ voices heard through their elected representatives in Congress. See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954). “Once Congress has decided upon the proposal that it will enact, however, the political safeguards of federalism have done their work.” Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 300 (2000). There is no need to further tip the scales in favor of state law by presuming that Congress did not really mean what it said. And that is especially true in cases like this one, where Congress has adopted provisions that “plainly do manifest an intent to supplant state law.” *Id.* at 291 (cleaned up).

If anything, the presumption against preemption undermines federalism by limiting Congress’s ability to carve out discrete areas for federal regulation. Suppose, for example, that Congress wishes to broadly preempt state law in a particular area, but does not want to entirely bar states from regulating. Notwithstanding the desire to preserve some space for local authority, Congress will be better off legislating in extremely sweeping terms, lest a

court read in unwanted loopholes for state police powers. Neither Congress nor the States benefit from a rule that encourages Congress to use a hacksaw rather than a scalpel when it comes to the displacement of state law.

II. A Presumption Against Express Preemption Creates Uncertainty That Harms Defense Counsel and Their Clients

“In deciding cases involving the American economy, courts should strive, where possible, for clarity and predictability.” *Seven County Infrastructure Coal. v. Eagle County*, 605 U.S. 168, 192 (2025). Especially as applied to express preemption provisions, the presumption against preemption is both unclear and unpredictable. The result is a morass of conflicting approaches that creates serious uncertainty for FDCC members and their clients. Only this Court can provide the nationwide uniformity that this “vitally important,” Nelson, *supra* p.6, at 225-26, area of the law demands.

A. This Court has not applied a presumption against preemption to any express preemption clause in the decade since *Franklin*. The Court’s most recent express-preemption decision, *Monsanto Co. v. Durnell*, 146 S. Ct. 2001 (2026), construed FIFRA’s express preemption provision without any reference to the presumption, confirming that the presumption plays no role in the interpretation of express preemption clauses.

Unfortunately, not all lower courts have followed this Court’s lead. While many federal courts of appeals have taken *Franklin* at its word and declined to apply the presumption to express preemption clauses,² other circuits

² See, e.g., *Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 258 (5th Cir. 2019); *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 761-62 (4th Cir. 2018); *EagleMed LLC v.*

have read *Franklin* narrowly and adhere to the presumption.³ The problem is even worse on the state side. Like the SJC in the decision below, several state supreme courts continue to treat the presumption as governing law—confining *Franklin* to its facts or ignoring it outright.⁴

The confusion is palpable. As Judge O’Scannlain has observed, the law after *Franklin* “remains troubling and confused—beset by tensions in Supreme Court precedents, disagreement among the circuits, and important practical questions still unanswered.” *Cal. Rest. Ass’n v. City of Berkeley*, 89 F.4th 1094, 1108 (9th Cir. 2024) (O’Scannlain, J., concurring).

The *Franklin* Court did not acknowledge—and, most importantly, did not expressly overturn—the decades of decisions applying the presumption against preemption to express-preemption provisions. And the *Franklin* Court did not resolve—nor even discuss—the scope of the rule it was applying. Was the *Franklin* Court simply electing to “not invoke” the presumption in a case easily answered by the “plain” statutory text?

Cox, 868 F.3d 893, 903 (10th Cir. 2017) (same); *Atay v. County of Maui*, 842 F.3d 688, 699 (9th Cir. 2016).

³ See, e.g., *Council for Responsible Nutrition v. James*, 159 F.4th 155, 171 (2d Cir. 2025); *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 771 (3d Cir. 2018); *R.J. Reynolds Tobacco Co. v. City of Edina*, 60 F.4th 1170, 1176-77 (8th Cir. 2023).

⁴ See, e.g., *Cole v. Pa. Dep’t of Env’tl Prot.*, 329 A.3d 1228, 1241, 1250 n.104 (Pa. 2025); *Happel v. Guilford Cnty. Bd. of Educ.*, 913 S.E.2d 174, 202 n.8 (N.C. 2025); *Town of Delafield v. Cent. Transp. Kriewaldt*, 944 N.W.2d 819, 821 (Wis. 2020); *Indiana v. Norfolk S. Ry. Co.*, 107 N.E.3d 468, 474 (Ind. 2018); *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 536-37 (Mich. 2014); *Brown v. Mortensen*, 253 P.3d 522, 529 (Cal. 2011).

Id. at 1110. Philip Morris’s petition presents an ideal opportunity for the Court to provide definitive answers to these questions to “the lower courts, which depend on this Court’s guidance, and to litigants, who must conform their actions to the Court’s interpretation of federal law,” *Altria Grp.*, 555 U.S. at 98 (Thomas, J., dissenting).

B. For the defense and corporate counsel who comprise the FDCC’s membership, the current doctrinal disarray is not an academic concern—it is a daily challenge. A preemption defense is often among the most consequential defenses available to a regulated company. FDCC members thus routinely advise clients on whether federal law forecloses state-law claims. Yet defense counsel will inevitably struggle to provide reliable advice to clients about the scope of federal preemption when the same statutory clause is interpreted differently depending on whether the case is filed in state or federal court—or in which state. In some cases, defense counsel are forced into the untenable position of telling clients: “The answer depends on which court you are sued in and whether the judge takes *Franklin* seriously.”

Moreover, even in courts that apply the presumption against preemption, it is often unclear what counts as the kind of “historic police power[.]” *Lohr*, 518 U.S. at 485 (citation omitted), that Congress is presumed to have preserved. The phrase “police power” was “long abandoned as a mere tautology” precisely because “[i]t is difficult to identify any state law” that could *not* be characterized as touching on the areas where states exercised primary authority prior to the ratification. *See Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 365-66 (2008) (Kennedy, J., dissenting). Yet the presumption against preemption depends on precisely that amorphous concept. Unsurpris-

ingly, then, the presumption against preemption encourages plaintiffs' lawyers (and sympathetic judges) to draw arbitrary distinctions that conveniently spare whatever claims the plaintiff is currently pressing.

The problem is magnified by the decisive weight that many courts give to the presumption against express preemption. As one commentator has observed, "where [the presumption] rears its head, its effect is seemingly outcome determinative." Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 Geo. Wash. L. Rev. 449, 506 (2008). Put differently, a presumption against express preemption is not a neutral tool of analysis; it is a thumb on the scale that predetermines results. And when some courts apply the presumption and others do not, the outcome of a preemption defense depends not on the merits of the argument but on the forum in which the case is litigated—a forum that plaintiffs almost always pick.

When a preemption defense that should succeed on the merits is defeated by the presumption, the consequences for defendants are severe. This case vividly illustrates the point. The SJC acknowledged that a failure-to-warn claim based on the removal of voluntary warnings would be preempted—yet held that the identical theory, repackaged as a fraud claim, escaped preemption. As petitioner explains, that formalistic distinction converts an express preemption provision into a "mere pleading requirement." Pet.13. That evasion of Congress's handiwork would not fly in many federal courts. But because respondents chose to file in state court, even an express statement by Congress that state-law claims are preempted may not be enough.

The problem is not confined to the tobacco context. “[P]reemptive federal statutes shape the regulatory environment for most major industries, including drugs and medical devices, banking, air transportation, securities, automobile safety, and tobacco.” Jay B. Sykes, Nicole Vanatko, Cong. Rsch. Serv., R45825, *Federal Preemption: A Legal Primer* (2023). Lower courts grappling with the presumption’s applicability to express preemption provisions have considered cases involving the Medical Device Amendments, FIFRA, the Airline Deregulation Act, the Federal Meat Inspection Act, ERISA, and numerous other statutes. Under all of these statutes, defendants face the threat that meritorious preemption defenses will be narrowed to nothingness by a presumption this Court has abandoned.

FDCC members represent clients across hundreds of industries, many of whom operate in multiple states. The inability to predict whether a court will apply a presumption against an express preemption clause makes it challenging at best to evaluate litigation risk, advise on compliance, or make sound strategic decisions in preemption cases. Without uniformity, manufacturers are forced to either comply with a multitude of conflicting and burdensome state laws or risk being subjected to expensive lawsuits and inconsistent jury verdicts. These increased costs of doing business, in turn, may ultimately be passed on to consumers in the form of higher prices and reduced product availability.

It does not have to be this way. The Court can grant the petition and resolve the splits in the lower courts that threaten to impede national uniformity of the law. Only by doing so can this Court restore the predictability and uniformity that Congress intended when it enacted ex-

press preemption provisions—and that the defense practitioners who comprise the FDCC’s membership require to fulfill their obligations to their clients and to the courts.

CONCLUSION

The petition for a writ of certiorari should be granted, and the Court should make clear, once and for all, that the presumption against preemption does not apply when Congress has enacted an express preemption provision.

Respectfully submitted,

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