No. 10-627

DEC 13 2010

In The
Supreme Court of the United States

THE CITY OF NEW YORK,

Petitioner,

v.

THE PERMANENT MISSION OF INDIA
TO THE UNITED NATIONS
and
THE BAYARYN JARGALSAIKHAN,
as principal resident representative to the
United Nations of the Mongolian People's Republic,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

BRIEF *AMICI CURIAE* OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, and U.S. CONFERENCE OF MAYORS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Does the Foreign Missions Act (FMA), 22 U.S.C. § 4301 *et seq.*, pre-empt state and local taxation authority?

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INTEREST OF *AMICI CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan professional organization consisting of more than 3500 members. The membership is comprised of local government entities, including cities and counties, and sub-divisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Among other things, IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

The National League of Cities (NLC) was founded in 1924 in order to foster collaboration between cities on urban affairs and proper methods of municipal governance. The NLC is a tireless advocate for over 19,000 cities and communities that are home to over 218 million Americans. Through a variety of projects, the organization aims to strengthen and promote cities

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[1] No counsel of a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief and no person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2(a), parties were provided with timely notice of intent to file this brief and their written consent has been submitted to the Clerk.

as centers of opportunity, leadership, and governance.

The United States Conference of Mayors (USCM) is the official non-partisan organization of all United States cities with populations of 30,000 or more. Members are represented in the Conference by their chief elected official, the mayor. The Conference promotes the development of effective urban policy, strengthens federal-city relationships, and creates a forum in which mayors can share ideas and information. It also represents urban interests as an *amicus curiae* in several courts around the country.

Each organization has a record of filing *amicus* briefs in this Court when issues arise that are important to the cities, communities, and individuals they represent. Members of this Court have consistently recognized the strength and importance of those briefs by favorably citing them with frequency and on core issues involving federalism and state power. See *McDonald v. Chicago*, 130 S. Ct. 3020, 3137 (2010) (Breyer, J. dissenting) (citing the brief of USCM); *Graham County Soil and Water Conservation Dist. v. U.S. ex rel Wilson*, 130 S. Ct. 1396, 1406 (2010) (citing the brief of NLC); *Pleasant Grove v. Summum*, 129 S. Ct. 1125, 1133, 1135 n.3, 1136 (2009) (citing and quoting the brief of IMLA); *Kelo v. City of New London*, 545 U.S. 469, 489-90 n.24 (2005) (citing the brief of NLC); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 781 n.9 (2005) (Ginsburg, J. dissenting) (citing the brief of IMLA).

Amici respectfully submit the following brief in order to highlight the importance of this case to local governments. The current economic climate has placed

state and local governments in a position in which their services are increasingly vital, but also increasingly underfunded. Taxes like the one in question here have been an integral part of supporting essential community services.

Amici organizations are uniquely situated to address issues of state taxation, pre-emption, and federalism. Each represents community leaders from politically, economically, and geographically diverse cities and states around the country. The communities that these organizations represent all share an interest in properly enforcing state tax provisions and clearly outlining the contours of Congress's pre-emption power over state and local taxes.

The decision of the court of appeals stands to upset this Court's carefully crafted state tax pre-emption jurisprudence and to strike at the ability of local governments to levy much-needed property taxes. The International Municipal Lawyers Association, National League of Cities, and the United States Conference of Mayors submit this brief in order to call this Court's attention to an issue that is of the utmost importance to the fiscal strength and political independence of communities across the country.

REASONS FOR GRANTING THE PETITION

I. LOCAL PROPERTY TAXATION AUTHORITY FALLS WITHIN THE POLICE POWER FOR PURPOSES OF FMA SECTION 4307, AND IS NOT SUBJECT TO FEDERAL PRE-EMPTION

The petition for certiorari should be granted in order for this Court to reassert protection of state and local exercise of police power through taxation. Section 4307 of the Foreign Missions Act (FMA) bars any construction of the statute that pre-empts "any State or municipal law or governmental authority regarding zoning, land use, health, safety, or welfare." 22 U.S.C. § 4307 (1982). This provision articulates the traditional presumption against pre-emption of state and local police power as defined by this Court. See *Patterson v. State of Kentucky*, 97 U.S. 501 (1878); *Gonzales v. Oregon*, 546 U.S. 243 (2006).

But there is no need in this case for recourse to a canon of construction to determine whether Congress's intent was to enable the Secretary of State to pre-empt state and local taxation authority over certain classes of foreign mission housing. Because tax revenue supports the services through which states exercise police power, the power to tax is an aspect of police power. Thus the clear language of FMA section 4307 bars the Secretary's action here. This understanding of taxation follows established case law, Congress's intent, and the needs of public policy.

A. This Court Recognizes The Connection Between The Power To Tax And The Police Power.

This Court has repeatedly identified a connection between a state's power to tax and its exercise of police power. In *Bode v. Barrett*, 344 U.S. 583 (1953), this Court held that an Illinois tax on truck operators for use of public highways "is, indeed, a tax for the privilege of using the highways of Illinois . . . it is within the police power of Illinois to exact such a tax at least from intrastate operators." Id. at 585. According to the *Bode* Court, a tax connected to protecting public health, safety, or welfare is an exercise of the police power.

Other cases reaffirm the link between taxation and police power. In *DeBuono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806 (1997), this Court found a New York tax on medical facilities "clearly operates in a field that 'has been traditionally occupied by the states,'" namely, "the regulation of matters of health and safety." Id. at 814 (quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977))). *DeBuono* articulates a general standard that taxes reasonably related to public health, safety, and welfare are an aspect of state police power.

This Court considers general revenue raising measures, including service fees, as an aspect of police power. A telegraph company licensing tax in *Postal Telegraph-Cable Co. v. Richmond*, 249 U.S. 252 (1919), was found to be "an exercise of the police power of the state for revenue purposes." Id. at 257. In

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), a state tax on out-of-state coal producers moving coal across state lines led this Court to discuss the obligation of out-of-state entities to shoulder a "just share of the tax burden." Id. at 624. "The 'just share of state tax burden' includes sharing in the cost of providing "police and fire protection, the benefit of a trained workforce, and the advantages of a civilized society." Id. (quoting *Exxon Corp v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228 (1980)).

B. *State And Local Authorities Need Stable Funding To Maintain Public Services, And Parties Relying On Those Services Must Assume A Fair Share Of The Tax Burden.*

The need for out-of-state entities to shoulder a just share of the tax burden continues to grow in the present economic climate. The City of New York anticipates a $3.3 billion deficit for the fiscal year starting July 1, 2011, which will expand to $4.8 billion by July 2013 absent new revenue. N.Y.C. Office of Mgmt. & Budget, Five Year Financial Plan Revenues and Expenditures (2010). New York serves as only one example of a national crisis. This year, 46 states face budget shortfalls totaling $125 billion, 39 of which already project continuing deficits into fiscal year 2012. Elizabeth McNichol et al., States Continue to Feel Recession's Impact, Center on Budget and Policy Priorities, at 1 (2010). State revenues have dropped at a rate never before recorded in the United States. Id. Without reliable revenue sources, state and local governments will be forced to curtail vital public

services. Reduced state and local taxes therefore block the effective exercise of police power.

Like many states and municipalities, the City of New York heavily relies on property tax income. New York derives one-quarter of its revenue from real property taxes. N.Y.C. Office of Management and Budget, *supra*. The Secretary of State's Notice nullifies property taxes assessed since 1980. The Second Circuit's holding magnifies the damage of this Notice by clearing a path for future nullification of currently and previously assessed taxes. The lower court's ruling diminishes New York City's tax base, hampering state and local governments' ability to budget resources for public health, safety, and welfare.

II. THE COURT OF APPEALS IGNORED THIS COURT'S PRESUMPTION AGAINST PRE-EMPTION OF STATE AND LOCAL TAXATION AUTHORITY AND GAVE IMPROPER DEFERENCE TO AN AGENCY INTERPRETATION

Assuming the power to tax is not intrinsically within the police power, and that FMA section 4307 is notionally silent as to whether state and local taxation authority is pre-empted, the Second Circuit should nevertheless have applied the longstanding presumption against pre-emption to find that Congress did not expressly intend to give the State Department the power to pre-empt local tax law. Moreover, the court of appeals accorded improper deference to an

agency's interpretation giving pre-emptive effect to the FMA. Two key principles of the law on pre-emption are in tension with the lower court's decision.

First, in all pre-emption cases, there is a presumption against pre-emption that accounts for the historic presence of state law without relying on the absence of federal regulation. *Wyeth v. Levine*, 129 S.Ct. 1187, 1195 n.3 (2009). In so doing, this Court awards the utmost respect for the states as "independent sovereigns in our federal system." *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996). In prior cases, this Court has given "some weight" to an agency's views about the impact of state law on federal objectives, but it has never "deferred to an agency's conclusion that state law is pre-empted." Id. at 1201.

Second, in the context of state taxation authority, even where foreign relations are implicated, the longstanding right permitting "the States [to] tax as they please" outweighs the risk of foreign retaliation. *Barclays Bank Plc v. Franchise Tax Bd.*, 512 U.S. 298, 322 (1994). In the present case, the court of appeals awarded improper deference to an agency's interpretive authority and virtually ignored this Court's strong presumption against pre-emption. The Second Circuit deferred to the Secretary of State's conclusion, which is unprecedented as to the pre-emption of state taxation authority. Thus, the respect for states as independent sovereigns and their longstanding right of taxation authority was improperly disregarded in favor of an agency's informal interpretive action giving pre-emptive effect to the FMA.

A. *The Secretary's Interpretive Authority Received Improper Deference Because There Is A Presumption Against Pre-emption And A Lack Of A Clear And Manifest Purpose Of Congress In Pre-empting Local Taxation Authority.*

The Secretary of State's interpretive action, giving pre-emptive effect to the Foreign Missions Act (FMA), received improper deference. The court of appeals inadequately addressed the presumption against pre-emption and failed to accord proper weight to the statutory text at issue. To determine the scope of an agency's pre-emptive authority, the analysis begins with the relevant statutory text. *Lohr*, 518 U.S. at 484. The interpretation of the specific statutory language, however, "does not occur in a contextual vacuum." Id. at 485.

Rather, all pre-emption cases are guided by a presumption against pre-emption, which is supported by two cornerstones. *Wyeth*, 129 S.Ct. at 1194. First, because the "States are independent sovereigns in our federal system," this Court has "long presumed that Congress does not cavalierly pre-empt state-law." *Lohr*, 518 U.S. at 485. Second, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth*, 129 S.Ct. at 1194. Thus, the purpose of Congress must be sufficiently evident to rebut this Court's presumption against pre-emption.

Much of this Court's precedent suggests that pre-emptive authority must be based on a clear and manifest purpose contained within the statutory text. See *Foster v. Love*, 522 U.S. 67, 71 (1997) (finding that the pre-emption issue was "a narrow one turning

entirely on the meaning of the state and federal statutes"); *CSX Transp. Inc., v. Easterwood*, 507 U.S. 658, 664 (1993) (evidence of pre-emptive purpose is sought in the text and structure of the statute at issue); see also *Wyeth*, 129 S.Ct. at 1207 (Thomas, J., concurring) (noting the Supremacy Clause of the Constitution permits pre-emptive effect only when the specific federal standards and policies are set forth in the statutory text). Therefore, particularly in cases of potential pre-emption, the express language of the statute and its surrounding statutory framework is of principle concern. *Lohr*, 518 U.S. at 486.

Despite extensive reliance on the statutory text, this Court has, on occasion, looked beyond the text to highlight Congress's awareness of state law obstacles to federal policies in finding a lack of pre-emptive purpose. *Wyeth*, 129 S.Ct at 1200; see also *Bonito Boats v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989) ("the case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them."). In *Wyeth*, the Court emphasized that Congress was certainly aware of state law obstacles to specific Food and Drug Administration (FDA) objectives. *Wyeth*, 129 S.Ct at 1200. However, during the course of the FDA's entire 70-year history, Congress never enacted any express pre-emption provision to give pre-emptive effect to overcome such obstacles. Id. The Court reasoned that Congress's "silence on the issue coupled with its certain awareness of the prevalence of state tort

litigation," was powerful evidence of congressional purpose not to give pre-emptive effect to FDA objectives. Id.

In the present case, the court of appeals merely gave a dismissive glance to this Court's rule of a presumption against pre-emption and gave inadequate consideration to the statutory text. See *City of New York v. Permanent Mission of India*, 618 F.3d 172, 188 (2d Cir. 2010). Looking to the statutory text to find congressional purpose, as instructed in *Lohr*, FMA section 4307[2] provides no express authority to pre-empt state and local taxation authority. In fact, the statute only addresses state and municipal laws, such as zoning, land use, health, safety and welfare that are specifically not subject to pre-emption. This language does not assume, as a result, that all other areas of state law are now subject to the agency's interpretive authority to pre-empt based on Congress's silence alone. The statutory provision at issue here does not embody any such pre-emptive effect on state and local taxation authority.

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[2] 22 U.S.C. § 4307. "Notwithstanding any other law, no act of any Federal agency shall be effective to confer or deny any benefit with respect to any foreign mission contrary to this chapter. Nothing in section 4302, 4303, 4304, or 4305 of this title may be construed to preempt any State or municipal law or governmental authority regarding zoning, land use, health, safety, or welfare, except that a denial by the Secretary involving a benefit for a foreign mission within the jurisdiction of a particular State or local government shall be controlling." Id.

Moreover, even if looking beyond the text, Congress's silence on the issue, coupled with its sure and certain awareness that local governments historically intend to tax their residents, is evidence of congressional purpose not to give pre-emptive effect. Nearly thirty years have passed since Congress enacted section 4307, during which it amended the FMA numerous times and chose not to include an express pre-emption provision as to state and local taxation authority. See 22 U.S.C. § 4301. The Court's reasoning in *Wyeth* suggests that this is strong evidence of Congress's purpose weighing against pre-emption despite a potential state and local obstacle to the federal policy at issue. As such, the agency was given improper deference.

B. *Where State and Local Taxation Authority Is Implicated, The Presumption Against Pre-Emption Requires A Clear Statement By Congress Of Pre-Emptive Effect, And Such Is Absent In The FMA.*

Unless Congress explicitly gives the Secretary authority to pre-empt state and local tax law, state and local taxation authority is not subject to the Secretary's pre-emption. Two well-settled propositions support this conclusion. First, taxation is an inherent and sovereign right that "presumptively belongs to the State with respect to every species of property and to an unlimited extent." *Pac. R.R. Co. v. Maguire*, 87 U.S. 36, 42 (1874); see also *Wisconsin & M. R. Co. v. Powers*, 191 U.S. 379, 385 (1903) (finding that the right of taxation was essential to the existence and continuance of government); *First Bank Stock Corp. v. Minnesota*, 301

U.S. 234, 239 (1937) (the right of a state to tax property within its territorial jurisdiction is inherent and an attribute of sovereignty). Even where a concern exists regarding a risk of foreign retaliation over a state's taxation authority, the longstanding history of the right permitting "the States [to] tax as they please" is favored over a "particular risk of retaliation." *Barclays Bank Plc.*, 512 U.S. at 322; see also *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983) (finding that Congress generally has "declined to give its consent to" treaties that would impose "tax restriction[s] to the States").

Second, congressional inaction forecloses pre-emption of state taxation authority. *Barclays*, 512 U.S. at 322. In *Barclays*, the Court found that neither the statute nor the agency's action had any pre-emptive force because Congress failed to enact legislation designed to expressly regulate state taxation. Id. Especially when pre-emption of state and local taxation authority is at stake, *Barclays* highlighted that there must be a "specific indication . . . of congressional intent." Id., at 323; see also *Maine v. Taylor*, 477 U.S. 131, 139 (1986) (requiring an "unambiguous indication of Congressional intent"); *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 373 (1994) (requiring sufficient clarity of congressional intent to strike down state taxes); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982) (finding that courts are not free to support an invalidation of state tax law unless Congress had acted). Furthermore, in *Barclays*, state taxation authority was upheld where there was a passive indication that federal law would not be impaired by the

state practices. *Barclays*, 512 U.S. 298 at 323; see also *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 75 (1993) (upholding taxation where the Court could draw the inference that the taxation was permitted to remain in place); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979) (emphasizing that a passive indication was enough to permit state taxation).

In the present case, state and local taxation authority outweighs federal pre-emption. Taxation is not mentioned in the text of the statute itself, and as a result, a strong respect must extend to the prerogative of the City of New York to tax "every species of property," as stated in *Maguire*. 87 U.S. at 42. In the court of appeals' examination of the legislative history, the Senate Governmental Affairs Committee acknowledged "concerns within Congress that the FMA would empower the State Department to preempt affirmatively a variety of state and local laws *including tax laws*." See *City of New York*, 618 F.3d at 188 (emphasis added). Congress then subsequently modified the bill to limit the agency's pre-emptive authority. Id.[3] This concern of Congress, along with its silence as to the taxation issue within the statutory text, indicates a lack of specific intent to pre-empt as required by *Barclays*.

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[3] *Amici* National League of Cities and United States Conference of Mayors objected, during Congress's deliberations, to broad pre-emption language in the draft bill. See Foreign Missions Act of 1982, S. Rep. No. 97-329, 97th Cong., 2d Sess, at 43-44 (1982). The pre-emption language was thus altered to what now appears in section 4307.

It also suggests Congress's recognition that federal law would not be impaired by permitting state taxation practices to continue.

Further, the court of appeals incorrectly reasoned that the "need for the Nation to speak with one voice" with respect to foreign affairs subjected state tax laws to pre-emption. Id. at 188. As this Court held in *Barclays*, the risk of foreign retaliation, to which the court of appeals alluded, is not a valid reason for preemption of state taxation authority. In addition, the FMA is no exception to this Court's finding in *Container Corp. of America* that Congress has repeatedly declined to consent to treaties that restrict state taxation authority. Thus, the need to speak with one voice is not cause for pre-emption of the states' sovereign right to levy taxes.

Although the court of appeals relied on various implications within section 4307 as to the Secretary's authority, it departed from well-settled precedent (specific to state taxation authority) that is against a finding of pre-emption. The Second Circuit failed to find the requisite specificity of congressional intent and drew an improper inference from Congress's silence on the issue. While the court of appeals pointed to certain House and Senate reports mentioning "[t]he problem of taxation of diplomatic personnel [as] particularly vexing," this finding does not show an unambiguous intent by Congress to preempt taxation authority. H.R. Rep. No. 97-102, Pt. 1, at 26 (1981). Instead, these references to the "vexing problem" that taxation poses may, in fact, strengthen the presumption against pre-emption.

Moreover, the court of appeals made a false assumption finding that there was "no doubt" as to Congress's intent to provide the authority for the agency to pre-empt State and local tax laws. See 618 F.3d at 188. The relevant inquiry is whether the language of the statute expresses Congress's unambiguous intent. The lower court's finding that "[section 4307] is tellingly silent with regard to state and local tax laws" incorrectly ascribes the lack of a direct preclusion of pre-emptive authority as enough to justify pre-emption. Id. This line of reasoning runs contrary to the requirement of a clear indication of congressional intent. In fact, the lack of preclusion can only support local and state taxation authority.

Relying on a broad delegation of discretion to the Secretary is simply not sufficient to invalidate state taxation authority. This Court's precedents, most notably *Barclays*, treats state taxation authority with a special level of respect. As such, the sovereign right of the states to impose taxes outweighs the federal foreign relations implications, and the lack of specific congressional intent dispels pre-emption. Therefore, the court of appeals gave improper deference to an agency interpretation giving pre-emptive effect of state and local taxation authority.

This Court should grant the petition for writ of certiorari to clarify the intended scope of the FMA and of agency pre-emptive power. As Congress has heretofore recognized, effective protection of public health, safety, and welfare depends on a stable income base for government services. If the Second Circuit's decision stands, state and local police power will be

encumbered by the possibility of the loss of tax support through federal agency pre-emption. Congress specifically limited its grant of authority in the FMA to avoid such a disruption of state and local authority. The Secretary of State may not pre-empt local tax authority under the FMA without an explicit mandate from Congress.

III. THE PETITION SHOULD BE GRANTED TO SETTLE SIGNIFICANT ISSUES OF STATUTORY CONSTRUCTION FOR TAX PRE-EMPTION

Whether to give deference to a federal agency's interpretation of a statute, which seeks to pre-empt state and local tax law, is an important issue of statutory construction. This Court has consistently encouraged careful consideration of federal laws that interfere with state and local tax authority. See *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981) (quoting *Dows v. Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.")). Here, the Secretary of State's *ad hoc* Notice frustrates state and local operations that rely so heavily on consistency and predictability.

If the lower court's decision is allowed to stand, this Court will permit the Second Circuit to

significantly distort well-established pre-emption jurisprudence. See, *supra*, part II. The presumption against pre-emption has played an important role in statutory interpretation in the lower courts and this Court can offer significant guidance to lower courts by addressing its use in the present case.

In order to provide state and local governments with the clarity required for efficient governance, this Court should grant the petition for writ of certiorari. Congress specifically chose to leave a broad swath of state functions unencumbered by the FMA and the most reasonable interpretation of that statute – the one rejected by the court below – does not give the Secretary the power she has declared.

The court of appeals' decision, if left undisturbed, will not just affect the ability of New York City to collect property taxes on certain categories of foreign mission residences. The impact of the ruling – and the broad power it grants to the Secretary of State in pre-empting local taxation authority – will be felt in dozens, if not hundreds of municipalities around the country, wherever there might be a foreign embassy, mission or consulate. See S. Rep. No. 97-329, *supra*, at 44-45 (list of municipalities hosting foreign missions, as of 1981); U.S. Department of State, Foreign Consular Offices in the United States (Summer 2007), http://www.state.gov/documents/organization/91446.pdf (visited Dec. 4, 2010) (indicating dozens of cities where consulates with career personnel (not honorary consuls) are based).

Amici represent cities and communities that rely heavily on taxes to support and enhance the well-being

of millions of citizens. These communities thrive based on a clear understanding of their powers. The decision below places these powers at the mercy of federal agency action without regard to congressional intent. This Court has the opportunity to dispel this uncertainty and to provide clear guidance in an area of great importance to the broader scheme of federalism.

CONCLUSION

The petition ought to be granted.

Respectfully submitted,

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