No. 14-181

IN THE

Supreme Court of the United States

ALFRED GOBEILLE, in His Official Capacity as Chair of the Vermont Green Mountain Care Board,

Petitioner,

v.

LIBERTY MUTUAL INSURANCE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

Counsel for Amicus Curiae
John Pagliaro
Counsel of Record
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street
Boston, Massachusetts 02111
Tel.: (617) 695-3660
johnpagliaro@nelfonline.org

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INTEREST OF AMICUS CURIAE [1]

New England Legal Foundation ("NELF") is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England and the nation as a whole, protecting the free-enterprise system, and defending individual economic rights and the rights of private property. NELF's members and supporters include both large and small businesses located primarily in New England. NELF has filed numerous amicus briefs in this Court in cases that raise concerns to NELF's members and supporters, including those in the business community. The outcome of some of those cases has turned, as this one does, on the interpretation of a federal statute.[2]

NELF believes that free enterprise, as well as the national economy generally, suffers when States impose on businesses additional regulation that

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[1] Pursuant to Supreme Court Rule 37.6, Amicus states that no party or counsel for a party authored this brief in whole or in part and that no person or entity, other than Amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), Amicus also states that on July 9 counsel for the Petitioner filed with this Court a written consent to the filing of amicus briefs in support of either or neither party, and that on July 10 counsel for the Respondent filed with this Court a similar consent.

[2] *See*, e.g., *Kellogg Brown & Root Serv., Inc. v. U.S. ex rel. Carter*, 135 S. Ct. 1970 (2015); *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014).

frustrates the objectives or operation of federal law. The Supremacy Clause serves a key structural role in our form of government because the doctrine of preemption it enshrines in the Constitution protects federal law from such encroachment and interference by State and lower levels of government. In the realm of commerce, for example, by ensuring that federal regulation cannot be undermined or subverted by State or local law, it enables Congress to create uniform national markets. For these reasons, NELF files this amicus brief in order to address whether the Court, in attempting to discern congressional intent in an express preemption provision, ought to employ a presumption that Congress does not intend to preempt State laws that regulate areas of traditional State concern.

SUMMARY OF THE ARGUMENT

The presumption against preemption and in favor of the States' prerogative to legislate in so-called areas of traditional State regulation is a late-adopted principle of this Court and one applied fitfully.

When Congress has included an express preemption provision in a statute, that provision obviates any need for the presumption because the text itself clearly establishes the *fact* of preemption. The actual language, purpose, and context of the statute provide better evidence of the scope of the intended preemption than could be given by any non-textual presumption.

When an express preemption provision is present, use of the presumption risks overriding the level of deference to State interests (if any) embodied

in the words of the statute enacted by Congress, and it may bestow a kind of undue, double weight on considerations of federalism. It also creates the further analytical problem of how to delimit the supposed area of traditional State concern.

ARGUMENT

THE PRESUMPTION AGAINST PREEMPTION SHOULD NOT BE APPLIED WHEN THERE EXISTS AN EXPRESS PREEMPTION PROVISION.

Preemption traces its constitutional source primarily to article VI, cl. 2 of the U.S. Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

As Justice Story observed of the Supremacy Clause, "surely a positive affirmance of that, which is necessarily implied, cannot in a case of such vital importance, be deemed unimportant." 3 *Commentaries on the Constitution of the United States* 693 (Boston, Hilliard, Gray & Co.; Cambridge, Brown, Shattuck & Co. 1833).

This Court's earliest cases dealing with Supremacy Clause preemption were decided without recourse to, or even mention of, a presumption against the preemption of State laws regulating

areas of traditional State concern.[3] *See*, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). On the contrary, in those cases the Court recognized that "the acts of the State Legislatures . . . though enacted in the execution of acknowledged State powers, . . . though enacted in the exercise of powers not controverted, must yield to [the acts of Congress]." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 82 (1824).

It has been long acknowledged by this Court that whether Congress has preempted the exercise of State lawmaking over a given subject matter is a question of the congressional intent. The Court has repeatedly emphasized that "[p]re-emption fundamentally is a question of congressional intent and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990) (citations omitted). *See also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) ("'purpose of Congress is the ultimate touchstone' of preemption analysis") (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) ("any understanding of the scope of a preemption statute must rest primarily on 'a fair understanding of *congressional purpose*'") (original emphasis)

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[3] Indeed, some commentators have even claimed that one might arguably find a textual basis in the Supremacy Clause for a presumption in *favor* of preemption. *See* Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 255 (2000); Viet D. Dinh, *Reassessing the Law of Preemptio*n, 88 Geo. L.J. 2085, 2093 (2000).

(quoting *Cipollone*, 505 U.S. at 530 n.27 (opinion of Stevens, J.)).

And, in order "[t]o discern Congress' intent," the Court has frequently stated, "we examine the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990).

Justice Scalia has observed on this point, "Under the Supremacy Clause, our job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning." *Cipollone*, 505 U.S. at 544 (concurring in the judgment in part and dissenting in part) (citation omitted).

However, in 1947 this Court added to its interpretive tools the working "assumption" that the "historic police powers of the States" should not be deemed to be superseded when "Congress legislate[s] . . . in [a] field which the States have traditionally occupied" unless to do so was "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

While the presumption formulated in *Rice* may have been adopted by the Court in order to assist it in discerning Congress's intention, there has been no shortage of scholars who, however much they may disagree among themselves on other legal points, agree that the Court has signally failed to employ the presumption in a consistent methodological fashion. *See*, e.g., Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727, 741 (2008) ("[T]he presumption against preemption is honored as much in the breach as in observance."); Mark D. Rosen, *Contextualizing Preemption*, 102 Nw. U. L. Rev. 781, 785 (2008)

(presumption "is only inconsistently invoked and applied"); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. Rev. 685, 733 (1991); Nelson, *supra*, at 288-89; Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 Geo. Wash. L. Rev. 449, 458 (2008) ("haphazard application of the presumption"); Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 Sup. Ct. Rev. 253, 307 ("The Justices ignored *Rice* in *Williamson* and *Concepcion* and invoked it only in dissent in *PLIVA* and *Bruesewitz*.").

In any event, the presumption is of dubious utility in cases that, like the present one, deal with an express preemption provision. When Congress has included an express preemption provision in a statute, the provision banishes any need for the presumption because it clearly states the *fact* of preemption. *See Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151 (2001) (presumption against pre-emption in areas of traditional state regulation is "overcome where . . . Congress has made clear its desire for pre-emption"). From that point on, the language, purpose, and context of the statute provide much surer guidance to Congress's intended meaning than could be given by any further use of a presumption unmoored to the statutory text. Indeed, if the goal truly is to discern congressional intent, the presumption may be a treacherous guide leading one *into* the wilderness, not out of it. *See* Nelson, *supra,* at 292 ("If the Court's normal rules of statutory interpretation are designed to give effect to congressional intent, then the Court's insistence on giving express preemption clauses a narrower-than-

usual interpretation will drive preemption decisions away from that intent.").

Addressing the "oft-repeated assumption that, absent convincing evidence of statutory intent to pre-empt, the historic police powers of the States [are] not to be superseded," Justice Scalia has written that "it seems to me that assumption 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 (concurring in the judgment in part and dissenting in part) (internal quotation marks and further citation omitted; original emphasis). He went on to observe:

> The proper rule of construction for express pre-emption provisions is, it seems to me, the one that is customary for statutory provisions in general: Their language should be given its ordinary meaning. . . . When this suggests that the pre-emption provision was intended to sweep broadly, our construction must sweep broadly as well. . . . And when it bespeaks a narrow scope of pre-emption, so must our judgment.

Id. at 548. *See also* Dinh, *supra*, at 2100 ("The work of the Court is likewise limited and rather straightforward: to interpret the express preemption clause and determine whether the state law at issue falls within the preemptive scope. This is neither constitutional law nor Supremacy Clause jurisprudence; it is statutory construction, plain and simple."); Nelson, *supra*, at 302 ("Congress's chosen level of deference to state interests will be reflected

in the *language* that Congress enacts, and there is no reason automatically to give that language a narrowing construction.") (emphasis added). *But see Altria Group, Inc. v. Good*, 555 U.S. 70, 76-77 (2008); *Lohr*, 518 U.S. at 485.

In his book on statutory interpretation, Justice Scalia returned to this point as part of his treatment of the subject of preemption:

> While any determination about field preemption is highly fact-bound, two principles seem to us clearly required. First, the preemption canon ought not to be applied to the text of an explicit preemption provision. That is, the text ought to be given its fair meaning rather than a meaning narrowed by the presumption. The reason is obvious: The presumption is based on an assumption of what Congress, in our federal system, would or should normally desire. But when Congress has explicitly set forth its desire, there is no justification for not taking Congress at its word—i.e., giving its words their ordinary, fair meaning.

Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 293 (2012).

Employing this approach in *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co*., this Court wrote, "Because [the federal statute] unquestionably *does* limit the power of States to tax companies whose only in-state activity is 'the solicitation of orders,' our task is simply to ascertain the fair meaning of that [statutory] term."). 505 U.S. 214, 224 (1992) (original emphasis).

Justice Kennedy wrote in a similar vein, in his partial concurrence in *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*:

> I believe, however, that this result [preemption] is mandated by the express terms of § 18(b) of the OSH Act. It follows from this that the pre-emptive scope of the Act is also limited to the language of the statute. When the existence of pre-emption is evident from the statutory text, our inquiry must begin and end with the statutory framework itself.

505 U.S. 88, 111 (1992) (concurring in part and concurring in the judgment). *See also id.* at 112 ("We have held, in express pre-emption cases, that Congress' intent must be divined from the language, structure, and purposes of the statute as a whole.").

The use of the presumption is problematic in other regards as well. This Court has observed that, under the Supremacy Clause, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Felder v. Casey*, 487 U.S. 131, 138 (1988) (internal quotation marks and further citation omitted). Indeed, "even state regulation designed to protect vital state interests must give way to paramount federal legislation." *DeCanas v. Bica*, 424 U.S. 351, 357 (1976).

As recently as 2008, this Court, in words especially relevant to the issue in this case, explained why a federal law preempted a Maine

public health law regulating the transportation of cigarettes:

> Despite the importance of the public health objective [of the Maine law], we cannot agree with Maine that the federal law creates an exception on that basis, exempting state laws that it would otherwise pre-empt. The [federal] Act says nothing about a public health exception. To the contrary, it explicitly lists a set of exceptions (governing motor vehicle safety, certain local route controls, and the like), but the list says nothing about public health.

Rowe v. New Hampshire Motor Transp. Ass'n, 552 U.S. 364, 374 (2008). This Court has previously noted that ERISA too is an example of federal law preempting an entire field traditionally regulated by the states. *See Alessi v. Raybestos, Inc.*, 451 U.S. 504, 510, 523 (1981) (ERISA "comprehensive and reticulated statute" explicitly establishing "pension plan regulation as exclusively federal concern") (internal quotation marks and further citation omitted). And, as with the statute examined in *Rowe*, the express exceptions to preemption listed in ERISA say "nothing about public health." *See* 29 U.S.C. § 1144(b).

Use of the presumption is also troubled by the problem of deciding how narrowly or expansively to define the relevant field of supposed traditional State regulation. *See* Young, *supra*, at 336. *Cf. Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) ("We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that

turns on a judicial appraisal of whether a particular [State] governmental function is 'integral' or 'traditional.'"). The present case exemplifies this problem, with the two sides contending over whether the relevant field should be viewed broadly, with the emphasis falling on traditional State health and welfare concerns, or narrowly, with the focus falling on the novelty of the intrusive means by which data is to be collected for the State under the Vermont law. This disagreement was mirrored in the sharply differing views taken by the majority opinion and the dissent in the appeals court. *See Liberty Mutual Ins. Co. v. Donegan*, 746 F.3d 497, 506 n.8 (2014); *id.* at 512-13 (Straub, J. dissenting).

Finally, because the judicially fashioned presumption against preemption necessarily works to narrow interpretation, it gives the "safeguards of federalism a kind of double weight" beyond the weighting intended by Congress as manifested in the statutory text enacted by that body.

> Once Congress has decided upon the proposal that it will enact, however, the political safeguards of federalism have done their work. For courts always to adopt narrowing constructions of the language that Congress enacts would be to give the political safeguards of federalism a kind of double weight

Nelson, *supra*, at 300. *Cf. South Carolina v. Baker*, 485 U.S. 505, 512 (1988) ("States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity").

When the Court "systematically favor[s] one result over another" by applying a presumption

against preemption, it "risk[s] an illegitimate expansion of the judicial function" by "disrupt[ing] the constitutional division of power between federal and state governments, rewrit[ing] the laws enacted by Congress, or both." Dinh, *supra*, at 2092. *See also Cipollone*, 505 U.S. at 544 ("our job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning") (Scalia, J. concurring in the judgment in part and dissenting in part) (citation omitted).

CONCLUSION

For the reasons stated above, the Court should not adopt the presumption against preemption in this case when determining the scope of the express preemption provision found in ERISA.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,

John Pagliaro, Staff Attorney
Counsel of Record
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street
Boston, Massachusetts 02111
Telephone: (617) 695-3660
johnpagliaro@nelfonline.org

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