No. 10-627

# In the Supreme Court of the United States

CITY OF NEW YORK, NEW YORK, PETITIONER

*v.*

PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, ET AL.

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

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**


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## QUESTIONS PRESENTED

1. Whether the Foreign Missions Act, 22 U.S.C. 4301 *et seq.*, authorizes the State Department to designate an exemption from state and local real property taxes as a benefit for certain foreign mission property in the United States.

2. Whether the State Department's benefit determination validly extended to previously assessed taxes and tax liens, as well as to future efforts to impose real estate taxes.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page



Treaties and statutes:

Statutes—Continued: Page



Miscellaneous:

Miscellaneous—Continued: Page

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This brief is filed in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

## STATEMENT

1. The Foreign Missions Act (FMA), 22 U.S.C. 4301 *et seq.*, governs the treatment of foreign missions in the United States. In enacting the FMA, Congress stated that it is "the policy of the United States to support the secure and efficient operation of United States missions abroad, to facilitate the secure and efficient operation in the United States of foreign missions, * * * and to assist in obtaining appropriate benefits, privileges, and immunities for those missions." 22 U.S.C. 4301(b). To that end, the FMA confers on the State Department

authority to determine "[t]he treatment to be accorded to a foreign mission in the United States * * * after due consideration of the benefits, privileges, and immunities provided to missions of the United States in the country or territory represented by that foreign mission, as well as matters relating to the protection of the interests of the United States." 22 U.S.C. 4301(c).

The State Department may "[p]rovide or assist in the provision of benefits for or on behalf of a foreign mission in accordance with section 4304 of this title." 22 U.S.C. 4303(2). Under Section 4304, the Department may do so upon request of a foreign mission, or upon "determin[ing] that such action is reasonably necessary on the basis of reciprocity or otherwise" in order to advance certain enumerated foreign relations goals. 22 U.S.C. 4304(a)-(b). Those goals include "facilitat[ing] relations between the United States and a sending State," "protect[ing] the interests of the United States," "adjust[ing] for costs and procedures of obtaining benefits for missions of the United States abroad," and "resolving a dispute affecting United States interests and involving a foreign mission or sending State." 22 U.S.C. 4304(b)(1)-(4).

The FMA defines the term "benefit" expansively, as "including the acquisition of" a list of property, goods, or services, such as "real property," "public services," "locally engaged staff," and "protective services." 22 U.S.C. 4302(a)(1). The term "benefit" also "includes such other benefits as the Secretary may designate." *Ibid.* "Determinations with respect to the meaning and applicability of the terms used" in the FMA, including "benefit," are "committed to the discretion of the Secretary." 22 U.S.C. 4302(b). The FMA also provides that "[e]xcept as otherwise provided, any determination re-

quired under [the FMA] shall be committed to the discretion of the Secretary." 22 U.S.C. 4308(g).

2. Petitioner City of New York brought suit in state court against respondents, the Permanent Mission of India to the United Nations and the Principal Resident Representative of Mongolia to the United Nations, based on their failure to pay local property taxes on certain properties owned by the governments of India and Mongolia. The properties contain the offices of the Indian and Mongolian missions to the United Nations (UN), and include residences for their UN mission staff and, in India's case, consular staff. Petitioner seeks unpaid property taxes levied on the portions of the properties used as staff residences, as well as a declaratory judgment establishing the validity of tax liens on the properties due to respondents' failure to pay the taxes. Pet. 9-10.

After these suits were removed to the District Court for the Southern District of New York, see 28 U.S.C. 1441(d), respondents moved to dismiss on the ground that they were immune from suit under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1604. The district court denied the motion, and the Second Circuit affirmed. See 446 F.3d 365. This Court also affirmed, holding that petitioner's claims fell within an exception to foreign sovereign immunity for cases involving "rights in immovable property situated in the United States," 28 U.S.C. 1605(a)(4). See 551 U.S. 193.

3. On remand, the district court held that petitioner's tax liens were valid, rejecting respondents' arguments that international law prohibits assessment of taxes against property used to house diplomatic and consular staff of a foreign government. Pet. App. 77a-104a. Respondents appealed.

4. On June 23, 2009, while respondents' appeal was pending, the State Department issued a Notice titled *Designation and Determination under the Foreign Missions Act*, 74 Fed. Reg. 31,788 (Notice). The Notice explained that the State Department had determined that property owned by foreign governments and used to house staff of consular posts or missions to the United Nations or the Organization of American States was exempt from state and local real property taxes. *Ibid.* The Department accordingly designated the tax exemption a "benefit" pursuant to the FMA. *Ibid.*; see 22 U.S.C. 4303(2), 4304(a)-(b). The Notice specified that the tax exemption "shall be provided to such foreign missions on such terms and conditions as may be approved by the Office of Foreign Missions" of the State Department, and that "any state or local laws to the contrary are hereby preempted." 74 Fed. Reg. at 31,788. The Notice provided that the Department's determination "shall operate to nullify any existing tax liens with respect to such property." *Ibid.* The Department did not require any refunds of taxes previously paid by a foreign government. *Ibid.*

The State Department determined that the Notice was "necessary to facilitate relations between the United States and foreign states, to protect the interests of the United States, to allow for a more cost effective approach to obtaining benefits for U.S. missions abroad, and to assist in resolving a dispute affecting U.S. interests and involving foreign governments which assert that international law requires the exemption from taxation of such diplomatic and consular properties." 74 Fed. Reg. at 31,788. The tax exemption was intended to resolve a longstanding dispute between the United States and foreign governments (including respondents)

by "conform[ing]" United States practice "to the general practice abroad of exempting government-owned property used for bilateral or multilateral diplomatic and consular mission housing." *Ibid.* The Department explained that local efforts to tax such property "ha[d] become a major irritant in the United States' bilateral relations." *Ibid.* As a result, the United States was "threaten[ed]" with "hundreds of millions of dollars in reciprocal taxation," and foreign governments had raised obstacles to implementation of security improvements to United States diplomatic and consular facilities abroad, "imposing unacceptable risks to the personnel working in those facilities." *Ibid.*

5. The court of appeals reversed and remanded with instructions to dismiss. Pet. App. 1a-70a. The court held that the Notice was a valid exercise of the State Department's authority under the FMA.

a. The court first held that the "FMA authorizes the State Department to designate property tax exemptions for mission and consular staff residences as 'benefits.'" Pet. App. 20a. Section 4302(a)(1), the court explained, defines "benefit" by listing "a variety of thereafter enumerated goods and services," and then stating, "in a phrase set-off from [the] aforementioned list of examples," that "benefit" also "includes such other benefits as the Secretary may designate." *Id.* at 21a-22a (quoting 22 U.S.C. 4302(a)(1))). The court concluded that this "broad and open-ended language," together with Section 4302(b)'s grant of discretion to the State Department to determine the meaning of the FMA's terms, confers on the Department expansive authority to "designate additional benefits" beyond the enumerated categories. *Id.* at 22a. The FMA thus guides the Department's exercise of its discretion not by limiting the scope of permissible

"benefits," but by directing, in Sections 4301(c) and 4304, that the Department consider the reciprocal treatment of United States missions, the interests of the United States, and other foreign-relations goals. *Id.* at 22a-23a.

The court therefore rejected petitioner's argument that the FMA permits the State Department only to restrict the benefits otherwise available to a foreign mission, "as a way to reciprocate for restrictions imposed on United States missions abroad." Pet. App. 21a. The canon of *ejusdem generis* also did not apply, the court held, because the enumerated categories of benefits were "structurally separate" from the conferral of authority to designate other benefits. *Id.* at 23a-26a. Petitioner's interpretation, moreover, was inconsistent with Congress' evident desire to give the State Department flexibility to conduct relations with foreign governments and further United States interests, including the interest in ensuring favorable reciprocal treatment of United States missions abroad. *Id.* at 27a-31a.

The court next rejected petitioner's argument that the FMA does not permit the State Department to provide a benefit that has the effect of preempting contrary state or local tax laws. Pet. App. 31a-42a. The court explained that "[a] federal agency 'may preempt state regulation' * * * provided the agency is 'acting within the scope of its congressionally delegated authority.'" *Id.* at 31a-32a (quoting *City of N.Y.* v. *FCC*, 486 U.S. 57, 63-64 (1988)). Relying on the FMA's "exceptionally broad" grant of authority to the State Department, the need for federal uniformity in the foreign-affairs context, and Congress' intent that the Department determine the national treatment of foreign missions in furtherance of United States interests, the court concluded that the

"language, structure, and subject-matter of the FMA all strongly indicate that Congress meant" to confer preemptive authority. *Id.* at 36a; see *id.* at 31a-42a.

The court rejected petitioner's argument that the Department's authority in this case was limited by Section 4307, which provides that nothing in the FMA "may be construed to preempt any State or municipal law * * * regarding zoning, land use, health, safety, or welfare, except that a denial by the Secretary involving a benefit * * * shall be controlling." 22 U.S.C. 4307. That provision, the court stated, is a savings clause that partially shields certain laws from preemption, and the omission of tax laws from its scope demonstrates that such laws may be preempted by granting positive benefits. Pet. App. 33a.

b. The court also upheld the Notice's effect of "nullify[ing] any existing tax liens" on property used to house mission staff. 74 Fed. Reg. at 31,788. The court acknowledged the presumption that a grant of rulemaking authority "will not, as a general matter, be understood to encompass the power to promulgate retroactive rules" in the absence of a clear statement. Pet. App. 45a (citation omitted). The court concluded, however, that *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), in which the Court declined to apply the presumption in determining the FSIA's retroactive effect, "demonstrates that the force of the presumption depends on the values that underlie it and the degree to which such values are at issue." Pet. App. 49a. Here, the court explained, those values were not strongly implicated because the tax exemption burdened only the public rights of States and municipalities and did not upset settled expectations, in view of the long-running uncertainty about the status of petitioner's claimed right to tax. *Id.*

at 53a. The court therefore concluded that the presumption against retroactivity was not dispositive. *Id.* at 61a.

The court then held that the FMA allowed the State Department to take action that would nullify existing tax liens. Pet. App. 62a. In light of "the FMA's substantial delegation of discretionary authority to the State Department," and the statute's express expectation that the State Department would resolve disputes with foreign nations concerning their missions, "it would be anomalous to read the FMA as requiring the State Department to resolve disputes involving foreign missions through the designation of benefits, and yet to tie the Department's hands by limiting it to prospective solutions that may not address the sources of the conflicts."[1] *Id.* at 62a-63a.

**DISCUSSION**

Petitioner challenges the court of appeals' conclusion that the State Department acted within its authority in defining as a benefit under the FMA a tax exemption for certain foreign government-owned property and in applying that exemption to existing tax liens. The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. The court applied settled principles and relied on circumstances unique to this case, including the FMA's express grant of expansive discretion to the State Department, the particular importance of federal uniformity and regulatory flexibility in the foreign-relations context, and reciprocity. The court's narrow decision is

[1] The court also rejected petitioner's argument that the Notice was procedurally defective under the Administrative Procedure Act, 5 U.S.C. 553 *et seq.* Pet. App. 63a-68a. Petitioner has not challenged that holding before this Court. See Pet. i.

thus unlikely to have implications beyond the context of this case. Further review is not warranted.

## I. THE COURT OF APPEALS' HOLDING THAT THE STATE DEPARTMENT ACTED WITHIN ITS STATUTORY AUTHORITY IN PROVIDING A TAX EXEMPTION AS A "BENEFIT" DOES NOT WARRANT REVIEW

### A. The Court Of Appeals' Decision Is Correct

Petitioner challenges (Pet. 26-38) the court of appeals' conclusion that the State Department possessed authority under the FMA to designate as a "benefit" a tax exemption for foreign government property used to house consular and mission staff. Petitioner's argument is without merit, and the court of appeals' interpretation of the FMA does not conflict with that of any other court.

1. The court of appeals correctly determined that the tax exemption granted by the Notice falls within the State Department's expansive authority to designate the "benefits" to be provided to foreign missions. Pet. App. 20a-31a. By stating that the term "benefit" "includes such other benefits as the Secretary may designate," 22 U.S.C. 4302(a)(1), the FMA confers on the State Department wide latitude to designate and provide benefits that are not specifically enumerated in the statute, in furtherance of the Department's authority to determine the treatment of foreign missions, 22 U.S.C. 4301(c). The breadth of that authority is confirmed by Section 4302(b), which provides that "[d]eterminations with respect to the meaning and applicability of the terms used" in the FMA, including "benefit," "shall be committed to the discretion of the Secretary." 22 U.S.C. 4302(b); cf. *Sheridan Kalorama Historical Ass'n* v. *Christopher*, 49 F.3d 750, 757-758 (D.C. Cir. 1995) (FMA

grants the State Department extremely wide discretion in fulfilling statutory purposes.).

The FMA guides the State Department's exercise of discretion in designating and providing benefits by specifying that the Secretary may provide benefits if requested by a foreign mission, or if the Secretary "determines that such action is reasonably necessary on the basis of reciprocity or otherwise" in order to advance certain foreign relations goals, including resolving disputes affecting United States interests. 22 U.S.C. 4304(a)-(b). In all cases, moreover, the Secretary's authority is to be exercised after "due consideration of the benefits * * * provided to missions of the United States" in other countries, "as well as matters relating to the protection of the interests of the United States." 22 U.S.C. 4301(c).

a. As the court of appeals correctly held, the "broad and open-ended language" in the definition of "benefits" permits the State Department to determine that a property tax exemption is an appropriate "benefit" to provide to foreign missions. Pet. App. 22a. Petitioner contends (Pet. 26-31) that the FMA confers only the authority to identify pre-existing benefits in order to restrict a foreign mission's access to them, but such a limited view of the Secretary's authority is contrary to the FMA's text. The fact that the FMA authorizes the Secretary to "[p]rovide or assist in the provision of benefits," 22 U.S.C. 4303(2), and to do so at the "request" of foreign missions, 22 U.S.C. 4304(a), indicates that the State Department's authority extends beyond simply withdrawing benefits in response to adverse treatment of United States missions abroad. See Pet. App. 26a. Moreover, had Congress intended to cabin the Department's authority in the manner petitioner suggests, it

would not have expressly granted the Department expansive authority to determine the "meaning and applicability" of the term "benefit," 22 U.S.C. 4302(b), and then identified broad considerations to guide the exercise of that discretion, see 22 U.S.C. 4301(c). It instead would have explicitly specified that the Department's discretion operates only in one direction—to *withdraw* existing benefits, rather than to grant positive benefits. See Pet. App. 22a-23a.

Petitioner relies on Section 4302(a)(1)'s provision that "benefit[s]" include "such other benefits as the Secretary may *designate*" to argue that the State Department's authority extends only to identifying and restricting pre-existing benefits. 22 U.S.C. 4302(a)(1) (emphasis added); see Pet. 27. But the fact that the Department may "designate," or identify, the dispensations that it has determined fall within the definition of "benefit" does not suggest that the Department is limited to identifying benefits that were already available. Nor does the canon of *ejusdem generis* support petitioner's argument; as the court of appeals correctly observed, Section 4302(a)(1)'s grant of authority to identify other benefits is "structurally separate from the enumeration" of benefits in Section 4302(a)(1)(A)-(G). Pet. App. 25a; see *United States* v. *Turkette*, 452 U.S. 576, 582 (1981).

Limiting the State Department's authority to restricting benefits as a sanction is also irreconcilable with the FMA's purpose of facilitating the "secure and efficient operation" of foreign missions in the United States. 22 U.S.C. 4301(b). The legislative history confirms that although Congress' primary focus was on reciprocal sanctions, Pet. App. 29a, Congress intended to permit the Executive Branch "both to * * * exercise more effective control over * * * foreign missions," such as

by imposing sanctions, "and to enhance the ability of foreign missions to conduct their representational duties in the United States," a purpose that contemplates granting affirmative benefits. S. Rep. No. 283, 97th Cong., 1st Sess. Pt. 1, at 8 (1981); see also H.R. Rep. No. 102, 97th Cong., 1st Sess. 28 (1981) (FMA "provide[s] the [State Department] flexibility * * * to decide which sanction or *other response* is most appropriate.") (emphasis added). Moreover, conferring affirmative benefits can be—as here—a means of furthering United States interests by ending or preventing adverse treatment of United States missions abroad. Petitioner suggests no reason that Congress would have arbitrarily prohibited the Department from utilizing a full range of methods in furtherance of United States foreign-relations and reciprocity interests. See Pet. App. 22a-23a.

b. The court of appeals also correctly held that the FMA confers on the State Department the authority to provide that its determinations preempt contrary state and local law. Pet. App. 31a-42a; see *City of N.Y.* v. *FCC*, 486 U.S. 57, 63-64 (1988) (*FCC*) ("a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation") (quoting *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 369 (1986)).

As the court explained, the FMA's grant of broad authority to determine the treatment of foreign missions in furtherance of the United States' foreign-relations interests evidences Congress' intent to authorize the State Department to confer benefits that have preemptive effect. Pet. App. 36a-37a; see *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 160-161 (1982) (*Fidelity*) (Congress' grant of broad authority demon-

strates intent to permit agency to preempt state law). In addition, by providing that "any determination required under" the FMA, including the definition and application of "benefits," is "committed to the discretion of the Secretary," 22 U.S.C. 4302(b), 4308(g), Congress intended that the State Department should have preeminent authority to determine the United States' treatment of foreign missions on a national level. Cf. 127 Cong. Rec. 26,074 (1981) (statement of Rep. Fascell) (section-by-section analysis of House bill substantially identical to enacted version; Section 4302(b) "is intended to avoid conflicting interpretations by different government agencies and courts and potential litigation that * * * might adversely affect the management of foreign affairs.").

Congress' intent to provide preemptive authority is particularly clear in view of the need for "uniformity in this country's dealings with foreign nations." *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413-414 (2003) (quoting *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964)). The State Department's authority under the FMA to set national policy regarding the treatment of foreign missions in order to protect the United States' foreign-relations interests necessarily includes the ability to preempt contrary state and local laws. See *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 381 (2000) ("This clear mandate and invocation of exclusively national power belies any suggestion that Congress intended the President's effective voice to be obscured by state or local action."). Although petitioner asserts (Pet. 20, 35-38), that "traditional State taxing powers" are less susceptible to preemption, the "relative importance to the State of its own law" does not alter an agency's preemptive authority. *Fidelity*,

458 U.S. at 153 (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)). That is especially so here because in the foreign-relations context, taxation often raises particularly sensitive sovereignty concerns, and therefore local tax laws have significant potential to undermine the United States' ability to manage its relations with foreign sovereigns. See, *e.g.*, *United States* v. *County of Arlington*, 669 F.2d 925, 932 (4th Cir.) (bilateral international agreements preempted local tax law with respect to residences housing bilateral diplomatic mission staff), appeal dismissed & cert. denied, 459 U.S. 801 (1982) (*Arlington County*). Indeed, the multilateral treaties governing bilateral diplomatic and consular relationships provide express exemptions from local taxation for offices of a diplomatic mission and consular post and for residences of the heads of such offices. See Vienna Convention on Diplomatic Relations, *done*, Apr. 24, 1964, Art. 23(1), 23 U.S.T. 3227, 3238, 500 U.N.T.S. 95, 108; Vienna Convention on Consular Relations, *done*, Apr. 24, 1963, Art. 32(1), 21 U.S.T. 77, 98, 596 U.N.T.S. 261, 288.

Petitioner's argument (Pet. 32) that Section 4307 establishes that the State Department may "only preempt local police powers * * * by denying benefits to foreign missions" is contrary to the statutory language. Section 4307 provides that with respect to state or local law "regarding zoning, land use, health, safety, or welfare," only a denial of benefits may have preemptive effect. 22 U.S.C. 4307. As the court of appeals explained, Section 4307 "cannot in its natural meaning be read as describing the FMA's full-preemptive scope, but rather [it is] a savings c[l]ause that insulates certain listed State and municipal powers from preemption." Pet. App. 38a; see *Fidelity*, 458 U.S. at 162-163. Because Section 4307 does not include state tax laws

among those subject to more limited preemption, it does not limit the Department's authority with respect to tax laws. Pet. App. 34a. Indeed, the omission of any reference to tax laws from this list affirmatively supports the propriety of the State Department's action.

2. In issuing the Notice, then, the State Department validly exercised its broad authority to designate a "benefit" to be provided to foreign missions and to preempt contrary state and local law. As provided in the FMA, the Department designated the tax exemption a benefit after considering reciprocity concerns, the United States' foreign-relations interests, the costs to United States missions abroad, and the need to "resolv[e] a dispute affecting United States interests and involving a foreign mission or sending State." 22 U.S.C. 4301(c), 4304(b)(1)-(4); see 74 Fed. Reg. at 31,788.

Significantly, the State Department's decision to issue the Notice took place against the backdrop of earlier notices regarding tax exemptions for staff residences of certain foreign missions. In 1986, for instance, the State Department issued a public notice recognizing, based on international law, an exemption from property taxes for the residences of the staff of bilateral foreign diplomatic missions. See 51 Fed. Reg. 27,303. The Fourth Circuit had upheld that exemption under the Supremacy Clause and prohibited efforts by a local government to tax the properties. See *Arlington County*, *supra* (upholding tax exemption based on international agreements).

At the time of that announcement, the State Department's position concerning tax exemption for staff-residence property extended only to housing for staff of bilateral diplomatic missions. See United States Mission to the U.N. Circular Note HC-12-01 (Apr. 5, 2001). In the intervening years, however, the taxation of foreign

government-owned property used to house staff of consulates and permanent missions to the United Nations—including taxation of the properties at issue in this case—has become a persistent irritant in the foreign relations of the United States. The governments of India and Mongolia, among others, have repeatedly objected to those tax assessments, and have sought protection from the State Department.

Even more significantly, as a result of the dispute, foreign governments have imposed or threatened to impose restrictions on the operation of United States missions abroad. For example, until recently, the government of India refused to issue construction permits for a new consular compound in Mumbai, resulting in substantial monetary costs to the United States and frustrating efforts to improve security for consular staff. See Gov't C.A. Br. 8; 74 Fed. Reg. at 31,788 (describing "[r]esponsive measures taken against the United States" that have hindered security improvements and "impos[ed] unacceptable risks to [American] personnel"). The State Department has informed this Office that foreign governments have also threatened to impose taxes on staff residences owned by the United States abroad, justifying their policies by reference to the taxable status of, and collection efforts regarding, their staff residences in New York.

The State Department concluded that state and local taxation of foreign mission properties in this country is disrupting the United States' foreign relations and threatening to cause disproportionate harm to the United States. And as the Notice explains, there is a "general practice abroad of exempting government-owned property used for bilateral or multilateral diplomatic and consular mission housing"—from which petitioner's

efforts to tax respondents' property depart. 74 Fed. Reg. at 31,788. Because the United States is "the largest foreign-government property owner overseas," it "benefits financially much more than other countries from an international practice exempting staff residences from real property taxes, and stands to lose the most if the practice is undermined." *Ibid.* Without the tax exemption, the State Department found, the United States could face the loss of hundreds of millions of dollars in reciprocal taxation. And as a result of the taxation, the government had encountered obstacles to the completion of necessary security improvements to diplomatic and consular facilities abroad. *Ibid.*

Having thus considered "the benefits, privileges, and immunities provided to missions of the United States" abroad, "as well as matters relating to the protection of the interests of the United States," 22 U.S.C. 4301(c), the Department invoked its authority under the FMA to extend the same tax treatment that applies to bilateral diplomatic missions to consular missions and missions to the United Nations and the Organization of American States. The Department's action falls within the core of its broad authority to provide "benefits" to foreign missions after consideration of United States interests and foreign-relations concerns.

### B. The Court Of Appeals' Preemption Analysis Does Not Conflict With Any Other Court's Decision

Petitioner contends that this Court should grant review in order to clarify that the "presumption against preemption" requires Congress to "clearly and manifestly, if not explicitly," express its intent to grant an agency authority to preempt state law, and that an agency's view of its preemptive authority is entitled to "little, if

any, deference." Pet. 18, 23; see Pet. 17-26. Contrary to petitioner's argument, the court of appeals applied settled principles, and there is no conflict among decisions of this Court or the courts of appeals regarding the scope of an agency's authority to take action having preemptive effect. This case would also be a poor vehicle to resolve that issue.

1. As the court of appeals explained, Pet. App. 35a-36a, whether agency action may preempt state law turns on "whether that action is within the scope of the [agency's] delegated authority." *Fidelity*, 458 U.S. at 154 (1982); see *FCC*, 486 U.S. at 63-64. The answer to that question "does not involve a 'presumption against pre-emption,' * * * but rather requires us to be certain that Congress has conferred authority on the agency." *New York* v. *FERC*, 535 U.S. 1, 18 (2002) (the presumption assists courts in determining whether state law conflicts with federal law, not in determining the scope of the agency's preemptive authority). Thus, "[a] preemptive regulation's force does not depend on express congressional authorization to displace state law." *Fidelity*, 458 U.S. at 154.

In concluding that the FMA confers authority to provide benefits having preemptive effect, the court of appeals applied these well-established principles. The court correctly rejected petitioner's argument that the presumption against preemption was implicated, and framed the inquiry as "whether the State Department acted within the scope of its congressionally delegated authority." Pet. App. 35a, 36a-42a. Contrary to petitioner's argument (Pet. 34), moreover, the court had no occasion to—and did not—defer to the State Department's interpretation of its authority, or to consider how much deference was appropriate, because the court con-

cluded on the basis of the "language, structure, and subject-matter of the FMA" that the FMA confers authority on the State Department to take action having preemptive effect. See Pet. App. 36a-42a.

Petitioner acknowledges that the court of appeals applied the approach set forth in *FCC*, but contends (Pet. 18-19) that other decisions of this Court and the courts of appeals conflict with that approach. Petitioner relies primarily on *Solid Waste Agency* v. *United States Army Corps of Engineers*, 531 U.S. 159, 172-173 (2001), but that decision did not address preemption or the scope of an agency's authority to take action having preemptive effect; rather, it applied the canon of constitutional avoidance in rejecting an agency's statutory construction. *Wabash Valley Power Ass'n* v. *Rural Electrification Administration*, 988 F.2d 1480 (7th Cir. 1993), also does not conflict with the decision below. There, the court applied *FCC* in holding that a federal regulation preempting state law was invalid because it was not authorized by the relevant statute. See *id.* at 1486 (citing *FCC*); cf. *id.* at 1490 (referring to the presumption against preemption in suggesting that any conflict between state and federal law was not severe enough to warrant preemption). There is therefore no conflict warranting this Court's review.[2]

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[2] Petitioner also relies on *Desiano* v. *Warner-Lambert & Co.*, 467 F.3d 85, 97 n.9 (2d Cir. 2006), aff'd by an equally divided Court, 552 U.S. 440 (2008) (per curiam), but an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, there the court of appeals simply noted that the presumption against preemption would be relevant to review of the agency's determination regarding a conflict between state and federal law. *Desiano*, 467 F.3d at 97 n.9.

2. This case would be a poor vehicle to consider petitioner's argument that a "clear[] and manifest[]" expression of congressional intent to confer preemptive authority is necessary, because petitioner would not benefit from a resolution of that question in its favor. In concluding that the FMA grants the State Department preemptive authority, Pet. App. 36a, the court found the clear manifestation of congressional intent that petitioner asserts is required. For the reasons stated above, that determination was correct. See pp. 12-17, *supra*. Moreover, although petitioner urges (Pet. 22-26) this Court to "clarify" that no deference is due an agency's interpretation of the scope of its preemptive authority, the court of appeals did not consider that question; its construction of the FMA did not rest on deference to the State Department's interpretation of its authority.

In addition, this case would be a poor vehicle to address any more general preemption question framed by petitioner because the FMA expressly confers unusually broad authority on the State Department to grant benefits to foreign missions in furtherance of the United States' foreign-relations interests. Because federal uniformity is particularly crucial in the foreign-relations context, Congress gave the State Department extremely wide latitude to define national policy concerning foreign missions. See pp. 13-14, *supra*. That broad conferral, moreover, is "in harmony with the President's own constitutional powers" to conduct foreign relations. *Crosby*, 530 U.S. at 380-381; see *Palestine Info. Office* v. *Shultz*, 853 F.2d 932, 937 (D.C. Cir. 1988) (holding that, when acting under the FMA, "the State Department acts at the apex of its power" because "it wields the combined power of both the executive and legislative branches"). Any review of the State Department's authority to pre-

empt state law in this context would therefore be unlikely to have broader implications for preemption analysis beyond the unique circumstances of this case.

## II. THE COURT OF APPEALS' HOLDING REGARDING EXISTING ASSESSMENTS AND LIENS IS CORRECT AND DOES NOT MERIT REVIEW

Petitioner briefly argues (Pet. 38-40) that this Court should review the court of appeals' conclusion that the FMA confers on the State Department the authority to issue benefit designations affecting existing assessments and liens. Petitioner does not allege any conflict among the courts of appeals, but simply seeks error correction of the court's narrow ruling. Further review is not warranted.

Contrary to petitioner's argument (Pet. 38), the court of appeals did not ignore the presumption against retroactivity or announce a categorical exception to the presumption. Pet. App. 61a. The court simply concluded, emphasizing that its "holding on this issue is narrow," that "the presumption against retroactivity is not determinative in this case" because several unique circumstances demonstrated that the concerns animating the presumption were not present. *Ibid.* The court relied on this Court's decision in *Republic of Austria* v. *Altmann*, 541 U.S. 677, 692-693, 696 (2004), which held that "the antiretroactivity presumption is just that—a presumption, rather than a constitutional command," and similarly declined to require a clear statement of retroactive effect because the concerns underlying the antiretroactivity presumption were not implicated under the circumstances.

The court of appeals' conclusion is correct. As the court explained, "the Notice does not upset expectations

that were genuinely settled" because the tax status of mission residences has long been uncertain, see Pet. App. 52a, 53a, 57a-60a; the Notice "implicates only public rights of States and municipalities," and thus does not threaten to burden an unpopular person or group, *id.* at 52a; and the impact on petitioner results from the federal government's authority to conduct foreign relations rather than any discriminatory intent, *ibid.* Petitioner does not dispute the existence of these unique circumstances or challenge the court's conclusion that the concerns underlying the presumption against retroactivity are not present here. Pet. 38-40.

After considering the text, structure, and purpose of the FMA, the court of appeals correctly concluded that the FMA permits benefit determinations by the State Department that affect existing assessments and liens in the circumstances presented here. The FMA contemplates that the State Department will use its benefit-designation authority to resolve disputes with foreign nations over the treatment of foreign missions. See 22 U.S.C. 4304(b)(4). In order to resolve such disputes, the Department must have the flexibility to determine the treatment of foreign missions in light of "current political realities and relationships" and the current interests of the United States. See *Altmann*, 541 U.S. at 696. As the court of appeals explained, "it would be anomalous to read the FMA as requiring the State Department to resolve disputes involving foreign missions * * * and yet tie the Department's hands by limiting it to prospective solutions that may not address the sources of the conflicts." Pet. App. 62a-63a; cf. *Dames & Moore* v. *Regan*, 453 U.S. 654, 679-684 (1981) (upholding President's suspension of pending claims against Iran); *Republic of Iraq* v. *Beaty*, 129 S. Ct. 2183, 2193-2194 (2009)

(upholding President's statutory authority to make an exception to foreign sovereign immunity inapplicable to Iraq, thereby affecting pending suits).

Petitioner's argument to the contrary (Pet. 39) rests on its contention that the FMA authorizes the State Department to resolve disputes only by restricting otherwise available benefits. For the reasons stated above, see pp. 9-12, *supra*, the court of appeals correctly rejected petitioner's interpretation of Sections 4302 and 4304. Further review of the court's narrow retroactivity holding is therefore unwarranted.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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