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California Restaurant Association v. Berkeley: Presumptions and Preemption

by Frank Cruz-Alvarez and Sofia M. Perla

In its recent *California Restaurant Association v. Berkeley* opinion, the Ninth Circuit concluded that the city of Berkeley's ordinance prohibiting the installation of natural gas piping within newly constructed buildings is expressly preempted by the federal Energy Policy and Conservation Act ("EPCA"). Specifically, the court declined to apply any presumption against preemption and held that the EPCA preempts Berkley's regulation "by its plain language." Despite the measured reasoning of the opinion, Judge O'Scannlain authored a concurring opinion taking issue with the following single paragraph of the majority opinion:

> As with any express preemption case, our focus is on the plain meaning of EPCA. *See Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016). That's because "the plain wording of the clause . . . necessarily contains the best evidence of Congress' pre-emptive intent." *Id.* In discerning its meaning, we look to EPCA's text, structure, and context. *See R.J. Reynolds Tobacco Co. v. County of Los Angeles*, 29 F.4th 542, 552 (9th Cir. 2022). And we apply this textual analysis "without any presumptive thumb on the scale" for or against preemption. *Id.* at 553 n.6.

In his concurrence, O'Scannlain opines that he was "bound" to reach the same conclusion as the majority because Ninth Circuit precedent instructed the Court not to apply any presumption against preemption to the provision before it. However, for O'Scannlain, reaching this conclusion was "not obvious or easy." For him, the "apparently conflicting lines of cases" have made this a "deeply troubled area of law."

What O'Scannlain really takes issue with is Justice Clarence Thomas's "drive by ruling" from the 2016 *Puerto Rico v. Franklin Cal. Tax-Free Trust* ("*Franklin*") case, where the court stated that it would "not invoke" any presumption for or against preemption, and it would "focus on the plain wording of the clause." For O'Scannlain, the *Franklin* decision was an unexplained departure from earlier cases like *Cipollone v. Liggett Group, Inc.* and *Medtronic, Inc. v. Lohr* that instructed courts to apply the presumption in express-preemption cases (at least in areas of traditional state concern) and to interpret preemption provisions narrowly. O'Scannlain subsequently faults the Ninth Circuit for broadly reading *Franklin* without hesitating to consider its limits or the possibility of reconciling *Franklin* with the case law coming before it.

In his concurrence, O' Scannlain conflates two distinctive, though similar, issues in this line of cases: (1) whether to apply the presumption against preemption in express-preemption cases,

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and (2) whether the "plain language of the statute begins and ends the analysis." Beginning with O'Scannlain's latter criticism, Justice Thomas's conclusion that "the plain language" of the statute "begins and ends the analysis" is not inconsistent with *Cipollone* and *Lohr*. Those cases, which were decided by the Supreme Court decades before *Franklin*, instruct lower courts to begin express-preemption analyses "with the text of the provision in question, and move on, *as need be*, to the structure and purpose of the Act" to determine the congressional intent, the backbone of the preemption analysis. Thus, it is not inconsistent with *Cipollone* and *Lohr* that an express preemption analysis does not discuss the purpose and structure of the statute and instead begins and ends with the statute's plain language, so long as the plain language evidences the congressional intent. This remains true regardless of whether the case law requires application of the presumption against preemption.

O'Scannlain's "doubt" about whether to apply any presumption in express preemption cases is misguided. The *Franklin* decision does not create conflicting lines of cases. Instead, *Franklin* clarifies and simplifies a single line of cases that had become nuanced and confused. Where the congressional intent is clear from the language of an express preemption provision and the related statutory terms, there is not room for other plausible alternatives, regardless of whether they favor or disfavor preemption. Justice Thomas's opinion should not come as a surprise to O'Scannlain because Thomas joined in Justice Scalia's dissenting opinion in *Cipollone*, where he disagrees with that Court's creation of the rules governing the presumption against preemption and argues instead that the language of express-preemption provisions should be given its ordinary meaning. Justice Thomas agreed with Scalia's framework in 1992 and applied it in *Franklin* in 2016.

Finally, even if *Franklin* required courts to continue to apply the presumption against preemption, the conclusion here would be unchanged. While the presumption requires courts to construe express provisions as narrowly as possible to determine the scope of preemption, Supreme Court and Ninth Circuit precedent—both pre- and post-*Franklin*—are consistent that the express-preemption analysis should begin with the text of the provision in question and proceed to the structure and purpose of the provision only as needed. Here, little analysis is needed; the text of the statute expressly indicates the congressional intent and therefore the scope of preemption. Congress defined the scope of preemption within the statute itself. The preemption provision reads, "no State regulation concerning the energy efficiency, energy use, or water use of [a covered product] shall be effective with respect to such product." The City of Berkeley's intended ordinance, which effectively bans the use of natural gas products, therefore concerns energy use. The series of definitions in the EPCA for the statutory terms solidify this reading, which allows no room for interpretation. In other words, there is no other plausible alternative that favors or disfavors preemption. The analysis begins and ends with the plain language, with or without any presumption against preemption.

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