No. 10-627

IN THE

Supreme Court of the United States

THE CITY OF NEW YORK,

Petitioner,

v.

THE PERMANENT MISSION OF INDIA TO THE UNITED STATES 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

REPLY BRIEF

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INTRODUCTION

Respondents ignore Petitioner's central point: this Court should grant *certiorari* to resolve the tension between two lines of precedent and clarify that federal agencies have as much preemptive power as Congress clearly and manifestly intended to grant, not as much preemptive power as agencies would have liked Congress to grant.

Striving to portray this case as raising merely a question of statutory interpretation, unworthy of this Court's consideration, Respondents claim that the Court of Appeals faithfully applied this Court's preemption principles. In fact, the Court of Appeals erred by discarding the presumption against preemption, and instead deferring to the Secretary's interpretation of her own preemptive powers (see Pet. at 17-38).

Beyond misapplying preemption principles, the Court of Appeals sanctioned a novel and troubling exercise of federal agency power. By administrative fiat – a Notice published in the Federal Register without notice or an opportunity for comment – the Secretary purported to create preemptive new State and local property tax exemptions for mission and consular staff housing. The Secretary's Notice defies:

> - this Court, which in *Permanent Mission*, 551 U.S. 193 (2007), rejected Respondents' jurisdictional immunity arguments and remanded this case for the District Court to

determine the validity of Petitioner's tax liens on Respondents' staff housing;

- the District Court, which held on remand that Respondents' staff housing is subject to local property taxes, and entered a $47 million judgment validating Petitioner's tax liens (App. 71a-104a);

- Congress, which has directed the Secretary to withhold foreign aid payments from countries who fail to satisfy property tax judgments – judgments which cannot be entered if the Notice is valid (see Pet. at 7-8);

- Congress, which in the FMA authorized the Secretary to regulate mission and consular access to designated benefits without "otherwise affect[ing] State or local law" by, for example, creating preemptive new property tax exemptions (see Pet. at 26-38);

- the State Department's assurance to Congress, in 1982, that the FMA authorized only the "negative" preemptive power to deny missions and consulates designated benefits otherwise available under local law (see Pet. at 36); and

- the traditional and economically essential power of State and local governments to tax (see Pet. at 7-8; Brief for the International Municipal Lawyers Association, *et al.* as *Amicus Curiae* at 6-7, 12-19, *City of New York v. Permanent Mission* (No. 10-627)).

By granting *certiorari*, this Court will have an opportunity to check the Secretary's extraordinary attempt to expand her power at the expense of judicial, Congressional and local powers.

A. The Court of Appeals Erred by Discarding the Presumption against Preemption and Deferring to the Secretary's Mistaken View of her Own Preemptive Powers.

As Petitioner has shown, the Court of Appeals erred by jettisoning the clear statement rule, as suggested by *New York v. FERC*, 535 U.S. 1 (2002), instead of applying the rule, as required by *Wyeth v. Levine*, ___ U.S. ___, 129 S. Ct. 1187 (2009) (Pet. at 17-22). Having abandoned the clear statement rule, the Court of Appeals further erred by deferring to the Secretary's unjustifiably broad interpretation of her own preemptive powers, contrary to *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (Pet. at 22-38). Respondents claim, however, that the Court of Appeals "acknowledged the presumption against preemption," without deferring to the Secretary (Opp. Br. at 1, 9, 11-12, 16).

The Court of Appeals indeed acknowledged that the presumption applies "when there is doubt about whether Congress intended to provide an agency" preemptive authority, as well as "where the text of a preemption clause is ambiguous" (App. 35a). At the very least, the FMA and its preemption provision create substantial doubt as to whether Congress intended to grant the Secretary authority to preempt State and local tax laws (see Pet. at 26-38). Yet the Court of Appeals, citing *FERC*, 535 U.S. 1, erroneously refused to apply the presumption (App. 35a),

and proceeded to interpret every statutory ambiguity in *favor* of the Secretary's assertion of broad preemptive powers (see Pet. at 34).

In doing so, the Court of Appeals admitted to affording the Secretary's interpretation of the FMA "especially substantial" deference (App. 19a). Indeed, the Court of Appeals consistently tracked flawed arguments advanced in the United States' *amicus* briefs (see Pet. at 29-31, 33).

At the invitation of the United States, for example, the Court of Appeals (like Respondents) construed the Secretary's preemptive powers broadly, because the FMA delegates "broad" authority to the Secretary (U.S. Amicus Br. at 3, 5, 11, 14, 20; U.S. Supp. Amicus Br. at 2-6; App. 15a, 20a, 22a, 25a, 29a-30a, 36a-37a; Opp. Br. at 3, 5, 6, 8, 11). Congress certainly granted the Secretary authority to "supervis[e]" and regulate foreign missions and consulates. *See*, *e.g.*, *Palestine Info. Office v. Shultz*, 853 F.2d 932, 937 (D.C. Cir. 1988). The FMA does not, however, clearly and manifestly express Congressional intent to authorize preemption of historical State and local tax powers (see Pet. at 12, 26-38). To the contrary, Congress sought to protect those powers (see Pet. at 32-34).

The Court of Appeals erred by accepting the United States' precedent-defying interpretation of the FMA preemption provision, § 4307, as implicitly authorizing an extraordinary agency power to preempt State and local property tax laws (see Pet. at 31-34). Ignoring nearly all of Petitioner's cited cases, Respondents strain to characterize the Court of Appeals' interpretation as "consistent" with *Wyeth*, 129 S. Ct. 1187 (Opp. Br. at 15).

Nothing in *Wyeth* alters this Court's instructions for interpreting preemption provisions: accept reasonably narrow constructions, and do not infer clear and manifest preemptive intent from Congressional silence (see Pet. at 31-34).

The Court of Appeals also adopted the United States' incorrect interpretation of FMA §§ 4302(a)(1) and 4304(b) as allowing the Secretary to create local law tax exemptions as a "benefit" for foreign missions (see Pet. at 26-31). As Petitioner has shown, these FMA provisions authorize the Secretary to "designate" otherwise available real property, goods, and services as "benefits," and to regulate foreign missions' access to designated "benefits," not to create new local law tax exemptions for foreign missions and consulates (Pet. at 26-29, 39).

Respondents assert that because the premises of *bilateral* diplomatic missions enjoy certain tax exemptions under international law, the Secretary merely "designated" existing exemptions as "applicable" to consular and *multilateral* mission staff housing (Opp. Br. at 2, 17-19). This argument contradicts the Secretary's Notice, which describes the new tax exemption as "in accord with," rather than an application of, other exemptions. Moreover, as the State Department had consistently ruled before the Secretary issued the Notice (including in a Diplomatic Note concerning the staff housing at issue here), tax exemptions for staff housing were not, and are not, available under international, federal, State or local law (see Pet. at 36; App. 81a-85a & n.2). Thus, the Secretary could not confer such exemptions without first creating them.

Contrary to Respondents' assertion (Opp. Br. at 2, 19), Petitioner has properly advanced its contention that the Secretary exceeded her FMA powers by purporting to create tax exemptions (Pet. at 26-29). "[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992). In the Court of Appeals, Petitioner contended that the Secretary's power to designate FMA benefits does not include the power to create and confer local law tax exemptions (see Brief for Plaintiff-Appellee in Response to Amicus at 4, 19-20, 27, 32). Having placed at issue the scope of the Secretary's designation power, Petitioner may now emphasize the distinction between designating and creating benefits. *See*, *e.g.*, *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 & n.27 (2001) (having raised Americans with Disability Act coverage claim below, petitioner permissibly advanced new coverage argument in petition for *certiorari* and merits brief).

Again, this Court should grant *certiorari* to clarify that when Congress does not clearly authorize a federal agency to preempt State and local laws, courts should apply the clear statement rule, rather than deferring to the agency's view of its own preemptive powers.

B. Respondents Cannot Now Claim that a Newly-Cited Federal Statute Authorized the Secretary's Assertion of Preemptive Power.

While a party may advance a new argument in support of a claim asserted below, a party cannot assert a wholly new claim for the first time. *See*, *e.g.*, *Pennsylvania Dep't*

of Corr. v. Yeskey, 524 U.S. 206, 212-13 (1998) (generally, this Court only decides questions raised, involved in, or passed upon by lower courts). This Court should therefore disregard Respondents' improperly-asserted new claim that the Diplomatic Relations Act ("DRA"), 22 U.S.C. §§ 254a *et seq.*, somehow authorizes the Secretary's Notice (Opp. Br. at 20). *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (by failing to raise it below, respondent waived argument that federal maritime law governs case); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 456-57 (1995) (refusing to consider Oklahoma's argument, asserted for first time in merits brief, that newly-referenced federal statute authorized challenged state tax).

Moreover, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."). The Secretary, in her Notice, and the United States, in its *amicus* briefs submitted to the Court of Appeals, relied on the FMA, not the DRA, as the Secretary's exclusive statutory authority for creating preemptive new tax exemptions.

In any event, Respondents' new DRA argument lacks merit. Under the DRA, the President (or the Secretary as his designee) "may, on the basis of reciprocity . . . , specify privileges and immunities" for diplomatic missions "which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention"

on Diplomatic Relations, 23 U.S.T. 3227 (1972) (the "VCDR"). 22 U.S.C. §§ 254a(3-4), 254c. Whereas the phrase "privileges and immunities" refers to international law obligations (see U.S. Amicus Br. at 4 n.4), international law does not exempt staff housing from State and local property taxes (App. 81a-85a & n.2). Moreover, because the concept of reciprocity is inapplicable to multilateral (*e.g.*, U.N.) missions (see IA126-27), the Secretary cannot act "on the basis of reciprocity" to create a new tax exemption for U.N. mission staff housing. Nor does § 254c apply to foreign consulates, whose privileges and immunities are governed by the Vienna Convention on Consular Relations, 21 U.S.T. 77 (1969), not the VCDR.

C. The FMA Does not Grant the Secretary Authority to Promulgate Retroactive Rules.

Like the Court of Appeals (App. 43a-44a), Respondents concede that the Secretary's Notice purports to operate retroactively (Opp. Br. at 21). Under this Court's precedent, that concession triggers the presumption against retroactivity, which requires clear and express Congressional authority – absent from the FMA – for the Secretary to promulgate retroactive rules (Pet. at 38-40).

Under *Bowen*, 488 U.S. 208, determining the validity of an arguably retroactive agency rule involves two questions: (1) does the rule operate retroactively; and, if so, (2) does the statute clearly and expressly authorize retroactive rule-making. Contrary to Respondents' (and the Court of Appeals') conflated analysis (Opp. Br. at 21-24; App. 43a-45a, 49a-63a), only the first question involves considerations such as whether the rule impairs vested rights, or upsets settled expectations. Because the Notice

purports to operate retroactively, such considerations lack relevance here.

Misconstruing this Court's precedent, Respondents argue that under *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), agencies may promulgate retroactive rules without clear Congressional authorization (Opp. Br. at 22-24 & n.9). In *Altmann*, which did not involve agency rule-making, this Court declined to apply the presumption against retroactivity, and instead scrutinized the FSIA for any sign of Congress' retroactive intent. 541 U.S. at 692-700. This Court limited its ruling, however, to the "*sui generis* context" of a statute that determined jurisdiction over foreign sovereigns. 541 U.S. at 696; *see also Republic of Iraq v. Beaty*, __ U.S. __, 129 S. Ct. 2183, 2194 (2009) (applying *Altmann* exception to law that merely altered rules of foreign sovereign immunity).

Subsequent cases confirmed the narrowness of *Altmann*'s exception to the presumption against retroactivity. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 576 (2006); *Fernandez-Vargas v. Gonzales,* 548 U.S. 30, 38 n.6 (2006). Thus, contrary to Respondents' unjustifiably expansive interpretation, *Altmann* overruled neither *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), nor *Bowen*, 488 U.S. 204.

Respondents cannot render *Altmann* applicable here by describing the Notice as a determination "regarding the immunity of foreign sovereigns" (Opp. Br. at 24 n.9). Whereas *Altmann* concerned jurisdictional immunity, the Notice purports to change the *substantive* law by creating a new immunity from State and local property taxes.

Accordingly, the Court of Appeals relied on irrelevant factors – such as whether the Notice impairs vested rights, or upsets settled expectations – to determine whether Congress, in the FMA, authorized the Secretary to promulgate retroactive rules. This Court should grant *certiorari* to clarify that under this Court's precedent, the Secretary lacked such authority.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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