No. 12-

IN THE

Supreme Court of the United States

DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; TREASURER OF THE STATE OF KENTUCKY; TREASURER OF THE STATE OF OKLAHOMA; ATTORNEY GENERAL OF THE STATE OF MISSOURI; TREASURER OF THE STATE OF PENNSYLVANIA,
Petitioners,

v.

UNITED STATES DEPARTMENT OF THE TREASURY; SECRETARY OF THE UNITED STATES TREASURY DEPARTMENT; BUREAU OF PUBLIC DEBT, A DIVISION OF THE UNITED STATES TREASURY DEPARTMENT; COMMISSIONER OF THE BUREAU OF PUBLIC DEBT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the federal savings bond statute and regulations impliedly preempt longstanding state unclaimed property laws, where the statute and regulations are wholly silent on the treatment of unclaimed bonds and where Congress has expressly preempted state unclaimed property laws in numerous other contexts.

2. Whether application of state unclaimed property laws to unclaimed U.S. savings bonds owned by state residents violates the intergovernmental immunity doctrine, where these laws reflect the States' exercise of constitutionally reserved escheat power.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the Treasurer of the State of North Carolina and the Treasurer of the State of New Jersey were plaintiffs in the district court. The Treasurer of the State of New Jersey was an appellant in the court of appeals.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Director of the Department of Revenue of the State of Montana, Treasurer of the State of Kentucky, Treasurer of the State of Oklahoma, Attorney General of the State of Missouri, and Treasurer of the State of Pennsylvania respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-57a, is reported at 684 F.3d 382. Its order denying the petition for panel rehearing and rehearing en banc, Pet. App. 95a-96a, is unreported. The unpublished opinion of the district court, Pet. App. 58a-94a, is reported at 2010 WL 457702.

JURISDICTION

The court of appeals issued its opinion on June 27, 2012. Pet. App. 1a. A timely petition for panel rehearing and rehearing en banc was denied on September 25, 2012. *Id.* at 95a-96a. On December 5, 2012, Justice Alito extended the time for filing this petition to and including January 23, 2013. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides: "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."

The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

31 U.S.C. § 3105 and the regulations implementing it are reproduced in the Appendix to this Petition at 97a-105a.

STATEMENT OF THE CASE

The decision below fundamentally conflicts with this Court's interpretation of the Supremacy Clause of the federal Constitution, which provides that federal law does not preempt state law in areas that the States have traditionally occupied, unless that is the "clear and manifest" purpose of Congress. The court of appeals diluted this requirement by holding that longstanding state unclaimed property laws are impliedly preempted by the federal savings bond statute and regulations, even though the statute and regulations are wholly silent on the treatment of unclaimed bonds and Congress has expressly preempted state unclaimed property laws in numerous other contexts. The court of appeals also ignored the "high threshold" that this Court has required in implied preemption cases by speculating about potential conflicts between the state laws and federal law, even though there was no record on those issues.

The decision below also overextended this Court's intergovernmental immunity principles derived from the Supremacy Clause, barring operation of the state laws, even though they do not in any way regulate

the federal government or interfere with its borrowing function, by relying on questions about administrative burdens that are wholly speculative. Thus, even if the intergovernmental immunity doctrine has any role beyond the work done by preemption, which is far from clear, it plainly does not deprive the States of their sovereign rights to enforce their longstanding escheat laws.

These holdings present recurring issues of national importance and arise out of a dispute involving $16 billion, which are reasons enough for this Court to grant review. What makes the case particularly worthy of this Court's attention is the need for the Court to preserve core principles of federalism by limiting expanded notions of implied preemption and intergovernmental immunity.

A. Statutory and Regulatory Background.

The U.S. Savings Bond Program. Pursuant to its constitutional power to borrow money, U.S. Const. art. I, § 8, cl. 2, Congress has delegated authority to the Secretary of the Treasury ("Secretary" or "Treasury") to issue savings bonds and to promulgate regulations governing the savings bond program. 31 U.S.C. § 3105; see *Moore's Adm'r* v. *Marshall*, 196 S.W.2d 369, 372 (Ky. 1946) (the United States sold savings bonds in order to raise revenue and "to encourage thrift and savings by small investors"). The Secretary's authority includes, *inter alia*, the power to prescribe conditions for the transfer and redemption of savings bonds. 31 U.S.C. § 3105(c).

Treasury's implementing regulations provide that savings bonds "are not transferable and are payable only to the owners named on the bonds, except as specifically provided in these regulations." 31 C.F.R. §§ 315.15, 353.15; see also *id.* §§ 315.5(a), 353.5(a)

(providing that savings bonds are "issued only in registered form" and that "registration is conclusive of ownership").[1] Payment, or redemption, of savings bonds is made only to registered owners, upon the bond's presentment and surrender to authorized payment agents, which include banks and other financial institutions located throughout the country. *Id.* §§ 315.35(a), 315.39, 353.35(a), 353.39. The regulations clarify that the "payment" barred to non-owners is only "redemption." See *id.* § 315.2(k) ("*Payment* means redemption, unless otherwise indicated by context.") (emphasis in original).

Notably, the statute and regulations do not require Treasury to notify owners when their savings bonds mature and no longer earn interest, and Treasury did not provide such notice for any of the bonds at issue here. Similarly, there is no requirement that Treasury attempt to locate the owners of these savings bonds, Pet. App. 6a, and Treasury makes no such efforts.

State Unclaimed Property Laws. The States have long had laws that safeguard unclaimed property and attempt to reunite it with its rightful owner. See *Conn. Mut. Life Ins. Co.* v. *Moore*, 333 U.S. 541, 547 (1948) ("The right of appropriation by the state of abandoned property has existed for centuries in the common law."); *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233, 251 (1944) ("[T]he escheat or appropriation by the state of property in fact abandoned or without an owner is . . . as old as the common law itself.").

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[1] The regulations codified at 31 C.F.R. pt. 315 and 31 C.F.R. pt. 353 address different series of U.S. savings bonds, but are identical as relevant here.

All 50 States have such laws, most of which are modeled on some version of the Uniform Unclaimed Property Act. These laws require that after a statutory time period, holders of unclaimed property (including state and local governments and the United States government) report and deliver it to the State for safekeeping.[2] Under modern unclaimed property laws, the State "does not take title to unclaimed property, but takes custody only, and holds the property in perpetuity for the owner." Nat'l Conf. of Comm'rs on Uniform State Laws, *Uniform Unclaimed Property Act* (1995) (Prefatory Note), *available at* http://www.uniformlaws.org/shared/docs/unclaimed%20property/uupa95.pdf. Thus, the original owner retains the right to recover the property, forever. The state laws relieve prior holders of liability once they transfer the unclaimed property to the State.[3]

In contrast to the United States' absolute refusal to make any effort to locate the owners of unclaimed savings bonds, the States as custodians make extensive efforts to locate the rightful owners of unclaimed property. Although publication is adequate notice to satisfy due process in unclaimed

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[2] Pursuant to this Court's decision in *Texas* v. *New Jersey*, 379 U.S. 674, 681-82 (1965), the last known address of the owner of unclaimed intangible personal property, such as the bonds at issue here, conclusively determines which State is entitled to take custody of the property.

[3] *See, e.g.*, Ky. Rev. Stat. Ann. § 393.130(1) ("Any person who pays or delivers abandoned property to the department under this chapter is relieved of all liability which then exists or which thereafter may arise or be made in respect to the property."); Mont. Code Ann. § 70-9-811(2) ("A holder that pays or delivers property to the administrator in good faith is relieved of all liability arising thereafter with respect to the property.").

property cases, *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428, 434-35 (1951), the States do much more. Each of the States administers a comprehensive program to reunite owners with their property.[4]

Treasury's Position Regarding Unclaimed Savings Bonds. The savings bond statute, 31 U.S.C. § 3105, does not address the disposition of unclaimed savings bonds and is silent about state unclaimed property laws. In addition, Treasury has never promulgated regulations that govern unclaimed savings bonds or address state unclaimed property laws.

Nevertheless, Treasury has internally determined and informally advised state governments that in order for them to receive the amount due on a savings bond, they must first acquire *title* to the bond from the bond's rightful owner. A statement currently on Treasury's website (and originally posted in 2000) says:

> The Department of the Treasury will recognize claims by States for payment of United States

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[4] For example, the Unclaimed Property Administration ("UPA") within New Jersey's Department of the Treasury

> has an Outreach section whose entire purpose is reuniting abandoned property with their owners through various outreach initiatives. These initiatives include mass mailings, media campaigns, and their presence at state fairs, community centers, and other public locations throughout the year. The UPA also advertises newly abandoned property in newspapers throughout the state twice a year and subscribes a searchable web application that accepts online claim submissions.

See UPA, *Frequently Asked Questions (FAQs)*, http://www.unclaimedproperty.nj.gov/faqs-public.shtml (last updated Dec. 11, 2012) ("What effort does the Unclaimed Property Administration (UPA) make to locate property owners?").

> securities where the States have succeeded to the title and ownership of the securities pursuant to valid escheat proceedings. The Department, however, does not recognize claims for payment by a State acting merely as custodian of unclaimed or abandoned securities and not as successor in title and ownership of the securities.

Treasury Direct, *EE/E Savings Bonds Facts*, http://www.treasurydirect.gov/indiv/research/indepth/ebonds/res_e_bonds_eefaq.htm#escheatment (last updated June 28, 2012).

The only origin of this so-called "Escheat Decision" appears to be an irrelevant letter from Treasury to New York rejecting its claim to payment on a bond premised upon the State's lawful possession of the paper instrument. See C.A. App. 134-37 (1952 letter from Treasury to the Comptroller of the State of New York); cf. C.A. App. 139 (1983 letter from Treasury to the Commonwealth of Kentucky).

B. Proceedings Below.

Petitioners' Lawsuit. Petitioners, state officials and governments, commenced this lawsuit in 2004 to conserve the amounts due on unclaimed U.S. savings bonds. Most of the savings bonds in question are Series E bonds that were issued between 1941 and 1980. C.A. App. 95 (5th Am. Compl. ¶ 30). Series E bonds issued between 1942 and 1965 had 40-year terms, while those issued between 1966 and 1980 had 30-year terms. *Id.* All of the bonds have long matured, in some cases decades ago, and earn no interest. However, due to the lengthy terms and small face amounts of the bonds, as well as the fact that Treasury does not notify owners when their bonds have matured, vast numbers of these bonds have not been redeemed. C.A. App. 96-97 (5th Am.

Compl. ¶¶ 35-36) ("approximately 40 million matured unredeemed U.S. savings bonds worth about $15.99 billion remain outstanding, almost entirely Series E"). Petitioners allege that "[a]pproximately $1.6 billion of that amount corresponds with Owners whose last known addresses are in" their States. C.A. App. 87 (5th Am. Compl. ¶ 3).

Petitioner States seek a declaration that defendants have violated federal law and state unclaimed property acts by failing to report and deliver the amounts due on these savings bonds. C.A. App. 106-09 (5th Am. Compl. ¶¶ 65-78). Petitioners also seek equitable relief in the form of an order directing defendants to report and deliver to them the amounts due on unclaimed bonds that fall within their respective unclaimed property laws, as well as an accounting, simply Treasury's owner registration records. C.A. App. 109-10. The complaint separately claims that the "Escheat Decision" violates the Tenth Amendment and the notice and comment provisions of the Administrative Procedure Act ("APA), 5 U.S.C. § 553. C.A. App. 109 (5th Am. Compl. ¶¶ 79-82).

In 2005, defendants moved to dismiss or transfer the action to the United States Court of Federal Claims. Adopting defendants' contract argument, the district court granted the transfer motion, and petitioners appealed. The Federal Circuit reversed and remanded, because petitioner's claims are not within the limited jurisdiction of the Court of Federal Claims. *McCormac* v. *U.S. Dep't of Treasury*, 185 F. App'x 954 (Fed. Cir. 2006). The Federal Circuit ruled that the Court of Federal Claims lacked jurisdiction because "although the States are asserting a claim that involves a contract, they are not asserting a contract claim." *Id.* at 956. The Federal Circuit articulated the States' claim by reference to this

Court's escheat jurisprudence: "Rather, they seek custody rights originating in their escheat statutes, such that they seek to 'act[] as a conservator, not as a party to a contract.'" *Id.* (quoting *Conn. Mut. Life Ins.*, 333 U.S. at 547).

On remand, the district court limited discovery to the issues of ripeness and final agency action. C.A. App. 120. In 2008, defendants moved to dismiss on the ground of sovereign immunity and for summary judgment based on intergovernmental immunity and federal preemption. The district court denied this motion and granted defendants leave to file a "new" motion limited to Fed. R. Civ. 12(b). In 2009, defendants filed a motion to dismiss pursuant to Rule 12(b)(1) for lack of jurisdiction and, alternatively, pursuant to Rule 12(b)(6), based on intergovernmental immunity and federal preemption. Defendants also argued that petitioners' Tenth Amendment and APA claims lack merit.

District Court Decision. The district court granted defendants' motion, thereby resolving the case at the most preliminary phase without discovery on key factual issues. Pet. App. 58a-94a. The court first considered defendants' arguments predicated on Rule 12(b)(6), even though defendants also challenged the court's jurisdiction. *Id.* at 72a. On the issue of intergovernmental immunity, the court stated that application of the state unclaimed property laws to the bonds would "impermissibly 'regulate'" defendants" by "imposing onerous record-keeping and reporting requirements." *Id.* at 79a. In addition, although it acknowledged that the indemnification provisions of the state laws would protect Treasury from "multiple obligations on the same bond," the court concluded – without any record on the issue – that "such a procedure would likely run afoul of the

intergovernmental immunity doctrine by creating an obligation and an unnecessary step that would burden the federal government." *Id.* at 79a-80a.

The court found that "implied conflict preemption" barred petitioners' claims because the States' proposal to take custody of the bonds "would impermissibly interfere with the contract between the United States and the owner of the bond and conflict with the narrow regulations governing redemption of the bonds." Pet. App. 80a. Specifically, the court asserted that "[p]ermitting the States to take custody of the bond proceeds convolutes the redemption process," even though there had been no discovery on that issue, and even though the Federal Circuit had determined that escheat is not a matter of contract redemption. *Id.* at 84a. In a footnote, the court rejected as "inapposite," *id.* at 83a n.10, this Court's own analysis on the subject in *Standard Oil Co.*, 341 U.S. at 436 ("no impairment of contract" by escheat statute, "but only the exercise of a regulatory power over abandoned property").

The court rejected petitioners' Tenth Amendment claim, finding no infringement of the States' reserved powers as reflected in their unclaimed property laws, because application of those laws to the savings bonds was preempted by federal law. Pet. App. 86a. Finally, the court rejected petitioners' APA claim on the view that the Escheat Decision was exempt from the notice and comment rulemaking procedures both because it "concerns government contracts" and is a "general policy statement." *Id.* at 88a; see 5 U.S.C. § 553(a)(2), (b)(3)(A).

Although the court did not specify that the dismissal was based on lack of jurisdiction, it also concluded that the United States had not waived

sovereign immunity. Pet. App. 88a-94a. It found that the judicial review provision of the APA, 5 U.S.C. § 702, did not waive sovereign immunity because neither the Escheat Decision nor defendants' refusal to turn over the unclaimed bonds constituted "final agency action" subject to judicial review. Pet. App. 93a-94a.

Third Circuit Decision. The court of appeals first held that the United States had waived its sovereign immunity from suit pursuant to the APA's judicial review provision. Pet. App. 22a-31a (holding that the waiver of sovereign immunity in section 702 is not limited to claims seeking review of "final agency action" and also extends to actions brought under state law). It also found that the district court had federal question jurisdiction because petitioners advanced a colorable Tenth Amendment claim. *Id.* at 37a-39a.

The court of appeals then affirmed the dismissal pursuant to Rule 12(b)(6). The court first held that "the federal statutes and regulations pertaining to United States savings bonds preempt the States' unclaimed property acts insofar as the States seek to apply their acts to take custody of the proceeds of the matured but unredeemed savings bonds." Pet. App. 44a-45a. It "recognize[d]" that "there is no federal statute or regulation that expressly preempts the application of the States' unclaimed property acts," but concluded that the state acts "conflict with federal law regarding United States savings bonds in multiple ways." *Id.* The court found that operation of the state unclaimed property laws would "interfere with the terms of the [bond] contracts." *Id.* at 47a. In this regard, the court added, "regulations regarding redemption effectively would be nullified," although it acknowledged that on the existing record,

"[w]e simply do not know." *Id.* at 47a-48a. Similarly, the court noted defendants' concerns about "being subject to multiple obligations on a single savings bond," but "decline[d] to speculate." *Id.* at 48a-49a & n.26. The court concluded, "the federal statutes and regulations are sufficiently pervasive so as not to leave room for the enforcement of the unclaimed property acts to achieve the result that the States seek." *Id.* at 50a.

Second, the court of appeals held that the States' claims were barred by intergovernmental immunity because the state unclaimed property laws would interfere with Congress's "'[p]ower to dispose of and make all needful Rules . . . and Regulations respecting the . . . Property belonging to the United States.'" Pet. App. 50a (second omission in original) (quoting U.S. Const. art. IV, § 3, cl. 2). On this issue, the court presumed that unclaimed bonds are property of the United States, and rejected petitioners' argument under *United States* v. *Klein*, 303 U.S. 276 (1938), that the United States has no "beneficial interest" in them. Pet. App. 50a-51a. The court added that an order compelling an accounting would violate the intergovernmental immunity doctrine because it "would result in a direct regulation of the Federal Government." *Id.* at 55a. The court did not address this Court's related teaching in *Roth* v. *Delano*, 338 U.S. 226, 230 (1949) ("It would not seem too much to ask that a federal officer, possessed of property claimed by the State to be subject to its taxing or escheat power, make reasonable disclosure thereof to such authority as the State designates. It is but a decent comity between governments.").

The Third Circuit denied rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

The decision below merits review because it conflicts with this Court's Supremacy Clause decisions that address the doctrines of preemption and intergovernmental immunity. See Sup. Ct. R. 10(c) (a consideration favoring review on certiorari is where a federal court of appeals "decided an important federal question in a way that conflicts with relevant decisions of this Court").

I. THE COURT OF APPEALS' PREEMPTION RULING CONFLICTS WITH DECISIONS OF THIS COURT.

The preemption doctrine, which is rooted in the Supremacy Clause of the U.S. Constitution, "invalidates state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough Cnty.* v. *Automated Med. Labs.*, 471 U.S. 707, 712-13 (1985) (quoting *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (Marshall, C.J.)). At the same time, "because the States are independent sovereigns in our federal system," this Court presumes that Congress does not "cavalierly" preempt state law. *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996). Thus, "[i]n all preemption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,'" courts must "'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress.'" *Id.* (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (emphasis added). Because this "presumption against pre-emption" is based on "the historic presence of state law," it "does not rely on the absence of federal regulation." *Wyeth* v. *Levine*, 555 U.S. 555, 565 n.3 (2009) (rejecting argument that the presumption did

not apply because the federal government has long regulated drug labeling).

The "'purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Wyeth*, 555 U.S. at 565 (quoting *Medtronic*, 518 U.S. at 485). Congress can indicate preemptive intent "through a statute's express language," see *Altria Grp., Inc.* v. *Good*, 555 U.S. 70, 76 (2008), but such "express" preemption is not at issue here. Preemption can also be "implied" if (1) "the scope of the statute indicates that Congress intended federal law to occupy the legislative field" (field preemption), or (2) "if there is an actual conflict between state and federal law" (conflict preemption). *Id.* at 76-77. Clearly, there is no field preemption here because the United States freely concedes that state escheat laws apply if the States obtain title to the bonds through those laws, see *supra* at 6-7 (which of course the States cannot do without the ownership information that the United States steadfastly refuses to provide, and which would be inconsistent with public policy favoring return of unclaimed property to rightful owners).

Implied conflict preemption exists either where it is "impossible for a private party to comply with both state and federal requirements," *English* v. *Gen. Elec. Co.*, 496 U.S. 72, 79 (1990), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). This Court has emphasized, however, that a "high threshold" must be met in order for conflict preemption to be implied in the absence of express Congressional or regulatory language. *Chamber of Commerce of the U.S.* v. *Whiting*, 131 S. Ct. 1968, 1985 (2011) (plurality opinion) (internal quotation marks omitted). In particular, "[i]mplied preemption

analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'" because "such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Id.* (quoting *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment)); see also *Wyeth*, 555 U.S. at 573 (impossibility preemption "is a demanding defense"). In addition, the Court has emphasized that the presumption against preemption applies to claims of implied conflict preemption. *Wyeth*, 555 U.S. at 565 n.3.

The court of appeals departed from three core components of preemption doctrine. *First*, although the court paid lip service to the presumption against preemption by reciting it as a "guiding principle[]," Pet. App. 44a, this core federalism principle played no part in the court's analysis. Instead of being outcome determinative in favor of the States, the court treated the presumption as irrelevant, even though nothing evidences a purpose of Congress to preempt the States' historic escheat powers. This was a fundamental misapplication of this Court's decisions because the presumption plainly should apply in favor of the States. The state unclaimed property laws are unquestionably in an area that the States have traditionally occupied. This Court has repeatedly recognized that state laws which safeguard unclaimed property and attempt to reunite it with its rightful owner have a longstanding historical pedigree. See *Conn. Mut. Life*, 333 U.S. at 547; *Luckett*, 321 U.S. at 251; see also *California* v. *ARC Am. Corp.*, 490 U.S. 93, 101 (1989) ("long history" of states laws shows them "plain[ly]" in "an area traditionally regulated by the States").

Here, the presumption should apply with even greater force because the federal government does *not* have any analogous laws and procedures designed to conserve unclaimed property, identify the rightful owners, and return it to them. In this circumstance, where Congress simply has not addressed the problem, the presumption dictates that courts presume Congress intended the longstanding and beneficial state property laws to operate, and certainly did not intend to oust them in favor of a federal regulatory void.

Under this Court's decisions, the presumption against preemption can only be overcome if Congress conveyed a "clear and manifest" purpose to preempt state law. The court of appeals, however, did not purport to apply that standard, and this failure allowed a result that is incompatible with principles of federalism. It is undisputed that Congress did not address state unclaimed property laws in 31 U.S.C. § 3105. See Pet. App. 45a (acknowledging that "there is no federal statute or regulation that expressly preempts the application of the States' unclaimed property acts"). It is further undisputed that neither § 3105 nor any other federal statute addresses the disposition of matured and unredeemed savings bonds. Nor do Treasury's regulations (31 C.F.R. pts. 315, 353) address either of these matters.[5] Since the statutes and regulations say nothing about how such savings bonds are to be handled, and are equally silent about the preexisting state unclaimed property laws, the presumption should have resolved the matter because the

[5] Where Congress has delegated its regulatory authority, as Congress did in § 3105, regulations that are consistent with that delegated authority and the underlying statute can also have preemptive effect. *Hillsborough*, 471 U.S. at 713.

statutory and regulatory language reveals no purpose – much less a "clear and manifest" one – to preempt the state laws. See *Wis. Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 607 (1991) ("Mere silence . . . cannot suffice to establish a 'clear and manifest purpose' to pre-empt local authority").[6]

The court of appeals' failure to apply the "clear and manifest purpose" standard also caused it to ignore compelling statutory evidence that Congress actually intended for savings bonds to be subject to state unclaimed property laws. As petitioners showed in their briefing below,[7] in many other contexts, Congress has expressly preempted or displaced the operation of state unclaimed property laws. See, *e.g.*, 26 U.S.C. § 6408, titled "State escheat laws not to apply" (unclaimed federal tax refunds are not subject to state abandoned property laws); 11 U.S.C. § 347 (unclaimed distributions from a bankruptcy plan become property of the debtor or the debtor's successor).[8] Of particular note here, 31 U.S.C.

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[6] *See also Wyeth*, 555 U.S. at 576 (Congress's "silence on the issue" of state tort suits in the area of prescription drug safety provided "powerful evidence" that it did *not* intend to preempt them); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 537 (1977) (Congress must speak "clearly" if it intends to preempt state law); *P.R. Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) (Congressional intent regarding preemption cannot be implied "in a vacuum, unrelated to the giving of meaning to an enacted statutory text").

[7] Br. for Appellants (Amended), at 22-23 (Dec. 14, 2011).

[8] *See also* 24 U.S.C. § 420(b)(1)(A) (three years after death, unclaimed property of a resident of an Armed Forces retirement home escheats to the retirement home); 10 U.S.C. § 2575 (permitting Department of Defense and Department of Homeland Security to dispose of unclaimed personal property that falls under their control); 12 U.S.C. §§ 216a-216b (author-

§§ 1321 & 1322 protect 91 categories of property in federal custody from state unclaimed property laws, but not U.S. savings bonds.[9]

Under traditional principles of statutory construction, Congress's failure to preempt or displace the operation of state unclaimed property laws with respect to savings bonds – when it purposefully has done so for numerous other forms of property where the federal interests are identical – provides powerful evidence that Congress lacked any preemptive intent. *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2288 (2010) ("Drawing meaning from silence is particularly inappropriate . . . [when] Congress has shown that it knows how to [address an issue] in express terms") (internal quotation marks omitted); *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (pursuant to the canon *expressio unius est exclusio alterius*, when a statute lists items that are members of an associated group, courts infer "that items not mentioned were excluded by deliberate choice, not inadvertence"). This evidence is especially compelling because, according to a Government Accountability Office report, unclaimed savings bonds constitute by far the largest category of unclaimed property held by federal entities.[10] Remarkably, the

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izing Comptroller of the Currency to dispose of unclaimed property from safe deposit boxes of closed national banks).

[9] 31 U.S.C. § 1321 designates 91 types of property in federal custody as "trust funds." 31 U.S.C. § 1322 provides that unclaimed amounts in those trust funds must be transferred to a specific Treasury account that is subject to claims. This federal procedure necessarily displaces the operation of state unclaimed property laws.

[10] GAO, *Unclaimed Money: Proposals for Transferring Unclaimed Funds to States* 19 tbl.2.1 (May 1989), *available at*

court of appeals' opinion contains no discussion of this powerful evidence that Congress never intended to preempt state laws in this area. It is the province of Congress, and not the Third Circuit, to make the policy judgments that led that court to disable the States' unclaimed property laws. Only this Court can speak to that "freewheeling" expansion of implied preemption.

Given the absence of any direct statutory or regulatory language that suggests preemptive intent – and the compelling statutory evidence to the contrary – the court of appeals' reliance on the general contractual requirements for redemption of U.S. savings bonds, see Pet. App. 46a-48a, was insufficient under this Court's decisions. The federal regulations provide for in-person redemption of U.S. savings bonds by their registered owners at banks as paying agents. While the relief petitioners seek contemplates something different, that only occurs in limited circumstances that Congress and Treasury have declined to address: where the registered owner has not come forward to redeem a bond at maturity, in conformity with the federal regulations. In these circumstances, the longstanding state laws merely operate in an area into which the federal scheme does not extend – a traditional context in which this Court has declined to find preemption[11] – and do not

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http://www.gao.gov/products/AFMD-89-44 (link to pdf). This report was part of the record below. *See* C.A. App. 145-214.

[11] *See, e.g.*, *Rice*, 331 U.S. at 237 (federal warehouse statute does not preempt state law as to areas into which Congress "has not moved" and as to matters on which Congress has not "adopt[ed] a policy of its own"); *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (Atomic Energy Act allows States to "retain their traditional responsibility in the field of regulating electrical

conflict with the federal regulations that govern contractual redemption.[12]

Indeed, a regime that applies state unclaimed property laws to matured and unredeemed bonds *furthers* the fundamental goal of the savings bond program to encourage the purchase of bonds, see *Free* v. *Bland*, 369 U.S. 663, 669 (1962), because individuals are encouraged to purchase bonds under a system where States make affirmative efforts to notify them of forgotten unredeemed bonds, as compared to a federal approach that never notifies them. Under these circumstances, the court of appeals' failure even to apply the presumption against preemption simply cannot be squared with this Court's holdings.

Moreover, the Third Circuit's failure to apply the presumption against preemption stands in stark contrast to the decisions of other courts of appeals, which have faithfully adhered to this Court's holdings that the presumption applies in areas traditionally occupied by the States and can only be overcome if Congress conveys a "clear and manifest" purpose to

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utilities for determining questions of need, reliability, cost and other related state concerns").

[12] In *Connecticut Mutual Life Ins. Co.*, 333 U.S. at 547, this Court held that state escheat laws did not conflict with similar contractual requirements for redemption of life insurance, noting "[t]he state is acting as a conservator, not as a party to a contract." *Accord Standard Oil Co.*, 341 U.S. at 436 ("Normally the obligor or holder and the obligee or owner of abandoned property would, as here, have no contractual arrangement between themselves for its disposition in case of the owner's failure to make claim. As the disposition of abandoned property is a function of the state, no implied contract arises between obligor and obligee to determine the disposition of such property. Consequently, there is no impairment of contract by New Jersey's [escheat] statute . . . but only the exercise of a regulatory power over abandoned property.").

preempt state law. See, *e.g.*, *City of Joliet* v. *New West, L.P.*, 562 F.3d 830, 836 (7th Cir. 2009) (Easterbrook, C.J.) (federal housing laws do not impliedly preempt local eminent domain powers because no language in the laws "supplies a 'clear statement' of a national decision to displace eminent domain" and there is "no concrete conflict between condemnation" and the federal laws);[13] *Castro* v. *Collecto, Inc.*, 634 F.3d 779, 784-86 (5th Cir. 2011) (federal Communications Act does not impliedly preempt state statute of limitations for debt collection actions because the presumption against preemption applies and "Congress has not made clear" that it intended for the federal law to have preemptive effect); *Oxygenated Fuels Ass'n Inc.* v. *Davis*, 331 F.3d 665, 673 (9th Cir. 2003) (Clean Air Act does not impliedly preempt California ban on gasoline additive because there is no "'clear evidence'" that Congress meant to preempt state environmental regulation, "an area of traditional state control") (quoting *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 885 (2000)).

Second, the court of appeals ignored the "high threshold" that applies in implied preemption cases and engaged in precisely the sort of "freewheeling" inquiry that this Court has disapproved as exceeding judicial authority. See *Whiting*, 131 S. Ct. at 1985 (plurality opinion); *Gade*, 505 U.S. at 111 (Kennedy, J., concurring in part and concurring in judgment). This Court has warned lower courts against "'seeking out conflicts between state and federal regulation where none clearly exists,'" *English*, 496 U.S. at 90 (quoting *Huron Portland Cement Co.* v. *Detroit*, 362

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[13] *See also New West*, 562 F.3d at 837 ("[I]t takes a federal command to preempt a state or local law; a conflict between a local law and legislative aspirations does not displace another jurisdiction's law.").

U.S. 440, 446 (1960)). In particular, it has instructed courts to find preemption only when there is an "irreconcilable" conflict between the federal and state schemes, not merely a "hypothetical or potential conflict." *Rice* v. *Norman Williams Co.*, 458 U.S. 654, 659 (1982).

The court of appeals' reasoning contravened these principles. For example, the court's analysis extended into the realm of the "hypothetical or potential," albeit concededly, when it speculated "it is possible that the States would designate the same payment agents" or they "could" adopt redemption procedures "more complex" than the federal procedures. Pet. App. 48a. As the court's concluding sentence acknowledged, however, there is no record on this issue. *Id.* ("We simply do not know."). In the absence of a record, the court relied upon a "hypothetical" conflict, contrary to this Court's teachings.[14] As evident in this Court's preemption holdings, implied conflict preemption theory seems particularly ill-suited to address across-the-board challenges to a category of state laws, as opposed to an as-applied challenge to a specific state law that the federal government views as unduly onerous.

Similarly, the court of appeals expressed doubts about the availability of state indemnification procedures to address defendants' concerns about potential double payments. Pet. App. 48a-49a. Again, however, without discovery on that issue, nothing in the record suggests that the existing indemnification provisions are not a complete answer

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[14] The court of appeals' suggestion (Pet. App. 24a n.17) that the States did not challenge the limitation on discovery imposed by the district court is incorrect. *See* Br. for Appellants (Amended), at 35-36 (Dec. 14, 2011).

to the United States' concerns. The court of appeals' speculation was therefore improper under this Court's precedent. See *Hillsborough*, 471 U.S. at 720-22 (rejecting argument that local ordinance concerning blood plasma collection conflicted with federal scheme's goal of ensuring adequate plasma supply because record lacked evidence to support this concern and it was therefore "too speculative to support preemption").

Third, the court of appeals' determination that implied preemption is supported by the fact that "the federal statutes and regulations are sufficiently pervasive so as not to leave room for the enforcement of the unclaimed property acts," Pet. App. 50a, is wrong on its own terms and conflicts with this Court's decisions. The court's reasoning implies that it relied on a theory of "field preemption," as well as "conflict preemption," but defendants' consistent concession that some state escheat laws, title ones, can operate in this area takes field preemption off the table.

Whatever the court's precise theory of implied preemption, its reasoning was unsound. As shown above, the federal savings bond statute and regulations hardly "leave [no] room" for the operation of state unclaimed property laws, inasmuch as they are silent on the disposition of matured and unredeemed bonds.

Moreover, this Court has long rejected the notion that the "pervasiveness" or comprehensiveness of a federal regulatory scheme supports implied preemption. *Hillsborough*, 471 U.S. at 718 ("Given the presumption that state and local regulation . . . can normally coexist with federal regulations, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to preempt in its

entirety a field" of traditional state concern); *English*, 496 U.S. at 87; *N.Y. Dep't of Soc. Servs.* v. *Dublino*, 413 U.S. 405, 415 (1973). As the Court explained in *Dublino*, "[t]he subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem." 413 U.S. at 415. Thus, the detailed regulatory treatment of savings bonds is nothing more than what one would expect for a government debt instrument, and the court of appeals' reliance on the "pervasive" regulatory scheme as a ground for finding implied preemption was simply wrong and plainly inconsistent with this Court's precedents.

II. THE COURT OF APPEALS' INTERGOVERNMENTAL IMMUNITY RULING CONFLICTS WITH DECISIONS OF THIS COURT.

The intergovernmental immunity doctrine also derives from the Supremacy Clause and the interpretation of that Clause in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 425-37 (1819). This doctrine preserves the preeminent role of the federal government by prohibiting any state law that "regulates the United States directly." *North Dakota* v. *United States*, 495 U.S. 423, 435 (1990) (plurality opinion). At the same time, in order to "accommodat[e] . . . the full range of each sovereign's legislative authority," this Court has adopted a "functional approach" to claims of intergovernmental immunity, which recognizes that burdens imposed on the federal government by "neutral state law[s]" are "'but normal incidents of the organization within the same territory of two governments.'" *Id.* (quoting *Helvering* v. *Gerhardt*, 304 U.S. 405, 422 (1938)).

As an initial matter, a serious threshold question exists: whether there is any room for an independent intergovernmental immunity doctrine separate from preemption. Ultimately, given the same underpinning of the Supremacy Clause, the issue has to be the same: would Congress permit the state law to operate in a way that imposes burdens on federal government operations. It is difficult to identify in this Court's jurisprudence a reason why the courts should be free to engage in freewheeling assessment of policy issues while addressing intergovernmental immunity when they are not in the implied preemption context. Such unfettered judicial policymaking merely invites the United States to claim that state laws violate intergovernmental immunity in circumstances where the text of the federal statute does not support a preemption argument. The resulting uncertainty makes it difficult for States to determine what they can regulate and what they cannot. Thus, the issues raised here provide the Court with the opportunity to consider precisely how preemption and intergovernmental immunity principles operate and interact.

Beyond that threshold issue, however, the court of appeals' two grounds for holding that the States' requested relief would violate the intergovernmental immunity doctrine conflict with directly relevant decisions of this Court.

First, as noted, the court of appeals held that operation of the state unclaimed property laws would interfere with Congress's "'[p]ower to dispose of and make all needful Rules . . . and Regulations respecting the . . . Property belonging to the United States.'" Pet. App. 50a (second omission in original) (quoting U.S. Const. art. IV, § 3, cl. 2). The court's premise that the amounts due on savings bonds are property that belongs to the United States is contrary to this

Court's precedents. In resolving an interstate dispute over escheat of intangible property in *Delaware* v. *New York*, 507 U.S. 490, 499 (1993), this Court held that "the property interest in any debt belongs to the creditor rather than the debtor." See also *Texas* v. *New Jersey*, 379 U.S. 674, 680-82 (1965) (adopting rule that power to escheat a debt is accorded to the State of the creditor's last known address because "debt is property of the creditor, not of the debtor"). Under this rule, the amounts due on the savings bonds are property of the bond owners (the creditors), not the United States (the debtor). As a result, the United States' plenary authority under the Constitution to regulate property of the federal government simply is not implicated here.

Moreover, the court of appeals' reliance on the Property Clause was particularly inapt here because the United States has claimed no interest in "dispos[ing] of" or regulating the amounts due on unclaimed savings bonds as federal property under the Property Clause. To the contrary, the United States effectively has *disclaimed* that the funds are subject to its plenary authority; instead, it asserts that its limited purpose is ensuring that the bond owners (its creditors) can rightfully assert *their claims to the property* at any time. See Br. for Appellees, at 29 (Dec. 23, 2011) ("the federal government has not 'escheated' the proceeds of matured U.S. savings bonds, which are honored by the United States in perpetuity"); *id.* at 17 (asserting that the amounts due "are currently payable to the rightful owners") (internal quotation marks omitted). Cf. *Klein*, 303 U.S. at 280 (unclaimed bond dividends deposited to court registry held subject to escheat, as United States did not assert "any right, title or interest"). Under these circumstances, the court of

appeals' reliance on the United States' interests under the Property Clause was wide of the mark, and its resulting conclusion that operation of state unclaimed property laws would violate the intergovernmental immunity doctrine by interfering with Congress' power under that Clause was fundamentally flawed.

Second, the court of appeals also held that an order requiring the accounting sought by the States would constitute "direct regulation" of the federal government by subjecting it to the States' "'onerous'" reporting and record-keeping requirements. Pet. App. 54a-55a. This holding conflicts with decisions of this Court, which have specifically rejected claims that requiring the United States and its instrumentalities to file reports and provide information pursuant to state unclaimed property laws violates the intergovernmental immunity doctrine. In *Anderson National Bank* v. *Luckett*, 321 U.S. at 252-53, the Court held that Kentucky could enforce its unclaimed property laws against abandoned accounts in a national bank. It specifically found that Kentucky could enforce the reporting requirements in the laws because those requirements are just "incident to" the overall operation of the laws. Similarly, in *Roth* v. *Delano*, 338 U.S. 226 (1949), the Court held that Michigan could enforce its unclaimed property laws and accompanying reporting requirements against abandoned dividends of a liquidated national bank. It stated that requiring a federal officer to provide information pursuant to a "mere" reporting obligation is not "too much to ask" and simply reflects "decent comity between governments." *Id.* at 230. The court of appeals did not address or distinguish either of these decisions.

Apart from *Luckett* and *Delano*, the court of appeals' conclusion that *any* application of the reporting requirements to the United States violates the intergovernmental immunity doctrine, "regardless of how stringently the States decide to enforce" them, Pet. App. 55a, violates this Court's decision in *North Dakota*. In that case, this Court held that the lower court had improperly prohibited North Dakota from imposing labeling and reporting requirements on alcohol sent to federal air force bases in the State, where there was "no evidence" that the burdens imposed by those requirements were "substantial." *North Dakota*, 495 U.S. at 443 (plurality opinion). As the Court stated:

> It would be both an unwise and an unwarranted extension of the intergovernmental immunity doctrine for this Court to hold that the burdens associated with the labeling and reporting requirements – no matter how trivial they may prove to be – are sufficient to make them unconstitutional.

Id. at 444 (plurality opinion). Here, there was "no evidence" concerning the burdens that would be imposed on the United States by the state reporting and record-keeping requirements – much less any evidence establishing that the burdens would be "substantial" – because there was no discovery on that issue. As a result, the court of appeals' reliance on these requirements as a basis for finding a violation of the intergovernmental immunity doctrine contravened this Court's precedents.

In sum, neither of the court of appeals' grounds for holding that operation of the state unclaimed property laws would violate the intergovernmental immunity doctrine was faithful to this Court's precedents. As a result, the decision below expanded

the doctrine by applying it to bar the operation of state laws that do not directly regulate the federal government or interfere with its borrowing function.

This violation of fundamental principles of federalism merits this Court's review because it also infringes on the States' Tenth Amendment rights by eviscerating state laws that are derived from the States' longstanding, reserved authority over unclaimed property. As the court of appeals failed to recognize, these reserved powers can comfortably coexist with the federal government's authority to borrow money and operate the U.S. savings bond program. Accordingly, the court needlessly construed federal law to bar application of a quintessential sovereign power of the States, in clear violation of the Tenth Amendment.

III. THE COURT OF APPEALS' PREEMPTION AND INTERGOVERNMENTAL IMMUNITY RULINGS POSE ISSUES OF FUNDAMENTAL IMPORTANCE.

The court of appeals' rulings present recurring and "important question[s]" of federal law that warrant this Court's review. See Sup. Ct. R. 10(c).

This case involves a $16 billion dispute between the federal government and the States. As the States face the profound challenge of maintaining the financial health of their citizens and economies in these difficult times, the question whether they can use their robust unclaimed property procedures to put the amounts due on unredeemed U.S. savings bonds into the hands of their citizens has important real-world consequences. In addition, as the court of appeals recognized, the question of which sovereign ultimately retains the amounts that are never claimed, whether the States as conservators or the

Treasury *sub silentio*, also will have enormous economic significance. Pet. App. 8a-9a. A particular responsibility of this Court is to hear such important disputes between the States and the national government, all the moreso to referee disputes over the allocation of power between them when Congress stands silent.

In addition to the fundamental importance of the parties' dispute, this Court has historically and in recent years taken particular interest in ensuring that the standards for preemption are properly and uniformly applied. See, *e.g., Arizona* v. *Inter Tribal Council of Ariz., Inc.*, No. 12-71 (U.S. Oct. 15, 2012) (petition granted); *Mut. Pharm. Co.* v. *Bartlett*, No. 12-142 (U.S. Nov. 30, 2012) (petition granted); *Pliva, Inc.* v. *Mensing*, 131 S. Ct. 2567 (2011); *Whiting*, 131 S. Ct. 1968; *Wyeth*, 555 U.S. 555; *Altria*, 555 U.S. 70; *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008).

The specific preemption issue presented – whether preemption can be implied in the absence of any identifiable statutory or regulatory language even suggesting, much less demonstrating, any preemptive intent – is a recurring one that has generated concern among current and past members of the Court. See, *e.g.*, *Wyeth*, 555 U.S. at 582-604 (Thomas, J., concurring in the judgment) ("implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution"); *Geier,* 529 U.S. at 886-913 (Stevens, J., dissenting); *Gade*, 505 U.S. at 109-14 (Kennedy, J., concurring in part and concurring in the judgment) (cautioning against "an undue expansion of our implied pre-emption jurisprudence"). Commentators, too, have raised concerns about implied preemption analysis that has no nexus to language. See, *e.g.,* Nina A. Mendelson, *A Presump-*

tion Against Agency Preemption, 102 Nw. U. L. Rev. 695, 724 (2008) ("[A]n agency [sh]ould not be assumed to have the authority to preempt state law unless there is clear evidence that Congress so intended."); Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 277 (2000) (arguing against "'imaginative reconstruction'" of Congressional intent when the "federal statute does not expressly address preemption").

This case is a compelling vehicle for addressing and clarifying the limits of implied preemption because the court of appeals eviscerated the presumption against preemption and ignored the high threshold that this Court has established for application of implied preemption by holding that longstanding state unclaimed property laws are preempted, even though the savings bond statute and regulations are stunningly silent on the subject and Congress has preempted these state laws in dozens of other contexts, but not this one. If allowed to stand, the inevitable result will be further applications of implied preemption that "wander" from the statutory text and erosion of the core federalism principle that Congress must speak clearly when it intends to displace state law.

Because the preemption doctrine is so fundamental to a proper application of the federalism principles embodied in the Constitution, this Court has granted certiorari to address preemption questions even in the absence of a clear conflict among the circuits. *See, e.g.*, *Wyeth*, 555 U.S. at 563. This case falls comfortably within that approach, particularly because a circuit split is unlikely to arise since the States have chosen to consolidate their claims (which could have been brought in multiple circuits) in one lawsuit. In addition, because this case involves a substantial dispute between sovereign governments,

with a clash between state and federal law that is more imagined than real, the Court should use this case as a vehicle for evaluating the scope of and interaction between implied preemption and intergovernmental immunity.

The court of appeals also wildly expanded the doctrine of intergovernmental immunity by applying it in a situation where there is no interference with the Property Clause under this Court's precedents and where the court's concerns about administrative burdens are wholly speculative. Beyond that judicial freewheeling, the substantial question persists, whether this Court's intergovernmental immunity doctrine stands separate and apart from its preemption principles. Accordingly, the court's intergovernmental immunity ruling, as well as its preemption ruling, poses a question of fundamental importance to "Our Federalism" that warrants this Court's review.

CONCLUSION

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

Respectfully submitted,

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